Digest of United States Practice in International Law

1991–1999

Digest of United States Practice in International Law

1991–1999

Sally J. Cummins
David P. Stewart
Editors

Office of the Legal Adviser
United States Department of State

INTERNATIONAL LAW INSTITUTE

The *Digest of United States Practice in International Law* is published by the International Law Institute under agreement with the United States Department of State, Office of the Legal Adviser. The contents of the *Digest*, including selection of documents and preparation of editorial commentary, are entirely under the auspices of the Office of the Legal Adviser.

INTERNATIONAL LAW INSTITUTE

For fifty years the International Law Institute has addressed issues of interest to the international legal community through research, publishing, training, and technical assistance. For information on the activities of the Institute:

Publishing Office
International Law Institute
The Foundry Building
1055 Thomas Jefferson St., NW
Washington, DC 20007

202-247-6006
202-247-6010 (fax)
e-mail: pub@ili.org
Internet: www.ili.org

ISBN 0-935328-97-1

Table of Contents

VOLUME I

Preface

It is with great pleasure that I welcome this special two volume edition of the *Digest of United States Practice in International Law* covering the years 1991–1999, thus closing a gap for this period during which the *Digest* was not published. I hope that practitioners and scholars will find these volumes, tracking developments in international law through an eventful decade, to be useful. We await the publication of the next volume, for the calendar year 2004, and look forward as well to presenting editions for all subsequent years.

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

Don Wallace, Jr.
Chairman
Internationl Law Institute

Introduction

I am pleased to be able to introduce the *Digest of United States Practice in International Law* covering the period 1991–1999. With the publication of these volumes, the Office of the Legal Adviser completes the effort to document the period when publication of the *Digest* was temporarily suspended. We hope that practitioners, scholars and the public, as well as governmental officials, will find this multi-year compilation a useful source of information regarding U.S. views and actions in the most important areas of international law. We have tried to be as comprehensive as possible within the limitation of available resources.

The material addressed retroactively in these volumes covers an important historical period involving many issues we believe readers will find highly relevant today. During this period, for instance, the United States became party to important human rights treaties, including the International Covenant on Civil and Political Rights, the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the International Convention on the Elimination of All Forms of Racial Discrimination. International terrorist acts such as the bombing of Pan Am 103 over Lockerbie, Scotland, posed new challenges, to which the United States responded through negotiation of new international terrorism conventions, efforts in both the UN Security Council and the International Court of Justice, and changes in U.S. domestic laws including the creation of an exception to sovereign immunity for certain acts of state sponsors of terrorism.

Legal issues involving the use of force arose with U.S. participation in the Gulf War and the military intervention in the territory of the Former Yugoslavia, and were addressed in several instances before the International Court of Justice. U.S. participation in the peace process and in peacekeeping in areas as diverse

as the Middle East, Bosnia, Kosovo, Somalia, and Haiti gave rise to both international and domestic legal issues. Major efforts were pursued in arms control and nuclear non-proliferation, including the establishment of the Korean Energy Development Organization.

The 1990s were an era of new international institutions and political structures. The United States was actively engaged, for instance, in the Security Council's creation of the international criminal tribunals for the former Yugoslavia and for Rwanda and the UN Mission in Kosovo, and in the negotiation stage of the establishment of the International Criminal Court. In the area of trade, the United States was deeply involved in the establishment of the World Trade Organization and the conclusion of the North American Free Trade Agreement. The breakup of the Soviet Union was only the biggest example of geo-political changes with a wide range of legal implications for the United States and other countries.

In other fields, to list only a few examples, after completion of the 1994 Agreement Relating to the Implementation of Part XI, the President transmitted both the 1982 Law of the Sea Convention and the 1994 Agreement to the Senate for advice and consent. Maritime interdiction of aliens and other aspects of immigration and naturalization generated important legal issues. Cases concerning the right of aliens in the United States to consular notification arose in U.S. courts and the International Court of Justice.

It is difficult adequately to describe the challenge of reaching back in time to identify and collect relevant material as was done to prepare these volumes. Although substantive work was completed by the time I became Legal Adviser, I want to express my thanks and appreciation for the efforts of the co-editors of this series, Sally Cummins and David Stewart. They assure me, however, that it would have been impossible without the extensive assistance they received from their many colleagues in the Office of the Legal Adviser and the support of my immediate predecessors, David Andrews and Will Taft. This is true for every volume of the *Digest*, but for this 1991–1999 endeavor, that assistance went far beyond the usual role of volunteers. It is safe to say that few lawyers in the Office were not called upon to contribute in some form. Those who made the biggest contribution did so on every level, identifying topics, retrieving documents, drafting, and reviewing drafts in their

areas of expertise. Our very deep thanks go to attorneys who drafted part or all of individual chapters: Mary McLeod (Chapters 1 and 2), Denise Manning (Chapter 3), Mary Catherine Malin (Chapter 7), Kathleen Hooke (Chapter 4), James Filippatos (Chapters 6 and 10), Mallory Stewart (Chapter 8), Mary Mitchell (Chapter 11), Steven Pomper (Chapter 17), and Monica Hakimi and Nicole Thornton (Chapter 18). Special recognition is due to Denise Manning who, with help from Elizabeth Amory and Steven Hill, conceived, organized and completed the initial daunting effort to identify the issues to be addressed in these volumes. A series of legal assistants and student interns have also left their mark: Juliana Bentes, Anna Conley, Ryika Hooshangi, Kristina Han, Joe Kelley, and Brett Watkins contributed invaluable assistance by researching and collecting documents as well as significant drafting of Chapters 4, 6, 9, and 16. Support from paralegal Trish Smeltzer has been essential.

The Office thanks also former Deputy Legal Adviser Michael J. Matheson for his generosity in consulting on various topics. And, as always, the volume would never have been completed without the exceptionally able assistance of Joan Sherer, a librarian in the Office of the Legal Adviser. Our collaboration with the International Law Institute continues to be the cornerstone of this effort. We thank its chairman Prof. Don Wallace, Jr. and editor William Mays for their superb support and guidance and summer intern Patrick Dennis for preparing the voluminous original source record for these books.

John B. Bellinger, III
The Legal Adviser
U.S. Department of State
August 2005

Note from the Editors

We are delighted to conclude preparation of the *Digest of United States Practice in International Law* for calendar years 1991–1999. This two-volume set, together with the 1989-1990 volume published in 2002, completes coverage of the period when publication of the *Digest* was suspended. Since publication was recommenced, we have also released annual volumes for each of the four years 2000 through 2003, and the volume for 2004 is in the final stages of preparation.

These volumes continue the organization and general approach adopted for *Digest 2000*. Given the retrospective nature of the 1991–1999 compilation, more extensive editorial background has at times been included than in annual volumes, particularly in treating issues that developed over the course of several years. We have also made an effort in these volumes to signal significant later developments, usually through references to the volumes of the *Digest* covering subsequent years. We cannot claim to have been comprehensive in this effort, but we hope the additional information will be useful to the reader.

Identifying issues, collecting documents, and addressing the topics for these volumes has been an enormous undertaking. We want to add our thanks to those of the Legal Adviser for the assistance of all 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 for their valuable support and guidance. We also want to thank the American Society of International Law for its cooperation in connection with use of materials prepared by State Department lawyers during the 1990s and published in the *American Journal of International Law* and *International Legal Materials*. We have provided cross-references to those publications. Our thanks also to Professor Don Wallace,

Jr., and the editors of the *Public Procurement Law Review* for their cooperation in our use of an article by Professor Wallace.

As many of our readers are aware, the *Cumulative Digest 1981–1988*, published in 1994 and 1995, covered a number of issues that were updated through the publication date. Where that updating was comprehensive, entries in *Digest 1991–1999* are briefer than their importance might otherwise warrant, with a reference back to the earlier volumes.

As in our annual volumes, our goal here has been to make the full texts of documents excerpted in this volume available to the reader to the extent possible. That has been more difficult, however, with the older documents. For many documents we have provided a specific internet cite in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication.

Many other types of documents are available from multiple public sources, both in hard copy and from various free or subscription online services. 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*. Note that Senate Treaty Documents, containing the President's transmittal of treaties to the Senate for advice and consent with related materials, are available at *www.gpoaccess.gov/serialset/cdocuments/index.html*. Senate Executive Reports, containing the Senate Committee on Foreign Relations reports of treaties to the Senate for vote on advice and consent and related materials are available at *www.gpoaccess.gov/serialset/creports/index.html*. In addition, the Library of Congress provides extensive legislative information at *http://thomas.loc.gov*. The government's "official web portal" is *www.firstgov.gov*, with links to a wide range of government agencies and other sites; the State Department's home page is *www.state.gov*. As of December 31, 2004, the United Nations has made its extremely useful Official Document System website available to the public at *http://documents.un.org*.

Unfortunately, these sources are temporally limited. The extensive materials retrievable from *www.access.gpo.gov*, for

instance, are generally not available for the early 1990s although many of those documents are retrievable from subscription online services. Another valuable resource for State Department material from the 1990s is the Electronic Research Collection ("ERC"), a partnership between the U.S. Department of State and the Federal Depository Library at the Richard J. Daley Library, University of Illinois at Chicago, available at *http://dosfan.lib.uic.edu/ERC*. We have relied fairly extensively on the *Department of State Dispatch*, which is no longer published but is available for the 1990s on the ERC site at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

Where documents are not readily available elsewhere, we have placed them on the State Department website, at *www.state.gov/s/l/c8183.htm*. That has been a particular challenge for documents from the 1990s since fewer are available electronically. Given the cost of preparing electronic documents in compliance with statutory requirements for government internet postings, we have not been able to make as many documents available as we would like. We believe, however, that most documents can be located and we hope that our excerpts will prove to be adequate in any event.

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. From time to time we are asked for the official citation to the Digest. We recommend for this volume *1991–1999 Dig. U.S. Pract. Int'l L.*

In closing, we wish to note that these are the final volumes for which David Stewart will serve as co-editor, having seen to fruition the resuscitation of the annual *Digest* in a revised format and organization, integrating electronic availability of full-text source documents. While his participation as editor will be sorely missed, he will, of course, continue to contribute to the annual *Digest* in the areas of his considerable expertise.

Sally J. Cummins
David P. Stewart

Chapter 1

Nationality, Citizenship and Immigration

A. NATIONALITY AND CITIZENSHIP

1. Acquisition of Citizenship

a. Citizenship of foreign-born child of unwed parents, only one of whom is American citizen

On April 22, 1998, in *Miller v. Albright*, 523 U.S. 420 (1998), the U.S. Supreme Court declined to find § 309 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1409, unconstitutional on the ground that it violated the Fifth Amendment by unlawfully discriminating against men. A majority of the Court did not agree on a single basis for affirmance, however. Thus the question of the constitutionality of § 309 was not definitively resolved. Section 309 establishes different conditions under which unwed U.S. citizen men and women may transmit U.S. citizenship to their children born abroad when the other parent is not an American citizen. It provides that unwed U.S. citizen mothers who have met a requirement of physical presence in the United States transmit U.S. citizenship to their children at birth; children of unwed U.S. citizen fathers, however, may acquire citizenship only if they or their fathers take certain steps to create or confirm a legal as well as biological relationship before the child turns 18. The opinion of Justice Stevens, who announced the judgment and who concluded that § 309 was constitutional, and one of the two concurring

opinions are excerpted below, with footnotes omitted. Three other separate opinions were also written: Justices O'Connor and Kennedy would have dismissed the case on standing grounds, whereas Justices Ginsburg, Scalia and Breyer would have found § 309 unconstitutional. The Supreme Court again considered § 309's constitutionality several years later in *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001). In that case five of the nine Justices opined that § 309 is constitutional. *See Digest 2000* at 1–19; *Digest 2001* at 7–8.

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE joined.

* * * *

Under the terms of the INA, the joint conduct of a citizen and an alien that results in conception is not sufficient to produce an American citizen, regardless of whether the citizen parent is the male or the female partner. If the two parties engage in a second joint act—if they agree to marry one another—citizenship will follow. The provision at issue in this case, however, deals only with cases in which no relevant joint conduct occurs after conception; it determines the ability of each of those parties, acting separately, to confer citizenship on a child born outside of the United States.

If the citizen is the unmarried female, she must first choose to carry the pregnancy to term and reject the alternative of abortion—an alternative that is available by law to many, and in reality to most, women around the world. She must then actually give birth to the child. Section 1409(c) rewards that choice and that labor by conferring citizenship on her child.

If the citizen is the unmarried male, he need not participate in the decision to give birth rather than to choose an abortion; he need not be present at the birth; and for at least 17 years thereafter he need not provide any parental support, either moral or financial, to either the mother or the child, in order to preserve his right to confer citizenship on the child pursuant to § 1409(a). In order retroactively to transmit his citizenship to the child as of the date

of the child's birth, all that § 1409(a)(4) requires is that he be willing and able to acknowledge his paternity in writing under oath while the child is still a minor. 8 U.S.C. § 1409(a)(4)(B). In fact, § 1409(a)(4) requires even less of the unmarried father—that provision is alternatively satisfied if, before the child turns 18, its paternity "is established by adjudication of a competent court." § 1409(a)(4)(C). It would appear that the child could obtain such an adjudication absent any affirmative act by the father, and perhaps even over his express objection.

There is thus a vast difference between the burdens imposed on the respective parents of potential citizens born out of wedlock in a foreign land. It seems obvious that the burdens imposed on the female citizen are more severe than those imposed on the male citizen by § 1409(a)(4), the only provision at issue in this case. It is nevertheless argued that the male citizen and his offspring are the victims of irrational discrimination because § 1409(a)(4) is the product of " 'overbroad stereotypes about the relative abilities of men and women.' " Brief for Petitioner 8. We find the argument singularly unpersuasive.

Insofar as the argument rests on the fact that the male citizen parent will "forever forfeit the right to transmit citizenship" if he does not come forward while the child is a minor, whereas there is no limit on the time within which the citizen mother may prove her blood relationship, the argument overlooks the difference between a substantive condition and a procedural limitation. The substantive conduct of the unmarried citizen mother that qualifies her child for citizenship is completed at the moment of birth; the relevant conduct of the unmarried citizen father or his child may occur at any time within 18 years thereafter. There is, however, no procedural hurdle that limits the time or the method by which either parent (or the child) may provide the State Department with evidence that the necessary steps were taken to transmit citizenship to the child.

The substantive requirement embodied in § 1409(a)(4) serves, at least in part, to ensure that a person born out of wedlock who claims citizenship by birth actually shares a blood relationship with an American citizen. As originally enacted in 1952, § 1409(a) required simply that "the paternity of such child [born out of

wedlock] is established while such child is under the age of twenty-one years by legitimation." 66 Stat. 238. The section offered no other means of proving a biological relationship. In 1986, at the same time that it modified the INA provisions at issue in *Fiallo* in favor of unmarried fathers and their out-of-wedlock children, see n. 4, *supra*, Congress expanded § 1409(a) to allow the two other alternatives now found in subsections (4)(B) and (4)(C). Pub. L. 99-653, § 13, 100 Stat. 3657. The purpose of the amendment was to "simplify and facilitate determinations of acquisition of citizenship by children born out of wedlock to an American citizen father, by eliminating the necessity of determining the father's residence or domicile and establishing satisfaction of the legitimation provisions of the jurisdiction." Hearings, at 150. The 1986 amendment also added § 1409(a)(1), which requires paternity to be established by clear and convincing evidence, in order to deter fraudulent claims; but that standard of proof was viewed as an ancillary measure, not a replacement for proof of paternity by legitimation or a formal alternative. See *id.*, at 150, 155.

There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective. See *Trimble* v. *Gordon*, 430 U.S. 762, 770–771, 52 L. Ed. 2d 31, 97 S. Ct. 1459 (1977); *Fiallo*, 430 U.S. at 799, n. 8. Nor can it be denied that the male and female parents are differently situated in this respect. The blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates; the relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record. Thus, the requirement that the father make a timely written acknowledgment under oath, or that the child obtain a court adjudication of paternity, produces the rough equivalent of the documentation that is already available to evidence the blood relationship between the mother and the child. If the statute had required the citizen parent, whether male or female, to obtain appropriate formal documentation within 30 days after birth, it would have been "gender-neutral" on its face, even though in practical operation it would disfavor unmarried males because in virtually every case such a requirement would be superfluous for the mother.

Surely the fact that the statute allows 18 years in which to provide evidence that is comparable to what the mother provides immediately after birth cannot be viewed as discriminating against the father or his child.

Nevertheless, petitioner reiterates the suggestion that it is irrational to require a formal act such as a written acknowledgment or a court adjudication because the advent of reliable genetic testing fully addresses the problem of proving paternity, and subsection (a)(1) already requires proof of paternity by clear and convincing evidence. See 96 F.3d at 1474. We respectfully disagree. Nothing in subsection (a)(1) requires the citizen father or his child to obtain a genetic paternity test. It is difficult, moreover, to understand why signing a paternity acknowledgment under oath prior to the child's 18th birthday is more burdensome than obtaining a genetic test, which is relatively expensive, normally requires physical intrusion for both the putative father and child, and often is not available in foreign countries. Congress could fairly conclude that despite recent scientific advances, it still remains preferable to require some formal legal act to establish paternity, coupled with a clear-and-convincing evidence standard to deter fraud. The time limitation, in turn, provides assurance that the formal act is based upon reliable evidence, and also deters fraud. Congress is of course free to revise its collective judgment and permit genetic proof of paternity rather than requiring some formal legal act by the father or a court, but the Constitution does not now require any such change.

Section 1409 also serves two other important purposes that are unrelated to the determination of paternity: the interest in encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and the related interest in fostering ties between the foreign-born child and the United States. When a child is born out of wedlock outside of the United States, the citizen mother, unlike the citizen father, certainly knows of her child's existence and typically will have custody of the child immediately after the birth. Such a child thus has the opportunity to develop ties with its citizen mother at an early age, and may even grow up in the United States if the mother returns. By contrast, due to the normal interval of nine months

between conception and birth, the unmarried father may not even know that his child exists, and the child may not know the father's identity. Section 1409(a)(4) requires a relatively easy, formal step by either the citizen father or his child that shows beyond doubt that at least one of the two knows of their blood relationship, thus assuring at least the opportunity for them to develop a personal relationship.

* * * *

Even though the rule applicable to each class of children born abroad is eminently reasonable and justified by important Government policies, petitioner and her *amici* argue that § 1409 is unconstitutional because it is a "gender-based classification." We shall comment briefly on that argument.

* * * *

The "gender stereotypes" on which § 1409 is supposedly premised are (1) "that the American father is never anything more than the proverbial breadwinner who remains aloof from day-to-day child rearing duties," and (2) "that a mother will be closer to her child born out of wedlock than a father will be to his." Even disregarding the statute's separate, non-stereotypical purpose of ensuring reliable proof of a blood relationship, neither of those propositions fairly reflects the justifications for the classification actually at issue.

Section 1409(a)(4) is not concerned with either the average father or even the average father of a child born out of wedlock. It is concerned with a father (a) whose child was born in a foreign country, and (b) who is unwilling or unable to acknowledge his paternity, and whose child is unable or unwilling to obtain a court paternity adjudication. A congressional assumption that such a father and his child are especially unlikely to develop a relationship, and thus to foster the child's ties with this country, has a solid basis even if we assume that all fathers who have made some effort to become acquainted with their children are as good, if not better, parents than members of the opposite sex.

Nor does the statute assume that all mothers of illegitimate children will necessarily have a closer relationship with their

children than will fathers. It does assume that all of them will be present at the event that transmits their citizenship to the child, that hospital records and birth certificates will normally make a further acknowledgment and formal proof of parentage unnecessary, and that their initial custody will at least give them the opportunity to develop a caring relationship with the child. Section 1409(a)(4)—the only provision that we need consider—is therefore supported by the undisputed assumption that fathers are less likely than mothers to have the *opportunity* to develop relationships. . . . These assumptions are firmly grounded and adequately explain why Congress found it unnecessary to impose requirements on the mother that were entirely appropriate for the father.

* * * *

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I agree with the outcome in this case, but for a reason more fundamental than the one relied upon by JUSTICE STEVENS. In my view it makes no difference whether or not § 1409(a) passes "heightened scrutiny" or any other test members of the Court might choose to apply. The complaint must be dismissed because the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.

The Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702, 42 L. Ed. 890, 18 S. Ct. 456 (1898). Under the Fourteenth Amendment, "every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." *Ibid.* Petitioner, having been born outside the territory of the United States, is an alien as far as the Constitution is concerned, and "can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress." 169 U.S. at 702–703; see also *Rogers* v. *Bellei*, 401 U.S. 815, 827, 28 L. Ed. 2d 499, 91 S. Ct. 1060 (1971). Here it is the "authority of Congress" that is appealed to—its power under Art. I, § 8, cl. 4, to "establish an uniform Rule of Naturalization."

If there is no congressional enactment granting petitioner citizenship, she remains an alien.

* * * *

By its plain language, § 1409(a) sets forth a precondition to the acquisition of citizenship under § 1401(g) by the illegitimate child of a citizen-father. Petitioner does not come into federal court claiming that she met that precondition, and that the State Department's conclusion to the contrary was factually in error. Rather, she acknowledges that she did not meet the last two requirements of that precondition, §§ 1409(a)(3) and (4). She nonetheless asks for a "declaratory judgment that [she] is a citizen of the United States" and an order to the Secretary of State requiring the State Department to grant her application for citizenship, App. 11–12, because the requirements she did not meet are not also imposed upon illegitimate children of citizen-mothers, and therefore violate the Equal Protection Clause. Even if we were to agree that the difference in treatment between illegitimate children of citizen-fathers and citizen-mothers is unconstitutional, we could not, consistent with the limited judicial power in this area, remedy that constitutional infirmity by declaring petitioner to be a citizen or ordering the State Department to approve her application for citizenship. "Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship." *INS* v. *Pangilinan*, 486 U.S. 875, 884, 100 L. Ed. 2d 882, 108 S. Ct. 2210 (1988) (internal quotation marks and citation omitted).

Judicial power over immigration and naturalization is extremely limited. "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' " *Fiallo* v. *Bell*, 430 U.S. 787, 792, 52 L. Ed. 2d 50, 97 S. Ct. 1473 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210, 97 L. Ed. 956, 73 S. Ct. 625 (1953)). See also *Landon* v. *Plasencia*, 459 U.S. 21, 32, 74 L. Ed. 2d 21, 103 S. Ct. 321 (1982) ("The power to admit or exclude aliens is a sovereign prerogative"); *Mathews* v. *Diaz*,

426 U.S. 67, 79–80, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"); *Kleindienst* v. *Mandel*, 408 U.S. 753, 769–770, 33 L. Ed. 2d 683, 92 S. Ct. 2576 (1972) ("Plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established"); *Galvan* v. *Press*, 347 U.S. 522, 531, 98 L. Ed. 911, 74 S. Ct. 737 (1954) ("That the formulation of [policies pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government"). Because only Congress has the power to set the requirements for acquisition of citizenship by persons not born within the territory of the United States, federal courts cannot exercise that power under the guise of their remedial authority. "Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [statutory] limitations." *Pangilinan*, *supra*, at 885. "An alien who seeks political rights as a member of this Nation can rightfully obtain them *only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications.*" *United States* v. *Ginsberg*, 243 U.S. 472, 474, 61 L. Ed. 853, 37 S. Ct. 422 (1917) (emphasis added).

* * * *

b. Nonacquisition of citizenship by birth in the Philippines during the territorial period

In *INS v. Rabang*, 35 F.3d 1449 (9th Cir. 1994), *cert. denied sub. nom Sanidad v. INS*, 515 U.S. 1130 (1995), excerpted below, the U.S. Court of Appeals for the Ninth Circuit held that birth in the Philippines while the Philippines was a territory of the United States did not confer U.S. citizenship. The U.S. Courts of Appeals for the Second and Third Circuits reached the same result in *Valmonte v. INS*, 136 F.3d 914 (2d

Cir. 1998) and *Lacap v. INS*, 138 F.3d 518 (3rd Cir. 1998), respectively. *See also Friend v. Reno*, 172 F.2d 638 (9th Cir. 1999).

---

* * * *

At the close of the Spanish-American War on December 10, 1898, Spain ceded the Philippine Islands to the United States by treaty. See Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, art. III, 30 Stat. 1754, 1755 (hereafter "Treaty of Paris"). That treaty provided that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Treaty of Paris, *supra*, art. IX, 30 Stat. at 1759.

The United States maintained military rule over the Philippine Islands until 1902. 2 R. Hofstadter, W. Miller & D. Aaron, *The American Republic* 340 (1959). Congress then enacted the Philippine Government Act, which established the terms of United States' civilian rule over the Philippines. *See* ch. 1369, 32 Stat. 691 (1902). That enactment provided that certain inhabitants of the Philippine Islands as of April 11, 1899 and "their children born subsequent thereto" were deemed "citizens of the Philippine Islands and as such entitled to the protection of the United States. . . ." § 4, 32 Stat. at 692. It also provided that the Constitution and laws of the United States would not apply to the Philippines. n. 2 § 1, 32 Stat. at 692.

In 1916, Congress adopted the Philippine Autonomy Act to "declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands." Philippine Autonomy Act, ch. 416, 39 Stat. 545 (1916). That act reiterated that "all inhabitants of the Philippine Islands who were Spanish subjects on [April 11, 1899] . . . and their children born subsequent thereto, shall be deemed . . . citizens of the Philippine Islands." § 2, 39 Stat. at 546.

Finally, thirty-five years after the United States acquired the Philippine Islands, Congress adopted the Philippine Independence

Act. *See* Philippine Independence Act, ch. 84, 48 Stat. 456 (1934). That act provided for the adoption of "a constitution for the government of the Commonwealth of the Philippine Islands," § 1, 48 Stat. at 456, and for the complete withdrawal of United States sovereignty ten years after the adoption of a Philippine constitution. § 10(a), 48 Stat. at 463 (codified at 22 U.S.C. § 1394(a) (1990)). The act also declared that citizens of the Philippine Islands who were not also citizens of the United States were to be considered "aliens" under the immigration laws of the United States. § 8(a)(1), 48 Stat. at 462.

On July 4, 1946, the United States relinquished control over the Philippine Islands and declared them to be an independent sovereign, thus ending their status as a United States territory. *See* Proclamation No. 2695, 60 Stat. 1352, 11 Fed. Reg. 7517 (1946), *reprinted in* 22 U.S.C. § 1394 (1990).

* * * *

All plaintiffs in this case are at some stage of deportation proceedings brought against them by the Immigration and Naturalization Service. Each complaint seeks declaratory judgment that the plaintiffs are entitled to citizenship under the Citizenship Clause of the Fourteenth Amendment. The plaintiffs allege that they or their parents were born in the Philippines during the territorial period, that during this time the Philippine Islands were "in the United States," and that plaintiffs were subject to the jurisdiction of the United States at their birth. They therefore claim that they (or their parents) were born "in the United States" and thus constitutionally entitled to citizenship.

The Citizenship Clause of the Fourteenth Amendment provides that:

> All persons *born* or naturalized *in the United States* and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

U.S. Const. amend. XIV (emphasis added).

No court has addressed whether persons born in a United States territory are born "in the United States," within the meaning

of the Fourteenth Amendment. The courts have, however, uniformly rejected claims that people born in the Philippines during the territorial period retained their "national" status after Philippine independence. *See, e.g., Rabang v. Boyd*, 353 U.S. 427, 430–31, 1 L. Ed. 2d 956, 77 S. Ct. 985 (1957) (rejecting claim that status as a United States "national" was so related to "citizenship" that U.S. relinquishment of the Philippine Islands could not divest petitioner of his U.S. nationality); *Manguerra v. INS*, 390 F.2d 358, 360 (9th Cir. 1968) (rejecting argument that United States nationality could not be taken away without consent); *Cabebe v. Acheson*, 183 F.2d 795, 800 (9th Cir. 1950) (rejecting claim that Congress did not have power to divest petitioner of nationality).

We now hold that birth in the Philippines during the territorial period does not constitute birth "in the United States" under the Citizenship Clause of the Fourteenth Amendment, and thus does not give rise to United States citizenship.

In the *Insular Cases* the Supreme Court decided that the territorial scope of the phrase "the United States" as used in the Constitution is limited to the states of the Union. Those cases addressed challenges to the imposition of duties on goods shipped from Puerto Rico to the continental United States. The Court held that Puerto Rico was "not a part of the United States within the revenue clauses of the Constitution." *Downes v. Bidwell*, 182 U.S. 244, 287, 45 L. Ed. 1088, 21 S. Ct. 770 (1901). *See* U.S. Const. art I, § 8 ("all duties, imposts, and excises shall be uniform *throughout the United States*") (emphasis added).

In arriving at this conclusion, the Court compared the language of the revenue clause ("all duties . . . shall be uniform throughout the United States") with that of the Thirteenth Amendment (prohibiting slavery "within the United States, *or* in any place subject to their jurisdiction") and the Fourteenth Amendment (extending citizenship to those born "in the United States, *and* subject to the jurisdiction thereof"). *Id.* at 251 (emphasis added). The Court emphasized that the language of the Thirteenth Amendment demonstrates that "there may be places within the jurisdiction of the United States that are no part of the Union." *Id.* In comparison, the Fourteenth Amendment has "a limitation

to persons born or naturalized in the United States *which is not extended to persons born in any place 'subject to their jurisdiction.'* " *Id.* (emphasis added). Like the revenue clauses, the Citizenship Clause has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereignty. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 291 n. 11, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990) (Brennan, dissenting) (distinguishing *Downes* holding regarding the revenue clauses, because the Fourth Amendment "contains no express territorial limitations").

The *Downes* Court further stated "In dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located." *Downes*, 182 U.S. at 263. In other words, as used in the Constitution, the term "United States" does not include all territories subject to the jurisdiction of the United States government. *See also Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 588 n. 19, 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976), *citing* H.R. Rep. No. 249, 56th Cong., 1st Sess., 16 (1900) ("upon reason and authority the term 'United States' as used in the Constitution, has reference only to the States that constitute the Federal Union and does not include the Territories.")

It is thus incorrect to extend citizenship to persons living in United States territories simply because the territories are "subject to the jurisdiction" or "within the dominion" of the United States, because those persons are not born "in the United States" within the meaning of the Fourteenth Amendment.

* * * *

2. Oath of Allegiance Requirement for Naturalization

a. Waiver not permissible

The Office of Legal Counsel ("OLC"), Department of Justice, concluded in a memorandum opinion dated February 5, 1997, excerpted below, that the Immigration and

Naturalization Service ("INS") could not waive the statutory requirement of § 337(a) of the INA, 8 U.S.C. § 1448(a), that all applicants for naturalization take an oath of allegiance. OLC's conclusion was based in part on evidence that Congress considered the oath to be indispensable to the naturalization process. The statute was amended in 2000 to provide for a waiver of the oath for the naturalization of aliens having certain disabilities. Pub. L. No. 106–448, § 1, 114 Stat. 1939 (2000). *See Digest 2003* at 4–5 regarding implementation of the statutory change.

The full text of the opinion is available at *www.usdoj.gov/olc/oathlltr3.htm.*

---

* * * *

It is our conclusion that the oath requirement of section 337 cannot be waived. Since the earliest days of our republic, Congress has exercised its power to "establish an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, to require some form of an oath of allegiance as a condition of naturalization. *See* Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (requiring applicants for naturalization to take oath "to support the Constitution of the United States"); *see also* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, 7 *Immigration Law and Procedure* § 96.05[1] (1996) (noting that "U.S. naturalization laws have always required an oath of allegiance as a prerequisite to naturalization" and chronicling statutory evolution of that oath). As "a promise of future conduct," *Knauer v. United States*, 328 U.S. 654, 671 (1946), the oath of allegiance has been, and remains, an "indispensable legal requirement[]" of naturalization. *United States v. Tuteur*, 215 F.2d 415, 417 (7th Cir. 1954); *See also United States v. Shapiro*, 43 F. Supp. 927, 929 (S.D. Cal. 1942) ("The alien makes a contract with the government of the United States. In return for the benefits and high privileges bestowed upon the alien, he makes a solemn agreement expressed in the oath required of all who become citizens."); *cf. Luria v. United States*, 231 U.S. 9, 22 (1913) ("Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a

duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other.").

The current version of the oath of allegiance contains five elements: (1) support the Constitution; (2) renounce all allegiance to any foreign state or sovereign; (3) support and defend the Constitution and laws of the United States against all enemies; (4) bear "true faith and allegiance" to the same; and (5) bear arms, perform noncombatant service, or perform work of national importance on behalf of the United States. 8 U.S.C. § 1448(a). In order to attain U.S. citizenship, an applicant must satisfy each of these elements, for the INA demands strict compliance with its statutory conditions.[1] *See* 8 U.S.C. § 1421(d) (1994) ("A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter *and not otherwise*.") (emphasis added); *cf. INS v. Pangilinan*, 486 U.S. 875, 884 (1988) (courts' role in naturalization process requires "strict compliance with the terms of [the] authorizing statute"). Moreover, courts have long recognized that naturalization is a privilege, not a right, to be granted only in accordance with the precise conditions established by Congress. *See Rogers v. Bellei*, 401 U.S. 815, 830 (1971) (" 'No alien has the slightest right to naturalization unless all statutory requirements are complied with.' ") (quoting *United States v. Ginsberg*, 243 U.S. 472, 475 (1917)).

[An INS] memorandum raises the possibility that Congress might have intended to waive the oath of allegiance requirement when, in 1994, it amended section 312(b) of the INA to permit waiver of the English language and civics requirements for naturalization applicants who are "unable because of physical or developmental disability or mental impairment to comply therewith." 8 U.S.C. § 1423(b)(1) (1994). According to this

---

[1] The only category of naturalization applicants that Congress exempted from the oath requirement are children who are applying for derivative citizenship pursuant to 8 U.S.C. § 1433 (1994) and who, in the opinion of the Attorney General, are "unable to understand [the oath's] meaning." 8 U.S.C. § 1448(a).

argument, by waiving the English language and civics requirements for disabled applicants who would otherwise be denied naturalization, Congress must also have intended to waive the oath of allegiance for those disabled applicants who could not satisfy that requirement.

We agree with the conclusion reached in your memorandum that this argument is unpersuasive. . . . To begin with, as you have also noted, not all disabled applicants who would benefit from a waiver of the English language and civics requirements would also need a waiver of the oath requirement in order to become U.S. citizens. The fact that Congress chose to waive one statutory requirement for a certain subset of naturalization applicants in no way compels the conclusion that Congress thereby implicitly intended to waive another statutory requirement for a larger subset of applicants. On the contrary, both the language and legislative history of section 312(b) indicate that Congress intended *only* to waive the English language and civics requirements. *See* 8 U.S.C. § 1423(b)(1) (waiver applies only to § 1423(a), language and civics requirements); 140 Cong. Rec. 29,220 (1994) (Rep. Mineta's statement that individuals obtaining waiver under section 312(b)(2) would benefit immigrants "who are eager to declare their loyalty to this, their adopted country, by taking the oath of citizenship").

Indeed, it can be argued that Congress's failure to provide an explicit waiver of the oath requirement supports the view that Congress considered the oath of allegiance a critical, indispensable element of the naturalization process. To be sure, Congress recognized that there might be naturalization applicants who, because of serious illness, permanent or developmental disability, advanced age, or other exigent circumstances, would be unable to take the oath of allegiance in a public ceremony as required by section 337(a). In 1990, Congress accommodated the needs of such applicants through the establishment of an alternative, expedited procedure for administration of the oath. *See* 8 U.S.C. § 1448(c). Notably, however, Congress chose not to excuse them from the oath requirement altogether, thereby reaffirming the centrality of the oath to the naturalization process.

* * * *

b. No statutory authority for satisfaction of oath of allegiance requirement by guardian or legal proxy

The INS subsequently requested OLC's advice whether section 504 of the Rehabilitation Act, 29 U.S.C. § 794, required some sort of accommodation for persons unable to form the mental intent necessary to take the naturalization oath of allegiance, and, specifically, whether the oath requirement might be fulfilled by a guardian or other legal proxy. In a memorandum opinion dated April 18, 1997, OLC advised that because the oath requirement was "essential" to naturalization, Section 504 of the Rehabilitation Act did not require accommodation for persons unable to form the mental intent necessary to take the naturalization oath of allegiance, and that the oath requirement could not be fulfilled by a guardian or other legal proxy.

The full text of the opinion, excerpted below (footnotes omitted) is available at *www.usdoj.gov/olc/oathrnd22.htm*. As noted above, the statute was amended in 2000. *See Digest 2003*, at 4–5.

---

* * * *

Section 504 of the Rehabilitation Act prohibits discrimination against any "otherwise qualified individual with a disability . . . solely by reason of her or his disability" in "any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). This Office has previously advised that all INS activities and programs constitute "program[s] or activit[ies] conducted by an Executive agency," *see* Memorandum for Maurice C. Inman, Jr., General Counsel, Immigration and Naturalization Service, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Section 504 of the Rehabilitation Act of 1973* (Feb. 2, 1983). The INS must therefore comply with the requirements of section 504 in the implementation and operation of its naturalization program.

The critical question presented by your memorandum is whether an individual who cannot personally satisfy the oath requirement

for naturalization because he or she lacks the ability to form the mental intent sufficient to take an oath can be considered "otherwise qualified" for naturalization; if so, section 504 would require the INS to provide for the naturalization of that individual.

* * * *

Case law makes clear that, where a program requirement is found to be essential to the program, section 504 does not mandate an accommodation that would alter or eliminate that requirement. . . . The accommodation you have suggested—that a guardian or other legal proxy satisfy the oath requirement of section 337 on behalf of an individual who cannot form the requisite mental intent—would thus be considered "reasonable" under section 504 only if personal satisfaction of the oath requirement is not essential to naturalization.

An analysis of the statutory scheme that Congress has established for naturalization, and the function of the oath of allegiance within that process, convinces us that personal satisfaction of the oath requirement is essential to naturalization. At its core, naturalization concerns the establishment of a relationship between the individual and the state. *See generally* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 Const. Commentary 9 (1990). In defining the prerequisites for this relationship, Congress always has required some form of an oath of allegiance. *See, e.g.*, Act of March 26, 1790, 1 Stat. 103; *see also* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, 4 *Immigration Law and Procedure* § 96.05[1] (1996) ("Gordon, Mailman & Yale-Loehr"). The naturalization oath set forth in the INA simultaneously affirms an individual's intent to become a U.S. citizen and to renounce "all allegiance and fidelity to any foreign prince, potentate, state or sovereignty," 8 U.S.C. § 1448(a), as well as his or her willingness to assume all the duties of citizenship required by the United States. By including this oath requirement and mandating strict compliance therewith, *see* 8 U.S.C. § 1421(d) (1994) ("A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise."),

Congress has made individual volition, as manifested through the oath of allegiance, fundamental to naturalization. *See* Gordon, Mailman & Yale-Loehr § 91.02[1] (in contrast to citizenship at birth, which is acquired automatically, naturalization involves individual volition).

That Congress considers the oath requirement central to the naturalization process is underscored by the fact that Congress has crafted various statutory accommodations of the oath requirement for persons with disabilities, but has stopped short of exempting such persons from the oath requirement altogether. *See* 8 U.S.C. § 1448(c) (providing for expedited judicial oath administration ceremony for persons with "developmental disability"); 8 U.S.C. § 1445(e) (1994) (Attorney General may provide for administration of oath of allegiance other than in public ceremony if person has disability that "is of a permanent nature and is sufficiently serious to prevent the person's personal appearance" or "is of a nature which so incapacitates the person as to prevent him from personally appearing").

We therefore find that, under the existing statutory scheme established by Congress, personal satisfaction of the oath requirement by each individual applicant is "essential" to naturalization and that permitting a legal guardian to fulfill that requirement on behalf of an individual whose disability precludes formation of the mental intent necessary to take the oath would not be a reasonable accommodation under section 504.

3. Loss of U.S. Citizenship

a. Expatriating acts

(1) Dual national serving as Prime Minister of a foreign country

In a letter dated July 1, 1993, excerpted below, Edward A. Betancourt, Chief, East Asian and Pacific Division, Office of Citizens Consular Services, responded to an inquiry about various aspects of dual nationality, including the question whether service as Prime Minister of a foreign country

would either (1) automatically revoke the naturalization of a foreign-born person not entitled to U.S. citizenship at birth, or (2) make such a person vulnerable to "elective denaturalization."

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

---

* * * *

At the outset, it should be noted that the various provisions of the Immigration and Nationality Act governing loss of U.S. citizenship apply to all U.S. citizens equally, regardless of whether the individual acquired U.S. citizenship at birth or acquired it subsequently by virtue of naturalization in this country. The Supreme Court has stated that there cannot be two classes of U.S. citizens based upon how that citizenship was attained, *Schneider* v. *Rusk*, 377 U.S. 163 (1964).

Section 349(a)(4) of the Immigration and Nationality Act pertains to potential loss of nationality as a consequence of acceptance of high political office in foreign governments. That subsection provides that a person who is a national of the United States risks loss of U.S. citizenship if he/she accepts employment with a foreign government *and* either (1) has the nationality of that foreign state or (2) the employment requires an oath or declaration of allegiance. However, even assuming that the hypothetical actions you propose are encompassed by Section 349(a)(4), the individual's intent toward retaining U.S. citizenship is still relevant. Thus, in addition to committing one of the acts defined in INA 349(a)(4) as potentially expatriating, loss of U.S. citizenship cannot occur unless and until it is determined that the individual acted voluntarily and intended to relinquish his/her citizenship.

The intent to relinquish citizenship was the focus of *Kahane* v. *Shultz*, 653 F.Supp. 1486 (E.D.N.Y. 1987). The *Kahane* court held that a declaration of intent to retain citizenship, even when made simultaneously with the commission of an act made potentially expatriating by statute, is sufficient to preserve the actor's U.S. citizenship. *Id.* at 1493. Once acquired, citizenship cannot be

diluted or canceled at the will of the Federal Government or any governmental unit. *Afroyim* v. *Rusk*, 387 U.S. 253, 262 (1967).

It has not been established that the act of serving as Prime Minister of a foreign country is necessarily inconsistent with American citizenship and would automatically deprive the actor of U.S. citizenship. It is worth noting that every citizenship case is judged solely on its merits. However, it is only on a case-by-case basis that the Department could determine whether committing any expatriating act detailed in INA 349(a)(4) would be sufficient to deprive the actor of U.S. citizenship.

* * * *

(2) Service in Japanese army during World War II; relevance of awareness of citizenship

In a telegram dated July 3, 1991, the Department responded to a request for an advisory opinion from a consular officer at the U.S. Consulate in Fukuoka, Japan in the case of a Japanese-American dual national who served in the medical corps of the Japanese Army during World War II, thereby committing a potentially expatriating act under § 349(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1481(a)(3). The dual national claimed that his service in the Japanese Army was not voluntary and was not performed with the intention of relinquishing U.S. nationality. Moreover, he claimed, he was not aware of his claim to U.S. citizenship until he was interviewed at the consulate in connection with a visa application. The Department concurred in the consular officer's opinion that a finding of non-loss of U.S. nationality should be made.

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

---

* * * *

4. Awareness of U.S. citizenship status/choice of allegiance

One issue . . . central to the development of this case concerns subject's knowledge of his U.S. citizenship status at the time he entered into foreign military service against the United States in time of war. . . .

It is not unusual in a culture such as Japan in the 1930s and 1940s for an individual to assume that citizenship could not be acquired merely by virtue of *jus soli*. Japanese citizenship is acquired by *jus sanguinis*, and until fairly recently only through the father. Dept. does not find it odd that [subject] claims that he was not aware of his possible claim to U.S. citizenship until he visited the American Consulate General in Fukuoka in 1985. Such an assumption on his part is fairly reasonable. [Subject] left the United States in the company of his parents at the age of nine and has lived in Japan ever since. He has never been back to the United States. He states that he has always known that he was born in Hawaii, but was not aware that he acquired U.S. citizenship. . . .

5. Voluntariness

With regard to [subject's] claim of involuntariness the Department cites the statutory presumption of section 349(c) which creates a rebuttable presumption that the potentially expatriating act was performed voluntarily. As evidence of the involuntariness of his actions, the subject alleges that inasmuch as he was conscripted into service, his military service was not voluntary. As Post is aware, the Department does not consider that a person who was conscripted (as opposed to one who enlisted in the military) must be held as a matter of law to have served involuntarily. One can enter the military by means of conscription but nonetheless have been willing, even eager, to serve in the military. On the other hand, one who has been conscripted is in a far better position to assert that such service was involuntary. . . . In [subject's] case, the question of voluntariness is colored by the fact that he was promoted four times leaving service with the rank of sergeant. [Subject] claims that this was not so much the result of working hard or enthusiasm for the work, but a way of avoiding corporal punishment which he describes as a routine practice without just cause.

6. Intent

[Subject] claims that he did not serve in the Japanese military with the intention of relinquishing U.S. nationality. Service against the United States in a time of war suggests that the subject's true allegiance was to Japan, not to the United States. This is further substantiated by the fact that [subject] was promoted four times during his military service. However, at issue is whether [subject] could intend to relinquish something which he claims he did not know he possessed, i.e., U.S. citizenship. . . .

7. Advisory opinion

[Subject] was conscripted and appears to have spent most of his military career in the medical corps. He was promoted four times during his period of service and was discharged with the rank of sergeant. He served in Northern China and French Indochina. Dept. views the effort and conduct involved and generally required to obtain regular promotions as inconsistent with the concept of involuntary service. Dept. cannot concur with Post's conclusion that [subject's] services in the Japanese Army were involuntary or against his will. . . .

. . . [Subject's] account of his experiences as a child returning to Japan with his parents, his conscription, early training, treatment by superior officers, specific services performed during the war, and the experiences of his regiment on the march from Northern China to French Indochina are highly persuasive of his intent, not to relinquish U.S. citizenship, but merely to survive the war. Given [subject's] lack of specific knowledge of his U.S. citizenship status (he was never issued a U.S. passport), his military service while satisfactory from the perspective of his superiors, does not reflect an intention to relinquish U.S. nationality. Dept. does not believe it can sustain the burden of proof that subject committed the potentially expatriating act with the intention of relinquishing U.S. nationality. . . .

b. Renunciation

(1) Renunciation valid when done to serve in foreign legislature

In an unreported decision dated June 27, 1991, the U.S. District Court for the District of Columbia found that Rabbi Meir Kahane had voluntarily renounced his U.S. citizenship in order to be eligible to run in an Israeli Knesset election in 1988, and that he could not revoke the renunciation based on a claim that his renunciation was coerced by an Israeli law requiring that Knesset members only be citizens of Israel. *Kahane v. Baker*, Civil Action No. 88–3093-AER, June 27, 1991 opinion by Chief Judge Aubrey E. Robinson, Jr.

See I Cumulative Digest 1981–1988 at 545–51 for a discussion of Kahane's renunciation and ensuing litigation.

(2) Severe economic coercion and personal duress

A February 9, 1993, letter from Carmen A. DiPlacido, Director of the Department of State's Office of Citizens Consular Services, overturned prior determinations by the U.S. Department of State that six individuals who were members of the Hebrew Israelite Community, a group whose members believe in the return of Jews to the Holy Land, had lost their U.S. citizenship by making formal renunciations of nationality under § 349(a)(5) of the INA (8 U.S.C. § 1481(a)(5)). The individuals went to Israel in the 1970s, mistakenly believing they would be granted Israeli citizenship under Israel's Law of Return, which allows Jews anywhere in the world to go to Israel and be eligible for Israeli citizenship. Israel, however, did not grant them Israeli citizenship or work permits. As undocumented aliens living in Israel they were subject to deportation unless they were stateless. On various dates, they all renounced their U.S. citizenship before a consular officer at the U.S. Department of State, thus becoming stateless. They were issued Certificates of Loss of Nationality.

Subsequently, the individuals asked that the loss of nationality determinations be overturned on the grounds they

had not clearly understood the consequences of renunciation and had acted under economic, political and social duress —the threat of deportation from Israel and separation from their families living there—when they renounced their citizenship.

Mr. DiPlacido noted in his letter that loss of citizenship cases are difficult to overturn "unless it can be shown that at the time of the act there were seriously mitigating circumstances unknown to the Department or our consular officials which could have altered our decision to approve the renunciation and issue the Certificate of Loss of Nationality." Looking at the facts regarding the individuals in question, he concluded that there was a sufficient basis to conclude that their renunciations were not voluntary. The Department of State accordingly vacated the individuals' Certificates of Loss of Nationality and advised the Embassy in Tel Aviv to treat the six individuals as U.S. citizens. *See* 70 Interpreter Releases 290–91 (1993).

(3) Renunciation required as prerequisite for Mexican citizenship

In the early 1990s, Mexican officials began to require evidence of formal renunciation of U.S. nationality from U.S.-Mexican nationals before according them benefits available to Mexican nationals. At the time, the Mexican constitution denied Mexican citizenship to persons who possessed the nationality of other countries. A November 16, 1993, telegram from the Department of State, excerpted below, recognized that individuals who decided to renounce their U.S. citizenship to claim the benefits of Mexican citizenship faced a difficult decision, but concluded that the hardships they might otherwise face did not in and of itself invalidate the "voluntariness" of their decisions.

---

* * * *

5. . . . The USG cannot administer its laws in a manner which relieves individuals of the consequences of compliance with local

law . . . [T]he [Government of Mexico] reserves the right to require formal renunciation as a prerequisite for Mexican citizenship. However disagreeable, this is the [Government of Mexico's] prerogative and it must be respected. The fact that dual nationals may regard themselves as "compelled" by Mexican law to formally renounce American citizenship does not, in and of itself, render their actions involuntary.

A DIFFICULT CHOICE, BUT A CHOICE NONETHELESS

6. A dual national faced with the dilemma of abandoning United States citizenship or suffering alleged hardship as a result of being barred from Mexican nationality admittedly is in a most difficult position. While she may have a choice, albeit a hard choice, she nevertheless is free to choose. She may stand to lose no matter what choice she makes. Her distress does not invalidate her choice however. The fact that renunciation may be motivated by a desire to avoid hardship does not negate intent to renounce, even if the renunciant does not wish the result. Also the fact that a renunciant might feel obliged by her circumstances to take an action she otherwise would not take does not render the action involuntary as a matter of law. See Jolley v. INS, 441 F.2d 1245 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971).

RENUNCIANTS SHOULD BE COUNSELLED

7. Persons choosing to renounce U.S. citizenship must be counseled concerning the finality and irrevocability of formal renunciation. In general, posts should not adminsiter formal oaths of renunciation to persons expressing equivocal intent or intent not to voluntarily relinquish citizenship. The choice to renounce, however, ultimately is that of the applicant. Also . . . the execution of the oath of renunciation and the determination of the loss of citizenship are separate. Department will determine whether an oath is effective to grant the prospective renunciant loss of citizenship.

* * * *

CONCLUSION

9. Department realizes that dual nationality hardship cases are among the most difficult of loss cases. Individuals are often faced

with hard choices but, to reiterate, if one has a choice to make, one is not under duress. It is important to note that the Department will examine each case separately on its merits. We cannot concede, however, that because an individual wants to remain a dual national, the individual is renouncing involuntarily. The indivdual's choice is to avoid renunciation if he or she wants to remain a U.S. citizen.

* * * *

c. Denaturalization for participation in Nazi persecution

During the 1990s, the Office of Special Investigations ("OSI") of the Criminal Division of the Department of Justice denaturalized and deported naturalized U.S. citizens who had participated or assisted in Nazi persecution. (For a description of OSI and a summary of Nazi persecution denaturalization cases in the 1980s, *see I Cumulative Digest 1981–1988* at 526–41). *See, e.g., Hammer v. INS*, 195 F.3d 836 (6th Cir. 1999) (individual denaturalized for serving as armed guard at Auschwitz and Sachsenhausen concentration camps and on prisoner rail transports between concentration camps was deportable and was collaterally estopped from relitigating factual issues covered in the denaturalization proceeding), *cert denied*, 528 U.S. 1191 (2000); United *States v. Ciurinskas*, 148 F.3d 729 (7th Cir. 1998) (service in the Schutzmannschaft, a Lithuanian military unit that assisted the Nazis in killing thousands of Lithuanian civilians, primarily Jews, was sufficient to constitute assistance in persecution and justify revocation of citizenship); *United States v. Stelmokas,* 100 F.3d 302 (3d Cir. 1996) (naturalized citizen who voluntarily served as platoon commander in the Schutmannschaft and who misrepresented his World War II employment status, was subject to repatriation); *United States v. Koreh*, 59 F.3d 431 (3d Cir. 1995) (for purposes of denaturalization, editor of a Hungarian newspaper that published anti-Semitic articles assisted in persecution by fostering a climate of anti-Semitism); *Kalejs v. INS*, 10 F.3d

441 (7th Cir. 1993) (company commander in a Latvian pro-German force, the Arajs Kommando, was deportable because he participated in persecution and made fraudulent statements on his immigration documents); *Kairys v. INS*, 981 F.2d 937 (7th Cir. 1992) (prison guard at the Treblinka work camp was deportable whether or not he committed specific atrocities and collateral estoppel barred him from relitigating facts litigated in his denaturalization proceedings); *Petkiewytsch v. INS*, 945 F.2d 871 (6th Cir. 1991) (individual who served involuntarily as a concentration camp guard and never abused prisoners was not deportable); *United States v. Schmidt*, 923 F.2d 1253 (7th Cir. 1991) (perimeter guard at the second largest Nazi concentration camp participated in persecution even if he did not personally participate in atrocities and revocation of his naturalization was justified); *United States v. Milius*, 1998 U.S. Dist. LEXIS 23172 (M.D. Fla. Aug. 17, 1998) (naturalized citizen who concealed service in the Vilnius Lithuanian Security Policy, or Saugumas, which assisted the Nazis in persecution of the Jews and ethnic Poles, was subject to denaturalization); *United States v. Lileikis*, 929 F. Supp. 31 (D. Mass. 1996) (naturalized citizen who entered under Displaced Persons Act and had been chief of Saugamas was subject to denaturalization); *United States v. Lindert*, 907 F. Supp. 1114 (N.D. Ohio 1995) (perimeter guard who entered under Refugee Relief Act and did not make false statements or file false information could not have citizenship revoked); *United States v. Hutyrczyk*, 803 F. Supp. 1001 (D.N.J. 1992) (perimeter guard at forced labor camp who entered under Displaced Persons Act was subject to denaturalization for assisting in persecution). Their efforts were assisted in some cases by the new availability of documents from archives of the former Soviet Union.

Most of the denaturalization cases involved persons who entered under the Displaced Persons Act of 1948 ("the DPA"), Pub. L. No. 80–774, ch. 647, 62 Stat. 1009 (1948), *as amended by* Pub. L. No. 81–555 ch. 262, 64 Stat. 219 (1950). The Third Circuit in *Koreh, supra*, laid out the legal standards applicable in such cases (footnotes omitted):

---

* * * *

We have previously noted the "two competing concerns" at issue in denaturalization cases, United States v. Breyer, 41 F.3d 884, 889 (3d Cir. 1994), which have an impact on our review. As acknowledged by the Supreme Court, "the right to acquire American citizenship is a precious one, and . . . once citizenship has been acquired, its loss can have severe and unsettling consequences." Fedorenko v. United States, 449 U.S. 490, 505, 66 L. Ed. 2d 686, 101 S. Ct. 737 (1981). Thus, the government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship." Costello v. United States, 365 U.S. 265, 269, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961). At the same time, however, courts require "strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." Fedorenko, 449 U.S. at 506. These two factors combine to "reflect our consistent recognition of the importance of the issues at stake—for the citizen as well as the Government—in a denaturalization proceeding." Id. at 507.

* * * *

Under Section 340(a) of the Immigration & Nationality Act of 1952, as amended, the government may seek the revocation of an order admitting a person to citizenship and the cancellation of that person's certificate of naturalization if such order and certificate "were illegally procured." 8 U.S.C § 1451(a). In order to legally obtain a naturalization order and certificate, an applicant must have resided in the United States for at least five years after having been "lawfully admitted for permanent residence." See 8 U.S.C. §§ 1427(a)(1), 1429. Lawful admission requires entry pursuant to a valid immigrant visa. See Fedorenko, 449 U.S. at 515; Breyer, 41 F.3d at 889; United States v. Kowalchuk, 773 F.2d 488, 493 (3d Cir. 1985) (in banc), cert. denied, 475 U.S. 1012, 89 L. Ed. 2d 303, 106 S. Ct. 1188 (1986).

. . . Koreh entered the United States under a visa issued pursuant to the DPA. At the time of Koreh's application, a DPA visa was available only to persons of concern to the International Refugee Organization (IRO). DPA § 2(b), 62 Stat. at 1009. The IRO

Constitution provided that persons "who can be shown to have assisted the enemy in persecuting civil populations of countries" are not persons "of concern" to the IRO. See Constitution of the International Refugee Organization, opened for signature Dec. 15, 1946, 62 Stat. 3037, 3051–52, T.I.A.S. No. 1846.

In addition, section 13 of the DPA provided, in part:

> No visas shall be issued under the provisions of this Act . . . to any person who is or has been a member of or participant in any movement hostile to the United States or the form of government of the United States, or to any person who advocated or assisted in the persecution of any person because of race, religion, or natural origin.

DPA § 13, 64 Stat. at 227 (emphasis added). . . .

* * * *

. . . . In Fedorenko, the Supreme Court addressed the meaning of the term "assistance in persecution" with respect to the validity of a visa obtained under the DPA. The Court held that an individual's service as a concentration camp guard constituted "assistance in persecution" even if that service was involuntary. Id. at 512–13 n.34. The Court recognized that "other cases may present more difficult line-drawing problems," and suggested that the proper focus is "on whether particular conduct can be considered assisting in the persecution of civilians." Id. (emphasis in original). It continued:

> Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.

Id.

We have read Fedorenko as describing a "continuum of conduct to guide the courts in deciding" how to apply the term "assistance in persecution." Breyer, 41 F.3d at 890. Thus, the term is to be applied on a case-by-case basis with reference to the relevant facts presented in each case.

* * * *

The deportation cases involved application of the "Holtzman Amendment," Pub. L. No. 95–549, 92 Stat. 2065 (1978), which amended the INA to make inadmissible and deportable aliens who ordered, incited, assisted or otherwise participated in Nazi persecution before and during World War II. (For a more detailed description of the Holtzman Amendment, *see 1 Cumulative Digest 1981–1988* at 526–27; *Digest 1978* at 263–70). In *Hammer, supra*, the Sixth Circuit explained the legal standards applicable to deportation under the Holtzman Amendment as follows:

---

* * * *

The Holtzman Amendment provides as follows:

> Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—
>
> (I) the Nazi government of Germany,
>
> (II) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (III) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (IV) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

8 U.S.C. § 1182(a)(3)(E).

Hammer argues that the government failed to meet its burden of proving that he "ordered, incited, assisted, or otherwise participated in . . . persecution" because it did not present "specific evidence of persecution by the Petitioner against the prisoners or that, as a guard, he engaged in acts of brutality against them." The government, however, need not present evidence of personal involvement in specific atrocities under the Holtzman Amendment. As the Seventh Circuit has observed:

> Because the statute authorizes deportation of anyone who "assisted" in persecution, personal involvement in atrocities need not be proven. An individual who served as a guard has assisted in persecution for purposes of [the Holtzman Amendment]. . . . Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political and religious oppression.

Kulle v. INS, 825 F.2d 1188, 1192 (7th Cir. 1987) (. . . brackets in original). See also Kairys v. INS, 981 F.2d 937, 942–43 (7th Cir. 1992) (holding that an alien's service as an armed SS guard at a labor camp attached to the Treblinka concentration camp rendered the alien deportable under the Holtzman Amendment for having "assisted" in Nazi persecution "whether or not he committed a specific atrocity by beating a Jewish inmate to death or otherwise mistreating him beyond what is implicit in serving as a guard at such a camp . . ."). As Judge Posner explained in Kairys:

> If the operation of such a camp were treated as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed coconspirators, or if not, certainly aiders and abettors of the conspiracy; and no more should be required to satisfy the noncriminal provision of the Holtzman Amendment that makes assisting in persecution a ground for deportation.

Id. at 943.

We find the reasoning in both Kulle and Kairys to be persuasive. The facts presented by the government show that Hammer served as an armed SS guard at Auschwitz and Sachsenhausen, and on prisoner rail transports. As a guard, Hammer had standing orders to shoot anyone who attempted to escape. Although Hammer correctly observes that the government produced no evidence that Hammer actually shot anyone or forced any prisoner into a gas chamber, no court has required such a showing. Over one million people were murdered based solely on their religion or ethnicity at the concentration camps where Hammer stood guard. Hammer's interpretation of the Holtzman Amendment would read the words "assisted, or otherwise participated" out of the statute. We conclude that the requirements of the Holtzman Amendment may be satisfied even in the absence of eyewitness testimony that the alien personally engaged in acts of brutality.

We also note that in Petkiewytsch v. INS, 945 F.2d 871 (6th Cir. 1991), a case involving a civilian forced laborer who had served under duress as a labor education camp guard, this court suggested that the Holtzman Amendment might require something more than "assistance," even though the word "assisted" appears directly in the statute. See id. at 880 (stating that the Holtzman Amendment "appears to require active participation in persecution going beyond 'assistance.' "). Hammer does not place great reliance on Petkiewytsch, and for good reason. The BIA found that he served willingly as an armed SS concentration camp guard. This is materially different than a prisoner serving under duress as a civilian guard at a labor education camp. Hammer, in fact, never claimed in the proceedings below that he served involuntarily as a concentration camp guard. Furthermore, the BIA found that the SS had no legal authority to conscript an ethnic German in Croatia, and even the unauthenticated document relied upon by Hammer refers only to the induction, and not conscription, of ethnic Germans.

Petkiewytsch thus appears to stand for the proposition that some forms of "assistance" to the Nazi regime (such as membership, without more, in an organization which cooperated with the Nazis) may be too attenuated to be considered "under the direction

of, or in association with" the Nazi government, and thus insufficient to trigger deportation under the Holtzman Amendment. We do not believe that Petkiewytsch compels the conclusion that "assistance" to the Nazi regime can never be sufficient for deportation under the Holtzman Amendment, because such an interpretation would be squarely at odds with the text of the statute. In any event, even if Hammer did not "assist[]" in persecution, he certainly "otherwise participated" in it. Indeed, in Petkiewytsch, this court took pains to distinguish labor education camps and those required to serve involuntarily as civilian guards at such camps from "extermination camps such as Auschwitz," Petkiewytsch, 945 F.2d at 873–74 (emphasis added), and the SS guards who controlled them.

* * * *

4. Employment by the United States Government of Persons with More Than One Nationality

a. Employment of noncitizen dual nationals; effective, dominant nationality in cases concerning allied countries

For a number of years, the annual Treasury, Postal Service and General Government Appropriations Act has contained a provision prohibiting, with various exceptions, the use of appropriated funds to employ noncitizens whose post of duty is in the continental United States. One exception has been for "nationals of those countries allied with the United States in the current defense effort." In 1997 the Assistant Director of the Office of Attorney Management at the Department of Justice sought an opinion from the Office of Legal Counsel ("OLC") at the Department of Justice on the question whether employment of a noncitizen law student who was a dual national of Canada and Bangladesh as a summer intern would be permissible under this provision, which was then in § 606 of the Treasury, Postal Service and General Government Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009–314, 354 (1996). Canada was on the State Department's list of countries allied with the United

States in the current defense effort, Bangladesh was not. OLC, finding that the language of the statute did not decide the question presented, concluded that the statute was best read by applying the concept of "effective, dominant nationality," a concept that derived from international law and that had been used by the federal courts to resolve disputes under domestic law that involved dual nationals.

The opinion is excerpted below. Most footnotes have been deleted. The full text of the opinion, Memorandum Opinion for the Assistant Director Office of Attorney Personnel Management, U.S. Department of Justice, Re: Eligibility of a Noncitizen Dual National for a Paid Position Within the Department of Justice, may be found at *www.usdoj.gov/olc/dual.bd.htm*.

* * * *

We think that the statute is best read, and the policies behind it most satisfyingly accommodated, by applying the concept of "effective, dominant nationality." That concept, which derives from international law,[3] has also been invoked by the federal courts to resolve disputes under domestic law that involve dual nationals. For example, the court in *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980), made use of the concept in analyzing whether the "alienage jurisdiction" statute, 28 U.S.C. § 1332(a)(2), which vests the district courts with jurisdiction over civil actions between citizens of states of the United States and citizens of foreign States gave rise to jurisdiction in a case involving a naturalized citizen who was

[3] See Nottebohm (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 22 (Apr. 6) ("International arbitrators . . . have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. . . . Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality."). . . .

also an Egyptian national under that country's laws. The court explained the concept as follows:

> Under international law, a country is responsible for official conduct harming aliens, for example, the expropriation of property without compensation. It is often said, however, that a state is not responsible for conduct which would otherwise be regarded as wrongful if the injured person, although a citizen of a foreign state, is also a national of the state taking the questioned action. . . .

Despite the general rule of nonresponsibility under international law for conduct affecting dual nationals, there are recognized exceptions. One is the concept of effective or dominant nationality. . . . [T]his exception provides that a country (respondent state) will be responsible for wrongful conduct against one of its citizens whose dominant nationality is that of a foreign state, that is,

> (i) his dominant nationality, by reason of residence or other association subject to his control . . . is that of the other state and has taken all reasonably practicable steps to avoid or terminate his status as a national of the respondent state.

Restatement (Second) of the Foreign Relations Law of the United States § 171(c) (1965).

615 F.2d at 1187 (citation omitted).

* * * *

These tests should be used to determine the dominant, effective nationality of the applicant in question. The primary question to be asked is what nationality is indicated by the applicant's residence or other voluntary associations. A second question is whether the applicant has manifested an intention to be a national of one of the two States, while also seeking to avoid or terminate nationality in the other. Of these two questions, the former will ordinarily be the more important. In *Sadat* itself, it was the plaintiff's voluntary

associations with the United States that led the court to find that his dominant nationality was American: he had not sought to terminate or avoid his Egyptian nationality, and had in fact maintained significant contacts with that country. Consequently, we believe that a dual national can be found to have a dominant, effective nationality of one country, even if he or she takes no affirmative steps to terminate or avoid the nationality of the other—indeed, even if he or she makes a conscious decision to retain the latter nationality.

We believe that the procedure we have outlined serves the various, and sometimes conflicting, goals of section 606. In particular, it will enable the United States to demonstrate its good will toward allied States and its confidence in their nationals, without compromising national security. Moreover, the results of following the procedure should be both fair to individual applicants and satisfactory to federal employers. Because "municipal law determines how citizenship may be acquired," *Perkins v. Elg*, 307 U.S. 325, 329 (1939), an applicant may be deemed a national of a particular country under its domestic law, even if he or she has no significant voluntary ties whatever to that country. It would be unfair to deny the possibility of federal employment to that applicant merely because of such an incidental nonvoluntary status, if the country in question happened to be nonallied. Equally, it would be unreasonable to treat such an applicant as eligible for federal employment merely because the country happened to be allied, when the applicant's actions and choices demonstrated a conscious commitment to the nationality of another, nonallied State.

* * * *

b. Employment of U.S. citizen dual national

In 1999 the Director of the Office of Attorney Personnel Management at the Department of Justice sought an opinion from OLC as to whether the statutory provision discussed in 2.a., *supra*, barred the Department from employing a U.S. citizen with dual nationality. OLC concluded in an opinion

excerpted below that § 606 did "not create any burdens on the employability of dual U.S. citizens by the Department of Justice that [did] not exist for sole U.S. citizens" and that it was not necessary to inquire about "effective dominant nationality" for purposes of establishing a dual U.S. citizen's eligibility for employment under that provision. OLC indicated that "second class" U.S. citizenship is disfavored and Congress had not clearly legislated a distinction for purposes of § 606. (Footnotes have been omitted.)

The full text of the opinion, Memorandum Opinion for the Director, Office of Attorney Personnel Management, U.S. Department of Justice, from Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Eligibility of a Dual United States Citizen for a Paid Position with the Department of Justice, is available at *www.usdoj.gov/olc/dualcitizen.htm*.

---

* * * *

In a 1996 memorandum to your office to your office, we addressed the closely related issue of the eligibility for employment of dual nationals who are not citizens of the United States, but who enjoy, as an incident of one of their nationalities, status in an excepted category ("noncitizen dual nationals"). [*See* 2.a. *supra*] . . .

* * * *

At the very least, in light of the 1996 Memorandum, the Department of Justice can hire dual U.S. citizens where their effective dominant nationality is with the United States. To conclude otherwise—that § 606 bars the hiring of all dual U.S. citizens—would produce the anomalous result of placing U.S. citizens in a worse position than noncitizens. That result would be particularly untenable here where neither the language nor the purposes of the statute support such a reading. The only question, then, is whether dual U.S. citizens are in a better position for purposes of this statute than the noncitizen dual nationals who were the focus of the 1996 Memorandum—in other words, whether the inquiry into "effective dominant nationality" is also

necessary for purposes of considering the eligibility of dual U.S. citizens for employment.

The 1996 Memorandum read into the statute the concept of effective dominant nationality. It is not entirely clear that we could not have concluded, from the language and structure of § 606, that the second nationality of the applicant is irrelevant if the applicant possesses one nationality that places him or her in an excepted category. The statute does not define ineligibility for employment, except by providing that an eligible person must possess any of six separate characteristics, and the noncitizen dual national in question did possess one of those six characteristics. Nevertheless, we interpreted the statute to incorporate the inquiry into effective dominant nationality, and we do not need to revisit that opinion at this time.

There are strong arguments that the potential employees here, being citizens of the United States, are not subject to the test of effective dominant nationality. Generally, U.S. law evidences hostility towards the notion of inferior classes of American citizenship. *Cf. Schneider v. Rusk*, 388 U.S. 163, 168–89 (1964) (striking down statute providing for denaturalization of naturalized citizens who returned to their original nation to reside for three or more years, noting that it "creates indeed a second-class citizenship"). Furthermore, although U.S. policy disfavors dual citizenship, it recognizes that in many cases the status of dual U.S. citizenship may be a function of the laws of another country and is not necessarily a status that an individual may control. ("[Dual citizenship exists largely as a result of conflicts in nations' ideas of citizenship. Following the rule that each nation is permitted to determine who its citizens are, American law reluctantly recognizes the existence of dual citizenship in certain cases, even where the party has renounced allegiance to foreign powers.]") In fact, courts have repeatedly emphasized that:

> The United States recognizes that a person may properly be simultaneously a citizen of this country and of another. Neither status in itself or in its necessary implications is deemed inconsistent with the other. ". . . The concept of dual citizenship recognizes that a person may have and

> exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other. . . . Dual citizenship . . . could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with maintenance of the other."

Jalbuena v. Dulles, 254 F.2d 379, 381 (3d Cir. 1958) (exercise of routine privilege of Philippine citizenship, applying for Philippine passport and subscribing oath to support Philippine Constitution, cannot deprive dual U.S./Philippine citizen of U.S. citizenship) (quoting *Kawakita v. United States*, 343 U.S. 717, 723–25 (1952)).

Without deciding whether Congress could place restrictions on the employment opportunities of dual U.S. citizens by virtue of their dual citizenship status, we would look for a much clearer statement before inferring that Congress had intended to create such "second class" citizenship based solely on dual citizenship status. We do not read the language in this appropriations provision to reach that result. We conclude that § 606 does not create any burdens on the employability of dual U.S. citizens by the Department of Justice that do not exist for sole U.S. citizens. No inquiry regarding their "effective dominant nationality" is necessary for purposes of establishing the dual U.S. citizen's eligibility for employment under that provision. Section 606, in a fairly straightforward manner, carves out an exception for U.S. citizens to the general bar on employment. Because dual U.S. citizens are U.S. citizens, they fall into the excepted category.

At the same time, in particular cases, the nature of individual applicants' ties to the U.S. or the strength of their links to their U.S. citizenship may be relevant when considering them for employment with the Department of Justice, particularly when questions of security or loyalty may arise. The manner in which an individual applicant has held or exercised his or her dual citizenship status—or a variation on the "effective dominant nationality" test—may be most appropriately incorporated into the hiring process, for example, as one of the many factors to be

considered in decisions to grant or withhold security clearances for employment.

* * * *

B. PASSPORTS

1. Issuance and Cancellation of Passports Valid Only for Travel to Israel

a. Diplomatic and official passports

Section 129(e) of the Foreign Relations Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102–138, 105 Stat. 647, 662 (1991), and § 503 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102–140, 105 Stat. 782, 820 (1991), barred the Secretary of State from issuing more than one official or diplomatic passport to a U.S. government official "for the purpose of enabling that official to acquiesce in or comply with the policy of the majority of Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passport or other documents reflect that" the official had visited Israel. The State Department believed that section 129(e) and section 503 unconstitutionally intruded on the President's authority to conduct diplomacy on behalf of the United States and sought the views and guidance of the Office of Legal Counsel at the Department of Justice on this issue, as well as on the issue of the constitutionality of the provisions as applied to non-executive branch officials, such as members of Congress and the federal judiciary, who often carry diplomatic passports, and Congressional staff, who frequently travel on official passports. Memorandum for Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel from Jamison M. Selby, Deputy Legal Adviser, Department of State (January 3, 1992).

The Office of Legal Counsel agreed with the State Department's conclusion that the provisions were unconstitutional. Memorandum Opinion for the Counsel to the President, Office of Legal Counsel, U.S. Department of Justice, Re: Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports (January 17, 1992), 16 Op. O.L.C. 18 (1992).

Excerpts from the State Department memorandum set forth below explain the Arab boycott passport provisions, the options considered by the Department of State to comply with the legislative provisions, and the Department's conclusion that the provisions were unconstitutional. Footnotes have been omitted.

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

---

* * * *

Preliminarily, we note that the Department of State is sympathetic to the goals of this legislation; we strongly object to the policy of some Arab nations of denying admission to persons whose passports reflect travel to Israel. It has been a goal of this administration's diplomacy in the Middle East to persuade those nations to abandon that policy. Thus, there is no conflict between the legislative and executive branches concerning the underlying issue: both agree that a goal of U.S. foreign policy is to bring about the end of the Arab League passport policy. The conflict arises because 1) Congress has attempted to direct the precise means by which the President is to carry out this foreign policy; and 2) the means chosen by Congress would itself interfere with the conduct of diplomacy and perhaps prevent the accomplishment of the desired goal.

* * * *

The provisions . . . are part of a comprehensive legislative plan that would require the executive branch vigorously to encourage the Arab League nations that maintain the passport and visa policy described in these provisions to reverse that policy, and would

also prohibit U.S. Government acquiescence in that policy, "especially with respect to travel by officials of the United States." . . . In addition to the ban on issuing multiple diplomatic or official passports for the purpose of complying with the Arab League passport policy and the requirement that the Secretary promulgate regulations to ensure that U.S. government officials do not comply with that policy, the legislation also directs the Secretary to cease issuing passports designated for travel only to Israel . . .

The effect of these provisions . . . is that the Secretary may still issue multiple passports to enable private travellers to comply with the Arab League passport policy, so long as no passport is stamped "Israel only." The legislation permits no such flexibility with respect to U.S. government officials. Instead, it directs that, without exception, they may not "comply with, or acquiesce in" that policy. (The U.S. policy of issuing two passports to accommodate travel to the Middle East region is not, in our view, acquiescence to the restrictive policy of the Arab States, but rather a challenge to it, because the rules of the boycott forbid the use of second passports to evade the policy. However, the legislative history of the provision in question explicitly states that Congress considers the issuance of second passports as compliance with the Arab League policy. *See* H.R. Rep. 102–138, Conference Report Accompanying H.R. 1415, at 107.)

BACKGROUND

The Arab League boycott of Israel. The Arab League boycott of Israel is designed to prevent commerce between Arabs and Israel and to prevent firms that do business with Arabs from contributing to the economic development of Israel. . . .

* * * *

The Damascus-based Arab League Central Boycott Office (CBO), which is responsible for monitoring boycott enforcement throughout the Arab League, promulgated a uniform Boycott Law which all Arab League members have adopted with minor variations. The CBO also promulgates "General Principles" or regulations to guide and assist member states' implementation of

the uniform law. One of these "general principles" requires member states to prohibit entry into their countries by foreign nationals with passports bearing Israeli visas or with a second passport designed to evade this restriction.

U.S. practice in response to the prohibition.

* * * *

. . . Over the past few decades, the State Department has responded to accommodate the official and private travel needs of U.S. citizens by issuing second passports to permit them to have one travel document for travel to Israel, leaving a second general passport free of any evidence of travel there. The State Department issues second official or diplomatic passports not only to U.S. Executive branch employees, but also to members of Congress and their staff and members of the federal judiciary, whose travel to the Middle East may include both Israel and Arab League member states that enforce the travel boycott. This practice has been successful in keeping the Arab travel boycott from interfering with the conduct of U.S. diplomacy in the region and from raising bilateral tensions.

Past U.S. practice has been to restrict one of the two passports for travel only to Israel. . . .

Impact of the legislation on the Arab League boycott.

* * * *

Because the legislation permits issuance of a second regular passport for non-official travel, there is likely to be little, if any, impact from the statute's prohibition on the issuance of "Israel-only" passports for such travel. With respect to diplomatic or official passports, however, we believe that the effect of this legislation might well be the opposite of what Congress intends. Arab League states that might have been willing quietly and without publicity to modify their policy as part of an overall diplomatic process may feel compelled to stand up to what they perceive as threatening, coercive U.S. legislation. It is also very likely that U.S. implementation of this legislation would be viewed by the Arab League nations as giving a concession to Israel without exacting anything in return.

A recent State Department survey of the governments of the Arab League countries with which the U.S. currently has relations supports this prognosis. . . .

. . . U.S. officials travelling to the Middle East could be expected to face obstacles to their entry to many Arab League countries if their passports reflect travel to Israel. Even those countries that do not enforce the prohibition, or enforce it haphazardly, could change their stand at any time without notice. Quite apart from the question of entry, difficulties might also arise when an individual bearing evidence of prior or future travel to Israel is stopped at one of the many internal checkpoints in Lebanon and other Arab countries, and asked to produce a passport. At this juncture, evidence of travel to Israel might spark other, more serious, problems than denial of an entry visa. Thus, we believe that the inability to issue more than one official or diplomatic passport would, in some cases, interfere with the ability of United States officials to engage in diplomacy and could upset delicate and complex negotiations. In addition, in some cases, travelling with a diplomatic passport bearing evidence of travel to Israel would place our officials at personal risk.

Other options.

* * * *

. . . [W]e examined a variety of possibilities for carrying out diplomatic functions without the issuance of more than one official or diplomatic passport and were unable to identify a satisfactory alternative in a significant number of cases that would be affected by this legislation.

* * * *

DISCUSSION

There appears to be very strong support for the proposition that the prohibition on the issuance of multiple diplomatic or official passports is unconstitutional because it impermissibly interferes with the President's authority to conduct diplomatic relations with foreign governments. "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.". . . . This statement by John

Marshall . . . summarizes the view—widely accepted from the founding of the Nation until the present—that the Constitution confers on the President a predominant, extensive power with respect to foreign affairs. Further, the President's authority is especially clear when, as is the case here, the challenged legislation would directly interfere with the President's ability to send his diplomats abroad to negotiate with foreign governments. . . .

A. The Constitution Vests In the President the Preeminent Authority to Conduct Diplomatic Relations

The source of the President's foreign affairs power is Article II of the Constitution which vests the executive power of the United States in the President and requires the chief executive to "preserve, protect and defend the Constitution." Article II, Section 1. The Constitution also designates the president as Commander in Chief of the armed forces, gives him the power, by and with the advice and consent of the Senate, to make treaties and appoint ambassadors and other consular officials, and the power to receive ambassadors from foreign countries. Article II, Sections 2 and 3. There is no dispute among the drafters of the Constitution, other early statements, the courts and scholars that these provisions give the President the preeminent role in conducting the nation's diplomacy.

* * * *

In modern times, Presidents have frequently asserted in signing statements that particular provisions of bills would be treated as non-binding because they impermissibly intruded on their constitutional foreign affairs power. For example, with respect to the very provisions at issue here, President Bush explained in his signing statement that the prohibition could interfere with his ability to conduct diplomacy and that he, therefore, was directing the Secretary of State to ensure that the provision does not interfere with his constitutional prerogatives and responsibilities. President Bush's Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, 27 Weekly Comp. Pres. Doc. 1527, 1529. In addition, President Bush previously stated that he

would treat as a non-binding sense of the Congress a section of the 1990–1991 Foreign Relations Authorization Act that purported to prohibit use of certain appropriated funds for attendance at any meeting within the framework of the Conference on Security and Cooperation in Europe unless the U.S. delegation contained members of a Congressionally controlled group. . . .

* * * *

B. The President's Power to Conduct Diplomacy Encompasses the Authority to Issue Multiple Diplomatic or Official Passports Where Necessary to Carry Out Diplomatic Relations.

The issuance of travel documents to enable U.S. officials to carry out diplomacy with foreign countries is part and parcel of the exclusively executive power to conduct diplomacy on behalf of the United States. . . . Article II's power to appoint ambassadors and other diplomatic officials includes the power to supervise them and to determine when, where, how and by whom the United States will conduct diplomatic relations abroad. . . .

The Executive accordingly has historically taken the position that the Senate cannot use its "advice and consent" function under Article II of the Constitution to restrict the President's exclusive authority in this area. *See* 7 Op. Of Atty. Gen. At 217 (Congress cannot constitutionally require the president to appoint or not appoint consular officials to a particular place); *Meyers v. United States*, 272 U.S. 52, 163–64 (1926) (Congress may not limit President's executive power of appointment by seeking to control removal of appointees from office).

The intent of this legislation is that *either* the Arab League drops its passport boycott, *or* the President may not send diplomats who travel to Israel to carry out diplomacy in Arab League nations. Based on prior experience and recent efforts to have the boycott repealed, we believe that at least in some instances the passport boycott will be enforced against U.S. officials. Therefore, the effect of the legislation would be to restrict the President's ability to determine where and by whom he will negotiate. . . .

C. If Congress Cannot Directly Prohibit the Issuance of Multiple Diplomatic Passports, It Cannot Do So Indirectly Through Its Appropriations Power.

* * * *

. . . While section 129 of the authorization act directly prohibits the issuance of multiple diplomatic or official passports for the purpose of complying with the Arab League boycott, section 503, the analogous provision in the appropriations act, prohibits the use of appropriated funds for this purpose. . . .

While Congress has its own constitutional power over appropriations, it appears to us that it may not, in the exercise of this power, circumvent constitutional limitations on congressional power or undercut other constitutional powers vested elsewhere. The Supreme Court most recently reaffirmed this principle in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 114 L.Ed. 2d 236 (1991).

* * * *

CONCLUSION

. . . [I]t appears to us that, to the extent they purport to prohibit the issuance of multiple diplomatic passports for the purpose of complying with the Arab League's passport policy, even when the issuance of such passports is necessary in order for the President to conduct negotiations with foreign governments, sections 129 and 503 are unconstitutional. (We also believe that a court would probably find this issue to be a non-justiciable political question.) . . .

A January 23, 1992, memorandum from President George H.W. Bush to the Secretary of State stated that the President would treat §§ 129 and 503 as "not imposing any binding legal obligation with respect to the issuance of more than one official or diplomatic passport to U.S. Government officials." It further directed the Secretary to continue issuing U.S. Government officials "with as many official and diplomatic passports as their work requires," notwithstanding

§§ 129 and 502. The full text of the memorandum is available at *www.state.gov/s/l/c8183.htm*.

b. Passports designated for travel only to Israel

Sections 129 and 503, discussed in 1.a, *supra*, further prohibited the Secretary of State from issuing any passport designated for travel only to Israel. On January 29, 1992, the Department of State promulgated its final rule revising the passport regulations at 22 C.F.R. § 51.4 to cancel, effective April 25, 1992, all passports to facilitate the foreign travel of United States citizens and nationals that were designated as valid only for travel to Israel. 57 Fed. Reg. 3282 (Jan. 29, 1992). The Department continued to issue a second passport to travelers who needed to visit both Arab League countries and Israel, but the second passport was not designated only for travel to Israel. *See* 57 Fed. Reg. 3454 (Jan. 29, 1992).

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

Section 370 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996) (42 U.S.C. § 652(k)), required the Secretary of State to deny (or, as appropriate, revoke, restrict or limit) passports of persons certified by the Secretary of Health and Human Services, on the basis of an underlying certification of a state agency, as owing child support arrearages in excess of $5,000. For a discussion of the implementing regulations subsequently issued by the Department, as well as constitutional challenges to the provision, *see Digest 2001* at 9–13.

3. Restrictions on Use of U.S. Passport

a. Imposition of Iraq and Kuwait passport restrictions

On February 1, 1991, Secretary of State James A. Baker III signed a notice pursuant to 22 C.F.R. § 51.73 imposing a

one-year restriction on use of U.S. passports for travel to, in, or through Iraq, with certain exceptions. 56 Fed. Reg. 5242 (Feb. 8, 1991). The notice provided as follows.

Pursuant to the authority of section 211a of title 22 of the United States Code, Executive Order 11295 (31 FR 10603), and in accordance with § 51.73(a) (2) and (3) of title 22 of the Code of Federal Regulations, all United States passports, with the following exception, are declared invalid for travel to, in, or through Iraq and Kuwait unless specifically validated for such travel. I hereby conclude that it is in the national interest of the United States that these passport restrictions shall not apply to those American citizens now residing in Iraq and Kuwait nor to American professional reporters and journalists on assignment there.

This action is required by the fact that armed hostilities now are taking place in Iraq and Kuwait, and that the safety of any American citizen travelling to those countries no longer can be guaranteed. The American Embassies in Baghdad and Kuwait are closed, thus preventing the United States from providing routine diplomatic protection or consular assistance to Americans who may travel to either country.

In light of these events and circumstances, I have determined that Iraq and Kuwait are areas ". . . where armed hostilities are in progress; or, a country . . . in which there is imminent danger to the public health or physical safety of United States travelers" within the meaning of § 51.73(a) (2) and (3) of title 22 of the Code of Federal Regulations.

The Public Notice shall be effective upon publication in the Federal Register and shall expire at the end of one year unless sooner extended or revoked by Public Notice.

* * * *

Effective March 12, 1991, Secretary Baker revoked the passport restriction imposed on February 1, 1991, with respect to Kuwait because armed hostilities had ceased in Kuwait. The revocation notice noted that certain potential health and safety dangers would continue to exist. 56 Fed. Reg. 10,454

(Mar. 12, 1991). The passport restriction remained in effect with respect to Iraq.

Effective February 27, 1992, Acting Secretary of State Lawrence S. Eagleburger extended the restriction on use of U.S. passports for travel to, in, or through Iraq for another year because, although armed hostilities had ended, the Government of Iraq continued to direct hostile acts against United States citizens and nationals. 57 Fed. Reg. 6762 (Feb. 27, 1992).

The restriction was again extended for one year by Acting Secretary of State Clifton R. Wharton, Jr., effective March 1, 1993, on the grounds that Iraq continued to be a country where there was "imminent danger to the public health or physical safety" of U.S. travelers. 58 Fed. Reg. 11,883 (Mar. 1, 1993). Further one-year extensions based on similar grounds were made during the period: 59 Fed. Reg. 10,451 (Mar. 4, 1994); 60 Fed. Reg. 13,002 (Mar. 9, 1995); 61 Fed. Reg. 10,839 (Mar. 15, 1996); 62 Fed. Reg. 13,426 (March 20, 1997); 63 Fed. Reg. 13,715 (Mar. 20, 1998); and 64 Fed. Reg. 14,301 (Mar. 24, 1999).

b. Extension of Lebanon passport restrictions

Effective February 1, 1991, Secretary of State James A. Baker III extended for a year the restriction on use of U.S. passports for travel to, in, or through Lebanon, originally imposed on January 26, 1987. The extension was based on a finding of "imminent danger to the public health and physical safety" of U.S. travelers within the meaning of 22 C.F.R. § 51.73(a)(3) because of the chaotic situation in Lebanon, and West Beirut in particular. 56 Fed. Reg. 4118 (Feb. 1, 1991). The restriction was further extended for one year: 57 Fed. Reg. 5925 (Feb. 18, 1992); and 58 Fed. Reg. 11,286 (Feb. 24, 1993); and for six-month periods: 59 Fed. Reg. 10,195 (Mar. 3, 1994); 59 Fed. Reg. 45,056 (Aug. 31, 1994); 60 Fed. Reg. 12,004 (Mar. 3, 1995); 60 Fed. Reg. 45,206 (Aug. 30, 1995); 61 Fed. Reg. 8096 (Mar. 1, 1996); 61 Fed. Reg. 43,395 (Aug. 22, 1996); and Fed. Reg. 4371 (Jan. 29, 1997).

c. Extension of Libya passport restrictions

Effective November 25, 1991, Acting Secretary of State Lawrence S. Eagleburger extended for another year the restriction on the use of U.S. passports for travel to, in, or through Libya, that had originally been imposed on December 11, 1981. The extension was also based on a finding of "imminent danger," due to the unsettled relations between the United States and the Government of Libya and the possibility of hostile acts against U.S. citizens in Libya. 56 Fed. Reg. 59,316 (Nov. 25, 1991). The restriction was further extended for one year periods: 57 Fed. Reg. 55,291 (Nov. 24, 1992); 58 Fed. Reg. 61,137 (Nov. 19, 1993); 59 Fed. Reg. 59,815 (Nov. 18, 1994); 60 Fed. Reg. 58,129 (Nov. 24, 1995); 61 Fed. Reg. 56,993 (Nov. 5, 1996); 62 Fed. Reg. 62,663 (Nov. 24, 1997); 63 Fed. Reg. 64,139 (Nov. 18, 1998); and 64 Fed. Reg. 67,600 (Dec. 2, 1999).

4. Revocation of Passport of Subject of Federal Arrest Warrant

The Department of State revoked the passport of Joseph R. Kelso, who was the subject of a federal warrant of arrest for several felonies, in response to a formal request dated January 20, 1998, by the FBI. As authorized under the Department's regulations, 22 C.F.R. §§ 51.70 (a)(1) and 51.72 (a) (1998), Kelso, who was in the United Kingdom, sought a post-revocation hearing to contest the action on January 29, 1998. The Department failed to schedule the post-revocation hearing within the sixty days required by its regulations. Kelso brought suit seeking a temporary restraining order to vacate the revocation on the grounds that (1) the absence of a pre-revocation hearing violated the Fifth Amendment's due process clause; (2) the regulations empowering the Secretary of State to revoke passports exceeded her delegated authority; and (3) the State Department's regulations compelled the Secretary to return Kelso's passport. The U.S. District Court for the District of Columbia rejected the plaintiff's first two arguments based on the Supreme Court holding in *Haig v.*

Agee, 453 U.S. 280 (1981) (*see Digest 1979* at 293–97; *Digest 1980* at 125–32; *Digest 1989–90* at 13–17), but ordered the Department (1) to vacate the revocation decision because of its failure to abide by its regulations requiring that it initiate the hearing within sixty days of a request and (2) to restore the *status quo ante* by returning Kelso's passport to the British authorities who possessed it prior to the revocation decision. *Kelso v. United States Dep't of State*, 13 F. Supp. 2d 1 (D.D.C. 1998).

The Department of State issued a replacement passport, but then again revoked Kelso's passport under 22 C.F.R. §§ 51.70 and 51.72 (1998) on the grounds that he was the subject of a federal arrest warrant and was deemed a present flight risk. Kelso filed a motion to show cause for contempt that was denied by the district court. The department's regulations, the court reasoned, did not provide any precise sanction for the department's failure to hold the revocation hearing and there was no sanction that prohibited the department from revoking the replacement passport. Moreover, the department's order vacating its first revocation was not a final judgment on the merits that barred the department by principles of *res judicata* from revoking the replacement passport. *Kelso v. Department of State*, 13 F. Supp. 2d 12 (D.D.C. 1998).

5. Right to Travel—Cuban Asset Control Regulations

In 1994 the Freedom to Travel Campaign ("FTC"), an organizer of educational trips to Cuba, and other plaintiffs sought a preliminary injunction to prevent enforcement of certain restrictions imposed on travel to Cuba by the Cuban Assets Controls Regulations (31 C.F.R. Part 515 (1994)). The regulations were promulgated shortly after President John F. Kennedy announced the 1962 Cuban trade embargo. As of 1994, they banned nearly all economic transactions with Cuban nationals. A small universe of persons—including journalists, government officials, and certain international organizations—qualified for a general license partially

exempting them from these restrictions. All other travelers, including tourists, were required to obtain a specific license that could be issued only upon a showing of "compelling need" to travel to Cuba for such specified reasons as "clearly defined educational . . . activities." 31 C.F.R. § 515.560(b) (1994). Traveling to Cuba without a license was a criminal offense subject to imprisonment, fine, and property forfeiture. 31 C.F.R. § 515.701 (1994). FTC did not qualify for a general license, and had never applied for a specific license. Nonetheless, it had made trips to Cuba in which several hundred people took part, and planned to conduct similar unlicensed trips in the future.

FTC argued that: (1) Congress' delegation of authority to the President under the Trading with the Enemy Act to renew the Cuban embargo solely upon a determination that it is "in the national interest" was too broad, (2) that Regulation 560(b)'s license requirements for "educational" travel were facially vague under both the Fifth Amendment right to travel and the First Amendment, and (3) that the President's statutory authority conflicted with the United States' human rights treaty obligations. The U.S. District Court for the Northern District of California denied FTC's motion for a preliminary injunction and granted the Treasury Department's motion for summary judgment upholding the regulations.

The United States Court of Appeals for the Ninth Circuit, holding that the "national interest" standard for Congress's delegation of power to the President was not too broad and that the regulations' provisions were not impermissibly vague, affirmed the denial of the preliminary injunction in an opinion excerpted below. *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996). Footnotes have been omitted. *See also* discussion of Cuba sanctions in Chapter 16.A.3.

---

* * * *

FTC initially argues that the Cuban Asset Control Regulations are an impermissible delegation of Congressional power.

These Regulations, under which the President maintains the Cuban embargo, were promulgated pursuant to TWEA [the Trading with the Enemy Act], 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1–44 (1988). TWEA itself was a delegation of Congressional power to the President. When the Cuban Asset Control Regulations were originally enacted, TWEA provided that the President could restrict foreign travel and trade both in times of peace and war. 50 U.S.C. § 5(b) (1925). Thus, at that time, the Regulations were a proper exercise of the President's authority under TWEA. *See Reagan v. Wald*, 468 U.S. 222 . . . (1984).

In 1977, Congress amended TWEA and cut back the President's authority to impose embargoes except in times of war. A new law was enacted to cover the President's emergency powers during times of peace. See International Emergency Economic Powers Act ("IEEPA"), Pub. L. No. 95–223 . . . codified at 50 U.S.C. §§ 1701–1706 (1988). It imposed a higher standard for the creation of peacetime embargoes; they were permitted only if necessary "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). The President also had to declare a national emergency. *Id.*

Congress, however, "grandfathered" in all then-existing economic embargoes. Instead of having to satisfy the more onerous IEEPA standards, the President could simply renew an embargo upon determining "that the exercise of such authority . . . for another year is in the national interest of the United States." Pub. L. No. 95–233, § 101(b)(1977) . . . In each year since the 1977 amendment, Presidents Carter, Reagan, Bush, and Clinton have determined that it was in the "national interest" to continue the Cuban embargo . . .

FTC argues that this "in the national interest" standard is too broad a delegation . . .

Article I, section 1 of the Constitution vests the legislative power of the federal government in Congress. U.S. Const., Art. I, § 1. Over time, the government has reached a "practical understanding that . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v.*

United States, 488 U.S. 361, 372 . . . (1989). Thus, delegations of Congressional authority are proper "so long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 . . . (1928)). This "intelligible principle" must not grant the delegate unrestrained freedom of choice." *Zemel v. Rusk*, 381 U.S. 1, 16 . . . (1965).

Courts have interpreted this mandate liberally and, with two exceptions, have upheld every challenge to allegedly impermissible delegations . . .

Delegation of foreign affairs authority is given even broader deference than in the domestic arena. It is well settled that "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than it customarily wields in domestic areas." *Zemel v. Rusk*, 381 U.S. 1, 17 . . . (1965). The level of deference is so much greater here that a delegation improper domestically may be valid in the foreign arena. *Curtiss-Wright*, 299 U.S. at 315.

Zemel clearly settles the issue before us. In *Zemel*, the plaintiffs challenged the delegation provisions of the Passport Act of 1926. This Act gave the Secretary of State the power to grant and issue passports, but set forth *no standards* to guide the use of his discretion. When the President invalidated all passports to Cuba in 1961, the plaintiff sued. The Court rejected his claim and found the delegation proper. *Id.* at 18.

. . . The Supreme Court's approval of the strikingly broad delegation in Zemel makes our conclusion crystal clear: the delegation under which the Regulations are promulgated is valid.

* * * *

FTC claims that its freedom to travel is trampled by the Regulations' travel ban. Although the right to travel internationally is a liberty interest recognized by the Fifth Amendment, *Kent v. Dulles*, 357 U.S. 116, 127 . . . (1958) ("Freedom to travel abroad is, indeed, an important aspect of the citizen's 'liberty.' "), it is clearly not accorded the same stature as the freedom to travel among the states. *Haig v. Agee*, 453 U.S. 280, 306 . . . (1981)

("The Court has made it plain that the freedom to travel outside the United States must be distinguished from the *right* to travel within the United States.") Restrictions on international travel are usually granted much greater deference. See *Califano v. Aznavorian*, 439 U.S. 170 . . . (1978) (upholding Social Security Act provisions against freedom to international travel challenge using only rational basis scrutiny). Given the lesser importance of this freedom to travel abroad, the Government need only advance a rational, or at most an important, reason for imposing the ban.

This the Government can do. The purpose of the travel ban is the same now as it has been since the ban was imposed almost 35 years ago—to restrict the flow of hard currency into Cuba. That goal has been found "important," "substantial," and even "vital." See *Walsh v. Brady* . . . 927 F.2d 1229, 1235 (D.C. Cir. 1991) (finding purpose "important" and "substantial"); *Teague v. Regional Comm'r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968), cert. denied, 394 U.S. 977 . . . (1969) (finding purpose "vital"). Thus, the Government seems to have satisfied its obligation.

FTC, however, would have us evaluate the foreign policy underlying the embargo. It contends that the President's current reason for the embargo—to pressure the Cuban government into making democratic reforms—is not as compelling a policy for an embargo as were previous justifications that relied on national security concerns. FTC thus invites us to invalidate the ban. This is an invitation we must decline.

It is well settled that "matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of the government as to be largely immune from judicial inquiry or interference." *Reagan*, 486 U.S. at 242 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 . . . (1952)). This immunity manifests itself in a history of judicial deference. In both *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir.), cert. denied, 385 U.S. 898 . . . (1966) and *Reagan*, 468 U.S. 222 . . . , courts refused to hear claims that the executive lacked an adequate foreign policy rationale for the Cuban embargo. See *Sardino*, 361 F. 2d at 112 (refusing to entertain claim that Cuban foreign policy did not support asset freezing); *Regan*, 468 U.S. at 242 (refusing to hear

claim that absence of Cuban Missile Crisis security risk left Cuban embargo without sufficient foreign policy justification).

Even if we were to second guess the President, this is not a case where the Government has set forth no justifications at all. It has detailed numerous reasons for the embargo. We will look no further. The Cuban Asset Control Regulations' travel ban is constitutional.

* * * *

FTC next argues that even if the ban itself is constitutional, the Regulations' licensing exceptions are unconstitutionally vague under the Fifth and First Amendments. This is a particularly novel argument in that FTC challenges the *restoration* of rights that have been validly taken away . . .

* * * *

FTC concludes by arguing that the Regulations conflict with the International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967) and are therefore invalid. FTC points to Article 12, section 3, which requires travel restrictions to be "necessary to protect national security." Since the 1977 grandfather clause allows the Cuban ban in the absence of national security threats, FTC argues that a national security requirement must be read into the grandfather clause.

We interpret treaties de novo. *United States v. Washington*, 969 F. 2d 752, 754 (9th Cir. 1992), *cert. denied sub nom. Lummi Indian Tribe v. Washington*, 507 U.S. 1051 . . . (1993). While it is true that acts of Congress should not be construed to conflict with international treaty obligations, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 . . . (1993), we fail to see any conflict here.

The "national security" provision of Article 12, section 3 qualifies only sections 1 and 2 of Article 12. 6 I.L.M. at 176 ("The *above-mentioned* rights shall not be subject to any restrictions except those . . . necessary to protect national security.") (emphasis added). Section 1 states that all persons within a nation shall have the right to move within that nation. Section 2 states that "everyone shall be free to leave any country, including his own."

Because the Regulations do not trigger either section 1 or 2, the section 3 "national security" requirement does not apply. The Regulations do not deal with interstate travel, so section 1 is irrelevant. Nor is Section 2 relevant: it only guarantees the right to leave the United States—it says nothing about the right to travel to specific destination.

Thus, there is no conflict between the grandfather provision and the International Covenant.

* * * *

C. IMMIGRATION AND VISAS

1. U.S.-Cuba Immigration Issues

a. Joint Communiqué on Migration (1994)

On August 8, 1994, Fidel Castro announced that the Cuban government would no longer forcibly prevent emigration from Cuba by boat. The new policy encouraged thousands of Cubans to escape Cuba and head for the United States in often unseaworthy boats and rafts. A number were lost at sea, although approximately 8,000 reached the United States safely.

On August 19, 1994, President William J. Clinton announced a new U.S. policy, stating at a White House press conference:

> The United States will do everything within its power to ensure that Cuban lives are saved and that the current outflow of refugees is stopped. Today, I have ordered that illegal refugees from Cuba will not be allowed to enter the United States. Refugees rescued at sea will be taken to our naval base at Guantanamo, while we explore the possibility of other safe havens within the region.

5 Dep't St. Dispatch No. 35 at 579 (Aug. 29, 1994), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*. For discussion of the legal issues resulting from the earlier

Mariel boatlift, *see 1 Cumulative Digest 1981–1988* at 650–661.

The exodus sparked talks in New York between representatives of the United States and of Cuba to normalize migration procedures and take measures to ensure that migration between the two countries would be "safe, legal, and orderly." On September 9, 1994, the representatives reached agreement on the U.S.-Cuba Joint Communiqué on Migration (September 9, 1994), which is excerpted below. The full text of the agreement is available at 5 Dep't St. Dispatch No. 37 at 603 (Sept. 12, 1994), *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

On October 14, 1994, President Clinton announced a series of immediate humanitarian steps relating to Cubans in safe havens in Guantánamo and Panama, which included paroling into the United States all chronically ill persons and their caregivers who could not be adequately cared for in the camps, unaccompanied young children, and migrants over 70; an administrative review of the status of all children in the camps; launching a major effort to persuade other countries to accept some of the Cuban migrants; and improvements in camp conditions, including providing better food, inaugurating mail and telephone service, and improving sanitary conditions. *See* 5 Dep't St. Dispatch No. 44 at 730 (statement of White House Press Secretary Myers, Oct. 31, 1994), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

U.S.-CUBA JOINT COMMUNIQUÉ ON MIGRATION

Safety of Life at Sea

The United States and the Republic of Cuba recognize their common interest in preventing unsafe departures from Cuba which risk loss of human life. The United States underscored its recent decisions to discourage unsafe voyages. Pursuant to those decisions, migrants rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be

taken to safe haven facilities outside the United States. Further, the United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways. The Republic of Cuba will take effective measures in every way it possibly can to prevent unsafe departures using mostly persuasive methods.

Alien Smuggling

The United States and the Republic of Cuba reaffirm their support for the recently adopted United Nations General Assembly resolution on alien smuggling [GA Res. 48/102, adopted Dec. 20, 1993]. They pledged their cooperation to take prompt and effective action to prevent the transport of persons to the United States illegally. The two governments will take effective measures in every way they possibly can to oppose and prevent the use of violence by any persons seeking to reach, or who arrive in, the United States from Cuba by forcible diversions of aircraft and vessels.

Legal Migration

The United States and the Republic of Cuba are committed to directing Cuban migration into safe, legal and orderly channels consistent with strict implementation of the 1984 joint communiqué. Accordingly, the United States will continue to issue, in conformity with United States law, immediate relative and preference immigrant visas to Cuban nationals who apply at the U.S. Interests Section [in Havana] and are eligible to immigrate to the United States. The United States also commits, through other provisions of United States law, to authorize and facilitate additional lawful migration to the United States from Cuba. The United States ensures that total legal migration to the United States from Cuba will be a minimum of 20,000 Cubans each year, not including immediate relatives of United States citizens. As an additional, extraordinary measure, the United States will facilitate in a one-year period the issuance of documentation to permit the migration to the United States of those qualified Cuban nationals in Cuba currently on the immigrant visa waiting list. To that end, both parties will work together to facilitate the procedures necessary to implement this measure. The two governments agree

to authorize the necessary personnel to allow their respective interests sections to implement the provisions of the communiqué effectively.

Voluntary Return

The United States and Cuba agreed that the voluntary return of Cuban nationals who arrived in the United States or in safe havens outside the United States on or after August 19, 1994, will continue to be arranged through diplomatic channels.

Excludables

The United States and the Republic of Cuba agreed to continue to discuss the return of Cuban nationals excludable from the United States.

Review of Agreement

The representatives of the United States and the Republic of Cuba agree to meet no later than 45 days from today's announcement to review implementation of this Joint Communiqué. Future meetings will be scheduled by mutual agreement.

* * * *

b. United States-Cuba—further steps to normalize migration (1995)

On May 2, 1995, the United States and Cuba announced in a Joint Statement on Migration that they had reached agreement on further steps to normalize immigration. These steps built upon the communiqué of September 9, 1994, and sought to address safety and humanitarian concerns, including overcrowding at the safe haven facilities in Guantánamo. The Joint Statement appears in full below, and is also available at 31 WEEKLY COMP. PRES. DOC. 752–53 (May 8, 1995); and 6 Dep't St. Dispatch No. 19 at 397 (May 8, 1995), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

Humanitarian Parole

The United States and the Republic of Cuba recognize the special circumstances of Cuban migrants currently at Guantánamo Bay. Accordingly, the two governments have agreed that the process of humanitarian parole into the United States should continue beyond those eligible for parole under existing criteria. The two governments agree that if the United States carries out such paroles, it may count them towards meeting the minimum number of Cubans it is committed to admit every year pursuant to the September 9, 1994 agreement. Up to 5,000 such paroles may be counted towards meeting the minimum number in any one-year period beginning September 9, 1995, regardless of when the migrants are paroled into the United States.

Safety of Life at Sea

The United States and the Republic of Cuba reaffirm their common interest in preventing unsafe departures from Cuba. Effective immediately, Cuban migrants intercepted at sea by the United States and attempting to enter the United States will be taken to Cuba. Similarly, migrants found to have entered Guantánamo illegally will also be returned to Cuba. The United States and the Republic of Cuba will cooperate jointly in this effort. All actions taken will be consistent with the parties' international obligations. Migrants taken to Cuba will be informed by United States officials about procedures to apply for legal admission to the United States at the U.S. Interests Section in Havana.

The United States and the Republic of Cuba will ensure that no action is taken against those migrants returned to Cuba as a consequence of their attempt to immigrate illegally. Both parties will work together to facilitate the procedures necessary to implement these measures. The United States and the Republic of Cuba agree to the return to Cuba of Cuban nationals currently at Guantánamo who are ineligible for admission to the United States.

September 9, 1994 Agreement

The United States and the Republic of Cuba agree that the provisions of the September 9, 1994 agreement remain in effect, except as modified by the present Joint Statement. In particular,

both sides reaffirm their joint commitment to take steps to prevent unsafe departures from Cuba which risk loss of human life and to oppose acts of violence associated with illegal immigration.

On May 22, 1995, Peter Tarnoff, Under Secretary of State for Political Affairs, testified on U.S. policy toward Cuba at hearings on S. 381, the Cuban Liberty and Democratic Solidarity Act, before the Subcommittee on Western Hemisphere and Peace Corps Affairs of the Senate Committee on Foreign Relations. 6 Dep't St. Dispatch No. 22 at 446–53 (May 29, 1995), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

The testimony, excerpted below, discussed the September 1994 and May 1995 migration agreements, and how they met the national interest. *Id.* at 450–52.

---

* * * *

It must be stressed that the legal migration program established by the September 1994 accord represents a significant increase in legal migration levels from Cuba. In the years prior to the accord, the U.S. Interests Section never processed more than about 6,000 people—including immigrants and refugees—for migration to the United States. On October 12, 1994, we announced plans to expand immigrant visa and refugee processing and to use parole authority to meet the 20,000 minimum. The U.S. Interests Section in Havana is on schedule with regard to issuing the required travel documentation. . . .

As part of our enhanced legal migration program for Cubans, the pre-existing in-country refugee program—one of only three the United States conducts in the world—was expanded to process some 7,000 refugees during the period September 1994–September 1995. The previous level of issuance of refugee documents in Havana was about 3,000 per year. The refugee program provides a mechanism for those individual Cubans under pressure by the authorities for attempting to exercise fundamental rights and freedoms, including the right to criticize the government and to come to the United States.

The September accord also called for periodic meetings to review progress toward its implementation; three such sessions have been held thus far. Our ongoing review indicates that the Cuban Government has lived up to its commitment to use persuasive methods to dissuade Cuban citizens from unsafe departures. We have no evidence that violence or coercion have been used to deter such departures or that those attempting to leave the country using irregular means have been persecuted or discriminated against. It is important to note that despite the lack of human rights and political freedom in Cuba, the Castro regime has not taken action against the tens of thousands of Cubans who have applied for legal immigration to the U.S. at the U.S. Interests Section in Havana or against those who have returned voluntarily to Cuba from Guantanamo since September 9, 1994.

Notwithstanding the successful implementation of the September agreement, there remained a potential threat to our borders and thus to our national security posed by a new outflow of Cuban migrants which might have been stimulated by further economic dislocation in Cuba and by the uncertain future for those being held in Guantanamo. To address these critical issues and to prevent additional loss of life at sea during the coming months and to find a responsible humanitarian solution to the problem of the Cuban migrants at our safe haven at Guantanamo, the President directed that we build on the September 1994 agreement to further regularize U.S.-Cuban migration relations. As you know, additional discussions were held with the Cuban Government last month which resulted in a new migration agreement. These discussions were unpublicized for one reason only: To avoid the very real possibility that rumors about the talks might trigger a massive exodus of new rafters seeking to anticipate any new U.S.-Cuban migration agreement. Such a disorganized panic would have presented serious risks of loss of life for Cubans on the high seas, as well as risks for U.S. military personnel who are charged with maintaining order at Guantanamo.

Let me stress that these talks involved only migration issues—there were no side agreements or secret understandings. There are two principal features of the May 2, 1995, migration agreement.

Drawing Down the Guantanamo Safe Haven. The first element of the new migration agreement concerns the Cuban migrants currently in our safe haven at Guantanamo. We will continue to bring into the United States those persons who are eligible for parole under the guidelines announced last October and December. These cover mainly children, the elderly, and the medically ill, with their families. Over 11,000 such persons have already arrived and an additional 5,000 remaining at Guantanamo will likely be eligible for parole on these same grounds. Following completion of processing under these categories, we will continue to parole into the United States on a case-by-case basis all other Cubans in the safe haven, provided they are not ineligible for admission because of criminal record; medical, physical, or mental condition; or commission of acts of violence while in U.S. safe havens—these persons will be returned to Cuba. In admitting these additional migrants we will bear in mind the impact of this "special Guantanamo entrants" program on state and local economies. . . .

These special Guantanamo entrants, who are expected to number about 15,000, will not represent a net increase in overall Cuban migration. Rather, they will be credited against the 20,000 annual Cuban migration figure which the United States agreed to in September 1994, at a rate of 5,000 per year for three years, beginning September 1995, regardless of when the parolees arrive in the United States.

The Government of Cuba has agreed to accept all Cuban nationals in Guantanamo who wish to return home, as well as persons at the safe haven who were previously excluded or deported from the United States or whom the United States deems ineligible for admission.

* * * *

Future Unauthorized Migration. The second element of the May 2 agreement provides that Cuban migrants rescued at sea while attempting to reach the United States will be taken back to Cuba, where U.S. consular officials will meet them at the dock and advise them how to apply to come to the United States through existing legal mechanisms. All such returnees will be permitted to apply for legal migration, including the expanded refugee program.

The Government of Cuba has committed to the United States that no one will suffer reprisals, lose benefits, or be prejudiced in any manner, either because he or she sought to depart irregularly, or because he or she applied for legal migration to the United States. As noted above, the Cuban Government has lived up to a similar commitment made in the context of the September 1994 agreement.

Let me describe how this has worked so far. After being rescued by the U.S. Coast Guard, Cuban rafters heading for the United States will be read a statement explaining that they will be taken back to Cuba where they can apply for legal migration. Trained, Spanish-speaking Immigration and Naturalization Service officers will be available on Coast Guard cutters to evaluate any claims the migrants may make regarding fear of return to Cuba. These are the procedures which were followed in the handling of the initial groups of rafters rescued since May 2. In all these cases the INS officer's determination was that the migrants could safely be returned to Cuba. A similar process will be available for post-May 2 arrivals at Guantanamo.

* * * *

Cubans who reach the United States through irregular means will be placed in exclusion proceedings and treated as are undocumented migrants from other countries, including being given the opportunity to apply for asylum.

It must also be noted that the arrival of warm weather has signaled the start of the period in which rafting historically reaches a peak. While prior to May 2 the number of interdicted rafters was well below the same period last year, it has been evident that some Cubans intended to persist in this risky venture. The announcement that Cuban migrants henceforth will not be allowed to enter the United States by illegal means should have a deterrent effect on future irregular departures.

* * * *

It is important to understand that our migration accords with the Cubans and the decision to allow Cubans to enter the U.S. from Guantanamo were made in order to help the U.S. better

control its borders, to deal with the humanitarian problem posed by prolonged migrant residence on Guantanamo, and to promote legal, orderly migration from Cuba that ensures adequate sponsorship of new arrivals and ends the life-threatening rafter phenomenon. These migration agreements stand alone. They do not signal any change in our policy toward Cuba, which is—let me state one more time—that we seek a peaceful, timely transition to a democratic government in Cuba, one which respects basic freedoms and human rights, one which promotes economic liberalization and individual enterprise, one which provides opportunity and liberty to all its citizens. It would be a mistake to encourage hope on the part of the Cuban Government that there has been or will be a change in U.S. policy toward Cuba as a result of these migration agreements.

* * * *

2. Grounds for Admission, Inadmissibility, Exclusion, Deportation, Removal of Aliens

a. Nonreviewability of consular officer decisions to deny and revoke visas

In *Saavedra Bruno v. Albright,* 197 F.3d 1153 (D.C. Cir. 1999), the U.S. Court of Appeals for the District of Columbia Circuit reaffirmed the long-standing doctrine of consular nonreviewability—that decisions of consular officers to deny or revoke visas cannot be reviewed by the courts. Excerpts below from the court's opinion provide the somewhat complex facts of the case and the court's conclusion (footnotes deleted).

---

* * * *

Saavedra is a Bolivian national. He moved to Washington, D.C. with his family in 1993. At the time, he held an F-1 visa (student) and a B-1/B-2 visa (temporary visitor for business or pleasure) . . .

In May 1995, [a corporation formed by Saavedra sought] to have Saavedra classified as a managerial employee qualified for an L-1 visa. The INS approved the classification [and an extension in 1996]. Saavedra then traveled abroad to seek the renewal of his visa, as is required, presenting himself to the American consul in Panama City on May 16, 1996. . . .

Upon finding Saavedra listed in the State Department's computer "lookout" system, the American consul in Panama City denied his visa application. Saavedra's name had been entered by the U.S. Consul General in Bolivia, who had received classified reports from federal agencies that Saavedra had been involved in narcotics trafficking. Saavedra quickly returned to the United States. . . . At [a] hearing the following week, the immigration officer told him to leave the country and to resolve the matter with the United States Embassy in Bolivia. He therefore departed on June 11, 1996. . . . The Consul General reviewed information [provided by Saavedra's lawyer] along with the classified reports and made a formal determination that Saavedra was ineligible to be admitted to the United States under § 212 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(2)(C), because there was reason to believe that he had been an illicit trafficker of controlled substances, or had knowingly assisted and abetted, or conspired and colluded with, others in the illicit trafficking of controlled substances. The Consul General sent a letter to Saavedra at his Florida address revoking his B-1/B-2 visa.

Thereafter, the State Department issued an advisory opinion supporting the Consul General's finding that Saavedra was ineligible for a visa under § 212(a)(2)(C) of the INA. The State Department issued a Certificate of Revocation on August 1, 1996, providing that the revocation of the B-1/B-2 visa would be effective as of Saavedra's next departure from the United States. . . .

In January 1998, Saavedra, his company, and its officer . . . filed suit in the district court seeking review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., of the revocation of his B-1/B-2 visa and the refusal to renew his L-1 visa. The complaint also challenged the State Department's failure to act on [a] request for a waiver of inadmissibility under § 212(d)(3) of

the INA, 8 U.S.C. § 1182(d)(3) [which the State Department subsequently denied]. . . .

* * * *

In view of the political nature of visa determinations and of the lack of any statute expressly authorizing judicial review of consular officers' actions, courts have applied what has become known as the doctrine of consular nonreviewability. The doctrine holds that a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise. For the greater part of this century, our court has therefore refused to review visa decisions of consular officials. . . . Under succeeding incarnations of federal immigration law through to the present, this court and other federal courts have adhered to the view that consular visa determinations are not subject to judicial review. . . . In *Castaneda-Gonzalez* [*v. INS*, 183 U.S. App. D.C. 396, 564 F.2d 417, 428 n.25 (D.C. Cir. 1977)] we dealt with the subject tersely, in a footnote, because the law was so settled: a consular officer, we wrote, could refuse to issue a visa to an alien "without fear of reversal since visa decisions are nonreviewable." 564 F.2d at 428 n.25.

* * * *

. . . [Jurisdiction for] Saavedra must . . . rest on the general federal question statute, 28 U.S.C. § 1331. But this general jurisdictional provision, the government tells us, is subject to preclusion-of-review legislation and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104–208, § 306(a)(2), 110 Stat. 3009, 546, is such legislation. There Congress further restricted judicial review of exclusion orders, now called removal orders, in actions brought by aliens present in the United States. As matters now stand, federal courts have no jurisdiction "to review any final order of removal against an alien who is removable by reason of having committed [certain] criminal offenses"—including trafficking in controlled substances. 8 U.S.C. § 1252(a)(2)(c) . . . The IIRIRA also amended the immigration law provision giving general jurisdiction to the district courts. The amended provision now reads: the "district courts of

the United States shall have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the provisions of this subchapter," 8 U.S.C. § 1329, thus making clear that district court jurisdiction founded on the immigration statute is confined to actions brought by the government. . . . Read in light of the long history of judicial noninterference with the judgments of consular officers regarding visas, one might characterize IIRIRA § 1329 as a restriction on district court jurisdiction to review claims such as those set forth in Saavedra's complaint, a restriction superseding general federal question jurisdiction. Or one might view this recent legislative history as reinforcing the judgment, to which we subscribe, that the immigration laws preclude judicial review of consular visa decisions and that the doctrine of consular nonreviewability remains intact, until Congress provides otherwise. Both views amount to the same thing and lead to the same conclusion—namely, that Saavedra's claims cannot be heard.

* * * *

See also Encuentro del Canto Popular v. Christopher, 930 F. Supp. 1360 (N.D. Cal. 1996) (summary judgment granted with respect to constitutional and statutory challenges to denial of visas to members of a Cuban musical group with exception of claim that the Secretary of State interfered with the authority of the consular officers in Havana to make visa decisions), later proceeding at 944 F. Supp. 805 (N.D. Cal. 1996).

b. Admission categories

(1) Immigrant visas

(i) Scientists from the former Soviet Union

The Soviet Scientists Immigration Act of 1992, Pub. L. No. 102–509, 106 Stat. 3316, 8 U.S.C. § 1153, relaxed the requirements to qualify for an immigrant visa as an alien

possessing "exceptional ability in the sciences" under § 203(b)(2)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1153(b)(2)(A), for up to 750 scientists from the former Soviet Union annually for four years. Such scientists were not required to establish that they had an employment offer or that they had advanced degrees, but were required to have expertise in nuclear, chemical, biological, or other high-technology fields or to be working on nuclear, chemical, biological, or other high-technology defense projects. The purpose of the legislation, as stated in Senate bill S. 2201, was to "enhance American competitiveness and to deter the proliferation of expertise in high technology fields associated with military research and development." *See* H.Rpt. 102–881(I)(1992).

(ii) Special immigrants

The Armed Forces Immigration Adjustment Act of 1991, Pub. L. No. 102–110, 105 Stat. 555 (scattered sections of 8 U.S.C.), added a new subsection (K) to INA § 101(a)(27) that created a new category of special immigrants consisting of persons who had served on active duty in the U.S. Armed Forces after October 15, 1978, for 12 years (or 6 in the case of an individual on active duty who had reenlisted to incur a total active duty service obligation of at least 12 years) and their spouses and children, if recommended by the executive department under which the individual serves or served.

Section 421(a) of the American Competitiveness and Workforce Improvement Act of 1998, as contained in Div. C, Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, 112 Stat. 2681–641 (1998), extended to NATO and NATO civilian components accompanying NATO forces or attached to an allied headquarters the special immigrant benefits given to certain unmarried sons and daughters of current or former international organization officers or employees, surviving

spouses of deceased international organization officers or employees, and retired officers of employees of international organizations and their spouses.

(iii) Diversity visa program

Sections 201(a)(3), 201(e), 203(c), 203(e) and 204(a)(1)(G) of the INA, added by the Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (scattered sections of 8 U.S.C.), established, effective for fiscal year 1995 and thereafter, a permanent annual numerical limitation of 55,000 for diversity immigrants, nationals of countries determined by specified mathematical computations to be underrepresented among immigrants to the United States. On December 29, 1993, the Department of State published regulations for the diversity visa program. The regulations provided that selection would be made at random from those who submitted petitions during application periods established by the Department and who met certain requirements as to education or occupational qualifications. 58 Fed. Reg. 68,791 (Dec. 29, 1993). Temporary diversity visa programs had previously been established by § 314 of Pub. L. No. 99–603, 100 Stat. 3359 (1986), § 3 of Pub. L. No. 100–658, 102 Stat. 3908 (1988) (8 U.S.C. § 1153 note) (*see Digest 1989–90* at 40) and § 132 of Pub. L. No. 101–649, 104 Stat. 4978 (1990). Department of State regulations implementing the permanent diversity visa program were published on December 29, 1993, 58 Fed. Reg. 68,791.

(2) Nonimmigrant visas

(i) Business visas

(A) NAFTA business entrants

In December 1992 the Presidents of the United States and of Mexico and the Prime Minister of Canada signed

the North American Free Trade Agreement ("NAFTA"). *See* Chapter 11.B.3. NAFTA, which entered into force on January 1, 1994, provided among other things for the admission of Canadian and Mexican citizens as temporary visitors under § 101(a)(15)(B) of the INA; as treaty traders and investors under INA § 101(a)(15)(E); and as intracompany transferees under INA § 101(a)(15)(L). NAFTA also created a new class of nonimmigrant visas for Canadian and Mexican citizens seeking to engage in professional activities. Mexican, but not Canadian, professionals were subject to an annual limit of 5,500 per year for at least the first ten years of the agreement; they also were required to enter on the basis of a petition filed by a United States employer. Admission could be denied where the temporary entry of a business person might affect adversely the settlement of any labor dispute in progress at the place or intended place of employment, or if temporary entry would affect adversely the employment of any person involved in such dispute. Section 341(a) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057 (1993) (19 U.S.C. § 3401) provided the necessary authority for Canadian and Mexican individuals to be classified as treaty traders and investors. Section 341(b) of the Act amended § 214(e) of the INA to provide for the new NAFTA professional category. On December 30, 1993, the INS issued an interim final rule effective January 11, 1994, implementing the business entrant provisions of NAFTA and the implementing legislation. 58 Fed. Reg. 69,205 (Dec. 30, 1993).

(B) Treaty traders and investors

On October 30, 1991, the INS published proposed regulations to codify its existing policy guidelines regarding the classification of nonimmigrant treaty traders and investors under INA § 101(a)(15)(E). 56 Fed. Reg. 42,952 (Aug. 30, 1991). On September 3, 1991, the Department of State

proposed regulations to implement the provisions of § 204(c) of the Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978, which required the Secretary of State to promulgate a regulatory definition of the term "substantial" after consultation with other appropriate U.S. government agencies. To qualify for treaty trader status, the trade conducted by the individual must be "substantial"; to qualify for treaty investor status, the investment must involve "a substantial amount of capital." 56 Fed. Reg. 43,565 (Sept. 3, 1991). Although the rules were intended to be identical in substance, the different language used by the two agencies led commenters to conclude that the rules were substantively different. One notable example lay in the two agencies' definitions of "substantial" trade. Six years later, the two agencies issued simultaneous and harmonized regulations, in which the INS deferred to the Department of State's definition of "substantial." 62 Fed. Reg. 48,138 (Sept. 12, 1997); 62 Fed. Reg. 48,149 (Sept. 12, 1997).

(ii) Abused spouses and children

Section 40,701(a) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (as amended at 8 U.S.C. §§ 1101–1154), permitted abused spouses and children to apply on their own behalf for immediate relative status as the spouse or child of a U.S. citizen abuser under § 204 of the INA, 8 U.S.C. § 1154(a), or for family preference immigration status as the spouse or child of a U.S. permanent resident abuser under § 203(a) of the INA, 8 U.S.C. § 1153, even if the marriage giving rise to the status had terminated.

(iii) Visa Waiver Pilot Program

The visa waiver pilot program, originally limited to eight countries, was authorized by § 313 of the Immigration Control and Reform Act of 1986, Pub. L. No. 99–603, 100 Stat. 3435,

which added § 217 to the INA, 8 U.S.C. § 1187. *See Digest 1989–90* at 26–27. Section 201 of the Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978, removed the eight-country cap and extended the program until September 30, 1994. In an interim rule published at 56 Fed. Reg. 46,716 (Sept. 13, 1991), the Department of State and the Department of Justice, acting jointly, designated Andorra, Austria, Belgium, Denmark, Finland, Iceland, Liechtenstein, Luxembourg, Monaco, New Zealand, Norway, San Marino, and Spain as visa waiver pilot program countries effective October 1, 1991. Brunei was designated as a participant in an interim rule published at 58 Fed. Reg. 40,581 (July 29, 1993). Section 211 of Pub. L. No. 103–416, 108 Stat. 4305 (1994) (8 U.S.C. § 1187), further extended the program until September 30, 1996, and created a new probationary status for countries meeting certain criteria. Ireland was added to the program as a country with probationary status effective April 1, 1995. 60 Fed. Reg. 15,872 (Mar. 28, 1995). On July 9, 1996, Argentina was added as a non-probationary participating country, 61 Fed. Reg. 35,628 (July 8, 1996), and Australia was added on July 29, 1996, 61 Fed. Reg. 39,318 (July 29, 1996). Section 635 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, Pub. L. No. 104–208, 110 Stat. 3009–702 (1996) continued the pilot program until September 30, 1997, and provided that the Attorney General would designate visa waiver countries "in consultation with" the Secretary of State, instead of jointly, as had previously been the case. On September 30, 1997, the Attorney General added Slovenia as a participating country, 62 Fed. Reg. 51,030 (Sept. 30, 1997). Section 125 of Pub. L. No. 105–119, 111 Stat. 2440 (1997) (8 U.S.C. § 1187), extended the pilot program through September 30, 1998, and § 1 of Pub. L. No. 105–173, 112 Stat. 56 (1998), extended it again through September 30, 2000. The Attorney General subsequently designated and authorized Portugal, Singapore and Uruguay to participate as visa waiver program countries effective August 9, 1999. See 64 Fed. Reg. 42,032 (Aug. 3, 1999).

(iv) Temporary entry and stay of natural persons under the 1994 General Agreement on Trade in Services

Under the General Agreement on Trade in Services ("GATS"), one of the agreements resulting from the Uruguay Round of trade negotiations, *see* Chapter 11.B.2.a, the United States made specific commitments relating to the entry and stay of services salespersons, who received visas under § 101(a)(15)(B)(ii) of the INA, 8 U.S.C. § 1101(a)(15)(B)(ii); intracorporate transferees, who received visas under § 101(a)(15)(L) of the INA, 8 U.S.C. § 1101(a)(15)(L); and fashion models and specialists, who received visas under § 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The commitments may be found at *www.wto.org/English/tratop_e/serv_e/serv_commitment_e.htm*.

(v) "S" Visas

Section 130003 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (Sept. 13, 1994) created a new nonimmigrant visa by adding subsection (S) to INA § 101(a)(15), 8 U.S.C. § 1101(a)(15)(S). The first paragraph of subsection (S) provided for the admission as nonimmigrants of aliens who were determined by the Attorney General to possess critical reliable information concerning a criminal organization or enterprise, who were willing to provide that information to federal and/or state authorities, and whose presence was essential to the success of an authorized criminal investigation or prosecution. The second paragraph covered aliens whom the Secretary of State and the Attorney General jointly determined possessed critical reliable information about a terrorist organization, enterprise or operation; who were willing to provide or have such information provided to federal law enforcement authorities or a federal court; who showed that they were or would be placed in danger as a result of providing such information; and were eligible for a reward

under 22 U.S.C. § 2708. Section 130003 also added a new § 214(j)(i) to the INA that limited admissions in the first category to no more than 100 per fiscal year, and admissions in the second category to no more than 25 per fiscal year.

(vi) Irish peace process cultural and training program

Section 2 of the Irish Peace Process Cultural and Training Program Act of 1998, Pub. L. No. 105–319, 112 Stat. 3013 (8 U.S.C. § 1101), provided for the admission under INA § 101(a)(15)(Q), 8 U.S.C. § 1105(a)(Q), of 4,000 Irish nationals from designated counties within the Republic of Ireland in each year of a four year program so that they could contribute to economic regeneration in Ireland and the Irish peace process by developing job skills and conflict resolution abilities. The Department of State implemented the program after publishing regulations at 22 CFR Part 139.

c. The Anti-Terrorism and Effective Death Penalty Act of 1996

Following the bombing of the World Trade Center in 1993 and the bombing of the Federal Building in Oklahoma in 1995, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996) ("AEDPA"). In his signing statement, President William J. Clinton remarked that AEDPA, *inter alia*, would:

> allow U.S. officials to deport terrorists from American soil without being compelled by the terrorists to divulge classified information, and to bar terrorists from entering the United States in the first place.

32 WEEKLY COMP. PRES. DOC. 717, 719 (Apr. 29, 1996).

(1) Designation of "foreign terrorist organization"

As discussed in Chapter 3.B. b.(1), § 302 of AEDPA added a new § 219, 8 U.S.C. § 1189, to the INA authorizing the

Secretary of State to designate an organization as a "foreign terrorist organization."

(2) Exclusion of alien terrorists

Section 411 of AEDPA expanded the exclusion of terrorists, INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), that had been added by the Immigration Act of 1990, 101 Pub. L. No. 649, 104 Stat. 4978 (1990) (*see Digest 1989–90* at 33–34). The amendment clarified that an alien who is engaged in any terrorist activity is inadmissible (past and likely future activity were already explicitly covered) and made inadmissible any alien who is a representative or a member of a foreign terrorist organization designated by the Secretary of State under the new § 219. A "representative" was defined to include "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."

(3) Alien terrorist removal provisions

Section 401 of AEDPA added a new Title V to the INA (8 U.S.C. §§ 1531–1537) providing special removal procedures for "alien terrorists." An "alien terrorist," as defined in INA § 241(a)(4)(B) (8 U.S.C. § 1231(a)(4)(B)) (renumbered § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B), by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *see* section d below) was any "alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity as defined in INA § 212(a)(3)(B)(iv)." A special removal court, created by appointment by the Chief Justice of the United States of five U.S. district court judges, was to consider applications by the Attorney General to remove alien terrorists. Provision was made for the protection of classified information from discovery by the alleged terrorist, and for the removal hearing to proceed on the

basis of an unclassified summary, if the judge found it sufficient to enable the alien to prepare a defense, after an *ex parte* review by the judge of the underlying classified information. Appeals from the decisions of the removal court had to be filed in the U.S. Court of Appeals for the District of Columbia Circuit. The Attorney General was authorized to take and retain in custody any alien with respect to which an application for removal as an alien terrorist had been filed until appeals were resolved, and, if an order of removal was issued, until removal to another country. Permanent resident aliens could request a release hearing. The actions of the Attorney General in deciding to continue the detention of an alien ordered removed whom no country was willing to receive were not to be subject to judicial review, including habeas corpus, except for a claim by the alien that continued detention violated his or her constitutional rights.

(4) Criminal penalty for reentry of alien terrorists

Section 401(c) of AEDPA amended § 276(b) of the INA, 8 U.S.C. § 1326(b), to make it a criminal offense for an alien who had been excluded pursuant to INA § 235(c) (8 U.S.C. § 1225(c)) (removal of aliens on security and related grounds), because of ineligibility under INA § 212(a)(3)(B) (8 U.S.C. § 1182(a)(3)(B)) (security and related grounds), or who had been removed under INA Title V (*see* section c(3) *supra*) to enter or attempt to enter the United States without the permission of the Attorney General.

(5) Denial of other relief for alien terrorists

Section 413 of AEDPA amended § 243(h) of the INA (8 U.S.C. § 1253(h)) (renumbered § 241(a)(b)(3), 8 U.S.C. § 1231(b)(3), by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *see* section d below) to provide that an alien removable as an "alien terrorist" would be considered an alien as to whom there are "reasonable grounds for

regarding [the alien] as a danger to the security of the United States," thus making the alien ineligible for withholding of deportation under § 243(h). Section 243(h) implements Article 33 of the United Nations Convention Relating to the Status of Refugees that, by operation of the 1967 UN Protocol Relating to the Status of Refugees, obligates the United States, with certain exceptions, not to return a refugee to a country where the alien's life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. Section 413 of AEDPA also amended § 243(h) to give the Attorney General discretion to waive the alien's ineligibility if granting withholding of deportation was necessary to ensure compliance with Article 33. *See also Digest 1989–90* at 47–54, and section D.1 below.

Section 413 of AEDPA also made "alien terrorists" ineligible for suspension of deportation and voluntary departure (which are less punitive alternatives to deportation) as well as for adjustment of status to that of a legal permanent resident.

(6) Exclusion of aliens who were not inspected and admitted

Section 414 of AEDPA made aliens in the United States who were not admitted to the United States after inspection (*i.e.*, who were not lawfully admitted) subject to exclusion, rather than deportation, proceedings, thus giving them fewer protections and making it easier to remove them from the United States.

(7) Denial of asylum to alien terrorists

Section 421 of AEDPA provided that the Attorney General could not grant political asylum if the Attorney General determined that the alien was excludable under INA § 212(a)(3)(B) (8 U.S.C. § 1182(a)(3)(B) (security and related grounds) or deportable under INA § 241(a)(4)(B) (8 U.S.C. § 1231(a)(4)(B)

(security and related grounds) (renumbered INA § 237(a)(4), 8 U.S.C. § 1227(a)(4), by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *see* section d below) unless the Attorney General determined there were "not reasonable grounds for regarding the alien as a danger to the security of the United States."

(8) Expedited removal procedure

Section 422 of AEDPA amended INA § 235(b)(1) to provide for expedited removal of aliens who had engaged in misrepresentation or lacked documents. It was repealed and superseded by § 302 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (see section d(1)(iii) below).

(9) Preclusion of judicial review

Section 423 of AEDPA amended INA § 106, 8 U.S.C. § 1105a, to provide that no court would have jurisdiction to review any individual determination, or to entertain any other cause or claim, arising from or relating to the implementation or operation of INA § 235(b)(1) (*see* section c(8) *supra*). Judicial review in such cases was limited to *habeas* proceedings and to determinations of (A) whether the petitioner is an alien, (B) whether the petitioner was ordered specially excluded under INA § 235(b)(1)(A), and (C) whether the petitioner was an alien lawfully admitted for permanent residence who was entitled to administrative review of an order of exclusion under INA § 235(b)(1)(A).

(10) Deportation of nonviolent offenders prior to completion of sentence of imprisonment

Section 438 of AEDPA amended INA § 242(h) (8 U.S.C. § 1252(h)) (renumbered as INA § 241(a)(4), 8 U.S.C.

§ 1231(a)(4), by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *see* section d below) to authorize the Attorney General to remove an alien who was imprisoned in a federal facility for a nonviolent offense prior to completion of the alien's sentence of imprisonment if the removal of the alien was appropriate and in the best interest of the United States. The Attorney General was similarly authorized to remove a nonviolent offender alien prior to completion of a sentence in a state facility if the chief state official with authority over the alien's incarceration determined that removal was appropriate and in the best interest of the state and submitted a written request.

d. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") was signed into law by President William J. Clinton as Division C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009–546, on September 30, 1996. In signing Pub. L. No. 104–208, President Clinton commented that IIRIRA "strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace and in the criminal justice system—without punishing those living in the United States legally." 26 WEEKLY COMP. PRES. DOC. 1935 (Oct. 7, 1996).

IIRIRA sought to deter illegal immigration by improving border control, facilitating legal entry and interior enforcement (§§ 101–110); increasing civil and criminal penalties for offenses related to alien smuggling (§§ 201–220); requiring three types of employment authorization verification pilot programs, and making certain other adjustments to employer sanctions for hiring illegal aliens (§§ 401–421) (for discussion of the Immigration Reform and Control Act of 1986, which established employer sanctions, *see I Cumulative Digest 1981–1988* at 638–45); restricting public benefits available to aliens

(§§ 501–510); and imposing new requirements on sponsors of alien relatives for immigration (§ 551).

As described below, IIRIRA also changed the procedures for denying aliens entry and for removing aliens, added to and amended the grounds for denying aliens visas and admission to the United States and removing aliens, and placed limitations on judicial review of certain removal decisions.

(1) Reorganization and amendment of removal procedures

(i) Treating persons present in the United States without authorization as not admitted

Section 301(a) of IIRIRA amended the INA to provide that an alien has been "admitted" only if the alien entered lawfully after inspection and authorization by an immigration officer. Aliens present in the United States who had not been admitted or who arrived in the United States (whether or not at a designated port of arrival and including aliens brought to the United States after being interdicted in international or United States waters) were deemed "applicants for admission," and are on a par with aliens who apply for entry at a port of entry or who are stopped at the border. Previously, aliens who managed to enter the United States illegally had been treated as deportable, which placed a higher burden on the Immigration and Naturalization Service ("INS") to remove them. *See* section d(1)(iii) below.

(ii) Consolidation of exclusion and deportation proceedings

Section 304 of IIRIRA created a new removal proceeding in INA § 240, 8 U.S.C. § 1229a, to replace the previous separate proceedings for exclusion and deportation. The new removal proceeding imposed on an "applicant for admission" the burden to show that he or she was clearly and beyond doubt entitled to admission and was not inadmissible. Aliens in the United States were given the burden of showing by clear

and convincing evidence that they were lawfully present in the United States pursuant to a prior admission. If an alien had been lawfully admitted, INS had the burden to show by clear and convincing evidence that the alien was removable.

(iii) Expedited removal procedure

Section 302 of IIRIRA repealed Section 422 of AEDPA (*see* section c(8) *supra*) and substituted a revised expedited removal procedure. Section 302 amended INA § 235(b)(1), 8 U.S.C. § 1225(b)(1), to permit an immigration officer to order an alien excluded from the United States without further hearing or review if the alien was inadmissible under INA § 212(a)(6)(C) (8 U.S.C. § 1182 (a)(6)(C)) (misrepresentation) or § 212(a)(7) (8 U.S.C. § 1182(a)(7)) (lack of required documents) so long as the alien did not indicate an intention to apply for asylum or a fear of persecution.

Congress decided to adopt an "expedited removal" system because of its finding that "thousands of aliens arrive in the United States each year without valid documents and attempt to illegally enter the U.S." H.R. Rep. No. 104–469, pt. 1, at 158 (1996). As noted in the conference report for IIRIRA, the purpose of the new removal procedures was:

> [t]o expedite the removal from the United States of aliens who indisputably have no authorization to be admitted . . . while providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims.

H.R. Conf. Rep. No. 104–828, at 209 (1996).

The new procedures applied to aliens arriving in the United States and, if designated by the Attorney General, aliens who had not been admitted or paroled into the United States and who had not shown to the satisfaction of an immigration officer that they had been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of

inadmissibility. The expedited removal procedure was not, however, applied to Cuban nationals.

Section 302 provided that if the alien expressed a desire to apply for asylum or a fear of persecution, the alien was to be interviewed by an asylum officer. If the asylum officer determined that the alien had a credible fear of persecution, the alien was to be detained for further consideration of the asylum application. If the asylum officer concluded that the alien did not have a credible fear of persecution, the alien could request prompt review by an immigration judge.

Other than the provision for review of an asylum officer's negative credible fear determination by an immigration judge, an expedited removal order was subject to administrative appeal only in cases involving permanent resident aliens, aliens admitted as refugees, or aliens granted asylum.

(iv) Expedited removal procedure for aliens inadmissible on security and related grounds

Section 302(c) of IIRIRA amended INA § 235, 8 U.S.C. § 1225, to provide that an immigration officer or an immigration judge who suspected that an arriving alien might be inadmissible under INA § 212(a)(3)(A) (espionage and sabotage or attempted overthrow of the U.S. Government), (B) (terrorist activities) or (C) (foreign policy) (8 U.S.C. §§ 1182(a)(3)(A), (B), (C)) must order the alien removed and report the order of removal to the Attorney General. If the Attorney General was satisfied on the basis of confidential information that the alien was inadmissible under those subsections and concluded that disclosure of the information would be prejudicial to the public interest, safety or security, then the Attorney General could order the alien removed without further inquiry or hearing by an immigration judge.

(v) Detention and removal of aliens ordered removed

Section 305 of IIRIRA amended previous provisions on the detention and removal of aliens ordered removed and placed

them in a new INA § 241, 8 U.S.C. § 1231. The new § 241 shortened the period the Attorney General had to remove the alien from six months (under pre-existing law) to 90 days. It mandated the detention of certain criminal aliens during the removal proceedings and the removal period. Moreover, it added a provision (§ 241(a)(6)) giving the Attorney General authority to detain beyond the removal period aliens ordered removed who were inadmissible under INA § 212 (8 U.S.C. § 1182), removable under INA §§ 237(a)(1)(C) (nonimmigrant status violators or violators of conditions of entry), 237(a)(2) (criminal offenses), or 237(a)(4) (security and related grounds) (8 U.S.C. §§ 1227(a)(1)(C), (a)(2), (a)(4)) or who the Attorney General determined were a risk to the community or unlikely to comply with the order of removal.

(2) Grounds of inadmissibility and grounds for deportation

(i) Aliens previously removed and unlawfully present

Section 301(b) of IIRIRA added a new paragraph (9) to INA § 212, 8 U.S.C. § 1182, making inadmissible (subject to certain exceptions and possible waivers) (1) any alien ordered removed upon arrival in the United States who sought admission within 5 years of the date of removal (or within 20 years in the case of a second or subsequent removal, or at any time if the alien was convicted of an aggravated felony); (2) any other alien who was ordered removed under INA § 240, 8 U.S.C. § 1229a, or any other provision of law or who left the United States while an order of removal was outstanding who sought admission within 10 years of the date of departure or removal (or within 20 years in the case of a second or subsequent removal or at any time if the alien was convicted of an aggravated felony); (3) any alien, other than a lawful permanent resident, who was unlawfully present in the United States for a period of more than 180 days but less than one year and voluntarily departed the

United States prior to the commencement of removal proceedings who sought admission within 3 years of the date of departure or removal; (4) any alien, other than a lawful permanent resident, who was unlawfully present in the United States for one year or more and sought admission within 10 years of the date of departure or removal, or (5) any alien who was unlawfully present in the United States for an aggregate period of more than 1 year or who had been ordered removed and who entered or attempted to reenter the United States without being admitted. An alien was deemed to have been "unlawfully present" if the alien was present in the United States after the expiration of the period of stay authorized by the Attorney General or without being admitted or paroled.

(ii) Aliens present without admission or parole

Section 301(c) of IIRIRA amended INA § 212(a)(6) to make inadmissible, subject to an exception for certain battered women and children, an alien who (1) was present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General or (2) failed or refused to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who sought admission to the United States within 5 years of departure or removal.

(iii) Alien guardian required to accompany helpless alien

Section 308(c)(2) of IIRIRA added a new subparagraph (B) under INA § 212(a)(10), 8 U.S.C. § 1182(a)(10), making inadmissible an alien who was accompanying another alien who was inadmissible and who was certified to be helpless from sickness, mental or physical disability, or infancy and whose protection or guardianship was determined to be required by the helpless alien.

(iv) Aliens involved in or connected to terrorism

Section 342 of IIRIRA added to the grounds of inadmissibility under INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), inciting terrorist activity under circumstances indicating an intention to cause death or serious bodily harm and providing false documentation to terrorists. The exclusion of representatives of terrorist organizations inserted by § 411(1)(C) of AEDPA (*see* section *c*(2) *supra*) was amended by § 355 of IIRIRA to provide for inadmissibility if "the alien knows or should have known" the organization was a terrorist organization.

(v) Aliens who have falsely claimed U.S. citizenship

Section 344 of IIRIRA added a new ground of inadmissibility to INA § 212 (a)(6)(C) (8 U.S.C. § 1182(a)(6)(C)), and a new ground of removal to INA § 237(a)(3)(D) (8 U.S.C. § 1227(a)(3)(D)), for aliens who "falsely represent, or have falsely represented" themselves to be U.S. citizens for purposes of receiving benefits under the INA or any other federal or state law.

(vi) Student visa abusers

Section 346 of IIRIRA added a new subparagraph (G) to INA § 212(a)(6) (8 U.S.C. § 1182(a)(6)), making excludable an alien who violated a term or condition of his or her student visa status (INA § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i)) until the alien had been outside the United States continuously for five years after the violation.

(vii) Unlawful voters

Section 347 of IIRIRA added a new subparagraph (D) to INA § 212(a)(10) (8 U.S.C. § 1182(a)(10)(D)(i)), providing for the inadmissibility of any alien who voted in violation of any federal, state, or local law, and added a new paragraph to

§ 237(a) (8 U.S.C. § 1227(a)), providing for the deportation of any such alien.

(viii) Criminal aliens

Section 321 of IIRIRA broadened the definition of "aggravated felony" provided in INA § 101(a)(43), as amended by § 441(e) of AEDPA, to provide that an alien who committed an aggravated felony at any time after admission was deportable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). Section 348 of IIRIRA prohibited the Attorney General from granting a waiver of criminal ineligibilities under INA § 212(h), 8 U.S.C. § 1182(h), to an alien previously admitted to the United States as an alien lawfully admitted for permanent residence if the alien had been convicted of an aggravated felony since the date of admission or had not lawfully resided continuously in the United States for a period of not less than 7 years immediately prior to removal proceedings.

(ix) Domestic violence, stalking, or violation of protection order, crimes against children

Section 350 of IIRIRA added a new subparagraph (E) to INA § 237(a)(2), 8 U.S.C. § 1227(a)(2), making deportable any alien who at any time after entry was convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment. It also added in new subparagraph (E) a provision making deportable any alien who at any time after entry violated a protection order issued for the purpose of preventing violent or threatening acts of domestic violence.

(x) Renunciation of U.S. citizenship to avoid taxation

Section 352 of IIRIRA added a new subparagraph (D) to INA § 212(a)(10), 8 U.S.C. § 1182(a)(10), providing for the inadmissibility of former citizens who renounced citizenship to avoid taxation.

(xi) High speed flight from immigration checkpoint

Section 108(c) of IIRIRA added conviction of a violation of 18 U.S.C. § 758, relating to high speed flight from an immigration checkpoint, to INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A), as a new ground of deportation.

(3) Preclusion of judicial review

Section 306 of IIRIRA repealed INA § 106 (8 U.S.C. § 1105a) (*see* c(9) *supra*), and replaced it with INA § 242, 8 U.S.C. § 1252, containing a number of limitations on judicial review of removal orders. Petitions for review of final removal orders generally had to be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings, and judicial review of all questions of law and fact (including interpretation and application of constitutional and statutory provisions) arising from any action taken or proceeding brought to remove an alien was made available only in judicial review of a final order of removal (INA § 242(b), (c), (d), 8 U.S.C. § 1252(b), (c), (d)). With respect to expedited removal orders under INA § 235(b)(1) (8 U.S.C. § 1225(b)(1)) (*see* d(1)(iv) *supra*), except for limited jurisdiction in *habeas corpus* proceedings, no court was to have jurisdiction to review any individual determination or any other cause or claim relating to the implementation or operation of the removal order, a decision by the Attorney General to invoke the section, the application of the section to individual aliens, or any procedures and policies adopted by the Attorney General to implement the section (INA § 242(a), 8 U.S.C. § 1252(a)). Judicial review of expedited removal orders in *habeas corpus* proceedings was confined to determinations of whether the petitioner was an alien, whether the petitioner was ordered removed under the section and whether the petitioner could prove that the petitioner had been admitted for permanent residence or as a refugee or had been granted asylum (INA § 242(e), 8

U.S.C. § 1252(e)). Only the U.S. District Court for the District of Columbia had jurisdiction to review initially whether INA § 235(b) or an implementing regulation was constitutional, or whether a regulation or other written procedure to implement the section was consistent with IIRIRA or otherwise consistent with law, and any suit had to be filed within 60 days of the date the section, regulation or procedure was implemented.

Section 242(a) also provided that no court would have jurisdiction to review any judgment relating to the granting of relief under INA §§ 212(h) (8 U.S.C. § 1182(h)) (waiver of certain criminal ineligibilities), 212(i) (8 U.S.C. § 1182(i)) (waiver of fraud or willful misrepresentation ineligibility), 240A (8 U.S.C. § 1229b) (cancellation of removal), 240B (8 U.S.C. § 1229c) (voluntary departure), or 245 (8 U.S.C. § 1255) (adjustment of status to that of a lawful permanent resident).

Section 242(a) further stated that no court would have jurisdiction to review any final order of removal against an alien who was removable by reason of having committed a crime covered in INA §§ 212(a)(2) (8 U.S.C. § 1182(a)(2)) or 237(a)(2)(A)(iii), (B), (C), or (D) (8 U.S.C. § 1227(a)(2)(A)(iii), (B), (C), or (D)).

Section 242(f) also placed limits on injunctive relief. It provided that no court other than the U.S. Supreme Court could enjoin or restrain the operation of the IIRIRA provisions relating to removal of aliens, except with respect to the application of such provisions to an individual alien against whom removal proceedings had been initiated. It also stated that no court could enjoin the removal of an alien unless the alien showed by clear and convincing evidence that the entry or execution of the final removal order was precluded as a matter of law.

Finally, § 242(g) stated that except as provided in § 242, no court would have jurisdiction to hear any claim by any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under the INA.

(4) Litigation

Following enactment of IIRIRA, litigation ensued on whether the Attorney General was authorized under INA § 241(a)(6) (8 U.S.C. § 1231(a)(6)) to detain aliens who had been ordered removed indefinitely beyond the removal period (*see* d(1)(v) above). In *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999), the U.S. Court of Appeals for the Fifth Circuit concluded that an alien's detention did not violate the Due Process Clause of the Constitution, even though three countries had refused to accept him, because eventual deportation was not "impossible," good faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review. By contrast, in *Kim Ho Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), the U.S. Court of Appeals for the Ninth Circuit affirmed the holding of a five-judge panel of the Federal District Court for the Western District of Washington that the Constitution prohibited post-removal-period detention unless there were a realistic chance that the alien would be deported and the panel's order that a detained Cambodian should be released because, given the lack of a repatriation agreement between Cambodia and the United States, there was no "realistic chance" that he would be returned. The U.S. Supreme Court ultimately decided, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that INA § 241(a)(6) contained an implicit "reasonable time" presumption of six months. After six months, if the alien provided good reason to believe that there was no significant likelihood of removal in the reasonably foreseeable future, the government would have to respond with evidence sufficient to rebut that showing. *See Digest 2001* at 17–20.

e. Inadmissibility of religious persecutors

As one of the sanctions for religious persecution imposed by the International Religious Freedom Act of 1998, Pub. L. No. 105–292, 112 Stat. 2787, 22 U.S.C. § 6401(note) (1998), § 604 made aliens who had engaged in "particularly serious

violations of religious freedom" inadmissible to the United States. In § 3 of the Act, "particularly serious violations of religious freedom" were defined as systematic, ongoing, egregious violations of religious freedom, including violations such as torture or cruel, inhuman, or degrading treatment for punishment; prolonged detention without charges; causing the disappearance of persons by the abduction or clandestine detention of those persons; or other flagrant denial of the right to life, liberty, or the security of persons. Section 604 added the following new subparagraph to § 212(a)(2) of the Immigration and Nationality Act (8 U.S.C. § 1182(a)(2)):

> (G) FOREIGN GOVERNMENT OFFICIALS WHO HAVE ENGAGED IN PARTICULARLY SEVERE VIOLATIONS OF RELIGIOUS FREEDOM.—Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time during the preceding 24-month period, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998, and the spouse and children, if any, are inadmissible.

The House Committee on the Judiciary report on the Act noted that the provision was "in keeping with the United States' tradition of denying admission to criminals, wrongdoers and violators of human rights." H.R. Rep. No. 105–480, pt. 3, at 18 (May 8, 1998).

f. Denial of visas to beneficiaries of uncompensated Cuban expropriations of American property

Section 401 of Title IV of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104–114, 110 Stat. 785 (1996) (also known as "the Helms-Burton Act" or simply "Helms-Burton"), prohibited visa issuance to, and required exclusion of, any alien whom the Secretary of State determined had confiscated or directed the confiscation of

property owned by a United States national, who converted such property for personal gain, who had trafficked in such property, or who was a corporate officer, principal or shareholder with a controlling interest of an entity which had been involved in the confiscation of such property or trafficking in such property. Confiscation was defined to encompass the taking of property without "adequate and effective compensation." The text of § 401 is set forth below.

SEC. 401. EXCLUSION FROM THE UNITED STATES OF ALIENS WHO HAVE CONFISCATED PROPERTY OF UNITED STATES NATIONALS OR WHO TRAFFIC IN SUCH PROPERTY.

(a) GROUNDS FOR EXCLUSION.—The Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States, any alien who the Secretary of State determines is a person who, after the date of the enactment of this Act—

(1) has confiscated, or has directed or overseen the confiscation of, property a claim to which is owned by a United States national, or converts or has converted for personal gain confiscated property, a claim to which is owned by a United States national;
(2) traffics in confiscated property, a claim to which is owned by a United States national;
(3) is a corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national; or
(4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3).

(b) DEFINITIONS.—As used in this section, the following terms have the following meanings:

(1) CONFISCATED; CONFISCATION.—The terms "confiscated" and "confiscation" refer to—
(A) the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property—
(i) without the property having been returned or adequate and effective compensation provided; or
(ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and
(B) the repudiation by the Cuban Government of, the default by the Cuban Government on, or the failure of the Cuban Government on, or the failure of the Cuban Government to pay—
(i) a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban Government;
(ii) a debt which is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government; or
(iii) a debt which was incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim.

(2) TRAFFICS.—(A) Except as provided in subparagraph (B), a person "traffics" in confiscated property if that person knowingly and intentionally—
(i) (I) transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property,
(II) purchases, receives, obtains control of, or otherwise acquires confiscated property, or
(III) improves (other than for routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), or begins after the date of the enactment of this Act to manage, lease, possess, use, or hold an interest in confiscated property,
(ii) enters into a commercial arrangement using or otherwise benefiting from confiscated property, or
(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

(B) The term "traffics" does not include—
(i) the delivery of international telecommunication signals to Cuba;
(ii) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national;
(iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or
(iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba.

(c) EXEMPTION.—This section shall not apply where the Secretary of State finds, on a case by case basis, that the entry into the United States of the person who would otherwise be excluded under this section is necessary for medical reasons or for purposes of litigation of an action under Title III.

* * * *

On June 17, 1996, the Department of State published guidelines for the implementation of Title IV of the LIBERTAD Act, 61 Fed. Reg. 30,655 (June 17, 1996). In a June 22, 1999 telegram to all diplomatic and consular posts, excerpted below, the Department set out the guidelines, requested that posts deliver a copy of the guidelines to host governments that had expressed a strong interest in the Act, suggested a number of talking points for presenting them, and provided press guidance for responding to any media inquiries about the guidelines. For an example of payment in connection with confiscated property resolving the question of whether a company's activities constituted "trafficking" within the meaning of Title IV, *see http://secretary.state.gov/www/briefings/statements/970723f.html*.

---

* * * *

5. Determinations of Excludability and Ineligibility.
Determinations of ineligibility and excludability under Title IV will be made when facts or circumstances exist that would lead

the Department reasonably to conclude that a person has engaged in confiscation or trafficking after March 12, 1996.

6. Prior Notification.
A. An alien who may be the subject of a determination under Title IV will be sent notification by registered mail that his/her name will be entered in the visa lookout system and port of entry exclusion system, and that he/she will be denied a visa upon application or have his/her visa revoked, 45 days after the date of the notification letter. The alien will be informed that divesting from a "trafficking" arrangement would avert the exclusion. The Department may inform the government of the alien's country of nationality in confidence through diplomatic channels of the name of any corporation or other entity related to this action.

B. If no information is received within the 45 day period above that leads the Department reasonably to conclude (I) that the alien or company involved has not engaged in trafficking or is no longer doing so, or (II) that an exception to trafficking under section 401(b)(2)(B) applies, the Department will notify consular officers and the Immigration and Naturalization Service ("INS") of a determination by entering the alien's name, including the names of the alien's agents, spouse and minor children, if applicable, in the appropriate lookout system, and a visa application from the named alien will be denied or a visa revoked in accordance with the law. Entry of the named alien into the appropriate lookout systems will be the exclusive means by which consular officers and the INS will verify that the alien has been determined to be excludable under section 401 of the Act.

7. Exemptions.
The Department may grant an exemption for diplomatic and consular personnel of foreign governments, and representatives to and officials of international organizations. An alien may request from the Department an exemption for medical reasons or for purposes of litigation of an action under Title III of the Act to the extent permitted under section 401(c) of the Act. The Department will notify Department consular officers and the INS through

appropriate channels of the decision to grant an exemption to a person otherwise excludable under Title IV of the Act. The Department may impose appropriate conditions on any exemption granted.

8. Review of Determinations. The Department may review a determination made under Title IV at any time, as appropriate, upon the receipt of information indicating that the determination was in error, that a person has ended all involvement with confiscated U.S. property in Cuba, that an exception applies under section 401(b)(2)(B), or that an exemption should be granted under section 401(c).

* * * *

10. Persons with Business Dealings with Persons Subject to a Determination. It is not sufficient in itself for a determination under section 401(a) that a person has merely had business dealings with a person for whom a determination is made under section 401(a).

* * * *

12. No Right of Action. Nothing in these guidelines will create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or its employees, or any other person.

* * * *

[Talking points]

- The U.S. remains committed to a dialogue with allies as we move forward with the implementation process. We agreed to take the concerns other governments have raised into account when drafting the guidelines, and have done so. We are sharing advance copies of the guidelines in this spirit. We have not sought formal comments on the guidelines prior to publication.
- The purpose of the guidelines is to provide information about what procedures the Department will follow in implementing Title IV, and about what criteria will be

used in making determinations of "trafficking" under Title IV.

- The guidelines may be revised at any time, based on input from the public or other governments as well as our implementation experience. Any revisions would be published in the Federal Register to ensure transparency.
- We recognize that the guidelines neither address every possible hypothetical situation nor answer all questions. Many issues will only become clear after we begin examining cases and making determinations.
- After the guidelines are published, the Department of State will rapidly proceed with a careful examination of possible cases involving suspected trafficking. As soon as we have sufficient information to establish that trafficking after March 12, 1996 has occurred, we will make a determination of exclusion. This could happen soon.
- When determinations have been made, individuals affected will be notified by mail 45 days prior to the date on which the exclusion becomes effective. This provides an opportunity for such persons to submit to the Department any information they believe should be considered before the exclusion becomes effective.
- We expect to send advisory letters in the vast majority of cases, but may in some cases inform individuals through notification letters when a determination has been made.
- We reiterate that the State Department does not have a Helms-Burton "black list." We do not plan to release publicly the names of individuals excluded under Title IV.
- We will continue to implement the Act in a manner that minimizes misunderstandings and avoids surprises. We will be open to considering requests to provide advance notification of companies having your country's nationality that are the subject of determination.
- We are looking at all possible cases of trafficking. An inter-agency group will carefully consider all available information before determinations are made.

* * * *

[Press guidance]

Q. How many companies are likely to be affected by Title IV? Which ones? Is there a list?

A. The State Department has no intention of publishing a list of individuals or companies that have been or might be affected by Title IV. Individuals determined to be "trafficking" will be notified privately by mail. We don't know yet how many companies will be determined to be "trafficking." Each case will be reviewed carefully under the guidelines before action is taken.

Q. Are you ready to make determinations of "trafficking" now? When can we expect action?

A. Now that the guidelines are published and in effect, we intend to proceed rapidly with a careful examination of suspected cases of trafficking. When we have sufficient information to establish that trafficking has occurred, we will make a determination. This could occur relatively quickly.

Q. Isn't this an extra-territorial application of U.S. law?

A. Countries have the sovereign right to control their borders, and to exclude individuals they determine to be undesirable.

Q. Isn't this a secondary boycott?

A. No. The Act is focused on deterring investment in confiscated U.S. property in Cuba, not all investment in Cuba.

Q. Doesn't Helms-Burton violate the WTO and NAFTA?

A. We believe that the Act is consistent with our international obligations. We have taken care to ensure that our implementation is similarly consistent.

* * * *

Q. Is the Administration concerned about harsh criticism from its closest allies of Helms-Burton? Isn't this hurting key U.S. relationships with other countries?

A. We have listened to the concerns our allies have expressed. We are trying to implement Helms-Burton in a way that will

maximize pressure on the Cuban government while minimizing frictions with our allies and trading partners. We believe, however, that the U.S. is fully justified in offering a strong response to the Cuban government's shootdown of unarmed U.S. civilian aircraft, and in deterring foreign investors from profiting from expropriated U.S. properties in Cuba.

We reject the notion that the Cuban Liberty and Democratic Solidarity Act represents a lessening of the U.S. commitment to the multilateral system.

The Act is meant to pressure Cuba to change its policies and begin reforms. It also reflects the concerns of U.S. nationals who see foreign companies using confiscated assets in Cuba to which they have claims.

g. Denial of visas to persons involved in unauthorized disclosures of certain confidential business information related to chemical production

As discussed in Chapter 18.D.1., the Chemical Weapons Convention, among other things, addressed concerns of industry to protect sensitive commercial information disclosed to inspectors under the inspection regime established by the convention. Section 103(f) of the "Chemical Weapons Convention Implementation Act of 1998," as contained in Division I, Title I of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105–277, 112 Stat. 2681 (1998), provided that the Secretary of State must deny a visa to, and the Attorney General must exclude, certain aliens who made unauthorized disclosures of, trafficked in, or were officers, principals or controlling stockholders of entities involved in unauthorized disclosures of, "United States confidential business information" related to the production of chemicals. Section 103(f) was one of a series of measures intended to address the fears of U.S. businesses that the reporting and inspections regime provided under the Convention would lead to misappropriation of their confidential business information. The text of § 103(f), 22 U.S.C. § 6713, is set forth below.

(f) SANCTIONS FOR UNAUTHORIZED DISCLOSURE OF UNITED STATES CONFIDENTIAL BUSINESS INFORMATION.—The Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States any alien who, after the date of enactment of this Act—

> (1) is, or previously served as, an officer or employee of the Organization and who has willfully published, divulged, disclosed, or made known in any manner or to any extent not authorized by the Convention any United States confidential business information coming to him in the course of his employment or official duties, or by reason of any examination or investigation of any return, report, or record made to or filed with the Organization, or any officer or employee thereof, such practice or disclosure having resulted in financial losses or damages to a United States person and for which actions or omissions the United States has been found liable of a tort or taking pursuant to this Act;
> (2) traffics in United States confidential business information, a proven claim to which is owned by a United States national;
> (3) is a corporate officer, principal, shareholder with a controlling interest of an entity which has been involved in the unauthorized disclosure of United States confidential business information, a proven claim to which is owned by a United States national; or
> (4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3).

h. Denial of visas to expropriators or confiscators of real property of U.S. nationals

Section 2225 of the Foreign Affairs Reform and Restructuring Act of 1998, as contained in Div. G, Title XXII of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, P. L. No. 105–277, 112 Stat. 2681 (1998) (8 U.S.C.

§ 1182d), authorized the Secretary of State to deny visas to aliens who, through abuse of position, convert for personal gain confiscated real property to which a U.S. national owns a claim. The text of section 2225 is set forth below.

SEC. 2225. DENIAL OF VISAS TO CONFISCATORS OF AMERICAN PROPERTY.

(a) DENIAL OF VISAS.—Except as otherwise provided in Section 401 of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Public Law 104–114), and subject to subsection (b), the Secretary of State may deny the issuance of a visa to any alien who—
(1) through the abuse of position, including a governmental or political party position, converts or has converted for personal gain real property that has been confiscated or expropriated, a claim to which is owned by a national of the United States, or who is complicit in such a conversion; or
(2) induces any of the actions or omissions described in paragraph (1) by any person.

(b) EXCEPTIONS.—Subsection (A) shall not apply to—
(1) any country established by international mandate through the United Nations; or
(2) any territory recognized by the United States Government to be in dispute.

(c) REPORTING REQUIREMENT.—Not later than 6 months after the date of enactment of this Act, and every 12 months thereafter, the Secretary of State shall submit to the Speaker of the House of Representatives and to the Chairman of the Committee on Foreign Relations of the Senate a report, including—
(1) a list of aliens who have been denied a visa under this subsection; and
(2) a list of aliens who could have been denied a visa under subsection (a) but were issued a visa and an explanation as to why each such visa was issued.

On June 2, 1999, the Department of State published guidelines for implementation of § 2225 in the Federal Register. 64 Fed. Reg. 29,731 (June 2, 1999).

A telegram sent on June 22, 1999, to all diplomatic and consular posts (1999 State 116236), excerpted below, transmitted the text of § 2225 and the guidelines, requested that posts bring the legislation and guidelines to the attention of appropriate host governments; provided guidance on the purpose of the statutory language drawn from the report of the Committee of Conference, H.R. Rep. No. 105–432 (1998); and provided several examples of situations where the provision would be applicable.

---

* * * *

1. . . . Department believes that [§ 2225] may be a valuable tool to discourage the conversion of expropriated or confiscated real property for personal gain and in appropriate cases to facilitate the resolution of outstanding claims.

* * * *

6. Note that [the statutory] standard encompasses both expropriation claims of individuals who were U.S. citizens at the time their property was taken, and claims of individuals who were foreign nationals at the time of the taking, but who have since become U.S. citizens. It applies only to the individual found to be subject to the statutes, and not to family members . . . [T]his legislation is not intended to serve the same purpose as Title IV of the Helms-Burton (Libertad) Act and therefore would not (as Cuban officials have claimed) circumvent the May 18, 1998 U.S.-EU Understanding on Expropriated Properties.

* * * *

Department of State Guidelines for Implementation of Title XXII, Section 2225 of the Foreign Affairs Reform and Restructuring Act of 1998.

1. *Purpose and authority*. These guidelines will be used by the Department of State ("Department") for the purpose of

implementing Section 2225 of the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105–277, and other applicable legislation as appropriate.

2. Delegation of Authority. The Secretary of State has delegated authority to the Assistant Secretary of State for Economic and Business Affairs to make determinations under section 2225(a) of the Act, in consultation with the Assistant Secretary of State for the regional bureau or bureaus with jurisdiction over the country where the confiscation or expropriation took place and the country of which the alien who is to be denied a visa is a national, and others as appropriate.

* * * *

4. Collection of Information.
a. The Department will collect information from available sources on whether property abroad, a claim to which is owned by a U.S. national, has been confiscated or expropriated and converted for personal gain by a person in a position covered by the Act. U.S. Embassies will also collect information and provide information and recommendations to the responsible bureaus in the Department of State concerning activities relevant to Section 2225.
b. As appropriate, the Department will request claimants to provide additional information related to ownership and confiscation or expropriation of the property concerned.
c. The Department will consult as appropriate with other agencies of the U.S. government regarding the identity of persons whose actions may be covered by Sec. 2225(a)(1) or Sec. 2225(a)(2).

5. Determinations under Section 2225. Determinations under Section 2225 will be made when facts or circumstances exist that lead the Department to conclude that a person has committed an act covered by Sec. 2225(a)(1) or Sec. 2225(a)(2).

6. Prior Notification.
a. An alien who is the subject of a determination under Sec. 2225 will be sent notification by registered mail that his/her name will be entered in the appropriate consular visa and immigration

lookout systems, and that he/she will be denied a visa upon application and/or have his/her visa revoked, 45 days after the date of the notification letter. The Department may inform the government of the alien's country of nationality in confidence through diplomatic channels of the pending action.
b. If no information is received within the 45 day period above that leads the Department to conclude that the person should not be denied a visa pursuant to Sec. 2225(a), the Department will enter the alien's name, including the names of the alien's agents, if applicable, in the appropriate consular visa and immigration lookout systems. Any then-pending visa application from the named alien will be denied, and any visa previously issued to the alien will be revoked in accordance with law.

7. *Review of Determinations*: The Department may review a determination made under Section 2225 at any time, as appropriate in its discretion.

8. Exceptions: Section 2225 subsection (a) will not be applied to property in (1) any country established by international mandate through the United Nations; or (2) any territory recognized by the United States Government to be in dispute.

9. Relationship to Section 527 of P.L. 103–236: This section supplements Section 527 of the 1994–1995 Foreign Relations Authorization Act, P.L. 103–326 (April 30, 1994), and is not meant to revise or otherwise detract from the substantive requirements of that section of law.

* * * *

CONFERENCE REPORT
The Committee of Conference consulted closely with the Department of State in fashioning a provision that is acceptable to both sides. The Committee of Conference intends that this section provides the Secretary of State with the authority to respond to particularly egregious, unlawful confiscations by foreign governments or Taiwan, especially those confiscations not undertaken for a public purpose but rather for the private gain of certain

persons of public position. The Committee notes that this provision would cover abuses of governmental or political positions, but there may be rare cases where aliens hold positions of particular social prominence and exercise forms of authority that allow them to take the property of foreign nationals for personal gain.

This section is not intended to apply to the issuance of a visa to aliens involved in a foreign government's or Taiwan's legitimate expropriation of property, consistent with international law. Neither is this section intended to affect in any way the broad variety of private commercial disputes in which United States citizens are involved all over the world. Further, this section does not cover the exercise of ministerial functions or legitimate police powers, such as seizures of property by police and judicial authorities involved in anti-drug programs. While this section supplements the sanctioning authority of Section 527 of the 1994–1995 Foreign Relations Authorization Act (P.L.103–236, April 30, 1994) it is not meant to revise (or otherwise detract) from the substantive requirements of that section of law.

EXAMPLES OF APPLICATION

I. Government A expropriates the residence of claimant X, a U.S. citizen, without compensation. Government A's minister in the Department responsible for expropriations moves into the expropriated or confiscated residence himself/herself. The minister may be subject to visa denial for abusing his/her position as minister and converting the expropriated or confiscated property for his/her own personal gain.

Instead of moving into the property, the minister arranges for the property to be transferred to the deputy minister in the same department. The deputy minister may be subject to visa denial for abusing his/her position and converting the expropriated or confiscated property for personal gain. The minister may be subject to visa denial for being complicit in such conversion.

II. Businessman B is very prominent in town Z in country Q. He has extensive agricultural holdings both in and around town Z. He has strong business and family ties to members of the town council, and in addition, B's family has for many years been considered the leading family in the town; for these reasons, many

citizens, including the members of the town council, defer to B in most of his business and personal dealings. B has coveted certain ranch land adjacent to one of his mills, but the land is owned by a U.S. citizen, C. However, C is only in Q six months of the year. While C is out of the country, B hires a number of town residents to be squatters who invade, improve and farm the land. C returns and seeks to persuade the town council to evict the squatters, but to no avail. B may be subject to visa denial for abusing his position as a prominent local person to convert for his own personal gain the property of C.

III. The Government of A has expropriated or confiscated properties belonging to U.S. citizens without compensation. Senior leaders of the government distribute a number of these properties to other members of the civilian and military bureaucracies. General L obtains one of these properties, a residence in the heart of the capital, from the government. General L may be subject to visa denial for abusing his position and converting for personal gain expropriated or confiscated property claimed by a U.S. citizen.

* * * *

i. Inadmissibility of international child abductors

As a deterrent to international child abduction, § 2226 of the Foreign Affairs Reform and Restructuring Act of 1998, as contained in Div. G, Title XXII of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, 112 Stat. 2681 (1998), amended subparagraph (C) of INA §212(a)(10), 8 U.S.C. § 1182(a)(10)(C). The subparagraph made inadmissible to the United States aliens who detained, retained, or withheld custody of a child from a person granted custody of the child by a U.S. court order until the surrender of the child to the person granted custody. As amended, it also made inadmissible aliens known by the Secretary of State "to have intentionally assisted" in the abduction or "to be intentionally providing material support or safe haven" to the abductor, and, if designated by the Secretary of State, spouses, children, parents, siblings and

agents of the abductor. Subsection (C) was made inapplicable, however, to non-U.S. citizen U.S. government officials acting within the scope of their duties, to foreign government officials designated by the Secretary of State, or while the child is located in a country that is a party to the Convention on the Civil Aspects of International Child Abduction, TIAS No. 11670.

j. Denial of visas to Haitians involved in certain killings, the 1991 coup or other violence against the Haitian people

Section 616 of the Departments of Commerce, Justice and State, and Judiciary, and Related Agencies Appropriations Act, 1999, contained in Title VI of § 101(a) of Division A, Pub. L. No. 105–277, 112 Stat. 2681 (1998), forbade the use of appropriated funds to grant visas to certain Haitians involved in extrajudicial and political killings, the 1991 coup d'etat, or related violence in Haiti. The text of § 616 is set forth below. The provision was extended and amended in subsequent appropriations acts. *See* Digest 2003 at 23–24.

SEC. 616. (a) None of the funds appropriated or otherwise made available in this Act shall be used to issue visas to any person who—

(1) has been credibly alleged to have ordered, carried out, or materially assisted in the extrajudicial and political killings of Antoine Izmery, Guy Malary, Father Jean-Marie Vincent, Pastor Antoine Leroy, Jacques Fleurival, Mireille Durocher Bertin, Eugene Baillergeau, Michelange Hermann, Max Mayard, Romulus Dumarsais, Claude Yves Marie, Mario Beaubrun, Leslie Grimar, Joseph Chilove, Michel Gonzalez, and Jean-Hubert Feuille;

(2) has been included in the list presented to former President Jean-Bertrand Aristide by former National Security Council Advisor Anthony Lake in December 1995, and acted upon by President Rene Preval;

(3) was sought for an interview by the Federal Bureau of Investigation as part of its inquiry into the March 28, 1995, murder

of Mireille Durocher Bertin and Eugene Baillergeau, Jr., and was credibly alleged to have ordered, carried out, or materially assisted in those murders, per a June 28, 1995, letter to the then Minister of Justice of the Government of Haiti, Jean-Joseph Exume;
(4) was a member of the Haitian High Command during the period 1991 through 1994, and has been credibly alleged to have planned, ordered, or participated with members of the Haitian Armed Forces in—
(A) the September 1991 coup against any person who was a duly elected government official of Haiti (or a member of the family of such official), or
(B) the murders of thousands of Haitians during the period 1991 through 1994; or
(5) has been credibly alleged to have been a member of the paramilitary organization known as FRAPH who planned, ordered, or participated in acts of violence against the Haitian people.
(b) EXEMPTION.—Subsection (a) shall not apply if the Secretary of State finds, on a case-by-case basis, that the entry into the United States of a person who would otherwise be excluded under this section is necessary for medical reasons or such person has cooperated fully with the investigation of these political murders. If the Secretary of State exempts any such person, the Secretary shall notify the appropriate congressional committees in writing.
(c) REPORTING REQUIREMENT.—(1) The United States chief of mission in Haiti shall provide the Secretary of State a list of those who have been credibly alleged to have ordered or carried out the extrajudicial and political killings mentioned in paragraph (1) of subsection (a).
(2) The Secretary of State shall submit the list provided under paragraph (1) to the appropriate congressional committees not later than 3 months after the date of enactment of this Act.
(3) The Secretary of State shall submit to the appropriate congressional committees a list of aliens denied visas, and the Attorney General shall submit to the appropriate congressional committees a list of aliens refused entry to the United States as a result of this provision.
(4) The Secretary of State shall submit a report under this subsection not later than 6 months after the date of enactment of

this Act and not later than March 1 of each year thereafter as long as the Government of Haiti has not completed the investigation of the extrajudicial and political killings and has not prosecuted those implicated for the killings specified in paragraph (1) of subsection (a).

(d) DEFINITION.—In this section, the term "appropriate congressional committees" means the Committee on International Relations and the Committee on Appropriations of the House of Representatives and the Committee on Foreign Relations and the Committee on Appropriations of the Senate.

k. Denial of entry to foreign nationals engaged in establishment or enforcement of forced abortion or sterilization policy

Section 801 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001, enacted into law by § 1000(a)(7) of Division B of Pub. L. No. 106–113, 113 Stat. 1536 (1999) (8 U.S.C. § 1182e), provided that foreign nationals whom the Secretary of State found, based on credible evidence, to have been directly involved in the establishment or enforcement of forced abortion or sterilization population control policies could not be issued visas or admitted to the United States unless the Secretary of State had substantial grounds for believing that the foreign national had discontinued his or her involvement with, and support of, such policies. The prohibitions did not apply to heads of state, heads of government, or cabinet level ministers. The Secretary was given authority to waive the prohibition upon a determination that it was important to the national interests of the United States to do so and notice to the appropriate congressional committees. The text of § 801 is set forth below.

SEC. 801. DENIAL OF ENTRY INTO UNITED STATES OF FOREIGN NATIONALS ENGAGED IN ESTABLISHMENT OR ENFORCEMENT OF FORCED ABORTION OR STERILIZATION POLICIES

(a) DENIAL OF ENTRY.—Notwithstanding any other provision of law, the Secretary of State may not issue any visa to, and the Attorney General may not admit to the United States, any foreign national whom the Secretary finds, based on credible and specific information, to have been directly involved in the establishment or enforcement of population control policies forcing a woman to undergo an abortion against her free choice or forcing a man or woman to undergo sterilization against his or her free choice, unless the Secretary has substantial grounds for believing that the foreign national has discontinued his or her involvement with, and support for, such policies.

(b) EXCEPTIONS.—The prohibitions in subsection (a) shall not apply in the case of a foreign national who is a head of state, head of government, or cabinet level minister.

(c) WAIVER.—The Secretary of State may waive the prohibitions in subsection (a) with respect to a foreign national if the Secretary—

(1) determines that it is important to the national interest of the United States to do so; and

(2) provides written notification to the appropriate congressional committees containing a justification for the waiver.

l. Place of visa processing—Southeast Asian migrant litigation

A flood of migrants from Vietnam and Laos fled their home countries seeking refuge in other countries in Southeast Asia during the 1980s. To deal with this migration crisis, 50 or so countries, including the United States, entered into an international agreement called the Comprehensive Plan of Action ("the CPA"). Under the CPA, local officials screened Vietnamese and Laotian migrants to determine refugee status. "Screened-out" migrants, *i.e.,* those who were determined not to be refugees, were repatriated to their home countries, where they could then apply for immigrant visas to emigrate. Until 1993 the United States Consulate General in Hong Kong processed the visa applications of migrants before, and sometimes after, they were screened out. After

other nations to the CPA objected, however, that this practice encouraged migration, the State Department adopted a policy against processing U.S. visa applications from "screened-out" Vietnamese or Laotian migrants in Hong Kong.

In 1994, two Vietnamese migrants, the migrants' sponsors in the United States, and a non-profit legal-rights organization challenged the State Department policy on the grounds that it violated § 202 of the INA, 8 U.S.C. § 1152(a), which prohibits United States consular officials from discriminating on the basis of nationality in the issuance of immigrant visas; that it was arbitrary and capricious within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(a); and that it violated the equal protection component of the Fifth Amendment's Due Process Clause. The district court granted the State Department's motion for summary judgment, but a divided panel of U.S. Court of Appeals for the District of Columbia reversed, holding that the consular venues policy violated 8 U.S.C. § 1152(a)(1) because the State Department had drawn a distinction between Vietnamese and Laotian nationals and nationals of other countries. *Legal Assistance for Vietnamese Asylum Seekers ("LAVAS") v. Department of State*, 45 F. 3d 469, 473 (D.C. Cir. 1995). Following various procedural motions and decisions, as well as a district court decision enjoining the Department of State's policy in *Le v. United States Department of State*, 919 F. Supp. 27 (D.D.C. 1996), the Supreme Court granted certiorari, *United States Department of State v. Legal Assistance for Vietnamese Asylum Seekers*, 518 U.S. 1003 (1996).

Shortly before the Supreme Court was to hear oral argument in *LAVAS*, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), enacted as Division C of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996). Section 633 of IIRIRA added the following subparagraph to 8 U.S.C. § 1152(a)(1):

> (B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the

procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

After supplemental briefing on the effects of § 633, the Supreme Court vacated the judgment in *LAVAS* and remanded the case to the court of appeals for further consideration in light of § 633, 519 U.S. 1 (1996). The court of appeals then consolidated *LAVAS* and *Le*. 104 F.3d 1349 (D.C. Cir. 1997).

In an opinion excerpted below, the court of appeals held that § 633 applied to the plaintiffs' claims, that the Secretary of State's actions in determining the place of visa processing were not reviewable under the APA, and that the plaintiffs' constitutional claims were without merit.

---

* * * *

Plaintiffs' statutory claim raises the question of whether the case is governed by the law in effect at the time the Secretary enacted the new consular venue policy or the law as amended by section 633. The Supreme Court set out the principles for determining whether a newly enacted provision is applicable to a pending case in *Landgraf v. USI Film Products*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). . . .

In *Landgraf*, the Supreme Court observed that changes in procedural rules will often not raise problems of retroactivity. *Id*. at 275. . . .

Applying the principles of *Landgraf* to this case, we conclude that application of section 633 would not raise retroactivity concerns. First, plaintiffs are asserting a procedural right. The challenged State Department action merely enacts a change in the procedure by which plaintiffs' visa applications are considered. This policy does not upset any substantive right. As we held in our earlier consideration of this case, plaintiffs do not have a substantive right to any particular process for having their applications considered. *See LAVAS*, 45 F.3d at 472. The Supreme Court has stated that such procedural claims do not raise retroactivity concerns. *Landgraf*, 511 U.S. at 275.

Moreover, plaintiffs are seeking only prospective relief. . . .

Having concluded that section 633 applies, we agree with the State Department that plaintiffs' statutory and APA claims are unreviewable because consular venue determinations are entrusted to the discretion of the State Department. Under the APA, a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute" is entitled to judicial review. 5 U.S.C. § 702. Judicial review is not available, however, if the statute precludes judicial review or the agency action is "committed to agency discretion by law." 5 U.S.C. § 701(a). . . . After reviewing the text of the statute and the nature of the agency action at issue we conclude that the consular venue policy falls within this category of unreviewable agency discretion.

First, the broad language of the statute suggests that the State Department policy is unreviewable. Congress has determined that "every alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner *and at such place as shall be by regulations prescribed*." 8 U.S.C. § 1202(a) (emphasis added). This section grants to the Secretary discretion to prescribe the place at which aliens apply for immigrant visas without providing substantive standards against which the Secretary's determination could be measured. Plaintiffs argue that there is a standard against which to measure the Secretary's decision in the prohibition against nationality discrimination contained in 8 U.S.C. § 1152. That argument is untenable after the adoption of section 633. That enactment made clear that the prohibition against nationality discrimination does not apply to decisions of where to process visa applications. These determinations are left entirely to the discretion of the Secretary of State.

In addition, the nature of the administrative action counsels against review of plaintiffs' claim. By way of comparison, the Supreme Court has held that the Food and Drug Administration's refusal to take enforcement action is unreviewable because it "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise. *Heckler*, 470 U.S. at 831. Similarly, in this case the agency is entrusted by a broadly worded statute with balancing complex concerns involving security

and diplomacy, State Department resources and the relative demand for visa applications. However, in this case the argument for executive branch discretion is even stronger. By long-standing tradition, courts have been wary of second-guessing executive branch decision involving complicated foreign policy matters. *See, e.g, Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420, 10 L. Ed. 226 (1839); *Garcia v. Lee*, 37 U.S. 511, 517–18, 520–21, 9 L. Ed. 1176 (1838); *Foster v. Neilson*, 27 U.S. 253, 307–310, 7 L. Ed. 415 (1829). As we noted in another context, "where the President acted under a congressional grant of discretion as broadly worded as any we are likely to see, and where the exercise of that discretion occurs in the area of foreign affairs, we cannot disturb his decision simply because some might find it unwise or because it differs from the policies pursued by previous administrations." *DKT Memorial Fund Ltd. v. Agency for Int'l Dev.*, 281 U.S. App. D.C. 47, 887 F.2d 275, 282 (D.C. Cir. 1989). In light of the lack of guidance provided by the statute and the complicated factors involved in consular venue determinations, we hold that plaintiffs' claims under both the statute and the APA are unreviewable because there is "no law to apply."

We likewise reject plaintiffs' claim that the State Department's consular venue policy violates the equal protection component of the Fifth Amendment's Due Process Clause. Plaintiffs concede that the migrants, as aliens, may not assert a Fifth Amendment right in challenging the procedures for granting immigrant visas. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990). The equal protection claim must be asserted, if at all, by the citizen sponsors of the migrants. However, the State Department's policy does not depend on the national origin of the sponsor. Under the INA, a United States citizen or a permanent resident alien may sponsor an alien by filing a petition stating that the alien is an immediate relative and is eligible for an immigration preference. 8 U.S.C. § 1154(a). Employment-based immigration preferences are also available when a citizen desiring to employ an alien files a petition. 8 U.S.C. § 1154(a)(1)(D). While we can assume that a sponsor who is asserting a familial relationship to the migrant will more often than not be of Vietnamese or Laotian origins, the State Department

does not require this to be the case. We have no reason to think that the nationality of an employer-sponsor at all corresponds to that of the migrant. Moreover, the substantive rights of the citizen sponsor to a particular process cannot be greater than the right of the applicant himself, and we have concluded that the applicants have no substantive right to have their visa applications processed in any particular venue.

* * * *

m. Deportation of alien for foreign policy reasons

Section 237(a)(4)(C) of the INA (8 U.S.C. § 1227) (formerly INA § 241(a)(4)(C), 8 U.S.C. § 1251(a)(4)(C)) provides that an alien "whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States" is deportable.

(1) Head of Haitian paramilitary organization

On March 29, 1995, Secretary of State Warren Christopher sent a letter to Attorney General Janet Reno indicating that he had determined that the continued presence of Emmanuel Mario Constant in the United States would have potentially serious adverse foreign consequences for the United States and requesting that the Attorney General take all steps possible to effect his deportation to Haiti.

According to Secretary Christopher's letter, Constant was a co-founder and the current president of the Revolutionary Front for the Advancement of the Progress of Haiti ("FRAPH"), a paramilitary organization whose members were responsible for numerous human rights violations in Haiti in 1993 and 1994. He was instrumental in sustaining the military regime that overthrew the democratically elected government of Jean-Bertrand Aristide in 1991. Secretary Christopher expressed concern that FRAPH-related activities

by Constant in the United States created the false impression that the United States supported and endorsed Constant at a time when elections were pending in Haiti.

The Immigration and Naturalization Service ("INS") commenced deportation proceedings based on the Secretary of State's determination on April 11, 1995. Constant disputed his deportability and maintained that he was a "political prisoner" being held to prevent him from participating in the presidential elections in Haiti. He sought dismissal of the proceedings, or, in the alternative, voluntary departure. On September 1, 1995, the immigration judge ordered Constant deported to Haiti. *In re Emmanuel Constant*, No. A 74 002 009 (Immigration Ct. 1995). Constant appealed the ruling to the Board of Immigration Appeals ("the BIA") but withdrew the appeal on December 13, 1995.

In 1998, Constant filed a motion to reopen his deportation order and to apply for asylum based on his claim that he had been advised by Justice Department and INS officials that "intelligence sources" had reason to believe his life would be in danger if he returned to Haiti. Constant remains in the United States.

Secretary Christopher's 1995 letter is excerpted below. The full text of the letter is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

My decision to invoke INA § 241(a)(4)(C) with respect to Mr. Constant is based on the following considerations. Supporting Haiti's fragile democracy is one of our foremost foreign policy priorities, as is seeking respect for human rights in Haiti and throughout the world. A central element of our bilateral policy toward Haiti is helping to build democratic institutions, including a vastly improved criminal justice system through the efforts of the Administration of Justice program jointly administered by the Department of the State, the Department of Justice, and the Agency for International Development. The Administration of Justice project seeks to enable the Haitian courts to bring to justice those

responsible for serious crimes and violations of the fundamental human rights of Haitians. One target of this effort is the Revolutionary Front for the Advancement and Progress of Haiti ("FRAPH"). Although FRAPH claims to be a political party, it has never in fact participated in the national political process. It is officially regarded by the Department of State as an illegitimate paramilitary organization whose members were responsible for numerous human rights violations in Haiti in 1993 and 1994. Opposition to FRAPH is a key element of our Haitian foreign policy, and we have said so publicly.

Mr. Constant's presence and activities in the United States seriously undermine these compelling foreign policy objectives. Mr. Constant is one of the co-founders and current President of FRAPH. He was instrumental in sustaining the repression that prevailed in Haiti under the illegal military-led regime until it was displaced last September by the multinational force led by the United States. On February 3, 1995, Mr. Constant sent a letter on behalf of FRAPH to the Special Representative of the Secretary General of the United Nations for Haiti using a Washington, D.C., return address and telephone number. In addition, since his arrival in the United States, FRAPH elements in Haiti have broadcast on Haitian radio tape recordings of Mr. Constant speaking on behalf of FRAPH to the Haitian people.

These activities create the impression in Haiti that the United States is permitting Mr. Constant to use the United States as a basis of operations for FRAPH. They fuel false but widespread perceptions in Haiti that Mr. Constant was deliberately allowed to enter the United States in December and that the United States is secretly supporting him; that the United States endorses both him and his positions; and that we approve of FRAPH. These misperceptions persist notwithstanding that we have consistently denounced FRAPH and made statements distancing the United States from it and Mr. Constant.

My concern about Mr. Constant's presence and activities in the United States is heightened by the fact that elections for a new Haitian Parliament and for over 2,000 local government positions are scheduled for June 4, 1995. The United States has a huge stake in making sure that these elections—the best manifestation

of democracy—are held successfully. Because Mr. Constant for many Haitians symbolizes the antithesis of democracy, permitting him to remain at large in the United States could undermine this important foreign policy objective.

In light of these facts and the current perception in Haiti of the United States' tolerance of Mr. Constant, even if Mr. Constant were to cease his FRAPH-related activities in the United States, his mere presence here would seriously undermine U.S. foreign policy interests. To permit Mr. Constant to remain at large in the United States in these circumstances will appear as an affront to the Haitian Government, and will cast doubt upon the seriousness of our resolve to combat human rights violations, thereby undermining our ability to play a leadership role in this area. I have therefore concluded that nothing short of Mr. Constant's removal from the United States can protect our foreign policy interests in Haiti.

The Haitian Government shares our belief that Mr. Constant is in the United States and has requested his extradition so that he may face criminal charges in Haiti. We have returned the request, which was technically deficient, to the Haitian Government, to which we have offered assistance in perfecting the documents. Given the compelling foreign policy interests at stake, it is essential that we seek Mr. Constant's deportation independent of any extradition efforts.

* * * *

(2) Former Deputy Attorney General of Mexico

On October 2, 1995, Secretary of State Warren Christopher sent a letter to Attorney General Janet Reno indicating that he had determined under INA § 241(a)(4)(C), 8 U.S.C. § 1251(a)(4)(C) (current version at 8 U.S.C. § 1227(a)(4)(C)) that the continued presence of Mario Ruiz Massieu, former Deputy Attorney General of Mexico, in the United States would have potentially serious adverse foreign policy consequences for the United States. He requested that the Attorney General "take all reasonable efforts to ensure Mr. Ruiz Massieu's

expeditious deportation from the United States [and], in light of the Mexican Government's interest in having Mr. Ruiz Massieu returned to Mexico, [and] that you do everything possible, consistent with the Immigration and Nationality Act, to effect his deportation to Mexico. Excerpts from the Secretary's letter below set forth the bases for his conclusions.

The full text of the letter appears as an appendix to 22 I. & N. Dec. 833 (June 10, 1999). *See also* 90 AM. J. Int'l L. 442 (1996).

---

* * * *

. . . As you are well aware, the United States and Mexico have made tremendous progress in the past five years in strengthening one of our most important and vital bilateral relationships. The range of issues that unite our two nations—from combatting international drug trafficking, to addressing vexing problems of legal and illegal migration, to fortifying trade and investment in one of the world's largest and fastest growing markets—is complex and varied.

One aspect of our relationship that has received the utmost attention from both governments is our ability to cooperate to confront criminality on both sides of the border. We have seen successes on this front, but we continue to seek enhanced cooperation. With easy transit between the United States and Mexico and extensive and ever-increasing ties, this is an area of vital importance to the United States. Our inability to return to Mexico Mr. Ruiz Massieu—a case the Mexican Presidency has told us is of the highest importance—would jeopardize our ability to work with Mexico on law enforcement matters. It might also cast a potentially chilling effect on other issues our two governments are addressing.

Furthermore, the case in question involves charges against the former second ranking law enforcement authority in Mexico and a man connected through his circle of family and friends to the center of power in Mexican politics. Serious allegations against such a high former official are unprecedented in modern Mexico.

The case against Mr. Ruiz Massieu and the arrest and trial for related crimes of Mr. Raul Salinas, brother of the former President, were the dramatic and unequivocal signs of the determination of President Zedillo and his Attorney General to break the so-called "culture of impunity" that long protected corrupt politicians, officials and other powerful elite from being held accountable for their actions and crimes. President Zedillo's anti-corruption drive has resonated throughout Mexico and continues to receive strong support from the Mexican people.

The U.S. Government has consistently urged Mexico to take the steps towards reform in its justice system that President Zedillo is so forcefully pursuing. The ability to prosecute Mr. Ruiz Massieu and other powerful individuals in Mexico for the crimes of which they are accused is key to the success of Zedillo's pledge to transform totally the judicial and law enforcement system and to rid Mexico of corruption and abuse of power. Should the U.S. Government not return Mr. Ruiz Massieu to Mexico, our support of such reforms would be seen as hollow and self-serving and would be a major setback for President Zedillo and our combined efforts to chart a new and effective course of U.S.-Mexican relations.

Our efforts to remove Mr. Ruiz Massieu from the United States should be directed at achieving his direct return to Mexico. When apprehended in New Jersey, Mr. Ruiz Massieu was attempting to depart the United States just days after being called for questioning in Mexico with regard to the crimes with which he was subsequently charged. If our efforts to remove him from the United States result in his ability to depart to a destination other than Mexico, the U.S. Government will almost certainly be viewed by Mexican officials and the Mexican public as not only permitting, but also aiding his successful escape from justice.

* * * *

The U.S. government initiated deportation proceedings against Massieu on December 22, 1995, based on Secretary of State Christopher's determination. This action followed four unsuccessful attempts earlier in 1995 to extradite Massieu to Mexico based on the crimes noted above. All

four extradition requests were denied on the ground that evidence was insufficient to establish probable cause.

On January 17, 1996, Massieu filed a complaint in the U.S. District Court for the District of New Jersey seeking an injunction against the deportation proceeding on three grounds: (1) illegal de facto extradition; (2) selective enforcement and (3) the unconstitutionality of INA § 241(a)(4)(C).

On February 28, 1996, the district court issued an order declaring § 241(a)(4)(C) unconstitutional on three grounds and enjoining the deportation proceedings. *Massieu v. Reno*, 915 F. Supp. 681 (D.N.J. 1996). First, the district court found the provision void for vagueness because it did not provide adequate notice to aliens of the standards with which they must conform and did not furnish adequate guidelines for law enforcement. *Id*. at 699–703. Second, the court held that the provision violated procedural due process because the Secretary of State's determination that the alien fell within the statutory standard was unreviewable, thus depriving the alien of a meaningful opportunity to be heard. *Id*. at 703–07. Finally, the court found that the provision was an unconstitutional delegation of legislative power because it lacked sufficiently intelligible standards to direct the Secretary's exercise of discretion or to enable the court to review the exercise of discretion. *Id*. at 707–11. The district court did not address the claim of de facto extradition or other arguments.

The U.S. Court of Appeals for the Third Circuit reversed but did not reach the merits of the constitutional question. *Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996). The Third Circuit remanded to the district court for dismissal, finding that the district court lacked jurisdiction to entertain plaintiff's claims because he had failed to exhaust available administrative remedies.

In a decision dated May 30, 1997, the immigration judge in the deportation proceedings found Massieu not deportable because the INS failed to show by clear, unequivocal, and convincing evidence that the opinion of the Secretary of State was reasonable. She found that the determination of

the Secretary of State alone was insufficient to demonstrate that the presence of Massieu could potentially produce serious adverse foreign policy consequences. Sitting en banc, the Board of Immigration Appeals ("the BIA") reversed the immigration judge. *In re Mario Salvador Ruiz-Massieu*, 22 I. & N. Dec. 833 (June 10, 1999).

The Board held that the Secretary of State's letter in this case was sufficient evidence to meet the INS's burden of proof:

> We conclude that Congress' decision to require a specific determination by the Secretary of State, based on foreign policy interests, to establish deportability under section 241(a)(4)(C)(i) of the Act, coupled with the division of authority in section 103 of the Act between the Attorney General and the Secretary of State, make it clear that the Secretary of State's reasonable determination in this case should be treated as conclusive evidence of the respondent's deportability. . . . The requirement that the Service demonstrate that the respondent is deportable by clear, unequivocal, and convincing evidence, . . . is met by the Secretary's facially reasonable and bona fide determination that the respondent's presence here would cause potentially serious adverse foreign policy consequences for the United States.

The BIA further held that the fact that Massieu had entered the United States voluntarily did not mean that the U.S. Government was required to let Massieu depart voluntarily prior to the initiation of deportation proceedings. Finally, the BIA rejected the argument that the Government's inability to extradite Massieu precluded efforts to deport him:

> Extradition proceedings are separate and apart from any immigration proceeding. . . . The standards of proof are different. As the Service has pointed out, not all of the charges brought in Mexico were cited as a basis for extradition. Also, the existence of criminal charges is not the only possible basis for a determination that the respondent's presence may have adverse foreign policy

> consequences. We note that other aliens have been deported after extradition requests were denied by the courts. . . .
>
> Massieu was subsequently indicted by a federal grand jury in August 1999 for depositing $9 million in U.S. banks, representing profits of narcotics trafficking. On September 15, 1999, he died while living in New Jersey under house arrest.

(3) Top official of HAMAS

After Israel suspended its request for the extradition of Mousa Mohammed Abu Marzook for multiple acts of terrorism in and around Israel, Secretary of State Madeleine K. Albright determined that the continued presence of Marzook in the United States would have potentially serious adverse foreign consequences for the United States. In a letter of April 4, 1997, Secretary Albright requested that Attorney General Janet Reno take all reasonable steps to ensure that Marzook, a legal permanent resident of the United States who was already in removal proceedings based on terrorist activities (INA § 212(a)(3)(B)), was not admitted to or permitted to remain in the United States. Marzook was deported to Jordan in 1997.

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

---

* * * *

The fight against international terrorism is one of this nation's highest foreign policy priorities. The United States is taking a leading role in international efforts, both bilateral and multilateral, to combat terrorism. Central to this policy is the effort to identify terrorists and to deny them safe haven.

The promotion of a peaceful resolution of outstanding issues between Israel and the Palestinians is also one of this country's highest foreign policy priorities. As the primary sponsor of this negotiating effort, the United States has devoted significant

diplomatic, political and economic support to facilitate progress and protect the negotiations against assaults from the enemies of peace. The President and I have been continuously and intensely involved in this effort.

The vital nature of the twin goals of fighting terrorism in the Middle East and promoting the peace process there is reflected in President Clinton's issuance of an executive order (E.O. 12947) on January 23, 1995, to block assets in the United States of terrorist organizations that threaten to disrupt the Middle East peace process and to prohibit financial transactions with these groups. The President, in issuing the order, found specifically that "grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." The HAMAS organization was designated in the Executive Order as a terrorist organization that has committed or poses a significant risk of committing acts of violence that have the purpose or effect of disrupting the Middle East peace process. Similarly, Mr. Marzook, who acknowledges that he is a top official of HAMAS, has been declared a "Specially Designated Terrorist" under the authority of the executive order by virtue of his actions on behalf of HAMAS. All assets of both HAMAS and Mr. Marzook in the United States are blocked, and financial transactions with each are prohibited unless authorized by the Department of the Treasury's Office of Foreign Assets Control.

Additionally, during the course of recent extradition proceedings against Mr. Marzook initiated at the request of the Government of Israel, two U.S. courts found probable cause that he was criminally responsible for ten specific grave incidents of terrorism in and around Israel before his arrival in the United States. . . .

Mr. Marzook's entry, presence and activities in the United States would seriously undermine compelling foreign policy objectives in the Middle East and in the fight against terrorism. The credibility of United States policies would be jeopardized if a prominent leader of a designated terrorist organization were allowed to reside in the United States. This in turn would undermine our ability to seek cooperation from others in denying terrorists

safehaven. Moreover, this is a particularly crucial moment in the Middle East peace process, when senior United States officials are making a maximum effort to secure cooperation in the fight against HAMAS terrorism and to resume the negotiating process. It would be highly damaging to this effort to admit Mr. Marzook to the United States.

There is also a clear risk that if Mr. Marzook is allowed to remain in the United States he will engage in activities inimical to United States foreign policy interests. . . . In sum, United States foreign policy objectives would be severely undermined if Mr. Marzook used the United States as a base from which to provide assistance to HAMAS, an organization whose goals are currently totally antithetical to U.S. objectives in the Middle East, and the restrictions imposed on him under the executive order cannot be relied on to produce this result.

* * * *

n. Genetic testing for visa purposes

A State Department telegram sent to all diplomatic and consular posts, March 12, 1999, excerpted below, provided information on when genetic testing was appropriate for purposes of adjudicating visa applications based on family relationships; what percentage of parentage probability was desirable, and what information laboratories needed in order to provide useful results.

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

---

* * * *

When is genetic testing appropriate?

2. Genetic testing is expensive, time consuming and logistically complex, and should never become a routine part of the visa adjudication process. Currently, no test can provide parentage with 100 percent certainty. In fact, different labs testing the same samples can report different results depending on the genetic

markers tested. Therefore, to the extent possible, consular officers should make determinations of parentage based on evidence such as birth certificates, baptismal certificates, etc. Only when such evidence is unavailable or not credible is genetic testing available.
3. When genetic testing appears warranted, the Conoff [consular officer] should advise the applicant that genetic testing may . . . establish the validity of the relationship; that such testing is entirely voluntary; and that all costs of testing and related expenses must be borne by the petitioner/beneficiary and paid to the laboratory in advance.
4. The approval of a visa petition is prima facie evidence of the relationship between the petitioner and the beneficiary. 9 FAM 42.43 N1 stipulates that only if a consular officer knows or has reason to believe that the beneficiary is not entitled to status shall a consular officer return the petition to the INS-approving office. Such a determination must be based upon evidence that the INS did not have available at the time of adjudication. DNA analysis which excludes the tested individual as the parent suffices to meet this burden of proof.
What percentage of probability is acceptable?
5. . . . American Association of Blood Bank (AABB) standards mandate 99 percent to be the minimum requirement for the probability of paternity, except in rare circumstances. Unfortunately, this statement oversimplifies matters and does not . . . mean that all results below 99 percent exclude paternity (maternity).
6. The type of test performed, the genetic profile of the local population and factors specific to the case at hand will all affect the level of probability that a post should require. Thus, each post should consult with local physicians and labs, consider local fraud profiles, and establish a post-specific desired level of confidence. Post should place this information in a cover letter which should be forwarded to labs with each request for genetic testing. . . .

What does the lab need to know?
Type of Testing Desired
7. RFLP mapping is the most powerful type of genetic testing currently available. RFLP mapping can typically exclude an average of 99.9 percent of falsely claimed parents and will generally provide

a probability of paternity (maternity) in excess of 99 percent in cases where the alleged parent is not excluded. RFLP mapping requires relatively large blood samples, however, and cannot be used in countries where collecting and shipping blood samples is not possible. In cases where substitution of a close relative is likely, posts should request the lab to test at least 6 genetic markers if RFLP mapping is used.

8. PCR-based testing is commonly used to evaluate DNA samples collected by scraping the cells lining the inside of the cheeks with a swab (aka Buccal Swab). PCR-based testing is typically 10 to 100 times less powerful than RFLP mapping, but is the only alternative in countries where blood samples cannot be collected or shipped. In cases where substitution of a close relative is likely, posts should request the lab to test at least 15 genetic markers if PCR-based testing is used.

Local Genetic Profile

9. Lab results can be interpreted differently based on the genetic profile of the local population. In countries where there is a high degree of intermarriage among family members and the population is homogeneous, a probability of 99 percent might not be conclusive (an uncle's blood substituted for that of the father might easily result in a 99 percent probability). In such a population, a post might advise labs that a higher than usual degree of probability is desired (for example, 99.5 percent) and provide the lab with a description of the local genetic profile. The lab may then test a wider range of genetic markers to achieve a more refined result.

10. In highly heterogeneous populations where little intra-family mixing occurs, on the other hand, a result of 99 percent or even somewhat less might be conclusive. Again, if the lab is aware of the local conditions, it can tailor its testing to meet a post's needs.

Case-Specific Information

11. It is extremely important that test results be evaluated in light of non-genetic evidence gathered by the consular and medical personnel coordinating the testing. Such information may include clues of premeditated misrepresentation of one or more members of a family. Again, this information may affect the lab's assumptions, analysis of the test results and even the number of genetic markers compared.

12. Posts should feel free to contact the laboratory for clarification if the lab's findings are inconclusive. Labs are able to conduct analysis of additional genetic markers to help resolve such cases. It is also possible for a laboratory to calculate the likelihood the tested individual is an uncle as well as the likelihood that he is a father. Where such concerns exist, officers should ask the lab to calculate which relationship is favored and by how much. A laboratory which states it is unable to comply with this type of a request should not be used for tests when substitutions are a concern. . . .

* * * *

o. Denial of visas for foreign policy reasons

Section 212(a)(3)(C) of the INA (8 U.S.C. § 1227) provides that an alien "whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States" is inadmissible. This general rule is subject to several provisions designed to regulate the denial of visas because of activities that would be protected by the First Amendment. Thus, a visa may be denied under this section based on the alien's "past, current, or expected beliefs, statements, or associations" only if "the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest."

Described below are individual cases of visa denials under Section 212(a)(3)(C) of the INA. In order to protect both the confidentiality of the underlying visa records, which are protected from disclosure by Section 222(f) of the INA, and information of national security sensitivity, each case has been summarized in general terms.

(1) Family members of a senior Iraqi government official

In December 1991 the Acting Secretary of State authorized the denial of non-immigrant tourist visas on foreign policy

grounds to the family members of a senior Iraqi government official. The determination was based on the visa applicants' close association through marriage/parentage with a senior Iraqi official who was a family member and close adviser to Saddam Hussein. Admitting the family for a discretionary visit would have undercut the United States' vital policy interest in maintaining all possible political and economic pressure on Iraq to comply with all UN Security Council Resolutions. If publicized, the visit would be perceived internationally and domestically as a softening of U.S. resolve in demanding Iraq's compliance with U.S. and UN sanction regimes. The Acting Secretary of State found both that the family members' entry would result in potentially serious adverse foreign policy consequences for the United States and that it would compromise a compelling United States foreign policy interest.

(2) Deputy leader of the Bosnian Serbs

In December 1992 Under Secretary of State for Political Affairs Arnold Kanter authorized the denial of a non-immigrant visa on foreign policy grounds to a deputy leader of the Bosnian Serbs. The individual claimed to be a member of the presidency of the so-called Serbian Republic of Bosnia, but the U.S. did not recognize the existence of any such republic. The determination was based on the leader's involvement with bombarding Sarajevo and other Bosnian cities, air force sorties in defiance of UN resolutions, ethnic cleansing of non-Serbs, and violent territorial raids on local populations. Granting this deputy leader of the Bosnian Serbs entry into the U.S. could have seriously undermined U.S. foreign policy objectives in combating the activities of the Bosnian Serbs and stabilizing the region.

(3) Iranian government official

In June 1993 Secretary of State Warren Christopher authorized the denial of a visa on foreign policy grounds to an Iranian

cleric and government official. Although the Iranian official ostensibly intended to enter the United States for unofficial purposes (including to deliver lectures at an Islamic center), there was reason to believe that the individual might engage in fundraising for organizations dedicated to meeting the Iranian government's objectives. In addition, the individual could have covertly represented Iranian government interests when there were no diplomatic relations between the United States and Iran, thereby enabling Iran to circumvent U.S. diplomatic policy. Thus the Iranian government official's presence in the United States would have had serious adverse foreign policy consequences for the United States.

(4) Former Iraqi diplomat

In August 1993 Secretary of State Warren Christopher authorized the denial of a visa for foreign policy reasons to a former Iraqi diplomat. The individual applied for a visa in order to visit close family relatives, some of whom were U.S. citizens and others of whom were lawful permanent alien residents. The determination was based on the fact that the former Iraqi diplomat had been a highly visible spokesperson and advocate for the hard-line policies of the Saddam Hussein regime. When the U.S. and Iraq discontinued diplomatic relations in 1990 following Iraq's invasion of Kuwait, the former Iraqi diplomat chose not to return to Iraq and eventually obtained permanent residence in another country, but never publicly repudiated any of the policies of the Iraqi government or disassociated himself from Saddam's regime. Allowing the individual to enter the United States would have contradicted U.S. policy and have been particularly harmful to U.S. efforts to encourage other countries to limit their diplomatic dialogue and all other usual diplomatic relations with Iraq by wrongly indicating a softening or shift in U.S. policy toward Iraq. The Secretary determined both that the applicant's entry would have compromised a compelling foreign policy interest and that

it would have had potentially serious adverse foreign policy consequences.

(5) Members of the Iraqi Trade Ministry

In October 1994 Under Secretary of State for Political Affairs Peter Tarnoff authorized the denial of visas on foreign policy grounds to two of four members of the Iraqi Trade Ministry seeking to attend the United Nations International Symposium on Trade Efficiency ("UNISTE") in Ohio. Iraq was under a trade embargo at the time. Allowing the full delegation to participate could have weakened U.S. credibility on Iraq sanctions issues prior to a November 1994 review of sanctions by the United Nations Security Council and given Iraq evidence that the international embargo against Iraq was on the verge of collapsing. Therefore, two members of the Iraqi Trade Ministry were denied visas because the Under Secretary determined that their entry would have compromised a compelling U.S. foreign policy interest.

(6) Senior FRY and Serbian officials

In March 1998 the Contact Group—a six-nation alliance including the United States, United Kingdom, Russia, France, Germany, and Italy—met to discuss the escalating violence imposed by Federal Republic of Yugoslavia ("FRY") and Serbian officials in the Balkans region. Determined to impose measures against those responsible for the atrocities committed against ethnic Albanians, Secretary Albright, in connection with a meeting of the Contact Group, decided that visas should be denied to fifteen senior FRY and Serbian representatives.

For purposes of visa denial, Section 212(a)(3)(C) had never previously been used in the absence of an actual visa application, or for a group of persons not traveling together

for the same purpose. However, in this particular case, the United States made the determination to deny visas in advance to senior FRY and Serbian officials to affirm its commitment to stabilizing the region in accordance with the policies of the Contact Group. Allowing entry, or even holding out the possibility that visa applications might be issued to these fifteen senior FRY and Serbian officials would have been at odds with the objectives of the Contact Group and inconsistent with the strong public and diplomatic stance of the United States condemning the kinds of ruthless security operations carried out in Kosovo, including the violence and repressive actions taken by Serbian police against the civilian men, women, and children.

(7) Belarusian officials

In June 1998 the Belarusian government evicted U.S., EU and other ambassadors from their official residences in Minsk. The Belarusian government failed to take any of the necessary steps to comply with the Vienna Convention on Diplomatic Relations ("VCDR") and continued to deny access to diplomatic residences. In response to the government of Belarus' failure to protect U.S. and other foreign missions' inviolability under the VCDR, the United States and the EU member states agreed to restrict the travel of Belarusian officials to their countries. In July 1998, Deputy Secretary of State Strobe Talbott approved a general policy to use foreign policy grounds when necessary to deny visas to Belarusian officials. As a result, all posts were instructed to refer to the State Department for review every application by a Belarusian official at a level of deputy minister or higher regardless of type of visa.

The policy was implemented in the following three cases involving Belarusian officials:

In September 1998 Deputy Secretary Talbott determined that a department head at an advanced Belarusian academic

institution and vice chairman of a government committee (comparable to a deputy minister level) was ineligible for admission to the United States; the individual's entry into the country would have had potentially serious adverse foreign policy consequences for the United States because it would have undercut the policy of the U.S. and EU with respect to Belarus.

In October 1998 Deputy Secretary Talbott found that the entry into the United States of a Belarusian official who was a member of a Commission in the Council of the Republic of Belarus would have potentially serious adverse foreign policy consequences thereby rendering him ineligible for admission to the United States. Allowing the individual to travel to the United States could have implied a lack of resolve in the US-EU commitment to reversing the Belarusian government's actions and ensuring its respect for the fundamental principles of diplomacy.

In December 1998, Deputy Secretary Talbott determined that a Belarusian official who was a member of the Office of the President of Belarus was ineligible for admission to the United States. The official applied for a non-immigrant visitor (B-1) visa to attend a ceremony in New York City. The determination was based on the fact that the individual was a senior Belarusian government official subject to our policy visa restrictions. The admittance of the individual would have contradicted American policy toward the Belarusian government, and thus compromised a compelling United States foreign policy interest.

3. Presidential Proclamations: Suspension of Entry

Section 212(f) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. § 1182(f)), authorizes the President to "suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate" whenever he finds that their entry would be "detrimental to the interests of the United States."

a. Suspension of entry of certain Haitian nationals

On October 1, 1991, the first democratically elected government in Haiti, headed by President Jean-Bertrand Aristide, was overthrown by a military coup, and President Aristide was forced into exile. Extensive diplomatic efforts and pressure (including economic sanctions) were brought to bear to restore the legal government.

On June 3, 1993, President Clinton issued Proclamation 6569, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Formulate or Implement Policies That are Impeding the Negotiations Seeking the Return to Constitutional Rule in Haiti," directed at the military coup leaders and their families. 58 Fed. Reg. 31,897 (June 7, 1993). Proclamation 6569 is excerpted below.

---

* * * *

In light of the political crisis in Haiti resulting from the expulsion from Haiti of President Aristide and the constitutional government, I have determined that it is in the interests of the United States to restrict the entry to the United States of certain Haitian nationals who formulate, implement, or benefit from policies that impede the progress of the negotiations designed to restore constitutional government to Haiti, and the immediate families of such persons.

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

Section 1. The entry into the United States as immigrants and nonimmigrants of persons who formulate, implement, or benefit from policies that impede the progress of the negotiations designed to restore constitutional government to Haiti, and the immediate family members of such persons, is hereby suspended.

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

Sec. 3. Persons covered by sections 1 and 2 shall be identified pursuant to procedures established by the Secretary of State, as authorized in section 6 below.

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

Sec. 5. This proclamation is effective immediately and shall remain in effect until such time as the Secretary of State determines that it is no longer necessary and should be terminated.

Sec. 6. The Secretary of State shall have responsibility to implement this proclamation pursuant to procedures the Secretary may establish.

* * * *

Although the military leaders in Haiti signed an agreement in July 1993 that had been negotiated under United Nations auspices for a return to democratically elected government, they did not implement it. Widespread human rights violations continued, and U.N. and OAS human rights monitors were expelled. On May 7, 1994, the President issued a broader proclamation, Proclamation 6685, "Suspension of Entry of Aliens Whose Entry is Barred Under United Nations Security Council Resolution 917 or Who Formulate, Implement, or Benefit from Policies that are Impeding the Negotiations Seeking the Return to Constitutional Rule in Haiti." 59 Fed. Reg. 24,337 (May 10, 1994). The proclamation revoked and superseded Proclamation 6569. Consistent with United Nations Security Council Resolution 917, S/RES/917(1994), the new proclamation barred the entry of all

officers of the Haitian military, including the police, and their immediate families; the major participants in the coup d'etat of 1991 and in the illegal governments since the coup d'etat, and their immediate families; and persons employed by or acting on behalf of the Haitian military, and their immediate families. In addition, the entry of all other persons who formulated, implemented, or benefited from policies that impeded the progress of the negotiations designed to restore constitutional government to Haiti and their immediate families was prohibited. Proclamation 6685 is excerpted below.

---

* * * *

In light of the political crisis in Haiti resulting from the expulsion from Haiti of President Aristide and the constitutional government, United Nations Security Council Resolution 917, and the overriding interest of the United States in the restoration of democracy to Haiti, I have determined that it is in the interests of the United States to restrict the entry to the United States of: (1) all aliens described in paragraph 3 of United Nations Security Council Resolution 917; and (2) all other aliens who formulate, implement, or benefit from policies that impede the progress of the negotiations designed to restore constitutional government to Haiti and their immediate families.

NOW, THEREFORE, I, WILLIAM J. CLINTON, by the powers vested in me as President by the Constitution and laws of the United States of America, including sections 212(f) and 215 of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1182(f) and 1185), and section 301 of title 3, United States Code, hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of aliens described in sections 1 and 2 of this proclamation would, except as provided for in sections 3 and 4 of this proclamation, be detrimental to the interests of the United States. I do therefore proclaim that:

Section 1. The immigrant and nonimmigrant entry into the United States of aliens described in paragraph 3 of United Nations Security Council Resolution 917 is hereby suspended. These aliens are:

(a) all officers of the Haitian military, including the police, and their immediate families;
(b) the major participants in the coup d'etat of 1991 and in the illegal governments since the coup d'etat, and their immediate families; and
(c) those employed by or acting on behalf of the Haitian military, and their immediate families.

Sec. 2. The immigrant and nonimmigrant entry into the United States of aliens who are not covered by section 1, but who nonetheless formulate, implement, or benefit from policies that impede the progress of the negotiations designed to restore constitutional government to Haiti, and their immediate families, is hereby suspended.
Sec. 3. Section 1 shall not apply with respect to any alien otherwise covered by section 1 where the entry of such alien has been approved as prescribed by paragraph 3 of United Nations Security Council Resolution 917.
Sec. 4. Section 2 shall not apply with respect to any alien otherwise covered by section 2 where the entry of such alien would not be contrary to the interests of the United States.

* * * *

b. Suspension of entry of certain Zairean nationals

In 1991 the long-time dictator of Zaire, President Mobutu Sese Seko, agreed to demands by democracy supporters that the government establish a national conference to draft a new constitution. A national conference was convened and, despite numerous delays and suspensions, announced in June 1992 that a transitional government would be formed in the lead up to proposed elections. In July 1992, President Mobutu and the national conference agreed to establish a

High Council of the Republic ("HCR") to oversee the implementation of the conference's decisions. President Mobutu ultimately refused to honor his promise to permit a transition to democracy, however, and suspended the HCR in December 1992. A near-total breakdown of Zaire's modern economic sector followed, along with hyperinflation, severe malnutrition, and severe human rights abuses, especially in the province of Shaba. On June 21, 1993, President Clinton issued Proclamation 6574, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Formulate or Implement Policies That Are Impeding the Transition to Democracy in Zaire or Who Benefit From Such Policies," intended to prevent the entry to the United States of Mobutu and his supporters. 58 Fed. Reg. 34,209 (June 23, 1993). In Proclamation 6574 President Clinton, acting "[i]n light of the political and economic crisis in Zaire," proclaimed, that "[t]he entry into the United States as immigrants and nonimmigrants of persons who formulate, implement, or benefit from policies that impede Zaire's transition to democracy, and the immediate family members of such persons, is hereby suspended," with further provisions similar to those relating to Haitian nationals, *supra*.

c. Suspension of entry of certain Nigerian nationals

After the military regime in Nigeria refused to release the results of a June 1993 presidential election and suspended the country's framework for a transition to democracy, President Clinton on December 10, 1993, issued Proclamation 6636, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Formulate, Implement, or Benefit From Policies That Are Impeding the Transition to Democracy in Nigeria," aimed at members of the military regime. 58 Fed. Reg. 65,525 (Dec. 14, 1993). In Proclamation 6636 President Clinton, acting "[i]n light of the political crisis in Nigeria," proclaimed that "[t]he entry into the United States as immigrants and nonimmigrants of persons who formulate,

implement, or benefit from policies that impede Nigeria's transition to democracy, and the immediate family members of such persons, is hereby suspended," with further provisions similar to those relating to Haitian nationals, *supra*.

On October 26, 1998, after a new interim regime released political prisoners and moved forward with plans for local elections in November 1998 and national elections in 1999, Secretary of State Madeleine K. Albright made a determination pursuant to authority provided in section 6 of Proclamation 6636 that the suspension of entry provided for under that proclamation should lapse and the proclamation should be terminated effective immediately. 63 Fed. Reg. 64,139 (Nov. 18, 1998).

d. Suspension of entry of certain Liberian nationals

On September 30, 1994, in response to evidence of human rights abuses by the various armed factions in Liberia and their failure to cooperate in efforts to reach workable peace agreements, President Clinton issued Proclamation 6730, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Formulate or Implement Policies That Are Impeding the Transition to Democracy in Liberia or Who Benefit From Such Policies." 59 Fed. Reg. 50,683 (Oct. 5, 1994). President Clinton, acting "[i]n light of the long-standing political and humanitarian crisis in Liberia," proclaimed that "[t]he entry into the United States as immigrants and nonimmigrants of persons who formulate or implement policies that impede Liberia's transition to democracy or who benefit from such policies, and the immediate family members of such persons, is hereby suspended," with further provisions similar to those relating to Haitian nationals, *supra*.

e. Suspension of entry of certain Burmese nationals

Reacting to continuing political repression by the regime in Burma, including detention of duly elected legislators,

opposition activities and other persons attempting to promote democratic change, President Clinton on October 3, 1996, issued Proclamation 6925, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Formulate or Implement Policies That Are Impeding the Transition to Democracy in Burma or Who Benefit From Such Policies." 61 Fed. Reg. 52,233 (Oct. 7, 1996), excerpted below.

---

* * * *

The current regime in Burma continues to detain significant numbers of duly elected members of parliament, National League for Democracy activists, and other persons attempting to promote democratic change in Burma. The regime has failed to enter into serious dialogue with the democratic opposition and representatives of the country's ethnic minorities, has failed to move toward achieving national reconciliation, and has failed to meet internationally recognized standards of human rights.

In light of this continuing political repression, I have determined that it is in the interests of the United States to restrict the entrance into the United States as immigrants and nonimmigrants of certain Burmese nationals who formulate or implement policies that impede Burma's transition to democracy or who benefit from such policies, and the immediate families of such persons.

* * * *

Section 1. The entry into the United States as immigrants and nonimmigrants of persons who formulate, implement, or benefit from policies that impede Burma's transition to democracy, and the immediate family members of such persons, is hereby suspended.

Sec. 2. Section 1 shall not apply with respect to any person otherwise covered by section 1 where the Secretary of State determines that the entry of such person would not be contrary to the interests of the United States. Section 1 shall not apply to officials assigned to Burmese missions in the United States or working-level support staff and visitors who support the work of Burmese missions in the United States.

Sec. 3. Persons covered by sections 1 and 2 shall be identified pursuant to procedures established by the Secretary of State, as authorized in section 6 below.

* * * *

Sec. 7. This proclamation may be repealed, in whole or in part, at such time as the Secretary of State determines that the Burmese regime has released National League for Democracy members currently being held for political offenses and other pro-democracy activists, enters into genuine dialogue with the democratic opposition, or makes significant progress toward improving the human rights situation in the country.

* * * *

f. Suspension of entry of members or officials of the Sudanese Government or armed forces

On June 26, 1995, an assassination attempt was made on the life of President Hosni Mubarak of Egypt while he was in Addis Ababa, Ethiopia. Ethiopia requested the extradition of three suspects who were being sheltered in Sudan, but Sudan refused to extradite them. The UN Security Council adopted Resolution 1044 of January 31, 1996, demanding under Chapter VII of the U.N. charter that the Government of Sudan extradite the suspects and desist from supporting terrorist activities. After Sudan refused to comply, the Security Council adopted Resolution 1054 of April 26, 1996, making the same demands and deciding that all states would significantly reduce the number of the staff at Sudanese diplomatic and consular posts while restricting the movements of those who remained, and take steps to restrict the entry into or transit through their territory of members and officials of the Government of Sudan, as well as members of the Sudanese armed forces. In furtherance of Resolution 1054, President Clinton on November 22, 1996, issued Presidential Proclamation 6958, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Are

Members or Officials of the Sudanese Government or Armed Forces." 61 Fed. Reg. 60,007 (Nov. 26, 1996). Acting "in light of the refusal of the Government of Sudan to comply with United Nations Security Council Resolution 1044 . . . and in furtherance of United Nations Security Council Resolution 1054," President Clinton proclaimed that "[t]he entry into the United States as immigrants and nonimmigrants of members of the Government of Sudan, officials of that Government, and members of the Sudanese armed forces, is hereby suspended," with further provisions similar to those relating to Haitian nationals, *supra.*

g. Suspension of entry of senior officials of the National Union for the Total Independence of Angola ("UNITA") and adult members of their immediate families

In November 1994, the Government of Angola signed the Lusaka Peace Accord with the National Union for the Total Independence of Angola ("UNITA") in an effort to end 20 years of civil war. Under the auspices of the United Nations Angola Peacekeeping Mission ("UNAVEM"), and with the help of three observer countries—the United States, Portugal and Russia—the Government of Angola and UNITA began to implement the Lusaka Protocol's provisions for a cease-fire, withdrawal of forces in contact, disarming and quartering of UNITA forces, integration of some UNITA solders into the Angolan armed forces, demobilization of remaining combatants, and creation of a Government of National Reconciliation. When UNITA failed to comply with some of its obligations, the United Nations Security Council adopted Resolutions 1127 of August 28, 1997; 1130 of September 29, 1997; and 1135 of October 29, 1997. In these resolutions, the Security Council, acting under Chapter VII of the UN Charter, demanded that UNITA implement all of its obligations under the Lusaka Protocol, including demilitarization of all its forces and full cooperation in the process of the normalization of state administration throughout Angola. Further, it decided

that all States must adopt sanctions against UNITA, including, *inter alia*, preventing the entry into or transit through their territories of all senior officials of UNITA and of adult members of their immediate families, with certain exceptions. In furtherance of the Security Council Resolutions, President Clinton issued Proclamation 7060, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Are Senior Officials of the National Union for the Total Independence of Angola ("UNITA") and Adult Members of Their Immediate Families," on December 12, 1997. 62 Fed. Reg. 65,987 (Dec. 16, 1997).

Acting "[i]n light of the failure of [UNITA] to comply with its obligations under the 'Accordos de Paz,' the Lusaka Protocol, and other components of the peace process in Angola, and in furtherance of United Nations Security Council Resolutions 1127 . . . , 1130 . . . , and 1135," President Clinton proclaimed that "[t]he entry into the United States as immigrants and nonimmigrants of senior officials of UNITA and adult members of their immediate families, is hereby suspended." In addition to provisions similar to those relating to Haitian nationals, *supra*, the proclamation provided in section 4 that

> [i]n identifying persons [otherwise covered but "the entry of such person would not be contrary to the interests of the United States"], the Secretary shall consider whether a person otherwise covered . . . is an official necessary for the full functioning of the Government of Unity and National Reconciliation, the National Assembly, or the Joint Commission, within the meaning of paragraph 4(a) of United Nations Security Council Resolution 1127 of August 28, 1997.

h. Suspension of entry of certain nationals of Sierra Leone

After a military junta displaced a democratically elected government in Sierra Leone, the United Nations Security

Council adopted Resolution 1132 of October 8, 1997. In Resolution 1132, the Security Council demanded that the junta relinquish power and make way for the restoration of the democratically elected government, and decided to impose a number of sanctions, including that all States prevent the entry into or transit through their territories of members of the junta and adult members of their families, with certain exceptions. In furtherance of Resolution 1132, President Clinton issued Proclamation 7062 on January 14, 1998, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Are Members of the Military Junta in Sierra Leone and Members of Their Family." 63 Fed. Reg. 2871 (Jan. 16, 1998). Acting "[i]n light of the refusal of the military junta in de facto control in Sierra Leone to permit the return to power of the democratically elected government of that country, and in furtherance of United Nations Security Council Resolution 1132," President Clinton proclaimed that "[t]he entry into the United States as immigrants and non-immigrants of members of the military junta in Sierra Leone and members of their families, is hereby suspended," with further provisions similar to those relating to Haitian nationals, *supra*.

i. Suspension of entry of certain nationals of the Federal Republic of Yugoslavia (FRY) and the Republic of Serbia

To sanction atrocities by the regime of President Slobodan Milosevic against civilians in Kosovo, as well as actions taken by the regime to obstruct democracy and suppress freedom of the press and to thwart economic sanctions, President Clinton issued Proclamation 7249 of November 12, 1999, "Suspension of Entry of Persons Responsible for Repression of the Civilian Population in Kosovo or for Policies That Obstruct Democracy in the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") or Otherwise Lend Support to the Current Governments of the FRY and of the Republic

of Serbia." 64 Fed. Reg. 62,561 (Nov. 17, 1999). Proclamation 7249 is excerpted below.

---

* * * *

In light of the actions of President Slobodan Milosevic and other officials of the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") and the Republic of Serbia against elements of the civilian population of Kosovo, including actions within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia; in light of actions being taken by the Milosevic regime to obstruct democracy and to suppress an independent media and freedom of the press in the FRY, Serbia, Montenegro, and Kosovo; and in light of the ongoing efforts of the Milosevic regime and its supporters to thwart the economic sanctions imposed by the United States and other countries against the FRY, I have determined that it is in the interests of the United States to suspend the entry into the United States of certain officials of the FRY Government and the Government of the Republic of Serbia and of other persons who either act in support of such officials' policies or who are closely associated with such officials.

* * * *

Section 1. The immigrant and nonimmigrant entry into the United States of the following persons is hereby suspended:

(a) Slobodan Milosevic and other persons who, as senior FRY or Serbian officials or as members of the FRY and/or Serbian military or paramilitary forces, formulated, implemented, or carried out repressive actions against the civilian population in Kosovo;
(b) Officials of the Government of the FRY or of the Republic of Serbia and FRY nationals who formulate, implement, or carry out policies obstructing or suppressing freedom of speech or of the press in the FRY, Serbia, Montenegro, or Kosovo, or who otherwise are obstructing efforts to establish a peaceful and stable democracy in these areas;

(c) Officials of the Government of the FRY or of the Republic of Serbia and FRY nationals who, individually or as officers or employees of business or financial entities, engage in financial transactions that materially support the Government of the FRY, the Government of the Republic of Serbia, Slobodan Milosevic, or members of the Milosevic regime; and

(d) Any spouse, minor child, close relative, or close personal associate of any person described in subsections (a) through (c) above, if the entry into the United States of such spouse, minor child, close relative, or close personal associate would not be in the interests of the United States in light of the objectives of this proclamation.

* * * *

Immigration measures had previously been imposed by Proclamation 6749 of October 25, 1994 to restrict the entry to the United States of "all aliens described in paragraph 14 of United Nations Security Council Resolution 942 [S/RES/942 (1994)]." 59 Fed. Reg. 54,117 (Oct. 27, 1994). The proclamation listed the affected aliens as:

> (a) members of the authorities, including legislative authorities, in those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces; officers of the Bosnian Serb military and paramilitary forces; and those acting on behalf of such authorities or forces;
>
> (b) persons found, after September 23, 1994, to have provided financial, material, logistical, military, or other tangible support to Bosnian Serb forces in violation of relevant United Nations Security Council resolutions; and
>
> (c) persons in or resident in those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces found to have violated or contributed to the violation of the measures set out in United Nations Security Council Resolution 820 of April 17, 1993, and United Nations Security Council Resolution 942 of September 23, 1994.

D. ASYLUM AND REFUGEE STATUS

1. Maritime Interdiction and *Non-refoulement* Under Article 33 of the Refugee Convention

a. High seas interdiction of Haitian migrants

In the early 1980s, as thousands of Haitians sought to emigrate to the United States by boat, the U.S. Government initiated a program to interdict illegal Haitian migrants at sea. The program continued into the 1990s, and was challenged in federal court on the grounds that it was a violation of the *non-refoulement* obligations of the United States under the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (entered into force for the United States Nov. 1, 1968) ("Protocol"). *See* description of the interdiction program in the U.S. Supreme Court opinion, *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), below; *see also I Cumulative Digest 1981–1988* at 631–38; *Digest 1989–1990* at 47–54.

The Protocol broadened the coverage of the Convention Relating to the Status of Refugees, done July 28, 1951, 188 U.N.T.S. 150, and incorporated by reference the substantive protections of the 1951 Convention. Article 33 of the 1951 Convention provides in part that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion."

In a letter dated December 11, 1991, to Acting Assistant Attorney General Timothy E. Flanigan, Office of Legal Counsel, Department of Justice, the Legal Adviser of the Department of State, Edwin D. Williamson, provided the legal opinion of the Department of State, excerpted below (footnotes omitted), that the *non-refoulement* obligation of Article 33 did not impose obligations on the United States with respect to refugees outside U.S. territory.

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

---

* * * *

. . . We have previously and publicly taken the position that the [*non-refoulement* obligation of Article 33] applies only to persons within the territory of a Contracting State. For reasons indicated below, the Department respectfully requests that you reconsider and withdraw the apparently contrary legal conclusion reflected in the opinion of the Office of Legal Counsel of August 11, 1981. . . .

The relevant provisions for interpreting a treaty are accurately reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/Conf.39/27 (1969) ("Vienna Convention"). . . .

Under Article 31 of the Vienna Convention, the starting point of treaty interpretation is "the ordinary meaning" of the terms of the treaty in their context, and in light of the object and purpose of the treaty. The context includes, among other things, "[a]ny agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty. Also to be considered is the subsequent practice in applying the treaty if the practice "establishes the agreement of the parties" regarding the treaty's interpretation. Under Article 32, the negotiating history of a treaty may also be consulted, either to confirm the results of an analysis under Article 31 or if the analysis under Article 31 leaves the meaning ambiguous or leads to an absurd or unreasonable result. These principles all lead to the conclusion that Article 33 of the Refugee Convention did not create obligations on States with respect to refugees outside their territory.

The Text and Negotiating History of Article 33

* * * *

The word "expel" in Paragraph 1 [of Article 33] clearly refers to the treatment of refugees in a State's territory. Paragraph 2 also clearly refers to refugees in a State's territory in excluding certain refugees from the protection of paragraph 1.

Article 33 also uses the word "return." The French term for the word "return" is included in the official English version of the treaty, a drafting device indicating that the word "return" is to be understood as synonymous with the French "*refouler*." The French was included in the English text for the express purpose of ensuring that the word "return" would be understood as applying only to refugees within a State's territory. During the final negotiating session for the Refugee Convention in July 1951, the Conference of Plenipotentiaries (representing 26 States, including the United States) directly confronted the question of how the word "return" in Article 33 (which was then Article 28) would be interpreted. At the session of July 22, the Swiss representative noted that the French word "*refoulement*" had some ambiguity, but that it "could not . . . be applied to a refugee who had not yet entered the territory of a country." The Swiss representative also expressed concern that Article 33 would be read to "impl[y] the existence of two categories of refugees: refugees who were liable to be expelled, and those who were liable to be returned." He therefore thought it essential that the drafting States "take a definite position with regard to the meaning to be attached to the word 'return,'" and stated his government's understanding that the word "return," like the word "expel," in fact "applies solely to refugees who had already entered a country, but were not yet resident there."

The Swiss representative made clear that his country's assent would depend on being assured of this reading, one implication of which would be that Article 33 would not require a state "to allow large groups of persons claiming refugee status to cross its frontiers." The representative of France affirmatively agreed with this interpretation and indicated that "[i]t was only the idea of what was generally meant by 'expulsion' that should be retained." The negotiating record for that day reflects no disagreement with this view. U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (16th mtg.) at 6, U.N. Doc. A/CONF.2/SR.16 (1951).

The limited meaning of the word "return" in Article 33 was reaffirmed at the second and final reading of the draft Convention, on July 25, 1951. The negotiating record for that day records that the Dutch representative recalled the earlier discussion as follows:

> The Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" ("*refoulement*") related to a refugee already within the territory but not yet resident there.

The Dutch representative went on to say that this was an important point for his government because of its implications with respect to "large groups of refugees seeking access to its territory." Noting that the representatives of Belgium, Germany, Italy, the Netherlands, and Sweden, as well as Switzerland, had supported this interpretation, he asked that it be placed on the record.

The President of the conference ruled that the interpretation should be placed on the record since no objection had been expressed. The British delegate added that the word "return" had been chosen as the nearest equivalent to "*refoulement*," and that he understood that the word "return" in this context had no broader meaning—i.e., no meaning broader than the French, which had already been clarified as applying only to a refugee within the territory. The President then suggested that the French word be included in brackets whenever the word "return" was used. U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (35th mtg.) at 21–22, U.N. Doc. A/CONF.2/SR.35 (1951). The final text of Article 33 was adopted by a vote of 20 for, 0 against, and 3 abstentions. *Id.* at 25.

In short, the negotiating history reflects a deliberate consideration of the meaning of the word "return," a clear understanding that it referred only to refugees within the State's territory, and a related understanding that Article 33 created no obligations with respect to refugees outside the territory, including no obligation to refugees massing at the border. A number of countries whose support for the Convention was of critical importance would never have agreed to Article 33 but for the explicit rejection of the possibility of reading "return" to apply to refugees outside their territory.

This record is dispositive, whether it is taken under Article 31 of the Vienna Convention to reflect "an agreement relating to the treaty" made between all the parties in connection with its

conclusion, to confirm an "ordinary meaning" analysis, or to resolve an ambiguity.

* * * *

Subsequent Practice

The protracted and unsuccessful international effort to supplement the Refugee Convention with a Convention on Territorial Asylum, a central goal of which was to codify a prohibition against rejection of refugees at the frontier, further evidences an understanding of the limitations of the Refugee Convention and demonstrates the reluctance of the international community to broaden its legal commitments in the area of refugees and immigration.

The effort to draft a territorial asylum convention was preceded by adoption of the non-binding Declaration on Territorial Asylum by the U.N. General Assembly in December 1967. Paragraph 1 of Article 3 of the Declaration carried forward Article 33's usage of the words "expel" and "return" to refer to persons within the territory of a State. Paragraph 1 is broader than Article 33, however, in that it also includes an explicit prohibition against rejection at the frontier:

1. No person [entitled to seek and enjoy asylum from persecution] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State in which he may be subjected to persecution.
2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

It was clearly understood that the Declaration's non-binding "prohibition" on rejection at the frontier, even as limited, went beyond the convention's Article 33 obligation. See Weis, *The*

United States Declaration on Territorial Asylum, 7 Can. Y.B. Int'l L. 92, 142 (1969). Thus, one distinguished commentator said that "Article 3(1) of the Declaration on Territorial Asylum, 1967, corresponds to Article 33(1) of the Refugee Convention, but it extends the rule to include the prohibition of rejection at the frontier as well." A. Grahl-Madsen, *An International Commentary on Territorial Asylum* 33 (2d ed., rev., 1976) (emphasis added).

Work on principles of asylum continued after 1967 with a view toward a binding instrument that would, among other things, extend the precept of *non-refoulement* to protection against rejection at the frontier. Private sector drafting efforts eventually resulted in a draft convention being submitted to the U.N. High Commissioner for Refugees and subsequently to the U.N. Economic and Social Council and, finally, the General Assembly ("UNGA"). The UNGA established a Group of Experts that met in 1975 and then called a Conference of Plenipotentiaries to meet in 1977.

The draft text submitted to the Group of Experts included an obligation for States to use their "best endeavours to grant asylum" to refugees (defined somewhat more broadly than in the Refugee Convention). Article 2 also included the following proposed provision:

> No person shall be subjected by a Contracting State to measures such as rejection at the frontier, return, or expulsion, which would compel him to return directly or indirectly to, or remain in a territory with respect to which he has well-founded fear of persecution, prosecution or punishment. . . .

U.N. Group of Experts on the Draft Convention on Territorial Asylum, *Draft Convention on Territorial Asylum* at 4, U.N. Doc. A/AC.174/CRP.1 (1975). A later draft continued the separate treatment of the concepts of "rejection at the frontier" and "return" or "expulsion". *See* U.N. GAOR Office of the United Nations High Commissioner for Refugees, *Elaboration of a Draft Convention on Territorial Asylum, Report of the Secretary-General* at 1, U.N. Doc. A/10177/Corr. 1 (1975).

The Group of Experts had difficulties with this Article, which it recognized as the most important provision in the draft convention. It settled on a proposed re-wording that became Article 3 and read in part as follows:

> No person entitled to the benefits of this convention who is in the territory of a Contracting State shall be subjected by such Contracting State to measures such as return or expulsion which would compel him to return to a territory where his life or freedom would be threatened. Moreover, a Contracting State shall use its best endeavours to ensure that no person is rejected at its frontiers if there are well-founded reasons for believing that such rejection would subject him to persecution, prosecution or punishment. . . .

The proposed revision went on to provide for exceptions similar to those contained in Article 33 of the Refugee Convention. U.N. Group of Experts on the Draft Convention on Territorial Asylum, *Report* at 16, 34, U.N. Doc. A/AC.174/MISC.3/GE.75–6119 (1975); *Elaboration of a Draft Convention on Territorial Asylum, Report of the Secretary General* at 1, U.N. Doc. A/10177/Corr. 1 (1975).

Significantly, the initial proposal to reword this provision came from the United States, which took the position that "the principle of non-refoulement . . . should only apply to persons in the territory of a Contracting State" and that "with regard to rejection at the frontier, the principle of non-refoulement should not be expressed in absolute terms but that the words 'use their best endeavours' should be employed." Report at 14, U.N. Doc. A/AC.174/MISC.3/GE, 75–6119. Compare Proposal by the expert of the United states, U.N. Doc. A/AC.174/Informal Working Paper No. 4 (1975) with Report at 14–16, U.N. Doc. A/AC.174.MISC.3/GE.75–6119. See also 1975 Digest of United States Practice in International Law 156–58.

Efforts to conclude the convention were eventually abandoned, as the Conference on Plenipotentiaries on the Draft Convention on Territorial Asylum failed to adopt the Convention. This record clearly demonstrates that States—including the United States—

did not regard Article 33 of the Refugee Convention as protecting refugees outside their territory, and that they were unwilling to assume such an obligation as a matter of international law.

The United States Understanding at the Time of Ratification

When President Johnson sent the Protocol to the Senate in 1968, he stated that it would require no changes in domestic law. Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees, 2 *Pub. Papers* 428 (1968). The Report of the Secretary of State, which accompanied the President's message to the Senate, specifically indicated that Article 33 of the Refugee Convention was comparable to section 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h) (1976), and that it could be "implemented within the administrative discretion provided by existing regulations." S. Exec. R., 90th Cong., 2d Sess. VIII (1968). Section 243(h) at that time explicitly applied only to refugees within the United States:

> The Attorney General is authorized to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reasons.

(emphasis added) In short, it was clearly understood at the time of ratification that Article 33 imposed an obligation only with respect to refugees already within the United States.

* * * *

Our view is not changed by the fact that the U.N. High Commissioner for Refugees ("UNHCR") now advocates recognition of an extraterritorial norm of non-*refoulement*. UNHCR was established by the U.N. General Assembly even before the Refugee Convention was completed, and has never been charged with a definitive role in the interpretation of the Convention. That role is given to the International Court of Justice by Article 38 of the

Convention and by Article IV of the Protocol. Similarly, the consensus-based executive committee ("EXCOM") of UNHCR (comprised of States both party and non-party to the Refugee Convention, and of States party to additional, more expansive conventions) has no authority to interpret legal obligations of States. UNHCR itself has recognized that the EXCOM conclusions have no legal effect, but instead provide guidance for States in developing their policies on refugee issues. *Statement of Mr. Arnaout, Director, Division of Refugee Law and Doctrine, UNHCR*, in Executive Committee of the High Commissioner's Programme, Summary record of the 431st Meeting at 11–12, U.N. Doc. A/AC.96/SR.431 (1988).

* * * *

In a memorandum dated December 12, 1991, Acting Assistant Attorney General Flanigan concurred in Mr. Williamson's opinion in a letter excerpted below, footnotes omitted.

The full text of the Flanigan memorandum is available at 15 U.S. Op. Off. Legal Counsel 86 (1991).

---

* * * *

We have reviewed your letter opinion dated December 11, 1991, in which you conclude that Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention) does not impose any domestic legal obligations on the United States with respect to individuals interdicted outside its territory as part of an effort to control mass illegal migration to the United States. . . . For the reasons outlined in your letter and for the additional reasons discussed below, we concur in your conclusions.

* * * *

The word "expel" in Article 33 clearly refers to the treatment to be afforded potential refugees found within a state's territory. Paragraph 1 also uses the term "return," followed by the French term "refouler." . . . [T]he history behind the insertion of "refouler" in the Convention demonstrates that the representatives of the

nations that negotiated the Convention intended that the English word "return" not be construed so as to make the treaty applicable to persons outside the territory of a contracting state. . . .

The Supreme Court, in its review of the legislative history of the United States' accession to the Protocol, has also observed that the United States acceded to article 33 based on the view that Article 33 could be implemented through the then-existing section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1978 ed.), and that section 243(h) applied *only* to deportation of refugees already in the United States. See *INS* v. *Stevic*, 476 U.S. 407, 415, 417–18 (1984). The legislative history of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102, supports this view of Article 33: the House Committee Report states that the Refugee Convention was intended to "insure fair and humane treatment for refugees *within the territory of the contracting states*." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) (emphasis added).

Judge Edwards in *Haitian Refugee Center* v. *Gracey*, 809 F.2d 794 (D.C. Cir. 1987), concluded unequivocally—and with specific reference to the Haitian interdiction program at issue here—that "Article 33 in and of itself provides no rights to aliens outside a host country's borders." Id. at 840 (Edwards, J., dissenting in part and concurring in part). The other two judges on the *Gracey* panel decided that the plaintiff lacked standing to challenge the interdiction program and decided the case on that ground, a decision from which Judge Edwards dissented. Neither of the judges in the majority, however, expressed any disagreement with or reservations about Judge Edwards' analysis of the underlying merits issues, including his discussion of Article 33 and his conclusion that it provides no rights to aliens outside a state's borders.

We note, moreover, as an independent ground for our conclusion, that the Protocol by which the United States adhered to the Convention is not self-executing for domestic law purposes. Accordingly, the Protocol itself does not create rights or duties that can be enforced by a court.

Under the Supremacy Clause of the Constitution, treaties made pursuant to the Constitution's procedures are part of the "supreme Law of the Land. . . ." U.S. Const., art. VI, cl. 2. Some treaties, however, merely impose obligations under international law that

the United States, as a contracting party, must perform particular acts, without themselves creating any obligations under domestic law. In such cases the international obligations must be "executed" through domestic legislation before the obligation becomes effectively the law of the land. Thus, in *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), Chief Justice Marshall recognized that not all treaties are self-executing:

> [A treaty] is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court. . . .

Whether a treaty is self-executing is controlled by the intent of the United States as a contracting party. *See British Caledonian Airways* v. *Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981); *United States v. Postal*, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). "The parties' intent may be apparent from the language of the treaty, or, if the language is ambiguous, it may be divined from the circumstances surrounding the treaty's promulgation." *Postal*, 589 F.2d at 876.

The language of the Protocol by which the United States adhered to the Refugee Convention demonstrates that the United States did not intend that the Convention, as adhered to, would be self-executing. In particular, Article III of the Protocol provides that the signatories are to communicate to the United Nations the "laws and regulations which they may adopt to ensure the application of the present Protocol." 19 U.S.T. at 6226. *Cf. Postal*, 589 F.2d at 876–77 (treaties that "expressly provide for legislative execution" are "uniformly declared executory" and therefore require further legislative action to bring the treaty into effect). Moreover, such a provision would have been unnecessary if the Refugee Convention were self-executing. *Cf.* Protocol, art. VI(b),

19 U.S.T. 6227 (any signatory with federal form of government obligated to bring the articles of Refugee Convention to the notice of the constituent states if those articles come within the states' exclusive legislative jurisdictions). Thus, the Protocol by its own terms plainly contemplates the need for implementing legislation by its signatories.

Furthermore, the understanding of the President and the Senate in adopting the Protocol was that the United States' obligations under the Refugee Convention, pursuant to the Protocol, would not be self-executing. Specifically, the President and Senate clearly believed that pre-existing domestic law governing refugees—which applied only to persons already in the United States—would suffice to implement the Refugee Convention and the Protocol. *See also Stevic*, 467 U.S. at 417–18. We also note that the Second Circuit, the only circuit court to address the question directly, has concluded that the Protocol is not self-executing. *Bertrand* v. *Sava*, 684 F.2d 204, 218–19 (2d Cir. 1982).

Because the Protocol is not self-executing, its provisions cannot be enforced by a private right of action in a United States court. It is well-established that individuals may directly seek enforcement of a treaty's provisions only when "the treaty . . . expressly or impliedly provides a private right of action." *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). *See also Head Money Cases*, 112 U.S. 580, 598–99 (1884); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 70, 373 (7th Cir. 1985) ("if not implemented by appropriate legislation [treaties] do not provide the basis for a private lawsuit unless they are intended to be self-executing"); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Linder* v. *Calero Portocarrero*, 747 F. Supp. 1452, 1462–63 (S.C. Fla. 1990); *Haitian Refugee Cent.* v. *Gracey*, 600 F. Supp. 1396, 1405–06 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

A one-page opinion of this Office, and one sentence in another Office of Legal Counsel opinion, might be read to suggest that refugees interdicted on the high seas enjoy certain rights under the Protocol adopting the Refugee Convention. See Memorandum for the Attorney General from Assistant Attorney General Olson,

5 Op. Off. Legal Counsel 242, 248 (1981) ("Individuals who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims [under Article 33]."); Memorandum for the Associate Attorney General from Larry L. Simms, Deputy Assistant Attorney General (Aug. 5, 1991) ("Those who claim to be refugees must be given a chance to substantiate their claims [under Article 33]."). Among other things, these memoranda did not address whether the Protocol adopting the Refugee Convention is self-executing. To the extent that these memoranda could be read to suggest that Article 33, as adopted by the Protocol, imposes a judicially enforceable obligation on the United States with respect to individuals interdicted beyond its territorial boundaries, those memoranda are incorrect.

* * * *

On May 24, 1992, President George H.W. Bush signed Executive Order No. 12807 on the interdiction of illegal aliens, 57 Fed. Reg. 23,133 (June 1, 1992). Executive Order No. 12807 revoked Executive Order No. 12324 issued by President Reagan in 1981, which had provided that "no person [interdicted by the United States on the high seas] who is a refugee will be returned without his consent." Executive Order No. 12807 stated that:

> [t]he international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States. . . .

In addition to ordering the Secretary of State to "undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea," the President ordered instructions to be issued to the Coast Guard "in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens."

The executive order required that the instructions provide for the Coast Guard:

> (1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.
> (2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.
> (3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

It authorized these actions "to be undertaken only beyond the territorial sea of the United States."

When the issue ultimately reached the Supreme Court, in *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), the United States argued that the Immigration and Nationality Act ("INA") precluded review of the interdiction program, that collateral estoppel barred the suit in light of an earlier ruling upholding the program, that § 243(h) of the INA (8 U.S.C. § 1253(h)) (later redesignated as INA § 241(b)(3) by the IIRIRA, *see* section C.2.b *supra*), the implementing legislation for Article 33, did not have extraterritorial application (consistent with the proper interpretation of Article 33); and that prudential considerations barred an injunction against the interdiction program. The Supreme Court ruled in favor of the government, holding "that neither § 243(h) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applies to action taken by the Coast Guard on the high seas."

The text of the United States brief is available at 1992 U.S. Briefs 344. The Supreme Court's decision is excerpted below; all footnotes have been omitted.

---

* * * *

The President has directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees. The question presented in this case is whether such forced repatriation, "authorized to be undertaken only beyond the territorial sea of the United States," violates § 243(h)(1) of the Immigration and Nationality Act of 1952 (INA or Act). We hold that neither § 243(h) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applies to action taken by the Coast Guard on the high seas.

* * * *

On September 23, 1981, the United States and the Republic of Haiti entered into an agreement authorizing the United States Coast Guard to intercept vessels engaged in the illegal transportation of undocumented aliens to our shores. While the parties agreed to prosecute "illegal traffickers," the Haitian Government also guaranteed that its repatriated citizens would not be punished for their illegal departure. The agreement also established that the United States Government would not return any passengers "whom the United States authorities determined to qualify for refugee status."

On September 29, 1981, President Reagan issued a proclamation in which he characterized "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" as "a serious national problem detrimental to the interests of the United States." Presidential Proclamation No. 4865, 3 CFR 50–51 (1981–1983 Comp.). He therefore suspended the entry of undocumented aliens from the high seas and ordered the Coast Guard to intercept vessels carrying such aliens and to return them to their point of origin. His

Executive Order expressly "provided, however, that no person who is a refugee will be returned without his consent." Exec. Order No. 12324, 3 CFR § 2(c)(3), p. 181 (1981–1983 Comp.).

In the ensuing decade, the Coast Guard interdicted approximately 25,000 Haitian migrants. After interviews conducted on board Coast Guard cutters, aliens who were identified as economic migrants were "screened out" and promptly repatriated. Those who made a credible showing of political refugee status were "screened in" and transported to the United States to file formal applications for asylum. App. 231.

On September 30, 1991, a group of military leaders displaced the government of Jean Bertrand Aristide, the first democratically elected president in Haitian history. . . . Following the coup the Coast Guard suspended repatriations for a period of several weeks, and the United States imposed economic sanctions on Haiti.

On November 18, 1991, the Coast Guard announced that it would resume the program of interdiction and forced repatriation. . . . .

. . . . During the six months after October 1991, the Coast Guard interdicted over 34,000 Haitians. Because so many interdicted Haitians could not be safely processed on Coast Guard cutters, the Department of Defense established temporary facilities at the United States Naval Base in Guantanamo, Cuba, to accommodate them during the screening process. Those temporary facilities, however, had a capacity of only about 12,500 persons. In the first three weeks of May 1992, the Coast Guard intercepted 127 vessels (many of which were considered unseaworthy, overcrowded, and unsafe); those vessels carried 10,497 undocumented aliens. On May 22, 1992, the United States Navy determined that no additional migrants could safely be accommodated at Guantanamo. App. 231–233.

With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders *and* offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating

them without giving them any opportunity to establish their qualifications as refugees. . . .

On May 23, 1992, President Bush adopted the second choice. After assuming office, President Clinton decided not to modify that order; it remains in effect today. . . .

* * * *

Both parties argue that the plain language of § 243(h)(1) is dispositive. It reads as follows:

> "The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1988 ed., Supp. IV).

* * * *

Other provisions of the Act expressly confer certain responsibilities on the Secretary of State, the President, and, indeed, on certain other officers as well. The 1981 and 1992 Executive Orders expressly relied on statutory provisions that confer authority on the President to suspend the entry of "any class of aliens" or to "impose on the entry of aliens any restrictions he may deem to be appropriate." We cannot say that the interdiction program created by the President, which the Coast Guard was ordered to enforce, usurped authority that Congress had delegated to, or implicated responsibilities that it had imposed on, the Attorney General alone.

The reference to the Attorney General in the statutory text is significant not only because that term cannot reasonably be construed to describe either the President or the Coast Guard, but also because it suggests that it applies only to the Attorney General's normal responsibilities under the INA. The most relevant of those responsibilities for our purposes are her conduct of the deportation and exclusion hearings in which requests for asylum or for withholding of deportation under § 243(h) are ordinarily advanced.

Since there is no provision in the statute for the conduct of such proceedings outside the United States, and since Part V and other provisions of the INA obviously contemplate that such proceedings would be held in the country, we cannot reasonably construe § 243(h) to limit the Attorney General's actions in geographic areas where she has not been authorized to conduct such proceedings. Part V of the INA contains no reference to a possible extraterritorial application.

Even if Part V of the Act were not limited to strictly domestic procedures, the presumption that Acts of Congress do not ordinarily apply outside our borders would support an interpretation of § 243(h) as applying only within United States territory. See, *e.g., EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991) (citing *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949)); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 585–589, 119 L. Ed. 2d 351, 112 S. Ct. 2130, and n. 4 (1992) (STEVENS, J., concurring in judgment); see also *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute"). The Court of Appeals held that the presumption against extraterritoriality had "no relevance in the present context" because there was no risk that § 243(h), which can be enforced only in United States courts against the United States Attorney General, would conflict with the laws of other nations. 969 F.2d at 1358. We have recently held, however, that the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations. *Smith* v. *United States*, 507 U.S. 197, 206–207, n. 5, 122 L. Ed. 2d 548, 113 S. Ct. 1178 (1993).

Respondents' expansive interpretation of the word "return" raises another problem: It would make the word "deport" redundant. If "return" referred solely to the destination to which the alien is to be removed, it alone would have been sufficient to encompass aliens involved in both deportation and exclusion proceedings. And if Congress had meant to refer to all aliens who might be sent back to potential oppressors, regardless of

their location, the word "deport" would have been unnecessary. By using both words, the statute implies an exclusively territorial application, in the context of both kinds of domestic immigration proceedings. The use of both words reflects the traditional division between the two kinds of aliens and the two kinds of hearings. We can reasonably conclude that Congress used the two words "deport" and "return" only to make § 243(h)'s protection available in both deportation and exclusion proceedings. Indeed, the history of the 1980 amendment confirms that conclusion.

* * * *

. . . [I]n sum, all available evidence about the meaning of § 243(h)—the Government official at whom it is directed, its location in the Act, its failure to suggest any extraterritorial application, the 1980 amendment that gave it a dual reference to "deport or return," and the relevance of that dual structure to immigration law in general—leads unerringly to the conclusion that it applies in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States.

* * * *

Although the protection afforded by § 243(h) did not apply in exclusion proceedings before 1980, other provisions of the Act did authorize relief for aliens at the border seeking protection as refugees in the United States. See *INS* v. *Stevic*, 467 U.S. at 415–416. When the United States acceded to the Protocol in 1968, therefore, the INA already offered *some* protection to both classes of refugees. It offered *no* such protection to any alien who was beyond the territorial waters of the United States, though, and we would not expect the Government to assume a burden as to those aliens without some acknowledgment of its dramatically broadened scope. Both Congress and the Executive Branch gave extensive consideration to the Protocol before ratifying it in 1968; in all of their published consideration of it there appears no mention of the possibility that the United States was assuming any extra-territorial obligations. Nevertheless, because the history of the 1980 Act does disclose a general intent to conform our law to Article

33 of the Convention, it might be argued that the extraterritorial obligations imposed by Article 33 were so clear that Congress, in acceding to the Protocol, and then in amending the statute to harmonize the two, meant to give the latter a correspondingly extraterritorial effect. Or, just as the statute might have imposed an extraterritorial obligation that the Convention does not (the argument we have just rejected), the Convention might have established an extraterritorial obligation which the statute does not; under the Supremacy Clause, that broader treaty obligation might then provide the controlling rule of law. With those possibilities in mind we shall consider both the text and negotiating history of the Convention itself.

Like the text and the history of § 243(h), the text and negotiating history of Article 33 of the United Nations Convention are both completely silent with respect to the Article's possible application to actions taken by a country outside its own borders. Respondents argue that the Protocol's broad remedial goals require that a nation be prevented from repatriating refugees to their potential oppressors whether or not the refugees are within that nation's borders. In spite of the moral weight of that argument, both the text and negotiating history of Article 33 affirmatively indicate that it was not intended to have extraterritorial effect.

* * * *

Article 33.1 [of the Refugee Convention] uses the words "expel or return ('refouler')" as an obvious parallel to the words "deport or return" in § 243(h)(1). There is no dispute that "expel" has the same meaning as "deport"; it refers to the deportation or expulsion of an alien who is already present in the host country. The dual reference identified and explained in our opinion in *Leng May Ma* v. *Barber* suggests that the term "return ('refouler')" refers to the exclusion of aliens who are merely " 'on the threshold of initial entry.' " 357 U.S. at 187 (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212, 97 L. Ed. 956, 73 S. Ct. 625 (1953)).

This suggestion—that "return" has a legal meaning narrower than its common meaning—is reinforced by the parenthetical reference to "*refouler*," a French word that is *not* an exact synonym for the English word "return." Indeed, neither of two respected

English-French dictionaries mentions "*refouler*" as one of many possible French translations of "return." Conversely, the English translations of "*refouler*" do not include the word "return." They do, however, include words like "repulse," "repel," "drive back," and even "expel." To the extent that they are relevant, these translations imply that "return" means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination. In the context of the Convention, to "return" means to "repulse" rather than to "reinstate."

The text of Article 33 thus fits with Judge Edwards' understanding that "'expulsion' would refer to a 'refugee already admitted into a country' and that 'return' would refer to a 'refugee already within the territory but not yet resident there.' Thus, the Protocol was not intended to govern parties' conduct outside of their national borders." *Haitian Refugee Center* v. *Gracey*, 257 U.S. App. D.C. at 413, 809 F.2d at 840 (footnotes omitted). From the time of the Convention, commentators have consistently agreed with this view.

The drafters of the Convention and the parties to the Protocol—like the drafters of § 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.

* * * *

B. The Negotiating History of the Convention

In early drafts of the Convention, what finally emerged as Article 33 was numbered 28. At a negotiating conference of plenipotentiaries held in Geneva, Switzerland, on July 11, 1951, the Swiss delegate explained his understanding that the words "expel" and "return" covered only refugees who had entered the host country. . . .

No one expressed disagreement with the position of the Swiss delegate on that day or at the session two weeks later when Article 28 was again discussed. . . .

* * * *

. . . . At one time there was a "general consensus," and in July 1951 several delegates [to the negotiation of the Convention] understood the right of *non-refoulement* to apply only to aliens physically present in the host country. There is no record of any later disagreement with that position. Moreover, the term "*refouler*" was included in the English version of the text to avoid the expressed concern about an inappropriately broad reading of the English word "return."

Therefore, even if we believed that Executive Order No. 12807 violated the intent of some signatory states to protect all aliens, wherever they might be found, from being transported to potential oppressors, we must acknowledge that other signatory states carefully—and successfully—sought to avoid just that implication. The negotiating history, which suggests that the Convention's limited reach resulted from a deliberate bargain, is not dispositive, but it solidly supports our reluctance to interpret Article 33 to impose obligations on the contracting parties that are broader than the text commands. We do not read that text to apply to aliens interdicted on the high seas.

* * * *

It is perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores. Whether the President's chosen method of preventing the "attempted mass migration" of thousands of Haitians—to use the Dutch delegate's phrase—poses a greater risk of harm to Haitians who might otherwise face a long and dangerous return voyage is irrelevant to the scope of his authority to take action that neither the Convention nor the statute clearly prohibits. As we have already noted, Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are

construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility. Cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 81 L. Ed. 255, 57 S. Ct. 216 (1936). We therefore find ourselves in agreement with the conclusion expressed in Judge Edwards' concurring opinion in *Gracey*, 257 U.S. App. D.C. at 414, 809 F.2d at 841:

> "This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy."

* * * *

On September 24, 1999, President William J. Clinton, pursuant to sections 212(f) and 215(a)(1) of the INA (as amended at 8 U.S.C. §§ 1182(f), 1185(a)(1)) and in light of Presidential Proclamation 4865 of September 29, 1981 on High Seas Interdiction of Illegal Aliens, 46 Fed. Reg. 48,107 (Oct. 1, 1981), delegated to the Attorney General the authority to (1) maintain custody at any location the Attorney General deemed appropriate and conduct any screening the Attorney General deemed appropriate in the Attorney General's unreviewable discretion of any undocumented person the Attorney General had reason to believe was seeking to enter the United States and who was encountered in a vessel on the high seas through December 31, 2000, and (2) undertake any other appropriate actions with respect to such aliens permitted by law. 64 Fed. Reg. 55,809 (Oct. 15, 1999).

b. Interdiction of undocumented aliens in the territorial sea

In late 1993 the Office of the Associate Attorney General for the Department of Justice ("DOJ") and the General Counsel's Office of the Immigration and Naturalization Service ("INS") requested an opinion from the Office of Legal

Counsel at DOJ ("OLC") on the question, *inter alia*, whether an undocumented alien who had been interdicted within United States territorial waters was entitled to an exclusion hearing.

OLC concluded that undocumented aliens within the territorial sea of the United States were not entitled to a hearing under the exclusion provisions of the INA and could be turned back from the United States by the Coast Guard if the President so ordered. Memorandum for the Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters, 17 Op. Off. Legal Counsel 77 (1993). The opinion is excerpted below. Most footnotes have been deleted.

---

* * * *

The background to these requests is as follows. Historically, the United States adhered to the rule that the territorial sea extends three nautical miles out. In 1988, however, President Reagan, by proclamation, extended the United States's territorial sea to a distance of twelve nautical miles. See Proclamation No. 5928 (Dec. 27, 1988), 54 Fed. Reg. 777 (1988), reprinted at 103 Stat. 2981, 3 C.F.R. 547 (1989) (the Proclamation). . . . Although the Proclamation by its terms purported not to extend or otherwise alter existing Federal law or any jurisdiction, rights, legal interests, or obligations derived therefrom, questions arose concerning the possible or alleged effects of the Proclamation on domestic law or law enforcement. . . .

* * * *

. . . The question presented here is whether undocumented aliens seeking to enter the United States but interdicted within its territorial waters—that is, within twelve nautical miles from the United States' baselines—must be accorded an exclusion proceeding under the INA.

Section 235(b) of the INA, 8 U.S.C. § 1225(b), "provide[s] the jurisdictional basis for an exclusion hearing before an immigration

judge." Matter of Waldei, Interim Dec. # 2981, 19 I. & N. Dec. 189, 191 (Board of Immigration Appeals 1984). That section reads in part as follows (emphasis added):

> Every alien (other than an alien crewman) and except as otherwise provided in subsection (c) of this section and in section 1323(d) of this title, who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer.

Section 236(a), 8 U.S.C. § 1226(a), provides for exclusion hearings before a "special inquiry officer" (i.e., an immigration judge, see 8 U.S.C. § 1101(b)(4)). Section 236(a) states:

> A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported.

As the plain language of the INA makes clear, it is a predicate for conducting exclusion proceedings that the alien seeking admission be examined "at the port of arrival" by an immigration officer. 8 U.S.C. § 1225(b). . . . An alien interdicted at sea—even if within the territorial waters of the United States—is not at any "port." Consequently, there is no jurisdiction to conduct an exclusion proceeding in such a case.

* * * *

. . . [T]he overall statutory scheme regulating the exclusion of an alien is activated by the alien's arrival at a port of the United States. That event triggers significant legal effects, including the transporter's duty to provide a manifest, the immigration officers' powers to inspect and detain, and the alien's right,

if detained, to an exclusion proceeding. Nothing in the statute contemplates that the same effects are to follow if the alien is interdicted at sea before reaching port—even if interdiction occurs within United States territorial waters. For purposes of exclusion under the INA, the ports of the United States—not the limits of its territorial waters—are functionally its borders. Accordingly, we conclude that aliens interdicted within United States territorial waters do not have a right to exclusion proceedings under INA section 236.

Asylum and Withholding Provisions of the INA

* * * *

" '[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry." ' " Sale, slip op. 18 (quoting Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953))). . . . "Entry" is here a term of art. See Landon v. Plasencia, 459 U.S. at 28–29; Matter of Patel, Interim Dec. # 3157. slip op. 4 (Board of Immigration Appeals, August 9, 199l). "Physically coming into the United States does not necessarily accomplish an entry, else all inspections would effectively have to be made on foreign soil. Presence after inspection and admission, however, does amount to entry. So does penetrating the functional border by intentionally evading inspection before being apprehended." 1 Charles Gordon and Stanley Mailman, Immigration Law and Procedure, supra, § 1.03[2][b]. Aliens who have made an "entry" are entitled to deportation proceedings; those who are seeking admission but who have not entered are accorded, at most, an exclusion proceeding—"a process in which the alien usually has less protection under the statute and little, if any, under the Constitution." Id.

Before 1980, aliens who were excludable but not deportable did not have the right to apply for either asylum or withholding

of deportation or return. By the enactment of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 107 (1980), Congress extended those benefits to both types of aliens. Section 201(b) of the Refugee Act, as amended, now codified at 8 U.S.C. § 1158(a), prescribed that the Attorney General was to establish procedures for asylum applications. The Refugee Act's asylum provision states in part:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum . . .

8 U.S.C. § 1158(a) (emphasis added). In Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498, 1510 (11th Cir. 1995), the court construed the language of the asylum provision and held:

> [T]he plaintiffs in this case—who have been interdicted on the high seas—cannot assert a claim based on the INA or the Refugee Act. . . . The plain language of the statute is unambiguous and limits the application of the provision to aliens within the United States or at United States' borders or ports of entry. . . . The plaintiffs in this case have been interdicted on the high seas and have not yet reached "a land border" or a "port of entry."

Precisely the same can be said of aliens who have been interdicted within territorial waters: they have not yet reached a land border or a port of entry.

Furthermore, aliens interdicted within the territorial waters are also not "physically present in the United States," 8 U.S.C. § 1158(a), in the sense of that expression evidently intended by Congress. The statute's distinction between aliens "physically present in the United States" and aliens "at a land border or port of entry" is evidently designed to refer to the difference between deportable and excludable aliens: as pointed out above, the former are understood to be "already physically in the United States," while the latter are deemed to be "outside the United States seeking admission." Landon v. Plasencia, 459 U.S. at 25. Aliens interdicted

within the territorial waters are undoubtedly not entitled to deportation proceedings. They are therefore not "physically present in the United States" within the meaning of the Refugee Act's asylum provision.

The Refugee Act also amended the INA to allow aliens in exclusion proceedings to seek "withholding" under INA section 243(h), 8 U.S.C. § 1253(h). See Sale, slip op. 19 ("The 1980 amendment erased the long-maintained distinction between deportable and excludable aliens for purposes of section 243(h). By adding the word 'return' and removing the words 'within the United States' from § 243(h), Congress extended the statute's protection to both types of aliens . . ."). In Sale, the Supreme Court held that this amendment did not limit the President's power to order the Coast Guard to repatriate undocumented aliens interdicted on the high seas. Id., 18–21. In our view, the amendment also does not limit the President's power to order the Coast Guard to turn back undocumented aliens interdicted within United States territorial waters.

INA section 243(h), 8 U.S.C. § 1253(h), provides that:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 243(h) by its terms applies only to the actions of the Attorney General. . . . If the President orders the Coast Guard to interdict and turn back aliens within the territorial waters, nothing in section 243(h) precludes that agency from obeying his instructions, any more than the section precluded the agency from obeying a similar Presidential order with regard to aliens on the high seas. Cf. Sale, slip op. 15–16.

This analysis of the scope of section 243(h) is consistent with Congress's understanding of the scope of Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (United Nations Convention).

Furthermore, Article 33 does not convey any entitlements that could be relevant here but that are not provided by section 243(h) itself. See Stevic, 467 U.S. at 426–28 n.22; Haitian Refugee Center, Inc. v. Gracey, 809 F.2d at 794 (Edwards, J., concurring in part and dissenting in part). Thus, Article 33 does not serve as an independent basis for requiring procedural protections not conferred by the statute. In addition, the State Department has advised us of its view that the United States's international law obligations under the Protocol do not require it to provide exclusion hearings to aliens who have merely arrived in its territorial waters.[23] That conclusion concerning the territorial scope of the signatories' obligations under Article 33 is re-enforced by the negotiating history of the article and the interpretations of commentators.

Accordingly, we conclude that the INA's sections relating to asylum and withholding do not require that an exclusion hearing be provided for aliens interdicted within territorial waters.

The Geographical Limits of the "United States"

Our reading of the INA is consistent with the statute's definition of the "United States," 8 U.S.C. § 1101(a)(38):

> "The term 'United States', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States."

That definition makes no reference to the United States's territorial waters and on its face is consistent with the view, supported by

---

[23] The State Department takes the position that "the non-refoulement obligation of the Protocol [which is reflected in the "withholding of return" language of INA § 243(h)] applies only with respect to aliens who have 'entered' the United States in the immigration law sense. That is, the international treaty obligation only applies with respect to an alien who is physically present on the land mass of the United States and who has passed a port of entry . . . [T]he non-refoulement obligation of the Refugee Protocol does not apply at sea at all and therefore has no bearing on the questions presented to you by INS." State Dep't Submission 2.

other sections of the INA, that an undocumented alien is entitled to an exclusion hearing only if he or she has actually arrived at a port of entry.[25]

* * * *

Effect Of Presidential Proclamation No. 5928

As discussed above, Presidential Proclamation No. 5928 of December 27, 1988, announced that the territorial sea of the United States would extend to twelve nautical miles from the baselines of the United States. The President further stated:

Nothing in this Proclamation:

> (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom. . . .

54 Fed. Reg. 777.

Despite this expressed intent not to alter domestic law, the INS suggests that the Proclamation did operate to extend the scope of the INA. More precisely, the INS appears to argue that the Proclamation operated to enlarge the INA's definition of the "United States," 8 U.S.C. § 1101(a)(38). See INS/OGC Memorandum 1–3.

---

[25] In numerous other statutes, Congress has specifically included a reference to the territorial waters when defining the "United States." For example, the Longshore and Harbor Workers Compensation Act defines the term "United States" "when used in a geographical sense [to include] the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. § 902 (9). The Congressional Research Service has identified a large number of statutes referring explicitly to the territorial sea. See Memorandum to Committee on Merchant Marine and Fisheries, from American Law Division, re: Effect of Territorial Sea Extension on Selected Domestic Law, CRS-12 (March 16, 1989), reprinted in Hearing Before the Subcomm. on Oceanography and Great Lakes of the House Comm. on Merchant Marine and Fisheries, 101st Cong., 1st Sess. 49, 60 (1989).

When the Proclamation was proposed, this Office considered various issues relating to its legality. As to the possible effect of the Proclamation on domestic law, we opined:

> By its terms, the Proclamation will make clear that it is not intended to affect domestic law. Congress may, however, have enacted statutes that are intended to be linked to the extent of the United States' territorial sea under international law. The issue, therefore, in determining the effect of the proclamation on domestic law is whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea. Thus, the question is one of legislative intent.

Memorandum to Abraham D. Sofaer, Legal Advisor, Department of State, from Douglas W. Kmiec, Acting Ass't Att'y Gen., Office of Legal Counsel, re: Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 12 Op. O.L.C. 301, 323 (1988).

Our 1988 opinion invites the question whether Congress intended the INA, or particular sections of the INA, to track any changes in the bounds of the United States's territorial sea. We have therefore considered whether Congress intended the INA's definition of the "United States" at 8 U.S.C. § 1101(a)(38) to track, and conform to, changes in international law determining the extent of the United State's territorial sea. We believe that Congress had no such intent. . . .

We shall, however, assume arguendo that Congress intended the INA's definition of the "United States" to track changes in the extent of the United States's territorial sea recognized by international law. Cf. Argentine Republic v. Amerada Hess Shipping, 488 U.S. at 441 (suggesting by negative implication that if injury had occurred in territorial waters, it would have taken place within "United States" as defined in Foreign Sovereign Immunities Act of 1976). It still does not follow that exclusion proceedings must be provided for undocumented aliens interdicted within the twelve mile bounds that now comprise the territorial waters. An implicit enlargement of the INA's definition of the

"United States" to include the new territorial waters has no bearing on the scope of the statute's exclusion provisions, INA sections 225–226. As discussed above, these sections do not refer to the "United States" in any relevant way; rather, they refer to "the ports of the United States," and condition exclusion proceedings on arrival at such ports. In short, by enlarging the territorial waters, the Proclamation may also have extended the geographical scope of the "United States" under the INA; but it does not follow that aliens for whom exclusion proceedings need not previously have been provided have become entitled to them.

Furthermore, the Proclamation should have no impact on the procedural entitlements of undocumented aliens under the INA because the statute's only significant reference to the territorial waters occurs in a provision establishing the Government's power to deter illegal immigration rather than in any of the provisions establishing an alien's procedural rights in seeking to enter the United States. A computer search shows that the terms "territorial waters" or "territorial sea" are mentioned in only one section of title 8 (which includes the INA). That provision is section 287(a)(3) of the INA, 8 U.S.C. § 1357(a)(3), which authorizes the INS to conduct warrantless searches of vessels "within the territorial waters of the United States. . . ." The absence of any other use in the INA of the terms "territorial waters" or "territorial sea"—and particularly their absence in the detailed provisions governing the treatment of aliens seeking to enter the United States—strongly suggests that an alien's arrival or presence in the territorial waters is simply not a relevant consideration for establishing or expanding the rights of aliens seeking entry. Had Congress wanted to make mere entry into the territorial waters sufficient to guarantee the entrant an exclusion hearing, it could easily have written such language into an appropriate section of the INA, as it did elsewhere in the Act . . .

Accordingly, we conclude that Presidential Proclamation No. 5928 does not have the effect of requiring exclusion hearings to be provided to undocumented aliens interdicted within the territorial sea.

* * * *

c. Interdiction in internal waters

INS subsequently sought OLC's opinion as to whether aliens who were interdicted in U.S. internal waters but who had not landed or been taken ashore on United States dry land were entitled to exclusion proceedings or other proceedings under the INA. Answering in the negative, OLC noted that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") substantially amended the INA, ch. 477, 66 Stat. 163 (1952) (as amended at 8 U.S.C. §§ 1101–1503) (for a discussion of IIRIRA, *see* section C.2.d. *supra*). Section 304(a)(3) of IIRIRA (INA §§ 239,240, 8 U.S.C. § 1229, 1229a) replaced deportation and exclusion proceedings with "removal proceedings" available to "aliens treated as applicants for admission" as well as aliens who had been admitted to the United States. As defined under section 302(a) of the Reform Act (section 235 of the INA), the term "aliens treated as applicants for admission" included: "[a]n alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters)." Accordingly, OLC concluded: "Congress provided that the unlanded alien interdicted in United States waters must first be 'brought to' the United States—i.e., taken ashore to U.S. dry land—before he can be said to have 'arrived' there and before he acquires the right to be treated as an applicant for admission." Memorandum for David A. Martin, General Counsel, Immigration and Naturalization Service, from Richard L. Shiffrin, Deputy Assistant Attorney General, re: Rights of Aliens Found in U.S. Internal Waters (Nov. 21, 1996).

The memorandum is excerpted below. Most footnotes have been omitted. The full text of the memorandum is available at *www.usdoj.gov/olc/pft90.htm*.

---

* * * *

Your inquiry raises questions concerning undocumented aliens (i.e., those lacking a visa or other authorization for lawful entry into the United States) interdicted in the "internal waters" of the United States, which you define by reference to certain treaty and statutory definitions.[2] The internal waters thus defined could include, for example, such locations as the straits between the Florida Keys, portions of the Chesapeake Bay, or even the upper reaches of the Potomac River. For purposes of this analysis, we assume that the aliens in question are aboard a vessel in transit from another country to the United States but have not landed or disembarked on U.S. soil at the time of interdiction.

I.

Your initial question asks whether an undocumented alien interdicted in U.S. inland waters has effected an "entry" within the meaning of the INA and is thus entitled to deportation proceedings. In this regard, we note that the amendments to the INA enacted by the Reform Act have supplanted the significance of the technical term "entry" as a legal threshold for such procedural entitlements. . . .

* * * *

. . . Thus, the question whether an alien's presence on the internal waters constitutes an "entry" mandating "deportation" procedures no longer reflects the governing terminology and procedures. The relevant question now is whether such an alien qualifies as an "applicant for admission" under section 235(a)(1) of the INA, which provides as follows (emphasis added):

---

[2] The Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, Part I, § II, art. 5(1), 15 UST 1606, 1609, provides, "[w]aters on the landward side of the baseline of the territorial sea form part of the internal waters of the State." The related classification of "Inland Waters" is defined for purposes of domestic law under 33 U.S.C. § 2003(o) as "the navigable waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States and the waters of the Great Lakes on the United States side of the International Boundary."

> (1) *Aliens Treated as Applicants for Admission*.—An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and *including an alien who is brought to the United States after having been interdicted in* international or *United States waters*) shall be deemed for purposes of this Act an applicant for admission.

Thus, aliens who are "present in" or have "arrive[d] in" the United States are to be deemed "applicants for admission" and must be accorded the inspection, screening, and attendant procedures that will result in either admission, asylum, or removal. That raises the question whether an alien interdicted on a vessel in the internal waters of the United States, *before he has disembarked on U.S. land*, shall be deemed "present in the United States" or to have "arrived in the United States." We conclude that the wording of section 235 yields a negative answer to that question.

The underscored portion of section 235 contemplates the situation where an alien is "*brought to* the United States *after* having been interdicted in . . . *United States waters*." *Id*. (emphasis added). If an unlanded alien interdicted in United States waters—which would include the inland waters—still must be "brought to" the United States, it plainly follows that Congress did not regard such an alien as already present or arrived in the United States.[3] Rather, Congress provided that the unlanded alien interdicted in United States waters must first be "brought to" the

[3] This interpretation is consistent with the fact that the INA's current definition of "United States," 8 U.S.C. § 1101(a)(38), does not include waters or airspace subject to the jurisdiction of the United States. Moreover, as emphasized in one recent court of appeals opinion, "Nor can it be said that the current definition implicitly includes territorial waters." *Yang v. Maugans*, 68 F.3d at 1548. The court in *Yang*, noting that the definition of United States prior to the 1952 enactment of the INA *did* include "waters . . . subject to [U.S.] jurisdiction," ascribed considerable significance to the absence of "waters" from the current definition in concluding that the "physical presence" requirement of the former "entry" test is satisfied "only when an alien reaches dry land." *Id*. at 1548–49.

United States—i.e., taken ashore to U.S. dry land—before he can be said to have "arrived" there and before he acquires the right to be treated as an applicant for admission.

Given our conclusion that unlanded aliens interdicted on internal waters do not constitute "applicants for admission," and therefore need not be inspected or screened pursuant to section 235(b), it necessarily follows that such aliens are not entitled to removal proceedings (i.e., the amended INA's substitute for deportation proceedings) under section 240. Only those interdicted aliens who qualify as applicants for admission must be referred to removal proceedings if the examining officer determines that they are not "clearly and beyond a doubt entitled to be admitted." Reform Act § 302(a), INA § 235(b)(2)(A).[4] Those aliens who do not land on U.S. soil, in contrast, do not constitute applicants for admission and therefore need not be inspected or screened by an immigration officer.

Our conclusion on this issue is fortified by court decisions interpreting the analogous concept of "physical presence in the United States" in deciding whether aliens had effected an "entry" under the pre-Reform Act provisions of the INA. . . . [T]hose decisions hold that an arriving alien's mere presence on U.S. waters does not establish the requisite physical presence in the United States unless and until the alien has "landed" on U.S. soil. *Yang v. Maugans*, 68 F.3d at 1546–49; *Zhang v. Slattery*, 55 F.3d 732,

---

[4] We note that section 235(a)(3) of the amended INA provides, "All aliens (including alien crewmen) who are applicants for admission *or otherwise seeking admission* or readmission to or transit through the United States shall be inspected by immigration officers." (emphasis added) We do not believe unlanded aliens interdicted on U.S. internal waters constitute aliens "otherwise seeking admission" who must be inspected by immigration officers under this section. Unless that term is limited to those persons who *appear before* immigration officers in the United States (or at its border) seeking dmission, it would extend overinclusively to persons who may be hundreds or thousands of miles from the United States, but nonetheless "seek admission" to it. Requiring immigration officers to inspect all such persons would make no sense. *Cf. Xiao v. Reno*, 837 F. Supp. 1506, 1562 (N.D. Cal. 1993), *aff'd sub nom. Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996).

754 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1271 (1996) ("an alien attempting to enter the United States by sea has not satisfied the physical presence element . . . until he has landed"); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1343 (4th Cir. 1995) (Chen never entered the United States because he was apprehended "before he reached the shore").

* * * *

II.

The second question is whether an unlanded alien's apprehension within the internal waters constitutes an "arrest" for purposes of section 287(a)(2) of the INA, 8 U.S.C. § 1357(a)(2), and would therefore require the institution of exclusion proceedings —i.e., what are now removal proceedings under amended section 240. In particular, INS takes the view that such apprehension constitutes an arrest "at least when it involves the boarding of the vessel by United States officers, the forced diversion of the vessel at the command of United States officers, or the physical custody of an individual (for example after being pulled from the water)." INS Mem. at 4.

Absent any purpose to hold the alien in question for processing under the INA, prosecution, or for other legal proceedings, we do not view the apprehension of an unlanded alien under the circumstances you describe as an "arrest" and do not conclude that it would require the institution of removal proceedings under the INA.

Our 1994 Arrest Opinion concluded that "INS interdictions of aliens within the territorial waters *do not involve taking aliens into custody and holding them for further legal proceedings*, and are thus not 'arrests' as that term is naturally understood." Arrest Op. at 3 (emphasis added). The mere fact that such an interdiction of unlanded aliens takes place in the internal waters of the United States—e.g., on the straits of the Florida Keys—does not alter or undermine our conclusion on that point. Because such an alien has not landed in the United States, he is not "present," nor has he "arrived," in the United States within the meaning of section 235 of the INA. We therefore do not consider his pre-landing,

non-prosecutorial apprehension an "arrest" any more than if the apprehension occurred on non-internal territorial waters of the United States. Only if the interdicted alien is taken into custody and held *for the purpose of further immigration proceedings or prosecution*—as opposed to being held until the vessel is escorted or diverted out of United States waters—would an "arrest" result.[5]

* * * *

d. Asylum applications by migrants interdicted at sea

A number of Cubans and Haitians who were interdicted at sea while attempting to reach the United States in 1994 were transported to temporary safe haven at the United States military base at Guantánamo Bay. The Cubans and Haitians were given the option of voluntary repatriation. They were not, however, allowed to apply for admission to the United States as refugees. Nor were they permitted to apply for asylum in the United States. Cuban advocacy groups brought an action in the United States District Court for the Southern District of Florida seeking, *inter alia*, access to Cuban detainees to provide legal advice concerning asylum in the United States and an end to further repatriations of Cubans. Haitian advocate groups filed a separate lawsuit seeking access to all Haitian migrants at Guantánamo Bay, a grant of parole to all unaccompanied Haitian minors and the names of all Haitian migrants in safe haven. In a series of orders, the district court granted virtually all of the relief sought by the plaintiffs.

On December 19, 1994, the U.S. Court of Appeals for the Eleventh Circuit consolidated the two cases and stayed

[5] Of course, if the alien were taken ashore for some reason—i.e., if he were "brought to the United States" within the meaning of section 235(a)(1)—he would be deemed an "applicant for admission" and would have to be inspected and screened pursuant to section 235(b), which in some cases may lead in turn to asylum or removal proceedings.

the relief granted by the district court. In an opinion dated January 18, 1995, the Eleventh Circuit held that Guantánamo, a leased military base over which Cuba retained sovereignty, was outside the United States and not the "functional equivalent" of a land border or "port of entry." *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995). Pursuant to *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), the migrants in safe haven at Guantánamo therefore had no rights pursuant to Article 33 of the Refugee Protocol or 8 U.S.C. §1253(h). Nor did they have protectable liberty or property interests for purposes of the Fifth Amendment, because providing safe haven was a gratuitous humanitarian act that did not create even a putative liberty interest in securing asylum processing. The opinion is excerpted below; most of the footnotes have been omitted.

---

* * * *

1. Statutory and Constitutional Rights of Migrants in Safe Haven

The Cuban migrants and the Haitian migrants are asserting statutory rights under the Immigration and Naturalization Act, 8 U.S.C. §§ 1101–1503 ("INA") and the Refugee Convention. The individual Cuban plaintiffs in safe haven also assert rights under the Cuban Refugee Adjustment Act, 8 U.S.C. § 1255, and the Cuban Democracy Act, 22 U.S.C. §§ 6001–6010. The individual Haitian unaccompanied minor plaintiffs assert rights against discriminatory parole decisions under 8 U.S.C. § 1182. Additionally, the individual Cuban plaintiffs advance claims to Fifth Amendment rights of due process, and the individual Haitian migrants are asserting Fifth Amendment rights to due process and equal protection of the laws.

a. Status of Guantanamo Bay

The district court in this case relied upon Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993), vacated by

Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994) [hereinafter HCC], in entering its order granting the Cuban migrants meetings with lawyers upon request and barring repatriation of migrants without prior legal consultation. In the HCC case, the New York district court found that lawyers had a First Amendment right to free speech and association for engaging in legal consultation at Guantanamo Bay because it was a naval base over which the United States has "complete control and jurisdiction" and "where the government exercises complete control over all means of delivering communication." Id. at 1040. The district court here erred in concluding that Guantanamo Bay was a "United States territory." October 31 Order at 9. We disagree that "control and jurisdiction" is equivalent to sovereignty. See Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 26, 1903, U.S.-Cuba, T.S. No. 418 (distinguishing between sovereignty of the Republic of Cuba over the leased land and the "control and jurisdiction" granted the United States), reprinted in 6 Bevans 1113–15; cf. United States v. Spelar, 338 U.S. 217, 221–22, 70 S. Ct. 10, 12, 94 L. Ed. 3 (1949) (construing the Federal Tort Claims Act not to apply to an American military air base in Newfoundland because the lease between Newfoundland and the United States "effected no transfer of sovereignty with respect to the military bases concerned").

The Cuban Legal Organizations and HRC attempt to circumvent precedent in this circuit by arguing that Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir.) (per curiam), cert. denied, 502 U.S. 1122, 117 L. Ed. 2d 477, 112 S. Ct. 1245 (1992) [hereinafter "HRC II"], in contrast with the instant case, dealt solely with Haitians who were interdicted on the high seas and returned to Haiti by United States Coast Guard cutters. However, we also addressed the claims of Haitians who were interdicted on the high seas and then transported to Guantanamo Bay. See HRC II, 953 F.2d at 1514; id. at 1516–17 (Hatchett, J., dissenting). Based upon our holding in HRC II, 953 F.2d at 1510, we again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are "functionally equivalent" to being land borders or ports of entry of the United States or otherwise within the United

States.[11] Therefore, any statutory or constitutional claim made by the individual Cuban plaintiffs and the individual Haitian migrants must be based upon an extraterritorial application of that statute or constitutional provision.

b. Extraterritorial Application of Legislation and the Constitution

If the migrants have been provided rights by statute, we need not reach the constitutional questions urged upon us. However, because the Cuban Legal Organizations and HRC struggle to re-assert statutory claims foreclosed by HRC II and Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 113 S. Ct. 2549, 125 L. Ed. 2d 128 (1993), and fail to assert new meritorious statutory claims, we reach the constitutional issues as well.

We decided in HRC II, 953 F.2d at 1510, and the Supreme Court agreed in Sale, 113 S. Ct. at 2557–58, 2563, that the very same statutes and treaties regarding repatriation, Article 33 of the Refugee Convention, n.13 and the INA, specifically, 8 U.S.C. § 1253(h) n.14 and 8 U.S.C. § 1158(a) do not apply extraterritorially. In HRC II, we unequivocally held that the interdicted Haitians could not claim any rights under sections 1253(h) or 1158(a). We further concluded that:

> the interdicted Haitians [on Coast Guard cutters and at Guantanamo Bay] have none of the substantive rights—under . . . the 1967 United Nations Protocol Relating to the Status of Refugees, the Immigration and Naturalization Service Guidelines, the Refugee Act of 1980, the Immigration and Nationality Act, or international law—that they claim for themselves or that the HRC claims for them.

---

[11] Panama regained sovereignty over the Panama Canal Zone and the area where the United States maintains military installations by the Panama Canal Treaty of 1977. Panama Canal Treaty, Sept. 7, 1977, U.S.-Pan., art. III, § 1, art. IV, § 2, 33 U.S.T. 39; Panama Canal Treaty, Implementation of Article IV, Sept. 7, 1977, U.S.-Pan., art. I, annex A, 33 U.S.T. 307.

HRC II, 953 F.2d at 1513 n.8 (emphasis added). These laws, which govern repatriation of refugees, bind the government only when the refugees are at or within the borders of the United States. See id. at 1509–10. Therefore, the claims asserted by the migrants under the INA and under Article 33 continue to be untenable.

The individual Cuban plaintiffs attempt to utilize the Cuban Refugee Adjustment Act, 8 U.S.C. § 1255, and the Cuban Democracy Act, 22 U.S.C. §§ 6001–6010, to assert the right of the Cuban migrants to seek parole and asylum in the United States. While these acts acknowledge the political climate in Cuba, provide for economic sanctions for dealing with Cuba, and allow for certain rights for Cubans who reach the United States, they do not address the rights of Cuban migrants to enter or to seek entry to the United States initially, nor do they confer directly any rights upon the Cuban migrants outside the United States. Hence, neither of these acts can be relied upon by the individual Cuban plaintiffs to assert a right against repatriation or to seek parole or asylum in the United States from safe haven.

Right to Counsel

The individual Cuban plaintiffs and the individual Haitian migrants claim a due process right to obtain and communicate with legal counsel of their choice regarding asylum application or parole in order to protect an interest against being wrongly repatriated from safe haven. In order for the migrants to have a right to counsel, they must first have a protectable liberty or property interest. See Board of Regents v. Roth, 408 U.S. 564, 569–572, 92 S. Ct. 2701, 2705–06, 33 L. Ed. 2d 548 (1972). The Executive Branch has made the policy decision not to offer preliminary refugee determination interviews, or "screening" to the Cuban or Haitian migrants. In previous Haitian migrant cases, migrants who had been held to have a liberty interest to which due process could attach were "screened-in" by the government. . . .

. . . The migrants in this case have not been "screened in" or otherwise processed for asylum. By bringing the migrants to safe haven, the government has not created any protectable liberty

or property interest against being wrongly repatriated and the migrants may not rest a claim of right of counsel and information on the due process clause.

Unaccompanied Minor Haitians' Right to Parole

The individual unaccompanied minor Haitian migrants are asserting statutory and constitutional equal protection claims to be paroled into the United States on the same basis that unaccompanied minor Cubans have been or may be paroled into the United States. The unaccompanied minor Haitian migrants claim that the Attorney General has abused her discretion under the INA, 8 U.S.C. § 1182, by paroling in Cuban unaccompanied minors but not Haitian unaccompanied minors. While this claim is not dependent upon the extraterritorial application of the statute, it fails nonetheless. We agree with our en banc court's statement in Jean v. Nelson, 727 F.2d 957, 981–82 (11th Cir. 1984) (en banc) [hereinafter "Jean I"], aff'd on other grounds, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985) [hereinafter "Jean II"], that "there is little question that the Executive has the power to draw distinctions among aliens based on nationality." Jean I, 727 F.2d at 978 n.30; see generally, Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (1990), reprinted in 8 U.S.C. § 1157. This authority extends both to the President of the United States and to the Attorney General. n.19 Jean I, 727 F.2d at 978. Aliens may be excluded or denied parole on grounds that might be "suspect in the context of domestic legislation," because "there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their admissibility." Id. at 965 n.5. Here, the Attorney General has exercised her discretion on the legitimate basis of the very different political climates in Haiti, under the newly restored democratic President Jean-Bertrand Aristide on the one hand, and in Cuba, under the regime of Fidel Castro on the other. See Garcia-Mir v. Smith, 766 F.2d 1478, 1492 (11th Cir. 1985) (per curiam) (holding Attorney General need only assert a " 'facially legitimate and bona fide' " reason for a parole decision (quoting Jean I, 727 F.2d at 977)), cert. denied,

475 U.S. 1022, 106 S. Ct. 1213, 89 L. Ed. 2d 325 (1986). Thus, we hold that the statutory claims made by the unaccompanied minor Haitian migrants are without merit and cannot justify an injunction directing the government to parole them into the United States. Because we conclude that the statute alleged does not protect the unaccompanied Haitian minors, we address their constitutional equal protection claim.

In Jean I, we held that unadmitted and excludable aliens "cannot claim equal protection rights under the Fifth Amendment, even with regard to challenging the Executive's exercise of its parole discretion." 727 F.2d at 970 (emphasis added). The plaintiffs in Jean I could not "challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole, on the basis of the rights guaranteed by the United States Constitution," id. at 984, because they had "no constitutional rights with regard to their applications," id. at 968; accord Landon v. Plasencia, 459 U.S. 21, 32, 103 S. Ct. 321, 329, 74 L. Ed. 2d 21 (1982) ("The power to admit or exclude aliens is a sovereign prerogative."); cf. Perez-Perez v. Hanberry, 781 F.2d 1477, 1479 (11th Cir. 1986) ("The world is not entitled to enter the United States as a matter of right."). The individual unaccompanied Haitian migrants here, who are outside the borders of the United States, can have no greater rights than aliens in Jean I who were physically present in the United States. See Landon, 459 U.S. at 32, 103 S. Ct. at 329 ("However, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

In HRCII, we concluded that the interdicted Haitians on Coast Guard cutters and at Guantanamo Bay did not possess any of the statutory rights they claimed under the INA and the Refugee Convention, or the constitutional rights they claimed under the due process clause of the Fifth Amendment, and the First Amendment. HRC II, 953 F.2d at 1503, 1511 n.6 (agreeing with the district court that the Haitian migrants had no "correlative First Amendment rights of their own"). Our decision that the Cuban and Haitian migrants have no First Amendment or Fifth Amendment rights which they can assert is supported by the Supreme Court's decisions declining to apply extraterritorially

either the Fourth Amendment, United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75, 110 S. Ct. 1056, 1066, 108 L. Ed. 2d 222 (1990) (rejecting Fourth Amendment limits to search and seizure of property owned by a non-resident alien conducted in Mexico by United States agents), or the Fifth Amendment, Johnson v. Eisentrager, 339 U.S. 763, 784, 70 S. Ct. 936, 947, 94 L. Ed. 1255 (1950) (rejecting claim that aliens outside the sovereign territory of the United States are entitled to Fifth Amendment rights). Cf. Reid v. Covert, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957) (plurality opinion) (holding the right to a jury trial applies to an American citizen abroad being tried by a United States military court (narrowest holding)). Clearly, aliens who are outside the United States cannot claim rights to enter or be paroled into the United States based on the Constitution.

Therefore, any right to equal protection of the laws, due process, or rights under the INA or the Refugee Convention now asserted by the Haitian and Cuban migrants are not cognizable. Thus, neither group of migrants could have a "substantial likelihood of success on the merits" which is a necessary predicate to the grant of injunctive relief. The district court erred in granting relief to the individual Cuban and Haitian migrants.

* * * *

2. Eligibility for Asylum

a. Persecution "on account of" race, religion, nationality, membership in a particular social group, or political opinion

In *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992), the U.S. Supreme Court held that an individual's statement that he had resisted forced conscription by a guerrilla group was not sufficient to establish that he had a "well-founded fear" of persecution based on "political opinion" and qualify him for asylum. The individual had to show that his fear of persecution was based on his political opinion, not that of the guerrillas, and a desire not to take sides between

the government and the guerrillas did not constitute a "political opinion." The decision is excerpted below (footnotes omitted).

---

* * * *

Respondent Elias-Zacarias, a native of Guatemala, was apprehended in July 1987 for entering the United States without inspection. In deportation proceedings brought by petitioner Immigration and Naturalization Service (INS), Elias-Zacarias conceded his deportability but requested asylum and withholding of deportation.

* * * *

Section 208(a) of the Immigration and Nationality Act, 8 U. S. C. § 1158(a), authorizes the Attorney General, in his discretion, to grant asylum to an alien who is a "refugee" as defined in the Act, *i.e.*, an alien who is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." § 101(a)(42)(A), 8 U. S. C. § 1101(a)(42)(A). See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 423, 428, n. 5, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987). The BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." 8 U. S. C. § 1105a(a)(4). It can be reversed only if the evidence presented by Elias-Zacarias was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed. *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 83 L. Ed. 660, 59 S. Ct. 501 (1939).

The Court of Appeals found reversal warranted. In its view, a guerrilla organization's attempt to conscript a person into its military forces necessarily constitutes "persecution on account of . . . political opinion," because "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." 921 F.2d at 850. The first half of this seems to us untrue, and the second half irrelevant.

Even a person who supports a guerrilla movement might resist recruitment for a variety of reasons—fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few. The record in the present case not only failed to show a political motive on Elias-Zacarias' part; it showed the opposite. He testified that he refused to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously *believed* that Elias-Zacarias' refusal was politically based.

As for the Court of Appeals' conclusion that the guerrillas' "motive in carrying out the kidnapping is political": It apparently meant by this that the guerrillas seek to fill their ranks in order to carry on their war against the government and pursue their political goals. See 921 F.2d at 850 (citing *Arteaga* v. *INS*, 836 F.2d 1227, 1232, n. 8 (CA9 1988)); 921 F.2d at 852. But that does not render the forced recruitment "persecution on account of . . . political opinion." In construing statutes, "we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9, 7 L. Ed. 2d 492, 82 S. Ct. 585 (1962); see *Cardoza-Fonseca, supra*, at 431; *INS* v. *Phinpathya*, 464 U.S. 183, 189, 78 L. Ed. 2d 401, 104 S. Ct. 584 (1984). The ordinary meaning of the phrase "persecution on account of . . . political opinion" in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion. Thus, the mere existence of a generalized "political" motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion, as § 101(a)(42) requires.

Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so, since we do not agree

with the dissent that only a "narrow, grudging construction of the concept of 'political opinion,'" *post*, at 487, would distinguish it from such quite different concepts as indifference, indecisiveness, and risk averseness. But we need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion. Even if it does, Elias-Zacarias still has to establish that the record also compels the conclusion that he has a "well-founded fear" that the guerrillas will persecute him *because of* that political opinion, rather than because of his refusal to fight with them. He has not done so with the degree of clarity necessary to permit reversal of a BIA finding to the contrary; indeed, he has not done so at all.

Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial. And if he seeks to obtain judicial reversal of the BIA's determination, he must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution. That he has not done.

* * * *

b. "Persecution" does not require subjective intent to harm

In *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997), the U.S. Court of Appeals for the Ninth Circuit reversed the Board of Immigration Appeals ("BIA") denial of asylum to a woman who requested asylum based on her fear of persecution on account of her political opinions and support of lesbian and gay rights in Russia. The BIA found that involuntary psychiatric treatment imposed on her by Russian militia and psychiatric institutions were not persecution, because they were intended to "cure" her and not to punish her. The court of appeals disagreed, as excerpted below (footnotes omitted), holding that subjective intent to punish was not a requirement for actions to constitute "persecution."

---

* * * *

I. Alla Pitcherskaia is a 35 year old native and citizen of Russia. She entered the United States as a visitor for pleasure on March 22, 1992, with authorization to remain for six months. On June 2, 1992, she applied for asylum on the basis that she feared persecution on account of her own and her father's anti-Communist political opinions. After a complete interview, the Immigration and Naturalization Service Asylum Office found that she was credible and that she had suffered past persecution. However, it found that she failed to establish a well-founded fear of future persecution and denied her application. She was placed in deportation proceedings for overstaying her visa.

Pitcherskaia renewed her request for asylum and withholding of deportation, under sections 208(a) and 243(h) of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. §§ 1158(a) and 1243(h). In this application, she claimed an additional basis for granting her petition—that she was persecuted and feared future persecution on account of her political opinions in support of lesbian and gay civil rights in Russia, and on account of her membership in a particular social group: Russian lesbians. . . .

* * * *

Pitcherskaia's father was an artist and political dissident. As a result of his antigovernment activities, he was arrested and imprisoned numerous times during Pitcherskaia's childhood until 1972 when he died in prison. Pitcherskaia testified that, because of her father's anticommunist activities, she has been under the control and surveillance of the police for her entire life.

* * * *

In 1985 or 1986, Pitcherskaia's ex-girlfriend was forcibly sent to a psychiatric institution for over four months, during which time she was subjected to electric shock treatment and other so-called "therapies" in an effort to change her sexual orientation. Pitcherskaia testified that while she was visiting this woman at the psychiatric institution, she was grabbed by the militia, forcibly taken to a doctor's office and questioned about her sexual orientation. She was permitted to leave only after she provided a false address outside the jurisdiction of the clinic. Although she denied

being a lesbian, the clinic registered her as a "suspected lesbian" and told her she must undergo treatment at her local clinic every six months. When she failed to show up for these outpatient sessions, she received a "Demand for Appearance." She testified that if she failed to comply, the militia would threaten her with forced institutionalization and forcibly take her from her home to the sessions.

Pitcherskaia testified that she attended eight of these "therapy" sessions. During these sessions, Pitcherskaia continued to deny that she was a lesbian. However, she was officially diagnosed with "slow-going schizophrenia," a catchall phrase often used in Russia to "diagnose" homosexuals. The psychiatrist prescribed sedative drugs, which Pitcherskaia never took. On one occasion, the psychiatrist tried to hypnotize her.

On two separate occasions, in 1990 and 1991, Pitcherskaia was arrested while in the homes of gay friends and taken to prison overnight. She received several "Demands for Appearance" when the militia sought to interrogate her about her sexual orientation and political activities. In 1991, she was interrogated about her activities with a gay and lesbian political organization—the "Union of Coming Out"—that had been denied legal recognition by the government.

Since her arrival in the United States, Pitcherskaia has received two more "Demands for Appearance" from the militia that were delivered at her mother's residence. Since she did not respond to the two recent Demands, Pitcherskaia fears that the militia will carry out their previous threats and forcibly institutionalize her if she returns to Russia.

* * * *

[II.] B. The Definition of *Persecution* is Objective

The majority of the Board required that Pitcherskaia prove that the Russian authorities intended to harm or punish her. While acknowledging that forced institutionalization, electroshock treatments, and drug injections could constitute persecution, *see e.g., Sagermark v. INS*, 767 F.2d 645, 650 (9th Cir. 1985) (suggesting that involuntary and unjust confinement to a mental institution

may constitute persecution), the BIA majority concluded that because here the "involuntary treatment and confinement [were] intended to treat or cure the supposed illness, not to punish," Pitcherskaia had not been persecuted nor did she have a well-founded fear of persecution. For the following reasons we conclude that in requiring Pitcherskaia to prove intent to harm or punish as an element of persecution, the BIA majority erred.

Although many asylum cases "involve[] actors who had a subjective intent to punish their victims . . . this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution." *In re Fauziya Kasinga*, Int. Dec. 3278 at 12 (BIA June 13, 1996) (en banc) (designated as precedent by the BIA). Neither the Supreme Court nor this court has construed the Act as imposing a requirement that the alien prove that her persecutor was motivated by a desire to punish or inflict harm.

We have defined "persecution" as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (citing *Sagermark*, 767 F.2d at 649). This definition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem "offensive." That the persecutor inflicts the suffering or harm in an attempt to elicit information, as in *Nasseri v. Moschorak*, 34 F.3d 723, 724–25 (9th Cir. 1994), for his own sadistic pleasure, as in *Lopez-Galarza, supra*, to "cure" his victim, or to "save his soul" is irrelevant. Persecution by any other name remains persecution.

Motive of the alleged persecutor is a relevant and proper consideration only insofar as the alien must establish that the persecution is inflicted on him or her "on account of" a characteristic or perceived characteristic of the alien. *See Elias-Zacarias*, 502 U.S. 478 at 481, 117 L. Ed. 2d 38, 112 S. Ct. 812. The BIA majority misconstrues this motive requirement. *Elias-Zacarias* does not require an alien to provide evidence that his persecutor's motive was to inflict harm and suffering in an effort to punish. It is the characteristic of the *victim* (membership in a group, religious or political belief, racial characteristic, etc.), not that of the *persecutor*, which is the relevant factor. *Id.* at 482 (the

ordinary meaning of persecution on account of political opinion "is persecution on account of the victim's political opinion, not the persecutor's").

* * * *

The Board has defined "persecution" as "the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim." *Kasinga*, at 12. This "'seeking to overcome' formulation has its antecedents in concepts of persecution that predate the Refugee Act of 1980." *Id.* The BIA majority, however invokes two prior BIA rulings, *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987) and *Matter of Acosta*, 19 I. & N. Dec. 211, 226 (BIA 1985), both of which speak in terms of an "intent to punish." To establish a well-founded fear of persecution, these cases require that an applicant for asylum establish that: "(1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of *punishment* of some sort; (2) the persecutor is already aware, or could . . . become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of *punishing* the alien; and (4) the persecutor has the inclination to *punish* the alien." *Mogharrabi*, 19 I. & N. Dec. at 446 (quoting *Acosta*, 19 I. & N. Dec. at 226) (emphasis added). This test confuses *punishment* and *persecution*. The two concepts are not coterminous.

Although we have held that unreasonably severe punishment can constitute "persecution," see *Rodriguez-Roman v. INS*, 98 F.2d 416, 430 (9th Cir. 1996), "punishment" is neither a mandatory nor a sufficient aspect of persecution. *See e.g., Fisher*, 79 F.3d at 963 (punishment for violation of enforcement of offensive regulations does not constitute persecution within the meaning of the INA). Webster defines to *punish* as "(1) To afflict with pain, loss, or suffering for a crime or fault; to chasten. (2) To inflict a penalty for (an offense) upon the offender." *Webster's New Collegiate Dictionary* 685 (Second Edition 1956). To *persecute*, in contrast, is defined as "(1) To pursue in a manner to injure; . . . to cause to suffer because of belief, esp. religious belief. (2) To afflict, harass, or annoy. . . ." *Id.* at 628. Hence, punishment implies that

the perpetrator believes the victim has committed a crime or some wrong; whereas persecution simply requires that the perpetrator cause the victim suffering or harm. To the extent that *Acosta* and *Mogharrabi* require an alien to prove the persecutor harbored a subjective intent to punish, we reject their holdings.

* * * *

The fact that a persecutor believes the harm he is inflicting is "good for" his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution. The BIA majority's requirement that an alien prove that her persecutor's subjective intent was punitive is unwarranted. Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as "curing" or "treating" the victims.

* * * *

c. Political opinion—China "one child" policy

In cases brought before 1997, the Board of Immigration Appeals and federal courts consistently held that sanctions imposed under China's "one child" family planning policy were not persecution "on account of political opinion" and were not a basis for a grant of political asylum. *See, e.g., Chen v. INS*, 95 F.3d 801 (9th Cir. 1996); *Jia-Ging Dong v. Slattery*, 84 F.3d 82 (2d Cir. 1996); *Xin-Chang Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996); *Chen Zhou Chai v. Carrol*, 48 F.3d 1331 (4th Cir. 1995); *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989).

In reaction to these decisions, Congress in 1997 amended the definition of "refugee" contained in § 101(a)(42) of the INA (8 U.S.C. § 1101(a)(42)) as follows:

> . . . a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population

> control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Section 601(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), contained in Division C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009–546 (1996).

Following enactment of § 601(a)(1), the U.S. Court of Appeals for the Fourth Circuit affirmed a BIA holding that a Chinese student from Shanghai who claimed he would be subject to forced sterilization, imprisonment, professional restrictions, fines, and educational and housing costs upon his return to China with a third child born in the United States had not established that a reasonable person in his circumstances would fear persecution. *Yong Hao Chen v. INS*, 195 F.3d 198 (4th Cir. 1999). In rejecting his claim, the court of appeals highlighted the lack of negative consequences when the applicant's second child was born in China, a State Department report that couples returning to Shanghai from university study abroad had been excused from any penalties, and the fact that the monetary penalties the applicant might face did not meet the "deliberate imposition of substantial economic disadvantage" standard necessary for economic deprivation to constitute persecution. The Fourth Circuit decision is excerpted below.

---

* * * *

Chen and Wei Kai Li's second child (Chen's third) was born in the United States in July 1993. The couple testified that there would be severe repercussions for them if they returned to China with another child. They speculated that they would be forced to undergo sterilization, imprisoned, professionally restricted, and

severely fined. They also expressed generalized fears about what their American-born son's status would be if they were forced to return, claiming that his access to educational opportunities and housing would be limited. The couple pointed to the fact that they had already sent money back to China to pay fines associated with their older child, although Chen's testimony suggested that these were merely fees for the cost of the child's housing and education. Chen also submitted a 1995 report by Human Rights in China, which describes severe repercussions for some families in violation of China's "one child" policy, including beatings and forced surgeries.

The INS, in arguing that Chen has no objective basis for his fears of persecution, submitted a 1995 State Department report on conditions in China. The report indicates that although forced abortions and sterilizations still occur, these practices have been on the decline since the mid-1980's, and they are increasingly limited to rural areas. Instead, according to the report, the "one child" policy "relies on education, propaganda and economic incentives as well as more coercive measures, including psychological pressure and economic penalties." Furthermore, the report cites interviews with family planning officials from Shanghai—Chen and Wei Kai Li's home city—in which the officials explained that couples returning from university study abroad with an additional child have been "excused" from paying any penalty or have paid only fees commensurate with the cost of housing and educating the child.

* * * *

. . . . Chen maintains that [the 1997 "refugee"] amendment entitles him to refugee status because he has a well-founded fear that he will be forced to undergo an involuntary sterilization procedure or that he will be subject to persecution for his refusals to undergo such a procedure.

* * * *

In amending the Immigration and Nationality Act, Congress included three additional classes of individuals in the definition of "refugee": 1) persons who had been forced to undergo an

involuntary sterilization or abortion; 2) persons who had been persecuted for refusing to undergo such a procedure or for other resistance to a coercive population control program; and 3) persons who have a well-founded fear of being subjected to a coercive population control program. See 8 U.S.C.A. § 1101(a)(42). By including applicants with a "well founded fear" of persecution as a distinct category, Congress directed that an individual in fear of a population control program would be able to qualify for refugee status even in the absence of a showing of past persecution.

For applicants seeking refuge from China's "one child" policy, the statute thus requires the Board, and ultimately the courts, to make judgments about the state of enforcement of a policy with contours that have been only partially disclosed, in a vast and diverse society on another continent. Tellingly, the State Department report on China, offered by the INS here, records conflicting insights from informants, breaks down its analysis by province and region, and offers only tentative conclusions. The asylum applicant who has suffered no past persecution will often be at great remove from what we would ordinarily consider "concrete" evidence. Yet that applicant may nonetheless have an objectively well-founded fear of future persecution under the "one child" policy.

It does not appear that any other court has yet been asked to evaluate a claim of a well-founded fear of a coercive population control program under the amended statute. However, courts have considered the quantum of evidence necessary to establish a well-founded fear of persecution on account of political opinion. In Cardoza-Fonseca, the Supreme Court rejected the INS's contention that the applicant must prove a "clear probability of persecution" if returned to his home country. 480 U.S. at 430. Rather, the Court explained, "one can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place. Id. at 431. We have never quantified precisely what is necessary to demonstrate a well-founded fear of persecution, cf. Montecino v. INS, 915 F.2d 518, 520 (9th Cir. 1990) (showing of 10% chance would be sufficient), but we have recognized that an individual can demonstrate such a fear by

showing that a reasonable person in like circumstances would fear persecution. See Huaman-Cornelio, 979 F.2d at 999; MA, 899 F.2d at 311.

Asylum petitioners who have not suffered past persecution have been able to establish a well-founded fear of future persecution when they have offered some evidence that they would be individually targeted, because of their particular status or role in their home country, for persecution on one of the statutorily defined grounds. . . . The "well founded fear" standard, however, does not require an asylum petitioner to show that he will be individually targeted, or "singled out," for persecution. See C.F.R. § 208.13(b)(2) (INS "shall not require the applicant to provide evidence that he or she would be singled out individually for persecution if . . . there is a pattern or practice . . . of persecution of a group of persons similarly situated" and the applicant establishes inclusion in such group). Thus, asylum petitioners have also been able to demonstrate a well-founded fear by showing that they belong to a broader class of individuals that has been subjected to systematic persecution. . . . The key for the applicant is to show the thorough or systematic nature of the persecution he fears.

Individual targeting and systematic persecution do not necessarily constitute distinct theories. Rather, an applicant will typically demonstrate some combination of the two to establish a well-founded fear of persecution. . . . Conversely, a stronger showing of individual targeting will be necessary where the underlying basis for the applicant's fear is membership in a diffuse class against whom actual persecution is haphazard and rare.

Congress's amended definition of "refugee" instructs the INS to consider, as the underlying basis for the asylum claim at issue here, membership in an extraordinarily large and diffuse class of individuals—persons subject to the coercive enforcement of China's "one child" population control policy. The Chinese government and its local agents, according to the State Department, impose these measures in a far from systematic way, and with decreasing frequency. As a result, an applicant must proffer some additional evidence that his fears of this policy are objectively reasonable. Unless the individual can offer persuasive evidence that, contrary

to the State Department report, coerced abortions and sterilizations continue to systematically occur, he must come forward with some additional evidence of the risk posed by a return to China. For example, he must show that he has been individually targeted for coercive enforcement of the "one child" program or that he belongs to some subgroup, such as those residing in a particular province or region, against whom coercive enforcement of the "one child" program remains systematic.

In this case, viewing the administrative record as a whole, we must conclude that substantial evidence supports the Board's decision. Chen offered no evidence that seriously contested the findings of the State Department regarding the current enforcement status of the "one child" policy. Although the Human Rights in China report offered by Chen details horrific practices that continue to take place, the report does not contradict the State Department's conclusion that the practice of forced sterilization is uncommon and increasingly limited to rural areas. The Human Rights in China report does not present a picture of systematic persecution under the "one child" policy.

* * * *

d. Membership in a particular social group—female genital mutilation

(1) In re Kasinga

The Board of Immigration Appeals (BIA) held in *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), excerpted below, that the practice of female genital mutilation ("FGM"), which results in permanent disfiguration and poses a risk of serious, potentially life-threatening complications, can constitute "persecution" for the purposes of eligibility for asylum. The BIA granted asylum to a woman from a tribe in Togo that practices FGM who had not yet been subjected to female genital mutilation, based on conclusions that she was a "member of a particular social group"—women of her tribe who had not had FGM and who oppose the practice—and

had a well-founded fear of persecution based on membership in that social group.

---

* * * *

According to the applicant's testimony, the FGM practiced by her tribe, the Tchamba-Kunsuntu, is of an extreme type involving cutting the genitalia with knives, extensive bleeding, and a 40-day recovery period . . . The background materials confirm that the FGM practiced in some African countries, such as Togo, is of an extreme nature causing permanent damage, and not just a minor form of genital ritual . . .

The record material establishes that FGM in its extreme forms is a practice in which portions of the female genitalia are cut away. In some cases, the vagina is sutured partially closed. This practice clearly inflicts harm or suffering upon the girl or woman who undergoes it.

FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can aversely affect sexual and erotic functions . . .

The FGM Alert, compiled and distributed by the INS Resource Information Center, notes that "few African countries have officially condemned female genital mutilation and still fewer have enacted legislation against the practice." FGM Alert, supra, at 6. Further, according to the FGM Alert, even in those few African countries where legislative efforts have been made, they are usually ineffective to protect women against FGM. The FGM Alert notes that "it remains practically true that [African] women have little legal recourse and may face threats to their freedom, threats or acts of physical violence, or social ostracization for refusing to undergo this harmful traditional practice or for attempting to protect their female children." . . .

* * * *

. . . We agree with the parties that this level of harm can constitute "persecution" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (1994).

While a number of descriptions of persecution have been formulated in our past decisions, we have recognized that persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of a victim. See Matter of Acosta, 19 I&N Dec. 211, 222–23 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I &N Dec. 439 (BIA 1987). The "seeking to overcome" formulation has its antecedents in concepts of persecution that predate the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102. See, e.g., Matter of Diaz, 10 I&N Dec. 199, 204 (BIA 1963).

As observed by the INS, many of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective "punitive" or "malignant" intent is not required for harm to constitute persecution. See Matter of Kulle, 19 I&N Dec. 318 (BIA 1985); Matter of Acosta, supra.

* * * *

To be a basis for a grant of asylum, persecution must relate to one of five categories described in section 101(a)(42)(A) of the Act. The parties agree that the relevant category in this case is "particular social group.". . . .

In the context of this case, we find the particular social group to be the following: young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice . . .

The defined social group meets the test we set forth in Matter of Acosta, supra, at 233. See also Matter of H—, Interim Decision 327 (BIA 1996) (finding that identifiable shared ties of kinship warrant characterization as a social group). It also is consistent with the law of the United States Court of Appeals for the Third Circuit, where this case arose. Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993) (stating that Iranian women who refuse to conform

to the Iranian Government's gender-specific laws and social norms may well satisfy the Acosta definition).

In accordance with Acosta, the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. The characteristics of being a "young woman" and a "member of the Tchanba-Kunsuntu Tribe" cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.

* * * *

To be eligible for asylum, the applicant must establish that her well-founded fear of persecution is "on account of" one of the five grounds specified in the Act, here, her membership in a "particular social group." . . .

Both parties have advanced, and the background materials support, the proposition that there is no legitimate reason for FGM . . . [T]he practice has been condemned by such groups as the United Nations, the International Federation of Gynecology and Obstetrics, the Council on Scientific Affairs, the World Health Organization, the International Medical Association, and the American Medical Association.

Record materials state that FGM "has been used to control woman's sexuality," FGM Alert, supra, at 4. It also is characterized as a form of "sexual oppression" that is "based on the manipulation of women's sexuality in order to assure male dominance and exploitation." Toubia, supra, at 42 (quoting Raqiya Haji Dualeh Abdalla, Somali Women's Democratic Organization). During oral argument before us, the INS General Counsel agreed with the later characterization . . . He also stated that the practice is a "severe bodily invasion" that should be regarded as meeting the asylum standard even if done with "subjectively benign intent" . . .

We agree with the parties that, as described and documented in this record, FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM. We

therefore find that the persecution the applicant fears in Togo is "on account of" her status as a member of the defined social group.

* * * *

(2) Abankwah v. INS

In *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999), the U.S. Court of Appeals for the Second Circuit reversed a decision of the BIA that a Ghanaian woman's fear of FGM was not sufficiently grounded in reality to satisfy the objective element of the test for well-founded fear of persecution. The woman had testified that she had engaged in premarital sex, and was in line to become the "Queen Mother" of a tribe that practiced FGM upon designated Queen Mothers who were not virgins. The court of appeals found her testimony credible and "particularly" compelling in light of a 1997 State Department report stating that, although Ghana criminalized FGM in 1994, the number of prosecutions had been insignificant, and between 15 and 20 percent of all women and girls in Ghana had been subjected to FGM. The decision is excerpted below, without footnotes.

---

* * * *

. . . Abankwah entered the United States illegally on March 29, 1997. She sought asylum on the ground that if she returns to Ghana, her tribe will inflict female genital mutilation ("FGM") on her as a punishment for having engaged in premarital sex. Abankwah also sought withholding of deportation under Section 243(h)(1) of the Act. 8 U.S.C. § 1253(h)(1) (1994). The Board of Immigration Appeals ("BIA") concluded that Abankwah failed to demonstrate an objectively reasonable fear that her tribe will subject her to FGM, and, consequently, to establish her eligibility for asylum.

For the reasons set forth below, we reverse the denial of asylum and the denial of the application for withholding of deportation

and remand for further proceedings not inconsistent with this opinion.

Background

. . . Abankwah is a twenty-nine year old native of Ghana and a member of the Nkumssa tribe, which is located in the central region of Ghana. The Nkumssa tribe condemns women who engage in premarital sex and punishes them through FGM. The type of FGM practiced in Ghana "involves the amputation of the whole of the clitoris and all or part of the labia minora."

Abankwah testified that her mother had held the position of Queen Mother within the Nkumssa tribe. . . . , that her mother died in July 1996, and that, as the eldest daughter, she was to become the next Queen Mother. . . .

Nkumssa tradition requires that the girl or woman next in line for the Queen Mother position must remain a virgin until she is "enstooled." . . . [I]f the woman is believed not to be a virgin, she will be forced to undergo FGM.

. . . While she was at school, Abankwah fell in love with a man from her tribe and commenced a sexual relationship with him. When Abankwah learned that she would be the next Queen Mother, she knew that her lack of virginity would be discovered and that FGM would be the consequence.

In an effort to avoid this result, Abankwah fled to the capital city of Accra to live with the family of a friend [and then] fled to the United States.

* * * *

C. Abankwah Has Established a Well Founded Fear of FGM

* * * *

The practice of FGM has been internationally recognized as a violation of women's and female children's rights. See, e.g., Report of the Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 14, U.N. GAOR, 45th Sess., Supp. No. 38, at 80, p. 438, U.N. Doc. A/45/38; The Beijing Declaration and The Platform for Action, Fourth

World Conference on Women, Beijing, China, 4–15 September 1995, U.N. Doc. DPI/1776/Wom (1996) pp. 112–113.

The practice of FGM has also been criminalized under federal law. See 18 U.S.C. § 116 (Supp. II 1996). In September 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress determined that whoever "knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained 18 years" shall be fined or imprisoned. The statute went into effect in April, 1997. It exempts certain medical procedures "necessary" to the health of a person when performed by a medical practitioner, but specifically notes that no account may be taken of a cultural belief that the practice is necessary. The congressional findings note the "physical and psychological health effects that harm the women involved." Pub.L. 104–208, § 645(a), 110 Stat. 3009–546 (1996). That FGM involves the infliction of grave harm constituting persecution under Section 101 (a)(42)(A) of the Act, 8 U.S.C. § 1101 (a)(42)(A) (1994), is not disputed here. See Kasinga, 1996 WL 379826.

1. Abankwah's Fear of FGM is Subjectively Real

The record as it stands establishes that Abankwah genuinely fears persecution if she returns to Ghana. Thus, there are no credibility issues before us. . . .

2. Abankwah Has Established an Objectively Reasonable Fear of FGM

The inquiry here is whether the record compels the conclusion that Abankwah's fear is objectively reasonable. The BIA found that Abankwah failed to present sufficient evidence to support her claim that she will be punished by FGM for having engaged in premarital sex. The BIA discounted the declaration of Kwabena Otumfuor as "not based on personal knowledge," "incomplete," and because it did not establish that the declarant "is an expert in the traditions of the applicant's tribe." With respect to the affidavit and testimony of Victoria Otumfuor ("Otumfuor"), the BIA noted

that Otumfuor testified that she did not know "a great deal" about the Nkumssa tribe, that she could not testify with certainty that the Nkumssa tribe practiced FGM as punishment, and that in her own tribe a person who had engaged in premarital sex would be expelled from the village. Finally, the BIA discredited the documentary evidence submitted by Abankwah since the studies did not list Abankwah's tribe as among those that still practice FGM in Ghana. Further, the BIA noted that none of the documents specifically states that FGM is imposed as punishment for lack of virginity.

The BIA was too exacting both in the quantity and quality of evidence that it required. As an initial matter, INS regulations do not require that credible testimony—that which is consistent and specific—be corroborated by objective evidence. See 8 C.F.R. § 208.13(a) (1999); 8 C.F.R. § 208.16(b) (1999) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."). "In the absence of documentary proof, the applicant's testimony will be enough if it is credible, persuasive, and refers to specific facts that give rise to an inference that the applicant has been or has good reason to fear that he or she will be singled out for persecution." Melendez, 926 F.2d at 215 (internal quotations and citation omitted).

* * * *

Without discounting the importance of objective proof in asylum cases, it must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation. See, e.g., Canas-Segovia v. INS, 902 F.2d 717, 727 n.20 (9th Cir. 1990) (the "requirement of evidence should not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself"), vacated on other grounds, 502 U.S. 1086 (1992). In this case, Abankwah has presented, through her affidavit and her own plausible, detailed, and internally consistent testimony, combined with evidence of the pervasiveness of FGM in Ghana and the testimony and affidavit of Victoria Otumfuor, strong evidence to demonstrate that her fear of FGM is objectively reasonable.

Abankwah's fear of FGM is thus sufficiently "grounded in reality" to satisfy the objective element of the test for well-founded fear of persecution. Melendez, 926 F.2d at 215. Given the customs of the Nkumssa tribe, a reasonable person who knew that she had disobeyed a tribal taboo and knew that discovery by the tribe of her disobedience was imminent would share Abankwah's fears.

* * * *

e. Gender guidelines

On May 26, 1995, the Office of International Affairs, Immigration and Naturalization Service ("INS"), issued guidance entitled "Considerations for Asylum Officers Adjudicating Asylum Claims from Women," intended to provide the INS Asylum Officer Corps with guidance and background on adjudicating asylum cases of women based wholly or in part on their gender. The guidance is excerpted below. Most footnotes have been deleted.

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

---

* * * *

Despite the increased attention given to this type of claim during the past decade, gender-based asylum adjudications are still relatively new developments in refugee protection. This "Considerations" memorandum is a natural and multi-faceted outgrowth of a set of gender guidelines issued by the UNHCR in 1991, the 1993 Canadian gender guidelines, a proposed set of guidelines submitted by the Women Refugees Project (WRP) of the Harvard Immigration and Refugee Program, Cambridge and Somerville Legal Services, in 1994, and recent (and still developing) U.S. caselaw. . . . Additionally, this memorandum seeks to enhance the ability of U.S. Asylum Officers to more sensitively deal with substantive and procedural aspects of gender-related claims irrespective of country of origin.

* * * *

II Procedural Considerations for U.S. Asylum Officers

(a) Purpose and Overview

Asylum Officers should bear in mind the context of these human rights and cross-cultural considerations when dealing with women claimants:

- The laws and customs of some countries contain gender-discriminatory provisions. Breaching social mores (e.g., marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection. As a result, the civil, political, social and economic rights of women are often diminished in these countries.
- Although women applicants frequently present asylum claims for reasons similar to male applicants, they may also have had experiences that are particular to their gender. A woman may present a claim that may be analyzed and approved under one or more grounds. For example, rape (including mass rape in, for example, Bosnia), sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds.
- Some societies require that women live under the protection of male family members. The death or absence of a spouse or other male family members may make a woman even more vulnerable to abuse.
- Women who have been raped or otherwise sexually abused may be seriously stigmatized and ostracized in their societies. They may also be subject to additional violence, abuse or discrimination because they are viewed as having

brought shame and dishonor on themselves, their families, and their communities.

* * * *

III. Legal Analysis of Claims

Women make up a large percentage of the world's refugees. In order to qualify as a refugee under our laws, female applicants must—like any applicant—show that they cannot return home and cannot avail themselves of the protection of their country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA section 101(a)(42). Often, of course, the asylum claim of a female applicant will have nothing to do with her gender. In other cases, though, the applicant's gender may bear on the claim in significant ways to which the adjudicator should be attentive. For example, the applicant may assert a particular kind of harm, like rape, that either is unique to women or befalls women more commonly than men. Or an applicant may assert that she has suffered persecution on account of her gender or because of her membership in a social group constituted by women. She might also assert that her alleged persecutors seek to harm her on account of a political or religious belief concerning gender. Such claims must be analyzed within the terms of United States law, but gender-related claims can raise issues of particular complexity, and it is important that United States asylum adjudicators understand those complexities and give proper consideration to gender-based claims.

* * * *

Persecution: How Serious is the Harm?

* * * *

The forms of harm that women suffer around the world, and that therefore will arise in asylum claims, are varied. Forms of harm that have arisen in asylum claims and that are unique to or more commonly befall women have included sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery,

domestic violence, and forced abortion. The form of harm or punishment may be selected because of the gender of the victim, but the analysis of the claim should not vary based on the gender of the victim. . . .

A. Rape and Other Forms of Sexual Violence as Persecution

Serious physical harm consistently has been held to constitute persecution. Rape and other forms of severe sexual violence clearly can fall within this rule. See *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (Salvadoran woman raped and brutalized by army sergeant who denounced her as subversive had been "persecuted" within the terms of the Act). In *Matter of—Krome* (BIA May 25, 1993), which the board recently voted to designate as a precedent, it was determined that the gang rape and beating of a Haitian woman in retaliation for her political activities was "grievous harm" amounting to persecution. Severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution. The appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm. As in all cases, the determination that sexual abuse may be serious enough to amount to persecution does not by itself make out a claim to asylum. The applicant must still demonstrate that the fear of persecution is well-founded and that the persecution was threatened or inflicted on account of a protected ground.

B. Violation of Fundamental Beliefs as Persecution

The Third Circuit has considered whether an Iranian woman faced with having to wear the traditional Islamic veil and to comply with other harsh rules imposed on women in Iran risked "persecution" as the Board has defined it. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). The record included evidence about the possibility of physical harm. The applicant had asserted in her brief that the routine penalty for women who break the moral code in Iran is "74 lashes, a year's imprisonment, and in many

cases brutal rapes and death." *Id.* at 1241. These, the court states, would constitute persecution. The court went on to assume that "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." *Id.* at 1242. Having to renounce religious beliefs or to desecrate an object of religious importance might, for example, be persecution if the victim held strong religious beliefs. . . .

The court did not specify how "profoundly abhorrent" to one's belief forced behavior must be to constitute persecution. It did note that "the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional." *Id.* at 1240. The degree of abhorrence an applicant claims to feel at such forced behavior must be objectively reasonable—that is, it would have to be a degree of abhorrence that a reasonable person in the circumstances of the applicant could share. *Id.* at 1242 n.11.

* * * *

Nexus: the "On Account of" Requirement

* * * *

A. Actual or Imputed Political Opinion

Asylum claims may often raise assertions of fear on account of a political opinion having to do with gender-related issues. The Third Circuit in *Fatin* had "little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes." 12 F.2d at 1242. The political opinion of the appellant in that case did not, however, provide a basis for refugee status. Though she had shown that she generally possessed political beliefs about the role of women in society that collided with those prevailing in Iran, she had not shown that she would risk severe enough punishment simply for holding such views. Nor had she shown that she actually possessed the narrower political opinion that Iran's gender-specific laws and repressive social norms must be disobeyed on grounds of conscience, although

the court had indicated that the penalties for disobedience were harsh enough to amount to persecution. *Id.* at 1242–43. However, the case does make clear that an applicant who could demonstrate a well-founded fear of persecution of account of her (or his) beliefs about the role and status of women in society could be eligible for refugee status on account of political opinion.

Some tribunals have held or suggested that an applicant can establish eligibility for refugee status by demonstrating that he or she is at risk on account of a political opinion that the persecutor believes the applicant to have, whether or not the applicant actually possesses that political opinion. This is the doctrine of "imputed political opinion." *See, e.g.*, *Ravindran v. INS*, 976 F.2d 754 (1st Cir. 1992); *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992); *Matter of R-*, Interim Decision #3195 (BIA 1992); Opinion of the General Counsel, "Continuing Viability of the Doctrine of Imputed Political Opinion" part I, pp. 1–6 (INS, January 19, 1993). Thus, in addition to the question whether views on issues that relate to gender can constitute a "political opinion" under the INA, asylum claims sometimes raise the question whether a woman has been persecuted because of a political opinion (regardless of its substance) that has been imputed to her.

In *Campos-Guardado v. INS*, 809 F.2d 285, 289 (5th Cir. 1987), for example, the Fifth Circuit considered the claim of a woman whose family members had been politically active in El Salvador. Armed attackers came to her home, bound the applicant and other female family members and forced them to watch while the attackers murdered male family members. The attackers then raped the applicant and the other female family members while one attacker chanted political slogans. In what might appear to be an extreme assessment of the evidence, the court affirmed the Board's determination that the attackers were motivated by a political opinion they imputed to the victim. Reasonable minds could differ over this record. The court might reasonably have concluded that the chanting of political slogans during the rape indicated not merely that the attackers were politically motivated, but more specifically that they believed the petitioner to have contrary political views and that they punished her because

of it. In any case, *Campos-Guardado* illustrates the need for an adjudicator to carefully ascertain all the facts surrounding an allegation of persecution in order to assess whether there are indicia that the act was committed or threatened on account of a protected characteristic.

B. Membership in a Particular Social Group

(2) Social Group Defined by Gender

An increasing number of asylum applicants claim that gender, alone or along with other characteristics, can define a "particular social group." The Second Circuit has stated that gender alone cannot. "Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." *Gomez v. INS*, 47 F.2d 660, 664 (2nd Cir. 1991). The Third Circuit has taken a different view. In *Fatin*, the court emphasized that an Iranian applicant who feared persecution because she is a woman would be a member of a particular social group under the INA. Ms. Fatin was not eligible for asylum, however, because she had not shown that persecutors would seek to harm her "based solely on her gender." 12 F.3d at 1240 (emphasis added).[13]

Thus, while some courts have concluded as a legal matter that gender can define a particular social group, no court has concluded

[13] The Eighth Circuit has adopted a similar approach. "Safaie asserts that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group. We believe this category is overbroad, because no fact finder could reasonably conclude that all Iranian women had a well-founded fear based solely on their gender." *Safaie v. INS*, 25 F.3d 636, 640 (8th Circ. 1994). Although this language on its face would suggest that gender could never define a particular social group, the court does not make so broad a statement. Though its language is imprecise, the *Safaie* court cites the portion of *Fatin* in which the Third Circuit concluded that, while gender can define a social group under the INA, the record before it contained no evidence from which a reasonable fact finder could conclude that persecutors in Iran seek to harm people simply because they are women.

as a factual matter that an applicant has demonstrated that the government (or a persecutor the government could not or would not control) would seek to harm her solely on account of her gender. The courts have then considered whether gender might be one characteristic that combines with others to define the particular social group.

In *Fatin*, for example, the applicant's primary argument was not that she risked harm simply for being female. Rather, she argued that she risked harm as a member of a "very visible and specific subgroup: Iranian women who refuse to conform to the government's gender-specific laws and social norms." 12 F.3d at 1241, quoting petitioner's brief (emphasis supplied by the court). This group, the court noted, is not made up of all Iranian women who hold feminist views, nor even of all those who object to the rules that govern women in that country. It is limited to the smaller group of women who so strongly object that they refuse to conform, despite the risk of serious punishment. If a person would choose to suffer severe consequences rather than to comply with rules contrary to her beliefs, the court reasoned, then those beliefs might well be so fundamental to her identity or conscience that she ought not have to change them. The subgroup that the applicant asserted therefore could be seen as a particular social group. Moreover, the record indicated that the punishment facing the members of that group is severe enough to constitute persecution. The applicant was not a refugee, though, because she had not shown that she was a member of such a group. She had testified only that she would try to avoid as much as she could the strictures that she objected to. *Id.*

Thus the *Fatin* court found that women in Iran could constitute a "particular social group" and recognized the applicant's membership, but found that the members were not at risk of persecution. The court also seemed to recognize the narrower subgroup of Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them, but similarly found no evidence that people in this narrower group faced harm serious enough to constitute persecution. Last, the court recognized the narrowest subgroup of Iranian women whose opposition to Iran's gender-specific laws is so profound that they would disobey

at serious peril; it held that the possible consequences of disobedience were extreme enough to be persecution, but found that petitioner was not in the particular social group. In each scenario the court regarded gender, either alone or as part of a combination, as a characteristic that could define a particular social group within the meaning of the INA. *Accord Safaie*, 25 F.3d at 640, *citing Fatin* (although "a group of women who refuses to conform [with moral code in Iran] and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance, may well satisfy the definition," the applicant had failed to show that she fell within that group).

* * * *

(3) Social Group Defined by Family Membership

Asylum seekers often claim to have suffered harm or to face the risk of harm because of a family relationship. In *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993), the court concluded: "There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of a nuclear family.". . . . *Gebremichael* concerned an Ethiopian applicant who had been imprisoned and tortured by Dergue government officials seeking information about the applicant's brother. The court found that

> the link between family membership and persecution is manifest: as the record makes clear and the INS itself concedes, the Ethiopian security forces applied to petitioner the "time-honored theory of *cherchez la famille* ('look for the family')," the terrorization of one family member to extract information about the location of another family member or to force the family member to come forward. As a result, we are compelled to conclude that no reasonable fact finder could fail to find that petitioner was singled out for mistreatment because of his relationship to his brother. Thus, this is a clear case of "[past] persecution of account of . . . membership in a particular social group."

10 F.3d at 36. See also *Ravindran v. INS*, 976 F.2d 754, 761 n.5 (1st Cir. 1992), *quoting Sanchez-Trujillo*, 801 F.2d at 1576 ("a prototypical example of a 'particular social group' would consist of the immediate family members of a certain family, the family being the focus of fundamental affiliational concerns and common interests for most people"). Without mentioning *Sanchez-Trujillo*, however, or exploring the question in depth, the Ninth Circuit later held that the concept of persecution on account of membership in a particular social group does not extend to the persecution of a family. *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991).

. . . Adjudicators should also note that the applicant's gender need not play any role in whether family membership can define a particular social group in the context of a particular case; Gebremichael, for example, was male. But claims based on family membership are frequently asserted by female applicants, particularly in countries where men tend to be more active politically than women. . . .

Public versus Private Acts

(1) Is the Persecutor the Government or Someone the Government is Unable or Unwilling to Control?

* * * *

In the usual case, the government will be the alleged persecutor. The question may arise, however, whether an act committed or threatened by a government official was nevertheless a purely private one. The Ninth Circuit considered whether a woman who was "singled out to be bullied, beaten, injured, raped and enslaved" was persecuted by an agent of the government for political or for personal reasons in *Lazo-Majano v. INS*, 913 F.2d 1432, 1434 (9th Cir. 1987). There the persecutor, a member of the Salvadoran military, threatened to accuse the applicant of subversion. He then did so, to a friend in the police force. Based on evidence of severe treatment of subversives by Salvadoran authorities, the court determined that the applicant was a refugee on account of the political opinion that could be imputed to her because of the public

accusation, even without evidence that she actually held subversive political views. In *Lazo-Majano*, therefore, an act that might have been regarded as personal violence not covered by the INA was held to have become persecution on account of a protected characteristic because of the conduct of the persecutor. *Cf. Matter of Pierre*, 15 I & N Dec. 461 (BIA 1975) (husband's status as a legislator in Haiti did not by itself make abuse of his wife persecution on account of political opinion even though the Haitian government would not restrain the husband).

The Sixth Circuit considered the distinction between public and private acts in a claim based on sexual harassment in *Klawitter v. INS*, 570 F.2d 149 (6th Cir. 1992). There the applicant claimed that she feared the unwanted sexual advances of a colonel in the Polish secret police. The court agreed with the position of the Board that "[h]owever distasteful his apparent treatment of the respondent may have been, such harm or threats arising from a personal dispute of this nature, even one taking place with an individual in a high governmental position, is not a ground for asylum." . . . Although petitioner's testimony recounts an unfortunate situation, harm or threats of harm based solely on sexual attraction do not constitute persecution under the Act. 970 F.2d at 152.[15]

These cases involve public officials who commit what is commonly seen as a private act. In such situations adjudicators must determine whether a reasonable basis exists for regarding the act as a "public" one that can be attributed to the government or an agent the government is unable or unwilling to control. . . .

As mentioned above, the persecutor might also be a person or group outside the government that the government is unable or unwilling to control. If the applicant asserts a threat of harm

---

[15] This does not mean that sexual harassment could never amount to persecution no matter the seriousness; nor does it mean that a government official could never engage in sexually abusive conduct as a means of punishing someone on account of a protected ground. *Klawitter* instead reiterates the requirement that an asylum seeker must show that harm is threatened or inflicted on account of a protected characteristic within the meaning of *Elias-Zacarias*, and that the agent of harm must be the government or someone the government is unable or unwilling to control. . . .

from a non-government source, the applicant must show that the government is unwilling or unable to protect its citizens. See *Matter of Villalta*, Int. Dec. 3126 (BIA 1990); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1005 (9th Cir. 1988). It will be important in this regard, although not conclusive, to determine whether the applicant has actually sought help from government authorities. *Id*. Evidence that such an effort would be futile would also be relevant.

(2) Is State Protection Possible Elsewhere in the Country?

The principle that international protection becomes appropriate where national protection is unavailable also means that, to be eligible for international protection, an applicant must generally demonstrate that the danger of persecution exists nationwide. . . . If there is evidence that the applicant can avoid the threat by relocating to a different part of the country or that a government would offer protection from otherwise private acts of harm elsewhere in the country than the locality where those acts take place, then normally the applicant will not qualify for asylum. *See Beltran-Zavala v. INS*, 912 F.2d 1027, 1030 (9th Cir. 1990).

This principle becomes crucial where the applicant alleges private actions—such as domestic violence—that the state will not protect against. In such situations the officer must explore the extent to which the government can or does offer protection or redress, and the extent to which the risk of harm extends nationwide. According to the UNHCR Handbook, "a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so." UNCHR Handbook ¶ 91.

* * * *

f. Children's asylum guidelines

On December 10, 1998, Jeff Weiss, Acting Director of the Office of International Affairs, Immigration and Naturalization Service ("INS"), issued "Guidelines for Children's Asylum

Claims," excerpted below, to provide the INS Asylum Office Corps with background and guidance on adjudicating children's asylum claims.

The full text of the guidelines is available at *www.uscis.gov/graphics/lawsregs/handbook/10a_ChldrnGdlns.pdf*.

---

* * * *

During the last 10 years, the topic of child asylum seekers has received increasing attention from the international community. Human rights violations against children can take a number of forms, such as abusive child labor practices, trafficking in children, rape, and forced prostitution. In violation of current international standards that establish age 15 as the minimum age for participation in armed conflicts, children under age 15 in some countries are forcibly recruited by regular or irregular armies to participate directly in military conflicts. Children who have had such experiences are referred to as "child soldiers" throughout this text. The protection needs of these and other children have commanded much international and domestic attention.

* * * *

Because of the unique vulnerability and circumstances of children, the Immigration and Naturalization Service considers it appropriate to issue guidance relating to our youngest asylum seekers. These "Guidelines for Children's Asylum Claims" provide Asylum Officers with child-sensitive interview procedures and analysis regarding the most common issues that may arise in these cases. This guidance is similar in approach to the "Considerations for Asylum Officers Adjudicating Asylum Claims from Women" (the "*Gender Guidelines*") memorandum issued on May 26, 1995. Like the *Gender Guidelines*, these guidelines are intended to enhance the ability of INS Asylum Officers to address more responsively the substantive and procedural aspects of claims, irrespective of the child's country of origin. . . .

* * * *

III. Legal Analysis of Claims

* * * *

(b) Children as Refugees

. . . In order to be granted asylum in the United States, the child applicant must establish that he or she meets the definition of refugee contained at Section 101(a)(42)(A) of the Immigration and Nationality Act (INA), as interpreted by Board and Federal court precedent. Regardless of how sympathetic the child's claim may be, he or she cannot be granted asylum unless this standard is met. Consequently, the "best interests of the child" principle, while useful to the interview process, does not replace or change the refugee definition in determining substantive eligibility.

In discussing the treatment of unaccompanied minors, the UNHCR *Handbook* notes that, "[t]he same definition of a refugee applies to all individuals, regardless of their age." Sensitivity to the age of the child, however, may affect the analysis of his or her refugee status:

> Although the same definition of a refugee applies to all individuals regardless of their age, in the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability.

* * * *

(c) Persecution

* * * *

The harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution. Given the "variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary." UNHCR *Handbook* . . . at ¶ 52. The types of harm that may befall children are varied. In addition to the many forms of persecution an adult may suffer,

children may be particularly vulnerable to sexual assault, forced labor, forced prostitution, infanticide, and other forms of human rights violations such as the deprivation of food and medical treatment. Cultural practices, such as FGM, may under certain circumstances constitute persecution. *Matter of Kasinga*, Int. Dec. 3278 (BIA 1996).

. . . A well-founded fear of persecution involves both subjective and objective elements. . . . For child asylum seekers, however, the balance between subjective fear and objective circumstances may be more difficult for an adjudicator to assess. Although there are no bright line tests, the UNHCR *Handbook* suggests that children under the age of 16 may lack the maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors. UNHCR *Handbook* . . . at ¶ 125, 217. "Minors under 16 years of age . . . may have fear and a will of their own, but these may not have the same significance as in the case of an adult." . . . There is, of course, no hard and fast rule; "a minor's mental maturity must normally be determined in the light of his [or her] personal, family and cultural background." . . .

* * * *

(d) Nexus: the "On Account of" Requirement

(1) General Factors to Be Considered

* * * *

. . . the nexus requirement may be particularly difficult to determine because a child may express fear or have experienced harm without understanding the persecutor's intent. A child's incomplete understanding of the situation does not necessarily mean that a nexus between the harm and a protected ground does not exist. . . .

Similarly, the inherent vulnerability of children often places them at the mercy of adults who may inflict harm without viewing it as such, sometimes to such a degree of severity that it may constitute persecution. In that context, it is important to remember that the Board of Immigration Appeals has held that a punitive or malignant intent is not required for a harm to constitute persecution

on the basis of a protected ground. A persecutor may believe that he or she is helping the applicant by attempting to overcome the protected characteristic. . . .

(2) Issues of Particular Relevance to Children

* * * *

When the child claims asylum on the basis of political opinion, the age and maturity of the child must also be taken into account. Just as a younger child may have difficulty forming a well-founded fear of persecution, the ability to form a political opinion for which one may be persecuted may be more difficult for a young child to establish. Because the level of children's political activity varies widely among countries, however, Asylum Officers should not assume that age alone prevents a child from holding political opinions for which he or she may be persecuted. *See Civil v. INS*, 140 F.3d 52 (1st Cir. 1998).

It may also be possible for a child's claim to be based on imputed political opinion. *See, e.g.*, *Matter of S-P-*, Int. Dec. 3287. The adjudicator should carefully review the family history of the child and should explore as much as possible the child's understanding of his or her family's activities to determine whether the child may face persecution based on the imputed political beliefs of family members or some other group with which the child is identified.

(e) Membership in a Particular Social Group

* * * *

(3) Social Groups Defined in Whole or in Part by Age

Domestic law with respect to age-based claims is scarce. The Second Circuit has noted that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991). With respect to gender, Federal courts have taken different legal approaches regarding the possible breadth of a gender-based claim, but have yet to find as a

factual matter that an applicant has established that a persecutor sought to harm the individual on the basis of gender alone. *See, Gender Guidelines* and cases cited therein. More often, while acknowledging the possibility of a broadly defined social group based on gender, courts have looked to narrowly defined subgroups in which gender is one of several factors used to determine the parameters of the particular social group. . . .

By analogy, an age-based claim grounded solely in the applicant's status as a child or a child from a particular country is unlikely to be sufficiently discrete to establish persecution on account of that status. The Board and Federal courts have rejected claims based primarily or exclusively on age. For example, in *Matter of Sanchez and Escobar*, 19 I&N Dec. 276 (BIA) 1985, the Board rejected as overly broad claims that young Salvadoran men, ages 18 to 30, who were urban, working class males of military age constituted a particular social group. The Board noted:

> Historically, it has been the young who have primarily been involved in both the internal and external armed conflicts of a country. Although it may be an element of the proof, a purely statistical showing is not by itself sufficient proof of the existence of a persecuted group. It is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk. In the context of the asylum and withholding provisions related to "membership in a particular social group" under the Act, there must be a showing that the claimed persecution is on account of the group's identifying characteristics.
>
> *Id*. at 285–86.

On appeal, the Ninth Circuit affirmed, reiterating that the term "particular social group" does not "encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance." *Sanchez-Trujillo*, 801 F.2d at 1576. See also *Civil* 140 F.3d at 56 (rejecting "Haitian

youth who possess pro-Aristide political views" as overly broad); *Ravindran v. INS*, 976 F.2d 754, 761 n.5 (1st Cir. 1991) (rejecting argument that Tamil males between the ages of 15 and 45 were targeted for persecution on the basis of age and gender); *Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988).

* * * *

3. Eligibility for Withholding of Deportation—"Serious Nonpolitical Crime"

Section 243(h) of the INA (8 U.S.C. § 1253(h)) (added by the Refugee Act of 1980 and later redesignated as INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) and amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *see* section C.2.b *supra*) prohibited the Attorney General from removing an alien to a country if the Attorney General decided that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. This remedy of "withholding of deportation" implemented the U.S. obligation of *non-refoulement* under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (entered into force for the United States Nov. 1, 1968). *See* section D(1) *supra* for a discussion of *non-refoulement*. Under § 243(h), an alien was not eligible for withholding of deportation if the Attorney General decided, *inter alia*, that there were "serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States."

In *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), the U.S. Supreme Court upheld the Board of Immigration Appeals' interpretation that to be a "political crime," a crime must be one in which the political aspect of the crime outweighed its common-law character, that crimes grossly out of proportion to the political objective or involving acts of an atrocious nature could not be "political crimes," and that the severity of the persecution that the alien was likely to face upon

return was not relevant to whether the crime was "political." Excerpts from the opinion follow (footnotes omitted.)

---

* * * *

. . . In 1994, respondent was charged with deportability by the Immigration and Naturalization Service (INS) for illegal entry into the United States. Respondent conceded deportability but applied for asylum and withholding. At a hearing before an Immigration Judge respondent testified, through an interpreter, that he had been politically active in Guatemala from 1989 to 1992 with a student group called Estudeante Syndicado (ES) and with the National Central Union political party. App. 19–20, 36–37. He testified about threats due to his political activity. The threats, he believed, were from different quarters, including the Guatemalan Government, right-wing government support groups, and left-wing guerillas. App. to Pet. for Cert. 23a.

Respondent described activities he and other ES members engaged in to protest various government policies and actions, including the high cost of bus fares and the government's failure to investigate the disappearance or murder of students and others. App. 20–21; App. to Pet. for Cert. 22a–23a. For purposes of our review, we assume that the amount of bus fares is an important political and social issue in Guatemala. We are advised that bus fare represents a significant portion of many Guatemalans' annual living expense, and a rise in fares may impose substantial economic hardship. See Brief for Massachusetts Law Reform Institute et al. as *Amicus Curiae* 18–19. In addition, government involvement with fare increases, and other aspects of the transportation system, has been a focus of political discontent in that country. *Id.,* at 16–21.

According to the official hearing record, respondent testified that he and his fellow members would "strike" by "burning buses, breaking windows or just attacking the police, police cars." App. 20. Respondent estimated that he participated in setting about 10 buses on fire, after dousing them with gasoline. *Id.,* at. 46. Before setting fire to the buses, he and his group would order passengers to leave the bus. Passengers who refused were stoned, hit with

sticks, or bound with ropes. *Id.,* at 46–47. In addition, respondent testified that he and his group "would break the windows of . . . stores," "take the people out of the stores that were there," and "throw everything on the floor." *Id.,* at 48.

The Immigration Judge granted respondent's applications for withholding of deportation and for asylum, finding a likelihood of persecution for his political opinions and activities if he was returned to Guatemala. App. to Pet. for Cert. 31a–32a. The INS appealed to the BIA. . . . With respect to withholding, the BIA did not decide whether respondent had established the requisite risk of persecution because it determined that, in any event, he had committed a serious nonpolitical crime within the meaning of § 1253(h)(2)(C).

In addressing the definition of a serious nonpolitical crime, the BIA applied the interpretation it first set forth in *Matter of McMullen*, 19 I. & N. Dec. at 97–98: "In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature." In the instant case, the BIA found, "the criminal nature of the respondent's acts outweigh their political nature." App. to Pet. for Cert. 18a. The BIA acknowledged respondent's dissatisfaction with the Guatemalan government's "seeming inaction in the investigation of student deaths and in its raising of student bus fares." *Ibid*. It said, however: "The ire of the ES manifested itself disproportionately in the destruction of property and assaults on civilians. Although the ES had a political agenda, those goals were outweighed by their criminal strategy of strikes. . . ." *Ibid*. The BIA further concluded respondent should not be granted discretionary asylum relief in light of "the nature of his acts against innocent Guatemalans." *Id.,* at 17a.

A divided panel of the Court of Appeals granted respondent's petition for review and remanded to the BIA. 121 F.3d 521 (CA9 1997). According to the majority, the BIA's analysis of the serious nonpolitical crime exception was legally deficient in three respects. First, the BIA should have "considered the persecution that Aguirre might suffer if returned to Guatemala" and "balanced his admitted

offenses against the danger to him of death." 121 F.3d at 524. Second, it should have "considered whether the acts committed were grossly out of proportion to their alleged objective" and were "of an atrocious nature," especially with reference to Ninth Circuit precedent in this area. *Ibid.* (internal quotation marks and citation omitted). Third, the BIA "should have considered the political necessity and success of Aguirre's methods." 121 F.3d at 523–524.

* * * *

As an initial matter, the Court of Appeals expressed no disagreement with the Attorney General or the BIA that the phrase "serious nonpolitical crime" in § 1253(h)(2)(C) should be applied by weighing "the political nature" of an act against its "common-law" or "criminal" character. *See Matter of McMullen, supra*, at 97–98; App. to Pet. for Cert. 18a; *Deportation Proceedings for Doherty*, 13 Op. Off. Legal Counsel 1, 23 (1989) (an act " 'should be considered a serious nonpolitical crime if the act is disproportionate to the objective' ") (quoting *McMullen* v. *INS, supra*, at 595), rev'd on other grounds, *Doherty* v. *INS*, 908 F.2d 1108 (CA2 1990), rev'd, 502 U.S. 314, 116 L. Ed. 2d 823, 112 S. Ct. 719 (1992). Nor does respondent take issue with this basic inquiry.

The Court of Appeals did conclude, however, that the BIA must supplement this weighing test by examining additional factors. In the course of its analysis, the Court of Appeals failed to accord the required level of deference to the interpretation of the serious nonpolitical crime exception adopted by the Attorney General and BIA. Because the Court of Appeals confronted questions implicating "an agency's construction of the statute which it administers," the court should have applied the principles of deference described in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Thus, the court should have asked whether "the statute is silent or ambiguous with respect to the specific issue" before it; if so, "the question for the court [was] whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843. See also *INS* v. *Cardoza-Fonseca*, 480 U.S. at 448–449.

* * * *

The Court of Appeals' error is clearest with respect to its holding that the BIA was required to balance respondent's criminal acts against the risk of persecution he would face if returned to Guatemala. In *Matter of Rodriguez-Coto*, 19 I. & N. Dec. 208, 209–210 (1985), the BIA "rejected any interpretation of the phrase . . . 'serious nonpolitical crime' in [§ 1253(h)(2)(C)] which would vary with the nature of evidence of persecution." The text and structure of § 1253(h) are consistent with this conclusion. Indeed, its words suggest that the BIA's reading of the statute, not the interpretation adopted by the Court of Appeals, is the more appropriate one. As a matter of plain language, it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstance that the alien may be subject to persecution if returned to his home country. See *ibid.* ("We find that the modifier . . . 'serious' . . . relates only to the nature of the crime itself").

It is important, too, as *Rodriguez-Coto* points out, 19 I. & N. Dec. at 209–210, that for aliens to be eligible for withholding at all, the statute requires a finding that their "life or freedom would be threatened in [the country to which deportation is sought] on account of their race, religion, nationality, membership in a particular social group, or political opinion," *i.e.*, that the alien is at risk of persecution in that country. 8 U.S.C. § 1253(h)(1). By its terms, the statute thus requires independent consideration of the risk of persecution facing the alien before granting withholding. It is reasonable to decide, as the BIA has done, that this factor can be considered on its own and not also as a factor in determining whether the crime itself is a serious, nonpolitical crime. Though the BIA in the instant case declined to make findings respecting the risk of persecution facing respondent, App. to Pet. for Cert. 18a, this was because it determined respondent was barred from withholding under the serious nonpolitical crime exception. *Ibid.* The BIA, in effect, found respondent ineligible for withholding even on the assumption he could establish a threat of persecution. This approach is consistent with the language and purposes of the statute.

In reaching the contrary conclusion and ruling that the risk of persecution should be balanced against the alien's criminal acts, the Court of Appeals relied on a passage from the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979) (U. N. Handbook). . . . The U. N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts. "Indeed, the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'" *INS* v. *Cardoza-Fonseca*, 480 U.S. at 439, n. 22 (quoting U. N. Handbook, at 1, P(ii)). See also 480 U.S. at 439, n. 22 ("We do not suggest, of course, that the explanation in the U. N. Handbook has the force of law or in any way binds the INS . . ."). For the reasons given, *supra*, at 9–10, we think the BIA's determination that § 1253(h)(2)(C) requires no additional balancing of the risk of persecution rests on a fair and permissible reading of the statute. See also *T.* v. *Secretary of State for the Home Dept.*, 2 All E. R. 865, 882 (H. L. 1996) (Lord Mustill) ("The crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned").

* * * *

Also relying on the U. N. Handbook, the Court of Appeals held that the BIA "should have considered whether the acts committed were 'grossly out of proportion to the alleged objective.' . . . The political nature of the offenses would be 'more difficult to accept' if they involved 'acts of an atrocious nature.'" 121 F.3d at 524 (quoting U. N. Handbook, P152, at 36). . . .

* * * *

. . . Our decision takes into account that the BIA's test identifies a general standard (whether the political aspect of an offense outweighs its common-law character) and then provides two more specific inquiries that may be used in applying the rule: whether there is a gross disproportion between means and ends, and

whether atrocious acts are involved. Under this approach, atrocious acts provide a clear indication that an alien's offense is a serious nonpolitical crime. In the BIA's judgment, where an alien has sought to advance his agenda by atrocious means, the political aspect of his offense may not fairly be said to predominate over its criminal character. Commission of the acts, therefore, will result in a denial of withholding. The criminal element of an offense may outweigh its political aspect even if none of the acts are deemed atrocious, however. For this reason, the BIA need not give express consideration to the atrociousness of the alien's acts in every case before determining that an alien has committed a serious nonpolitical crime.

The BIA's approach is consistent with the statute, which does not equate every serious nonpolitical crime with atrocious acts. Cf. 8 U.S.C. § 1253(h)(2)(B) (establishing an exception to withholding for a dangerous alien who has been convicted of a "particularly serious crime," defined to include an "aggravated felony"). Nor is there any reason to find this equivalence under the statute. In common usage, the word "atrocious" suggests a deed more culpable and aggravated than a serious one. See Webster's Third New International Dictionary 139 (1971) (defining "atrocious" as, "marked by or given to extreme wickedness . . . [or] extreme brutality or cruelty"; "outrageous: violating the bounds of common decency"; "marked by extreme violence: savagely fierce: murderous"; "utterly revolting: abominable"). As a practical matter, if atrocious acts were deemed a necessary element of all serious nonpolitical crimes, the Attorney General would have severe restrictions upon her power to deport aliens who had engaged in serious, though not atrocious, forms of criminal activity. These restrictions cannot be discerned in the text of § 1253(h), and the Attorney General and BIA are not bound to impose the restrictions on themselves.

In the instant case, the BIA determined that "the criminal nature of the respondent's acts outweigh their political nature" because his group's political dissatisfaction "manifested itself disproportionately in the destruction of property and assaults on civilians" and its political goals "were outweighed by [the group's] criminal strategy of strikes." App. to Pet. for Cert. 18a. The BIA concluded

respondent had committed serious nonpolitical crimes by applying the general standard established in its prior decision, so it had no need to consider whether his acts might also have been atrocious. The Court of Appeals erred in holding otherwise.

* * * *

It is true the Attorney General has suggested that a crime will not be deemed political unless there is a "'close and direct causal link between the crime committed and its alleged political purpose and object.'" *Deportation Proceedings for Doherty*, 13 Op. Off. Legal Counsel, at 23 (quoting *McMullen* v. *INS*, 788 F.2d 591 (CA9 1986)). The BIA's analysis, which was quite brief in all events, did not explore this causal link beyond noting the general disproportion between respondent's acts and his political objectives. Whatever independent relevance a causal link inquiry might have in another case, in this case the BIA determined respondent's acts were not political based on the lack of proportion with his objectives. It was not required to do more. Even in a case with a clear causal connection, a lack of proportion between means and ends may still render a crime nonpolitical. . . .

* * * *

4. *Non-refoulement* under Article 3 of the Convention Against Torture

The United States became a party to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("the Torture Convention"), 1465 U.N.T.S. 113 (1984), on November 21, 1994. *See Digest 1989–90* at 176–90, for a discussion of U.S. ratification of the Convention. Article 3(1) of the Convention provides that: "No State Party shall expel, return, ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture." Article 3(2) states that "[f]or the purposes of considering whether there are such grounds, the competent authorities shall

take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights."

In 1998 the Board of Immigration Appeals of the U.S. Department of Justice ruled in *Matter of H-M-V-*, 22 I&N Dec. 256 (BIA 1998), that the Torture Convention Article 3 protections could not be invoked in regular asylum proceedings because the Convention was not self-executing and therefore not binding on Immigration Judges in the absence of implementing legislation. Congress subsequently enacted § 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, as contained in Division G of Title XXII of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, 112 Stat. 2681–822 (1998). Section 2242 made it the policy of the U.S. "not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing that the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States," and required that INS issue implementing regulations within 120 days. On February 19, 1999, the INS published interim regulations in 64 Fed. Reg. 8478, discussed in Chapter 6.F.1.b.

5. Temporary Protected Status, Deferred Enforced Departure and Related Statutory Relief

a. Temporary protected status

Section 244A of the INA, 8 U.S.C. § 1254a, as amended, added by § 302(a) of Title III of Pub. L. No. 101–649, 104 Stat. 4978 (1990) (*see Digest 1989–90* at 39–40) and redesignated as § 244 by § 308 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009–546 (1996),

authorized the Attorney General to grant temporary protected status in the United States to eligible nationals of designated foreign states. It authorized the Attorney General, after consultation with appropriate agencies, to designate a state (or any part thereof) after finding that (1) there was an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state had requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that rendered the state temporarily unable to handle the return of its nationals; or (3) there were other extraordinary and temporary conditions in the state that prevented nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. Section 304(b)(1) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102–232, 105 Stat. 1733 (1992) extended eligibility for temporary protected status to a person with no nationality if he or she last habitually resided in a designated state.

The Attorney General exercised the authority to grant temporary protected status on a number of occasions from 1991 through 1999.

(1) Armed conflict and civil strife

(i) Lebanon

Attorney General Dick Thornburgh designated Lebanon under § 244A effective March 17, 1991 through March 22, 1992, based on his findings that (a) there was an ongoing armed conflict in Lebanon and requiring the return of nationals of Lebanon would pose a serious threat to their personal safety, and (b) there were extraordinary and temporary conditions in Lebanon that prevented Lebanese nationals from returning in safety and permitting Lebanese nationals to remain

temporarily in the United States was not contrary to the national interest of the United States. 56 Fed. Reg. 12,746 (Mar. 27, 1991), excerpted below.

---

* * * *

By the authority vested in me under section 244A of the Immigration and Nationality Act, as amended, and as Attorney General, I find that (a) There is an ongoing armed conflict within Lebanon and, due to such conflict, requiring the return of aliens who are nationals of Lebanon to that state would pose a serious threat to their personal safety and (b) there exist extraordinary and temporary conditions in Lebanon that prevent aliens who are nationals of Lebanon from returning to Lebanon in safety and permitting nationals of Lebanon to remain temporarily in the United States is not contrary to the national interest of the United States. Accordingly, it is ordered as follows:

(1) Lebanon is designated under section 244A(b) of the Act and nationals of Lebanon may apply for Temporary Protected Status.
(2) I estimate that there are no more than 27,000 Lebanese nationals, who are currently in nonimmigrant or unlawful status, eligible for Temporary Protected Status.
(3) Except as specifically provided in this notice, applications for Temporary Protected Status submitted by nationals of Lebanon must be filed pursuant to the provisions of 8 CFR part 240.
(4) Any alien who is a national of Lebanon and has been continuously physically present and has continuously resided in the United States since March 27, 1991, may apply for Temporary Protected Status within the 12-month period of designation from March 27, 1991, to March 27, 1992.

The designation was extended, 57 Fed. Reg. 2931 (Jan. 24, 1992), and was terminated in 1993, 58 Fed. Reg. 7582 (Feb. 8, 1993), as excerpted below.

* * * *

By the authority vested in me as Attorney General under section 244A of the Immigration and Nationality Act, and pursuant to sections 244A(b)(3)(A) and (C) of the Act, I find, after consultation with the appropriate agencies of the United States Government, that the extraordinary and temporary conditions found to exist in Lebanon on March 21, 1991, and on January 20, 1992, are not presently in existence. The United States embassy in Beirut reports that the security situation for Lebanese citizens is steadily improving. The Lebanese government's amnesty law specifically protects Lebanese citizens from prosecution for virtually all actions taken during the war years, and the majority of Lebanese go about their daily activity without hindrance. While the few persons who might still encounter difficulties in Lebanon due to their affiliations could apply for asylum, we believe that Temporary Protected Status is no longer appropriate for Lebanese citizens in general.

* * * *

(ii) Liberia

Attorney General Thornburgh designated Liberia under § 244A effective March 27, 1991, 56 Fed. Reg. 12,746 (Mar. 27, 1991) based on his findings that (a) there was an ongoing armed conflict in Liberia and requiring the return of nationals of Liberia would pose a serious threat to their personal safety, and (b) there were extraordinary and temporary conditions in Liberia that prevented Liberian nationals from returning in safety and permitting Liberian nationals to remain temporarily in the United States was not contrary to the national interest of the United States. The designation was extended and renewed until July 1998, when Attorney General Janet Reno terminated the designation. With the recurrence of armed conflict in Liberia, Attorney General Reno redesignated Liberia in September 1998, a designation that was terminated in September 1999. 57 Fed. Reg. 2932 (Jan. 24, 1992)

(extension); 58 Fed. Reg. 7898 (Feb. 10, 1993) (extension); 59 Fed. Reg. 9997 (Mar. 2, 1994) (extension); 60 Fed. Reg. 16,163 (Mar. 29, 1995) (extension); 61 Fed. Reg. 8076 (Mar. 1, 1996) (extension); 62 Fed. Reg. 16,608 (Apr. 7, 1997) (extension and redesignation); 63 Fed. Reg. 15,437 (Mar. 31, 1998) (termination of designation); 63 Fed. Reg. 51,958 (Sept. 29, 1998) (redesignation); 64 Fed. Reg. 41,463 (July 30, 1999) (termination of designation). The Federal Register notice of final termination is excerpted below.

---

* * * *

On September 29, 1998, the Attorney General published a notice re-designating Liberia for TPS for a period of one year, based upon conditions in Liberia at that time. 63 FR 51958 (Sept. 29, 1998). That TPS designation is scheduled to expire on September 28, 1999.

Based upon a more recent review of conditions within Liberia by the Departments of Justice and State, the Attorney General finds that conditions no longer support a TPS designation. A Department of State memorandum concerning Liberia states that "[t]he divisive civil war in Liberia which began in 1990 ended with the Abuja Peace Accords in 1996. Since 1997, the country in general has not experienced ongoing armed conflict. In September 1998, violence erupted suddenly in Monrovia.* * * Since then, however, no further general conflict has occurred." The memorandum also states that "Although conditions in Liberia remain difficult, the overall situation is not sufficiently adverse to prevent most Liberian nationals in the U.S. from returning to Liberia in safety." It concludes, "The Department of State finds that sufficient grounds to recommend a further extension of TPS for Liberia do not exist. We therefore recommend that TPS for Liberia be terminated on its current expiration date of September 28, 1999."

Based on these findings, the Attorney General has decided to terminate the designation of Liberia for TPS.

* * * *

(iii) Other countries

Somalia was designated as to its nationals based on "extraordinary and temporary conditions in Somalia" on September 16, 1991. 56 Fed. Reg. 46,804 (Sept. 16, 1991). The designation was extended annually through the 1990s. 57 Fed. Reg. 32,232 (July 21, 1992); 58 Fed. Reg. 48,898 (Sept. 20, 1993); 59 Fed. Reg. 43,359 (Aug. 23, 1994); 60 Fed. Reg. 39,005 (July 31, 1995); 61 Fed. Reg. 39,472 (July 29, 1996); 62 Fed. Reg. 41,421 (Aug. 1, 1997); 63 Fed. Reg. 51,602 (Sept. 28, 1998); 64 Fed. Reg. 49,511 (Sept. 13, 1999).

Bosnia-Herzegovina was designated on August 10, 1992, as to its nationals and "stateless nationals who last habitually resided in Bosnia-Hercegovina," based on armed conflict. 57 Fed. Reg. 35,604 (Aug. 10, 1992). The designation was extended yearly through the 1990s. 58 Fed. Reg. 40,676 (July 29, 1993); 59 Fed. Reg. 36,219 (July 15, 1994); 60 Fed. Reg. 39,004 (July 31, 1995); 61 Fed. Reg. 39,471 (July 29, 1996); 62 Fed. Reg. 41,420 (Aug. 1, 1997); 63 Fed. Reg. 45,092 (Aug. 24, 1998); 64 Fed. Reg. 43,720 (Aug. 11, 1999).

Rwanda (June 7, 1994), Burundi (November 4, 1997), Sierra Leone (November 4, 1997), and Sudan (November 4, 1997) were also designated as to nationals and stateless aliens last habitually residing in those countries based on armed conflict.

— For Rwanda, *see* 59 Fed. Reg. 29,440 (June 7, 1994). The designation was extended several times until Attorney General Reno terminated it in June 1997. 60 Fed. Reg. 27,790 (May 25, 1995) (extension); 61 Fed. Reg. 29,428 (June 10, 1996) (extension); 61 Fed. Reg. 58,425 (Nov. 14, 1996) (extension); 62 Fed. Reg. 33,442 (June 19, 1997) (termination).

— For Burundi, *see* 62 Fed. Reg. 59,735 (Nov. 4, 1997); extended 63 Fed. Reg. 59,334 (Nov. 3, 1998); extended and redesignated in November 1999, 64 Fed. Reg. 61,123 (Nov. 9, 1999).

— For Sierra Leone, *see* 62 Fed. Reg. 59,736; extended 63 Fed. Reg. 59,336 (Nov. 3, 1998); extended and redesignated in November 1999, 64 Fed. Reg. 61,125 (Nov. 9, 1999).

— For Sudan, *see* 62 Fed. Reg. 59,737 (Nov. 4, 1997); extended 63 Fed. Reg. 59,337 (Nov. 3, 1998), extended and redesignated in November 1999, 64 Fed. Reg. 61,128 (Nov. 9, 1999).

Guinea-Bissau was designated as to its nationals and stateless aliens habitually resident therein based on civil strife in the country, effective March 11, 1999. 64 Fed. Reg. 12,181 (Mar. 11, 1999).

(2) Natural disasters

Starting in July 1995, the 10-square-kilometer island nation of Montserrat was endangered by an active volcano. The volcano's eruptions forced the evacuation of more than half the island, closed the airport, stopped most seaport activity and destroyed three-fourths of the infrastructure of the island. On August 26, 1997, Attorney General Janet Reno designated Montserrat under § 244 based on her findings that (a) there had been an environmental disaster in Montserrat resulting in a substantial, but temporary, disruption of living conditions, (b) the government of Montserrat officially had requested designation, and (c) there were extraordinary and temporary conditions in Montserrat that prevented nationals of Montserrat (and stateless aliens who last habitually lived in Montserrat) from returning to Montserrat in safety. 62 Fed. Reg. 45,685 (Aug. 28, 1997). Eligibility for temporary protected status was granted to nationals of Montserrat (and aliens having no nationality who last habitually resided in Montserrat) who had been "continuously physically present" in the United States since August 28, 1997 and who had "continuously resided in the United States" since August 22, 1997. Effective August 28, 1998, Attorney General Reno extended the designation for a year, 63 Fed. Reg. 45,864 (Aug. 27, 1998), and effective August 28, 1999, she extended the designation through August 27, 2000. 64 Fed. Reg. 48,190 (Sept. 2, 1999).

After Hurricane Mitch swept through Central America, causing severe flooding and associated damage, Attorney

General Janet Reno designated Honduras and Nicaragua under § 244 effective January 5, 1999 until July 5, 2000. She found that, due to the environmental disaster and substantial disruption of living conditions caused by Hurricane Mitch, each country was unable, temporarily, to handle adequately the return of its nationals. 64 Fed. Reg. 524, 526 (Jan. 5, 1999).

(3) Province of Kosovo in the Republic of Serbia in the State of the Federal Republic of Yugoslavia (Serbia-Montenegro)

Marking the first time that the Attorney General had designated a portion of a country under § 244, Attorney General Reno designated the Province of Kosovo effective June 9, 1998, 63 Fed. Reg. 31,527 (June 9, 1998), as excerpted below.

---

* * * *

Background

Based on a thorough review by the Departments of State and Justice of all available evidence, the Attorney General finds that there is an on-going armed conflict in the Province of Kosovo in the Republic of Serbia in the state of the Federal Republic of Yugoslavia (Serbia-Montenegro) (hereafter "Kosovo Province") and that, due to such conflict, requiring the return of nationals of Serbia-Montenegro to Kosovo Province would pose a serious threat to their personal safety.

Kosovar Albanians constitute approximately 90 percent of the 2 million people in the Province of Kosovo in Serbia-Montenegro, a country governed by a Serb-majority government. Tensions have been particularly high since the government's 1989 revocation of Kosovo's political autonomy. In March 1998, the Serb government crackdown left approximately 90 Kosovar Albanians dead, including non-combatants and children. Although the fighting has subsided, protests continue and the Serb government has shown

limited cooperation with the international community's calls for dialogue concerning the killings.

* * * *

An extension and redesignation went into effect on June 8, 1999, 64 Fed. Reg. 30,542 (June 8, 1999), excerpted below.

* * * *

Due to the recent events in Kosovo Province and surrounding areas of the Federal Republic of Yugoslavia, the Attorney General and the Department of State have reexamined conditions in Kosovo Province. A recent Department of State report on conditions in that region found that, "[g]iven the state of open war in Kosovo, the ongoing NATO air strikes in the Federal Republic of Yugoslavia (including Kosovo), and no indication of peaceful resolution, a resident of Kosovo now in the United States could not possibly return to Kosovo without incurring an extremely serious threat to his or her personal safety." Based on these and other findings, the Attorney General has determined that conditions in Kosovo Province have worsened since the initial designation and, as a result, has decided to extend and redesignate Kosovo Province under the TPS program. This will extend availability of TPS to include eligible nationals of Kosovo Province (and aliens having no nationality who last habitually resided in Kosovo Province) who arrived in the United States after the date of initial designation.

* * * *

b. Related statutory relief

(1) The Chinese Student Protection Act of 1992

On October 9, 1992, President George H. W. Bush signed into law the Chinese Student Protection Act of 1992, Pub. L. No. 102–404, 106 Stat. 1969 (1992). The Act enabled many of the Chinese nationals who had been granted deferred enforced departure following the brutal suppression by armed

forces of the government of the People's Republic of China ("PRC") in June 1989 of Chinese student dissidents who participated in the Tiananmen Square demonstrations (*see Digest 1989–90* at 54–57) to regularize their status and remain in the United States permanently.

The Act permitted Chinese nationals who had resided continuously in the United States since April 11, 1990, (other than for brief, casual and innocent absences) and who were not physically present in the People's Republic of China for longer than 90 days after that date and before the date of enactment to apply for lawful permanent residence without being subject to a number of the usual restrictions on adjustment of status, such as certain grounds of inadmissibility.

(2) The Nicaraguan Adjustment and Central American Relief Act of 1997

The Nicaraguan Adjustment and Central American Relief Act of 1997, enacted into law on November 19, 1997, as title II (§§ 201–204) of the District of Columbia Appropriations Act of 1998, Pub. L. No. 105–100, 111 Stat. 2160 (1997), provided aliens of certain nationalities with the opportunity to apply for relief from removal. Section 202 allowed nationals of Nicaragua and Cuba who had been physically present in the United States continuously since December 1, 1995, as well as their spouses, children and unmarried sons and daughters, to apply for adjustment of status to that of an alien lawfully admitted for permanent residence provided they did so by April 1, 2000. Certain usual restrictions on adjustment of status, such as the availability of visa numbers and the application of certain grounds of inadmissibility, did not apply to such adjustments.

Section 203 of the Act exempted specified groups of aliens from the stricter "continuous presence" rules for the remedies of "suspension of deportation" and "cancellation of removal" that had been established by § 309(c)(5) of the

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (*see* C.2.b. *supra*). The exempted groups included aliens who were not apprehended at the time of entry after December 19, 1990, and who were: (1) Salvadorans who entered the United States on or before September 19, 1990, and who, on or before October 31, 1991, either registered for benefits under the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (for a discussion of the settlement agreement, *see Digest 1989–90* at 40–42) or applied for Temporary Protected Status under § 244A of the INA (for a discussion of § 244A *see* section D.5.b. *supra*; *Digest 1989–90* at 39–40); (2) Guatemalans who entered the United States on or before October 1, 1990, and registered for benefits under the *American Baptist Churches* settlement on or before December 31, 1991; (3) Salvadorans and Guatemalans who applied for asylum on or before April 1, 1990; (4) the spouses or children of aliens in the preceding three categories at the time the alien's application for relief was approved; (5) the adult, unmarried sons or daughters of such aliens if they entered the United States on or before October 1, 1990; and (6) nationals of the Soviet Union (or any of its successor republics), Latvia, Estonia, Lithuania, Poland, Czechoslovakia (or its successor republics), Romania, Hungary, Bulgaria, Albania, East Germany, or Yugoslavia (or its successor republics) who entered the United States on or before December 31, 1990, and applied for asylum on or before December 31, 1991.

(3) The Haitian Refugee Immigration Fairness Act of 1998

The Haitian Refugee Immigration Fairness Act of 1998 ("HRIFA"), Title IX (§§ 901–904) of Division A of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105–277, 112 Stat. 2681–538 (1998), allowed certain Haitians to apply for adjustment of status to that of lawful permanent resident

provided they did so before April 1, 2000. Eligible Haitians were those present in the United States on December 31, 1995, and who were continuously present in the United States from that date through the date their adjustment petition was filed and who: (1) filed for asylum on or before December 31, 1995; (2) were paroled into the U.S. on or before December 31, 1995, after being identified as having a credible fear of persecution or for emergency reasons or reasons deemed strictly in the public interest; or (3) were children who (a) arrived in the U.S. without parents and had remained without parents while in the U.S., (b) became orphaned subsequent to arrival in the U.S., or (c) were abandoned by parents or guardians prior to April 1, 1998, and remained abandoned. With respect to such Haitians, HRIFA lifted a number of the restrictions usually applicable to adjustment of status. HRIFA applicants were not, for example, required to have been inspected and admitted or paroled into the United States; were not subject to the bars to adjustment contained in section 245(c) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1255(c); were not subject to the immigrant visa preference quotas; did not need to demonstrate they were not inadmissible under certain provisions of section 212(a) of the INA, 8 U.S.C. § 1182(a); and were not barred from filing applications for adjustment of status while in exclusion or removal proceedings.

Cross-references

Case concerning Fifth Amendment privilege against self-incrimination based on fear of prosecution abroad in denaturalization and deportation proceeding, **Chapter 3.B.6.**

Federal preemption of state regulations of rights of aliens, **Chapter 5.A.3.c.**

Dual nationality in cases at Iran-U.S. Claims Tribunal, **Chapter 8.A.8.e.**

Persons with dual U.S. and Vietnamese nationality assigned to diplomatic and consular missions, **Chapter 9.A.2.j.**

Chapter 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS AND ASSISTANCE

1. Consular Notification and Access

In the early 1990s U.S. compliance with consular information and notification requirements under Article 36 of the Vienna Convention on Consular Relations ("the VCCR"), April 24, 1963, 21 U.S.T. 77 (entered into force for the United States December 24, 1969), particularly in death penalty cases, became a frequent subject of bilateral discussions and an increasingly litigated issue in criminal cases in the U.S. and before international commissions and courts. Foreign nationals in the United States facing or convicted of criminal charges—and sometimes their consular authorities on their behalf— began seeking to suppress evidence or to overturn convictions based on alleged failures of officials in the United States to inform detainees of their right to consular notification and/or to notify their consulates without delay as required by Article 36.

Article 36 of the VCCR provides:

> COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE
>
> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

a. U.S. court consideration of alleged violations of consular notification

With a few exceptions, in cases decided between 1991 and 1999, U.S. courts rejected attempts to obtain suppression of confessions, new trials, or new sentencing hearings based on alleged failures to inform a foreign national without delay that he could have his consular officer notified of his detention, as required by Article 36(1)(b) of the VCCR. Courts found the claims unavailing on a number of grounds,

including that the defendant failed to raise the claim at trial (the procedural default doctrine), that the VCCR did not create individual rights, that any individual rights created by the VCCR were not "fundamental," that the defendant failed to show prejudice and/or that the claim was barred by the Eleventh Amendment of the U.S. Constitution (which prohibits suits against a state by citizens of another state or by citizens or subjects of any foreign state).

For example, the U.S. Court of Appeals for the Fifth Circuit on April 10, 1996, refused to overturn the conviction of a Canadian citizen, Stanley Faulder, who was twice convicted and sentenced to death in Texas for the murder of an elderly widow. The State of Texas admitted that it had not complied with the consular notification requirements of Article 36, paragraph 1(b) of the VCCR. The Fifth Circuit held: "[w]hile we in no way approve of Texas' failure to advise Faulder, the evidence that would have been obtained by the Canadian authorities is merely the same as or cumulative of evidence defense counsel had or could have obtained," and Faulder therefore was not prejudiced. *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996). For discussion of diplomatic communications between the United States and Canada and U.S. Department of State actions in the *Faulder* case, *see* 1.c.(2)(i) below.

The U.S. Court of Appeals for the Fourth Circuit on June 19, 1997, affirmed a decision of the U.S. District Court for the Eastern District of Virginia to deny a petition for federal *habeas corpus* relief in a case involving a Mexican national defendant where Article 36, paragraph 1(b) of the VCCR allegedly had been violated. *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997). The defendant pled guilty and was sentenced to death in Virginia state court for murder-for-hire and conspiracy to commit capital murder. Defendant's federal *habeas corpus* petition claimed that the failure to inform him of his right to contact the Mexican consulate made his conviction and sentence constitutionally invalid. The district court rejected the petition because his VCCR claim had not been raised in state court. On appeal, in addition to finding

no justification for the defendant's failure to raise the VCCR claim in state court, the court of appeals held defendant could not make the "substantial showing of the denial of a constitutional right" required under the federal *habeas corpus* statute, 28 U.S.C. § 2253, to appeal the denial of his petition. The court of appeals reasoned that, even assuming the VCCR created individual rights as opposed to setting out the rights and obligations of States Parties, it did not create constitutional rights. Although states of the United States had an obligation under the Supremacy Clause to comply with the provisions of the VCCR, the Supremacy Clause did not convert violations of treaty provisions into violations of constitutional rights. Finally, the court of appeals found that Murphy had failed to establish prejudice from the alleged VCCR violation because he could not explain how contacting the Mexican consulate would have changed either his guilty plea or his sentence. United States and Mexican diplomatic exchanges in the Murphy case are discussed in 1.c.(2)(iv) below.

In *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997), the U.S. Court of Appeals for the Ninth Circuit dismissed an action brought by Mexico, the Legal Advisor of the Secretary of Foreign Relations of Mexico, and the Consul General of Mexico in the State of Arizona, to enjoin execution of a Mexican national, Ramon Martinez Villareal. Mexico and its officials alleged that Arizona officials had failed to notify Martinez Villareal of his consular notification rights in violation of the VCCR and the U.S.-Mexico bilateral consular convention, had denied Mexico a meaningful opportunity to assist him under the two treaties, and had failed to ensure that he had competent counsel. They further contended that he was retarded and his execution would violate the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, as well as customary international law. The Ninth Circuit held that the Arizona officials were immune from suit under the Eleventh Amendment. Martinez Villareal's petition to the Inter-American Commission on Human Rights is discussed in section 1.d.(1)(ii) below.

In *Breard v. Greene*, 523 U.S. 371 (1998), the U.S. Supreme Court by a 5–4 majority declined to review the conviction of Angel Francisco Breard, a Paraguayan national, for murder, or to stay his execution based on noncompliance with the consular notification provisions of the VCCR and a provisional measures order from the International Court of Justice ("ICJ") indicating that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision" of the ICJ in a suit filed by Paraguay against the United States. The Supreme Court concluded that the VCCR claim was procedurally barred and resolved a number of other issues against review. For further discussion of the domestic court and ICJ litigation in the *Breard* case, *see* section 1.d.(2)(i) below.

A 1999 decision by a panel of the Ninth Circuit holding that Article 36, paragraph 1(b), created individual rights that could be enforced in U.S. courts by foreign national defendants and that incriminating statements made before a defendant was informed of those rights should be suppressed if the defendant could show prejudice from the failure to inform was reversed in 2000 by the Ninth Circuit sitting en banc. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885–888 (9th Cir. 2000). *See* discussion in *Digest 2000* at 23–46.

In *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74 (D. Mass. 1999), a lawful permanent resident who was a national of Cameroon was charged with violation of the Endangered Species Act when customs agents discovered and seized ivory figurines in his luggage during a secondary inspection. He argued that the evidence against him was obtained in violation of Article 36, paragraph 1(b), of the VCCR because he had not been informed of his consular notification rights, and asked that either the complaint be dismissed or the evidence be suppressed. While the district court agreed with defendant's assertion that Article 36, paragraph 1(b), granted individual rights, it found that the defendant was not "detained" within the meaning of that paragraph. The secondary inspection did not cross the line into custodial

interrogation, the questioning was straightforward and not coercive, no events caused heightened suspicion, and the duration of examination was only approximately an hour.

In *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999), the U.S. Supreme Court by a 5–4 majority declined to exercise its original jurisdiction over a suit by the Federal Republic of Germany seeking to enforce a provisional measures order of the ICJ indicating that the United States "should take all measures at its disposal to ensure that" a German national, Walter LaGrand, "is not executed pending the final decision" of the ICJ in a case brought by Germany against the United States based on an alleged failure to inform Walter LaGrand of his consular notification rights. The Court stated:

> With regard to the action against the United States, which relies on the *ex parte* order of the International Court of Justice, there are imposing threshold barriers. First, it appears that the United States has not waived its sovereign immunity. Second, it is doubtful that Art. III, § 2. cl. 2 provides an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul. With respect to the action against the State of Arizona, as in *Breard v. Greene*, 523 U.S. 371 . . . (1998), a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles. This action was filed within only two hours of a scheduled execution that was ordered on January 15, 1999, based upon a sentence imposed by Arizona in 1984, about which the Federal Republic of Germany learned in 1992. Given the tardiness of the pleas and the jurisdictional barriers they implicate, we decline to exercise our original jurisdiction.

See also discussion in *Digest 2000* at 43–93; *Digest 2001* at 21–24.

In *State v. Reyes*, 1999 WL 743598 (Del. Super. Ct. Aug. 17, 1999), the Superior Court of Delaware suppressed the

statement of a Guatemalan defendant who had shot and killed another man, but claimed he acted in self defense. The State conceded the defendant had not been notified of his consular notification rights before he made incriminating statements. The court made a specific finding of prejudice in fact and concluded that suppression of the statement was an appropriate remedy, but noted that it was not holding that a violation of the VCCR is "prejudice *per se*."

For further examples where claims regarding failure to give consular information did not succeed, *see*

—*Waldron v. INS,* 17 F.3d 511 (2d Cir. 1994) (INS failure to follow its own regulations concerning mandatory consular notification did not justify remand in deportation case because Article 36 rights were not fundamental rights derived from the constitution or federal statutes and the Nigerian national did not claim or demonstrate that the failure to notify prejudiced him in his preparation of a defense to the deportation charges);

—*Villafuerte v. Stewart*, 142 F.3d 1124 (9th Cir. 1998) (Article 36 claim procedurally defaulted in state court was not "a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" and therefore was not cognizable as a federal *habeas* claim under 28 U.S.C. § 2244);

—*United States v. Maldonado-Vences*, 1998 U.S. App. LEXIS 32637 (4th Cir. Dec. 31, 1998) (failure of arresting authorities to comply with Article 36 did not constitute "plain error" justifying reversal of Mexican national's conviction for illegal re-entry into the United States, because voluntary guilty plea waived prior nonjurisdictional defects, there was no denial of constitutional rights, and the Mexican national failed to show prejudice);

—*United States v. Salas*, 1998 U.S. App. LEXIS 32633 (4th Cir. Dec. 31, 1998) (district court properly denied motion to suppress use of heroin as evidence on ground arresting officers did not comply with Article 36 because national of Dominican Republic failed to show how failure could have affected the outcome of his case);

—*United States v. Ademaj*, 170 F.3d 58 (1st Cir. 1999) (failure to give consular information to an Albanian national did not constitute "plain error" where issue was not raised before trial court and defendant provided no evidence that the Albanian Consul could have assisted in his defense or that any material due process right was infringed by the failure to notify the Consul);
—*United States v. Doe*, 1999 U.S. App. LEXIS 21400 (4th Cir. Sept. 7, 1999) (defendant did not meet burden of showing she was prejudiced by the Government's failure to notify her of her rights under Article 36);
—*United States v. Esparza-Ponce*, 193 F.3d 1133 (9th Cir. 1999) (motion to suppress incriminating post-arrest statements based on alleged Article 36 violations was properly denied where Mexican national failed to demonstrate or even allege that he would have contacted the Mexican consul if he had been informed of his right to do so, that the consul would have done anything to help him, and, if the consul had, that it would have been something that his attorney had not already done);
—*United States v. Ediale*, 1999 U.S. App. LEXIS 28477 (4th Cir. Nov. 2, 1999) (judgment denying motion to suppress was affirmed where defendant failed to demonstrate how assistance from consul would have affected the outcome of his trial);
—*United States v. Juarez-Yepez*, 1999 U.S. App. LEXIS 30604 (9th Cir. Nov. 22, 1999) (post arrest statement would not be suppressed on basis of alleged Article 36 violation in absence of showing of prejudice);
—*Consulate General of Mexico v. Phillips*, 17 F. Supp. 2d 1318 (S.D. Fla. 1998) (although Mexico had standing to seek redress for alleged Article 36 violation by Florida state officials, the Eleventh Amendment barred the federal court from issuing a writ of mandamus to require Florida court to permit taking of organic brain damage scan and its introduction in state court sentencing proceedings);
—*United States v. $69,530 In United States Currency*, 22 F. Supp. 2d 593 (W.D. Tex. 1998) (in a civil forfeiture proceeding, suppression of incriminating statements for violation of

Article 36 was not warranted because the exclusionary rule was designed to protect only core constitutional values);

—*United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122 (C.D. Ill. 1999) (VCCR creates private enforceable rights, but without showing of prejudice exclusionary rule is not a remedy for violation of its provisions);

—*United States v. Tapia-Mendoza*, 41 F. Supp. 2d 1250 (D. Utah 1999) (assuming without deciding that defendant had standing to assert violation of Article 36 rights as ground for suppressing incriminating statements, defendant failed to demonstrate that he was prejudiced when Mexican consulate would only have advised him of his Miranda rights of which he was aware);

—*United States v. Alvarado-Torres*, 45 F. Supp. 2d 986 (S.D. Cal. 1999), *aff'd* 230 F.3d 1368 (9th Cir. 2000) (foreign national defendant who was advised of Miranda rights and waived them could not establish prejudice based on INS agents' failure to advise of right to consular notification before interrogation);

—*United States v. Salameh*, 54 F. Supp. 2d 236 (S.D.N.Y. 1999) (assuming but not deciding that Egyptian defendant in 1993 World Trade Center bombing case had standing to bring an Article 36 VCCR claim, suppression of post-arrest statements would not be an appropriate remedy where no constitutional violation and defendant could not demonstrate prejudice because Egyptian officials turned him over to U.S. authorities in Egypt and therefore knew of his detention);

—*United States v. Torres-Del Muro*, 58 F. Supp. 2d 931 (C.D. Ill. 1999) (exclusion of incriminating statements not available remedy for Article 36 violation because it was not a constitutional violation);

—*United States v. Miranda*, 65 F. Supp. 2d 1002 (D. Minn. 1999) (two-day delay between arrest and advice of Convention rights violated Article 36, paragraph 1(b), but defendant was not prejudiced because he failed to contact the consulate when advised of his rights and did not demonstrate how contact with the consulate might have prevented him from making the statements he sought to exclude);

—*United States v. Rodrigues*, 68 F. Supp. 2d 178 (E.D.N.Y. 1999) (suppression of incriminating post-arrest statements did not constitute showing of prejudice because defendant was fully informed of his constitutional right to remain silent and to have an attorney and waived those rights and there was no evidence that Guyanese consulate in New York regularly provided any assistance at all to its citizens who were arrested, and the VCCR did not prohibit questioning of a foreign national awaiting consular contact; suppression of statements was not an appropriate remedy for violation of Article 36, paragraph 1(b) because it was not a constitutional violation, and all VCCR parties remedied breach through traditional diplomatic and not judicial channels);

—*United States v. Carrillo*, 70 F. Supp. 2d 854 (N.D. Ill. 1999) (even if Mexican nationals had standing to raise alleged violations of Article 36 of the VCCR and showed prejudice, neither dismissal of their indictments for drug-related offense nor suppression of cocaine seized from their vehicle were available remedies);

—*United States v. Briscoe*, 69 F. Supp. 2d 738 (D.V.I. 1999) (Jamaican defendant had standing to raise Article 36 violation, but did not meet burden of establishing prejudice—producing evidence that (1) he did not know of his right, (2) he would have availed himself of the right and (3) there was a likelihood that the contact with the consul would have resulted in assistance to him—when he said he would have asked consular officers whether he should make a statement but where no showing of how the consular officer's assistance would have added or varied from the assistance of an attorney, which he had voluntarily waived);

—*United States v. Martinez-Villalva*, 80 F. Supp. 2d 1152 (D. Colo. 1999) (district court would not suppress incriminating statement defendant made about his illegal reentry to the United States to Immigration and Naturalization Service because INS was independently aware of his previous deportation order and defendant therefore could not establish prejudice);

—*State v. Loza*, 1997 Ohio App. LEXIS 4574 (Ohio Ct. App. Oct 13, 1997) (defendant sentenced to death for multiple murders was not entitled to post-conviction relief for alleged violation of Article 36, paragraph 1(b) because the rights violated were not of constitutional dimension);

—*Cardona v. State*, 973 S.W.2d 412 (Tex. App. 1998) (trial court's refusal to suppress statement because Mexican defendant was not informed of his right of access to his consulate was not reversible error when consulate was notified within hours of his arrest and probable impact of statement on jury was negligible);

—*Kasi v. Commonwealth*, 508 S.E.2d 57 (Va. 1998) (Article 36 does not create any legally enforceable individual rights, but, in any event, VCCR did not require defendant, who was seized in Pakistan and brought back to the United States, to be informed of his consular notification rights when he was arrested in Pakistan and turned over to Pakistani authorities, and once defendant returned to the United States, the prosecutor informed the defense of his right to contact the Pakistani consulate);

—*Alcozer v. State*, 1999 Tex. App. LEXIS 1545 (Tex. App. Mar. 9, 1999) (foreign national defendant who claimed he was not notified of his Article 36 rights was not entitled to a new trial because he did not raise the violation in a timely manner and failed to show violation of a constitutional right or other "substantial right");

—*Martinez v. State*, 984 P.2d 813 (Okla. Crim. App. 1999) (Cuban defendant failed to show he requested to exercise his rights under Article 36, that the issue was properly raised or preserved at trial, or that any prejudice resulted from the alleged violation);

—*Ibarra v. State*, 11 S.W.3d 189 (Tex. Crim. App. 1999), *cert. denied*, 531 U.S. 828 (2000) (Mexican defendant's Article 36 claim was procedurally defaulted because he did not raise it at trial);

—*Melendez v. State*, 4 S.W.3d 437 (Tex. App. 1999) (alleged failure to comply with Article 36, paragraph 1(b) did not

invalidate juvenile court's transfer of defendant to criminal court because it was not settled that an individual had standing to raise violations of Article 36, consular assistance under Article 36 is subject to the practices and procedures of the receiving State, and although defendant was born in El Salvador, there was no evidence in the record that he was not a U.S. citizen);

—*Walker v. Pataki*, 266 A.D.2d 40 (N.Y. App. Div. 1999) (petitioners, who were not seeking post-conviction relief for themselves, did not have standing to seek declaratory, injunctive and mandamus relief based on alleged violations of prisoners' Article 36 rights);

—*Flores v. State*, 994 P.2d 782 (Okla. Crim. App. 1999) (Mexican national was not prejudiced by failure to inform him of Article 36 rights when he voluntarily waived his *Miranda* rights, signed a search warrant for his apartment, and presented no evidence that he would have been granted greater protection or would have acted differently had he been so informed).

b. Department of State guidance on consular notification and access for federal, state, and local law enforcement and other officials

In January 1998 the Department of State released a new 72-page document, Publication 10518, *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*. Prepared by the Office of the Legal Adviser in booklet format, the manual contained "instructions and guidance relating to the arrest and detention of foreign nationals, deaths of foreign nationals, the appointment of guardians for minors or incompetent adults who are foreign nationals, and related issues pertaining to the provision of consular services to foreign nationals in the United States." The foreword pointed out that cooperation of federal, state

and local law enforcement agencies in ensuring treatment of foreign nationals in accordance with the instructions not only would permit the United States to comply with its consular legal obligations domestically, but also would help ensure that the United States could insist upon "rigorous compliance by foreign governments with respect to United States citizens abroad."

Part One of the booklet, Basic Instructions, summarized consular notification and access requirements pertaining to foreign nationals under the VCCR and bilateral consular agreements. Part Two provided more detailed instructions; Part Three covered frequently asked questions; Part Four supplied translations of suggested statements in 13 languages; Part Five provided relevant legal overview and provisions; and Part Six listed phone and fax numbers for foreign embassies and consulates in the United States.

Parts One and Two are excerpted below. The full text of the publication is available at *www.state.gov/www/global/legal_affairs/ca_notification/introduction.html.*

Part One

* * * *

1. When foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified.
2. In some cases, the nearest consular officials *must* be notified of the arrest or detention of a foreign national, *regardless of the national's wishes*.
3. Consular officials are entitled to access to their nationals in detention, and are entitled to provide consular assistance.
4. When a government official becomes aware of the death of a foreign national, consular officials must be notified.
5. When a guardianship or trusteeship is being considered with respect to a foreign national who is a minor or incompetent, consular officials must be notified.
6. When a foreign ship or aircraft wrecks or crashes, consular officials must be notified.

These are mutual obligations that also pertain to American citizens abroad. In general, you should treat a foreign national as you would want an American citizen to be treated in a similar situation in a foreign country. This means prompt, courteous notification to the foreign national of the possibility of consular assistance, and prompt, courteous notification to the foreign national's nearest consular officials so that they can provide whatever consular services they deem appropriate.

* * * *

Part Two

* * * *

The instructions in this booklet are based on international legal obligations designed to ensure that governments can assist their nationals who travel abroad. While these obligations are in part matters of "customary international law," most of them are set forth in the Vienna Convention on Consular Relations ("VCCR"), and some are contained in bilateral agreements, conventions, or treaties (*i.e.*, agreements between the United States and just one other country). The agreements discussed herein have the status of treaties for purposes of international law and Article VI, clause 2 of the Constitution of the United States ("all treaties made . . . shall be the supreme law of the land"). They are binding on federal, state, and local government officials to the extent that they pertain to matters within such officials' competence.

These instructions focus primarily on providing consular notification and access with respect to foreign nationals arrested or detained in the United States, so that their governments can assist them. The obligations of consular notification and access apply to United States citizens in foreign countries just as they apply to foreign nationals in the United States. When U.S. citizens are arrested or detained abroad, the United States Department of State seeks to ensure that they are treated in a manner consistent with these instructions, and that U.S. consular officers can similarly assist them. It is therefore particularly important that federal, state, and local government officials in the United States comply with these obligations with respect to foreign nationals here.

These instructions also discuss obligations relating to deaths of foreign nationals, to the appointment of guardians for foreign nationals who may be minors or incompetent adults, and to foreign aircraft or ship wrecks. Like the obligations of consular notification and access, these are mutual obligations that also apply abroad.

* * * *

Arrests and Detentions of Foreign Nationals

Whenever a foreign national is arrested or detained in the United States, there are legal requirements to ensure that the foreign national's government can offer him/her appropriate consular assistance. *In all cases, the foreign national must be told of the right of consular notification and access. In most cases*, the foreign national then has the option to decide whether to have consular representatives notified of the arrest or detention. *In other cases*, however, the foreign national's consular officials must be notified of an arrest and/or detention regardless of the foreign national's wishes. *Whenever a foreign national is taken into custody, the detaining official should determine whether consular notification is at the option of the foreign national or whether it is mandatory.* A list of all embassies and consulates in the United States, with their telephone and facsimile numbers, is included in this booklet to facilitate the provision of notification by detaining officials to consular officials when required.

Notification at the Foreign National's Option

In all cases, the foreign national must be told of the right of consular notification and access. The foreign national then has the option to decide whether he/she wants consular representatives notified of the arrest or detention, *unless* the foreign national is from a "mandatory notification" country. The mandatory notification countries are listed on page 5 and in Part Five of this booklet.

If the detained foreign national is a national of a country not on the mandatory notification list, the requirement is that the foreign national be informed without delay of the option to have his/her government's consular representatives notified of the detention. *If the detainee requests notification, a responsible detaining official must ensure that notification is given to the nearest consulate or embassy of the detainee's country without delay.*

Mandatory Notification

In some cases, "mandatory notification" must be made to the nearest consulate or embassy "without delay," "immediately," or within the time specified in a bilateral agreement between the United States and a foreign national's country, *regardless of whether the foreign national requests such notification*. Mandatory notification requirements arise from different bilateral agreements whose terms are not identical. The exact text of the relevant provisions on mandatory notification in our bilateral agreements is reproduced in Part Five of this booklet.

Foreign nationals subject to mandatory notification requirements should otherwise be treated like foreign nationals not subject to the mandatory notification requirement. Thus, for example, the foreign national should be informed that notification has been made and advised that he/she may also specifically request consular assistance from his or her consular officials.

Privacy concerns or the possibility that a foreign national may have a legitimate fear of persecution or other mistreatment by his/her government may exist in some mandatory notification cases. The notification requirement should still be honored, but it is possible to take precautions regarding the disclosure of information. For example, it may not be necessary to provide information about why a foreign national is in detention. Moreover, *under no circumstances should any information indicating that a foreign national may have applied for asylum in the United States or elsewhere be disclosed to that person's government*. The Department of State can provide more specific guidance in particular cases.

* * * *

Consular Access to Detained Foreign Nationals

Detained foreign nationals are entitled to communicate with their consular officers. Any communication by a foreign national to his/her consular representative must be forwarded by the appropriate local officials to the consular post without delay.

Foreign consular officers must be given access to their nationals and permitted to communicate with them. Such officers have the right to visit their nationals, to converse and correspond with them, and to arrange for their legal representation. They must

refrain from acting on behalf of a foreign national, however, if the national opposes their involvement. In addition, consular officers may not act as attorneys for their nationals.

The rights of consular access and communication generally must be exercised subject to local laws and regulations. For example, consular officers may be required to visit during established visiting hours. Federal, state, and local rules of this nature may not, however, be so restrictive as to defeat the purpose of consular access and communication. Such rules "must enable full effect to be given to the purposes" for which the right of consular assistance has been established.

The above requirements are set out in Article 36 of the VCCR. Additional requirements may apply to particular countries because of bilateral agreements.

* * * *

c. Bilateral exchanges on consular notification and access

(1) United States-Mexico Memorandum of Understanding on Consular Protection of United States and Mexican Nationals

On May 7, 1996, in the context of the U.S.-Mexico Binational Commission, U.S. Secretary of State Warren Christopher and Secretary of Foreign Relations Angel Gurria of the United Mexican States concluded the Memorandum of Understanding on Consular Protection of United States and Mexican Nationals ("MOU"). A non-binding statement of principles and goals, the MOU reemphasized the importance of compliance with Article 36, paragraph 1(b) of the VCCR by both countries. In response to Mexico's particular concerns involving the detention of minors, pregnant women and "people at risk" (understood to be people with extremely serious mental or physical problems, or who were charged with crimes that could result in the death penalty), reflected in paragraph 2 of the MOU, the Department of State subsequently wrote to the governors of the fifty states of the United States asking that they encourage law enforcement

authorities to consider policies of notifying Mexican consular officials of such cases even when notification would not be required by the VCCR.

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

The Government of the United States of America and the Government of the United Mexican States,
Considering their firm commitment to respect the human rights of all individuals within their respective territories;
Considering their firm will to strengthen and enhance their relationships in all areas, within the spirit of good neighbors and mutual respect;
Considering the need to continue to foster and strengthen the effective relationships and communications among consular officials and local authorities of both countries, within the spirit of the Consular Convention between the two Governments and the Vienna Convention on Consular Relations;
Considering that the Working Group on Migration and Consular Affairs of the Binational Commission has proven to be an effective forum to discuss and exchange information on the migratory phenomenon between the two countries, as well as to agree on measures that serve the interest of both nations;
Considering the will of both Governments to strengthen the Border Liaison Mechanisms and the Consultation Mechanisms on Immigration and Naturalization Service Activities and Consular Protection, which have been recently established for, among other purposes, sharing information concerning migratory practices and procedures by authorities on both sides of the border, and resolving problems at the local level, including issues related to the protection of human rights;
Considering the interest of both Governments in preventing situations that negatively affect the physical safety, dignity and human rights of their nationals within the territory of the other country, and the importance of having adequate institutional mechanisms to effectively address those situations when they might occur,

Adopt the following principles and goals:

1. To include within the mandate of the Working Group on Migration and Consular Affairs of the Binational Commission, the discussion and evaluation of issues, problems and trends related to the consular protection and human rights of nationals of both countries and the understandings expressed in this memorandum as regular matters on its agenda, in order to make recommendations to the respective Governments, if mutually agreed upon.
2. To provide any individual detained by migration authorities with notice of his/her legal rights and options, including the right to contact his/her consular representatives, and to facilitate communication between consular representatives and their nationals. Both Governments will endeavor, consistent with the relevant laws of each country, to ensure that specific notification to consular representatives is given in cases involving the detention of minors, pregnant women and people at risk.
3. To endeavor to provide settings conducive to full and free exchange between the consular representatives and detained individuals in order to allow, consistent with the relevant laws of each country, consular officials to interview their respective nationals when they are detained, arrested, incarcerated or held in custody in accordance with Article VI, paragraph 2, section (c) of the Consular Convention between the United States of America and the United Mexican States of August 12, 1942, and in accordance with Article 36, first paragraph, of the Vienna Convention on Consular Relations of 1963.
4. To allow and to facilitate, consistent with the relevant laws of each country, consular officials to be present at all times at the trials or judicial procedures concerning their respective nationals, including those legal procedures relating to minors.
5. To bring to the attention of the Working Group on Migration and Consular Affairs significant reports concerning consular protection and respect for human rights

of nationals of both countries discussed at the Border Liaison Mechanisms and the Consultation Mechanisms on Immigration and Naturalization Service Activities and Consular Protection.

6. To promote bi-cultural sensitivity and understanding related to human rights protection through the Border Liaison Mechanisms and the Consultation Mechanisms on Immigration and Naturalization Service Activities and Consular Protection, and to encourage the participation of local authorities in these entities.
7. To encourage cooperation at the highest levels to facilitate investigation of violent and serious incidents involving consular protection of their respective nationals.

(2) Diplomatic communications and State Department responses in consular notification cases involving the death penalty

The following summarizes a number of cases that arose between 1991 and 1999. Information about the cases was submitted to the ICJ in the *Avena* case (*see Digest 2003* at 43–103) in the Declaration of Ambassador Maura A. Harty regarding U.S. compliance with Article 36(1)(b) of the VCCR (Annex 1 to the U.S. Counter Memorial), filed November 3, 2003.

(i) Joseph Stanley Faulder

As noted in section 1.a, *supra*, Joseph Stanley Faulder, a Canadian national, was twice convicted of capital murder and sentenced to death by the State of Texas for a murder committed in 1975. His first conviction and sentence were vacated in 1980, and his second trial was held in 1981. The Canadian Government brought Faulder's case to the attention of the Department of State in 1992. At the Department's request, Texas investigated the consular notification issue and provided a report that was shared with the Canadian Embassy in September 1992. The Canadian Embassy also asked whether the Department would consider supporting

Faulder in litigation on its behalf. The United States concluded that it could not represent to a court that a breach of Article 36, paragraph 1(b) required that the defendant be granted remedies in the U.S. criminal justice system.

After years of appeals and several stays of execution, Faulder's date of execution ultimately was set for December 10, 1998. He filed a clemency petition with then Governor George W. Bush of Texas based, in part, on the alleged failure of Texas officials to inform him of his right to have a Canadian official notified of his detention under Article 36(1)(b) of the VCCR.

The Minister of Foreign Affairs of Canada, Lloyd Axworthy, in a letter of November 2, 1998, requested Secretary of State Madeleine Albright to recommend clemency for Faulder. In her reply of November 27, Secretary of State Albright apologized for the failure of consular notification in Faulder's case. While she did not feel the Department of State had an adequate basis to recommend clemency, she indicated that the Department "was concerned that the failure of notification, coupled with the fact that Faulder's name was not included on lists of Canadian prisoners given to the Canadian Consulate General in Dallas, meant that he did not have an opportunity to receive consular assistance, particularly in connection with his second trial." Accordingly, she indicated that she was writing to the Texas Board of Pardons and Paroles asking that it give serious consideration to the failure of consular notification in Faulder's case, and to Governor Bush to advise him of the Department's submission to the Board and to encourage him to give serious consideration to the Government of Canada's request for a thirty-day extension.

Secretary Albright's November 27, 1998, letter to Victor Rodriguez, Chairman of the Texas Board of Pardons and Paroles, with attachments, is excerpted below. She wrote to Governor Bush on the same day.

On June 16, 1999, the Texas Board of Pardons and Paroles voted 18–0 to deny Faulder's request for reprieve or commutation of sentence. He was executed on June 17, 1999.

Secretary Albright's letters to Governor Bush and to Mr. Rodriguez, with attached Observations of the United States Department of State Concerning Consular Notification Issues in the case of Joseph Stanley Faulder, as well as correspondence from Canadian Minister of Foreign Affairs Lloyd Axworthy to Secretary Albright and to the same Texas officials, are available in Memorial of Mexico (*Mexico v. United States of America*), 2003 I.C.J. (Annex 29) (1 June 20, 2003), at A420–A439.

---

* * * *

I am deeply troubled by the failure of consular notification in this case. Texas has conceded that the VCCR's requirement of consular notification was violated. Further, safeguards that the Canadian Government had in place to protect against violations of consular notification requirements failed when Texas omitted Mr. Faulder's name from the lists of prisoners. It is clear that, but for these failures, Canadian consular officials would have visited Mr. Faulder in prison and offered him assistance before his second trial and direct appeals had been completed, when such assistance would have been most critical. Moreover, we are not confident that the purposes of the VCCR were served in Mr. Faulder's case through other mechanisms. We are particularly troubled by the facts that Mr. Faulder's legal counsel has been found by the courts to have been deficient in his handling of the sentencing phase of trial, that no mitigation evidence was presented to the jury in the sentencing phase, and that Mr. Faulder's family was not aware of his situation. These are all areas in which Canadian consular officials might well have taken some action. While the VCCR violation in this case does not create any legal right to relief, we believe that this is a case in which consular notification issues may provide sufficient grounds for according discretionary clemency relief.

We do not have access to all relevant information and cannot take a position on whether Mr. Faulder in fact warrants clemency. We believe, however, that the absence of consular notification and assistance in this case should be a significant relevant factor in your deliberations. I am enclosing for the Board's consideration

the observations of the Department of State with respect to the consular issues raised in this case. . . .

* * * *

We have not previously made such a submission. For example, this case is quite unlike the recently highly publicized case of Angel Breard. We have decided to make a submission here because the breakdown of consular assistance mechanisms in this case had implications for Mr. Faulder's ability to enlist the assistance of his government and his family in ensuring that he had competent counsel and presented relevant information in his defense, particularly in the sentencing phase. Failure to examine these issues carefully would be inconsistent with the United States' policy of supporting respect for the consular notification and access requirements of the VCCR both here and abroad.

As Secretary of State, ensuring the protection of American citizens abroad is one of my most important responsibilities. The treaty violated in this case governs the United States' consular relations with over 140 countries and provides the basic framework under which United States consular officers under my direction assist American citizens imprisoned abroad. Last year, the Department of State was providing assistance to over 2,500 such Americans, including well over 300 from Texas. We assist by attempting to ensure that they understand the foreign country's legal system and their legal options, by helping them obtain qualified legal representation, by taking other steps to improve the prisoner's situation and, in some cases, to influence the outcome of the proceedings. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations so that we can have access to detained Americans in time to assist them.

Ensuring worldwide respect for the consular notification requirements of the VCCR and for international law generally is a major responsibility and concern for me. We must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad. We cannot have a double standard. State as well as federal executive officials must be committed to

compliance with consular notification requirements and must look seriously at allegations of failures of compliance.

* * * *

OBSERVATIONS OF THE UNITED STATES DEPARTMENT OF STATE CONCERNING THE CONSULAR NOTIFICATION ISSUES IN THE CASE OF JOSEPH STANLEY FAULDER

* * * *

Faulder's defense attorney for both trials was Vernard Solomon, a court appointed attorney. In 1992, in the context of the first state proceeding on an application for a writ of habeas corpus by Faulder, a Texas state court rejected Faulder's ineffective assistance of counsel claim. . . .

In the subsequent federal habeas proceeding, the federal district court found that Faulder's attorney was deficient, but that the deficiency was not prejudicial. The Fifth Circuit affirmed this finding. . . .

A failure to advise a detainee of the right to request consular assistance may be largely irrelevant in any number of situations. For example, the detainee may already be aware of this right; the appropriate consular officials may learn of the detention independently; the detainee's government may have been unable or disinclined to provide significant consular services in any event; the kind of assistance that consular services is designed to permit may have independently been available to the defendant; [footnote omitted] or the foreign national may have been resident in the home country so long that he or she is for all practical purposes on the same footing in the criminal justice system as a national. Moreover, there is no legal requirement that the collection of evidence by prosecutors be held in abeyance until consular notification is given or until consular assistance is provided.

* * * *

In this case, there is no evidence that Faulder knew that he could request consular assistance. . . . His time in the United States

prior to his arrest, his uncertain ties to the United States, and his apparent lack of involvement with the American justice system prior to his 1977 arrest, suggest someone not fully integrated into American society. His family was in Canada and apparently entirely unaware of his detention. . . . Solomon had no prior experience in death penalty cases and did not understand the law relevant to mitigation evidence. In addition, Solomon failed to develop or introduce mitigation evidence notwithstanding that such evidence would have been available. Full development of the possible mitigation evidence in question required access to people (family, friends, doctors, etc.) and records available in Canada. The federal courts have held that Faulder's court appointed lawyer was deficient in the sentencing phase, and have denied Faulder's ineffective assistance of counsel claim only because they concluded—at a stage when the burden of proof was on Faulder (and some evidence no longer available)—that Faulder had failed to show that, had the mitigation evidence been introduced, a different sentence was reasonably likely.

At the same time, the Canadian Consulate General was actively and aggressively seeking to provide consular services to Canadian prisoners in Texas during the critical period of Faulder's second trial and direct appeal. The Consulate General's own "safety mechanism" for protecting against a failure of notification—requesting lists of Canadian prisoners from Texas authorities—failed, however, because Texas did not include Faulder on lists given to Canada. This meant that Canada was unable to offer Faulder assistance directly. Had he been on the Texas lists, a Canadian consular official would have contacted him and offered assistance. Because Canada began requesting and obtaining lists by the late 1970s but the second trial did not occur until 1981, such an offer very likely would have occurred prior to the second trial.

It also appears that, even if Faulder had declined an offer of assistance from the Canadian Consulate General when first made, Canadian representatives nevertheless would have attended Faulder's trial and continued to remain available to him so that he could have obtained consular assistance at any time if he had changed his mind.

Canada has offered significant evidence of its involvement in criminal cases involving Canadians abroad, explaining how its consular assistance has made a difference. . . .

A number of reasons have been offered for concluding that the failure of notification was not significant in Faulder's case. . . .

The fact that some Canadian law enforcement officials knew of Faulder's detention: Texas authorities corresponded with Canadian law enforcement entities in Canada for information about Faulder that would support his conviction. . . .

As the Department of State has officially stated, however, informing law enforcement officials from a foreign national's country of the foreign national's detention is not a substitute for informing the appropriate consular officials. Page 20 of *Consular Notification and Access* [*see* section 1.b, *supra*] includes the following question and answer on this issue:

> Q. If the alien's government is aware of the case and helping with our investigation, should we still go through the process of notification?
>
> *A. Yes. It is important to distinguish between a government's consular officials and other officials, such as law enforcement officials, who have different functions and responsibilities. Even if law enforcement officials of the alien's country are aware of the detention and are helping to investigate the crime in which the alien was allegedly involved, it is still important to ensure that consular notification procedures are followed.*

There are a number of reasons for this. The VCCR explicitly requires that the notification must be to a consular post. The functions of consular and law enforcement officials are very different; law enforcement officials may have an interest in not disclosing information to anyone in order to protect an investigation, and are unlikely to have been trained to notify consular officials of their country (with whom they may have no established working relations) of a detention. Accordingly, if an American detained abroad were not advised of the right to request assistance from a U.S.

consular official, the United States would not agree that the fact that a federal law enforcement agency such as the Drug Enforcement Administration knew of the detention excused the failure.

* * * *

The fact that Mr. Faulder advised his attorney not to contact his family. The courts have noted that, while Faulder's family was not involved in his defense, he had instructed his attorney not to contact them. It appears, however, that this instruction was an instruction not to ask them to attend his trial for the purpose of eliciting sympathy. It was not an instruction not to seek to have them testify in mitigation, since Solomon apparently did not understand that such testimony was an option. [citations omitted]

The Department of State would not conclude that, because Faulder told his attorney not to contact his family for purposes of having them attend trial, he would have given the same instruction to a Canadian consular officer. The fact that Faulder told his attorney not to contact his family is not in our view dispositive of whether his family would have been involved by a consular officer.

First, because the Canadian Consulate General had established a practice of requesting lists of Canadian prisoners in Texas and offering its assistance to all those on the lists, it is fair to assume that Faulder would have had at least one face-to-face meeting with a Canadian consular representative before his second trial if his name had been on the lists. . . .

The experience of the Department of State is that, once direct contact is established between a prisoner and a consular officer, there is a significant potential for a relationship of trust to develop over time. Prisoners who decline consular assistance at the outset of their detention frequently change their mind as the period of detention lengthens. In addition, prisoners tend to develop a qualitatively different relationship with consular officials than with their own attorneys. The consular officer is a fellow countryman, while the attorney invariably is not; a prisoner may feel an affinity with a consular official from his own country lacking in his relationship with his attorney. A consular official cannot substitute as legal counsel, but can take on a role as advocate (*e.g.*, for improved detention conditions) and even confidant in addition to

monitoring whether the foreign national is receiving a fair trial and has legal representation.

American prisoners abroad who instruct consular officers not to notify their families of their detention frequently change their minds as the period of detention becomes longer, as they perceive their situation to be more dire, or if they understand that their families can provide important assistance. If a relationship of trust had developed between Faulder and a Canadian consular officer, it is possible that the officer over a period of five years—the period of Faulder's detention before his second trial—would have ultimately persuaded Faulder to permit the officer to contact his family. A consular officer normally seeks to involve the detainee's family in part because the family can provide financial and moral support to the prisoner. . . . It would be entirely possible, therefore, that Faulder's family would have been informed and involved by the time of Faulder's second trial.

The fact that mitigation evidence was not obtained by Faulder's attorney. The Department similarly would not infer from the fact that Faulder's attorney did not develop mitigation evidence that such evidence could not have been developed if Faulder had had consular assistance. As in the case of family involvement, a consular officer may affect the way in which a defendant is represented. Whether and to what extent this occurs will vary in individual cases and in light of different countries' consular practices. There is precedent, however, for consular officers to assist in obtaining legal counsel and sometimes even in obtaining evidence. Over the five-year period prior to Faulder's second trial, such efforts could have been undertaken by Canadian consular officials.

* * * *

(ii) Carlos Santana

Carlos Santana was convicted in Texas state court of a brutal murder during the course of an armed robbery and sentenced to death. *See Santana v. State*, 714 S.W.2d 1 (Tex. Crim. App. 1986). After his execution was set for March 23, 1993, the Ambassador of the Dominican Republic, Jose del Carmen

Ariza, wrote a letter dated March 15, 1993, to Secretary of State Warren Christopher. The Ambassador alleged that Santana was a national of the Dominican Republic and that he had not been notified of his rights under Article 36 of the VCCR, and sought the assistance of the Department of State in obtaining a stay of his execution and a commutation of his sentence of death. An individual complaint was also filed with the Inter-American Commission on Human Rights on behalf of Santana, Case 11.130, Inter-Am. C.H.R., OEA/ser. L/V/II.95(1993). Santana was executed on March 23, 1993.

A May 10, 1993, letter from James H. Thessin, Acting Legal Adviser of the Department of State, excerpted below, responded formally to the Ambassador's letter, describing the actions taken by the Department in response to it. The full text of Mr. Thessin's letter is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

In response to your letter, we asked Texas Governor Anne Richards to provide for an investigation of the consular notification issue. . . .

On March 23, 1993, Governor Richard's office and the Texas Attorney General's office in a series of telephone calls provided us with detailed information about the consular notification issue. Based on that information, we concluded that Texas authorities had no reason to think Mr. Santana was a Dominican citizen, in part because he at times had affirmatively represented that he was a citizen of the United States. . . .

The record as we know it would not in our view support a conclusion that there was any failure to comply with the consular notification provisions of the Vienna Convention. We have, however, reminded the Texas officials with whom we have communicated of the seriousness with which we regard these provisions, and of the importance of complying with them.

* * * *

The Dominican ambassador did not respond to this letter. Nor did the Dominican Republic otherwise advise the

Department of any disagreement with the Department's assessment that Santana had represented to law enforcement officials that he was a U.S. citizen.

(iii) Irineo Tristan Montoya

In 1985 Irineo Tristan Montoya, a Mexican national, was convicted of murder and sentenced to death by the State of Texas. During 1996 and 1997, the Government of Mexico filed four diplomatic protests with the U.S. Department of State. In the notes, Mexico alleged that Tristan Montoya had not been informed of his right to contact Mexican consular officials in violation of Article 36 of the VCCR and the Consular Convention Between the United States of America and the United States of Mexico, Aug. 12, 1942, U.S.-Mex., 57 Stat. 800, 125 U.N.T.S. 301 (entered into force July 1, 1943), and that his confession had been obtained in violation of the two Conventions, as well as the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. In the last of the four notes, dated June 17, 1997, Mexico asked the U.S. federal government to intervene "before the appropriate judicial body, in order to suspend the execution of Tristan Montoya" and further requested "that the possible violation of the [VCCR and bilateral consular convention], and the consequences on equity and fairness of the process followed against the Mexican national be determined with strict observance of the law, repairing the harm, if justified, through a new trial." (The diplomatic notes discussed in this section are set forth in Memorial of Mexico (*Mexico v. United States of America*), 2003 I.C.J.(Annex 16) 1 (June 20, 2003), at A236–A255.)*

* At the initial public sitting for oral presentations, December 15, 2003, President Shi, presiding, announced that the Court had decided that "copies of the pleadings and documents annexed will be made accessible to the public on the opening of the oral proceedings on the merits. Further, in accordance with the Court's practice, these pleadings without their annexes will from today be put on the Court's Internet site [www.icj-cij.org]."

In response to Mexico's notes, the Department of State communicated orally with Texas and the Embassy of Mexico to ascertain the relevant facts and, after confirming a breach of Article 36, asked that the breach be considered as a factor in Tristan Montoya's clemency petition.

The State of Texas executed Tristan Montoya on June 18, 1997. Mexico protested the execution in a diplomatic note dated June 19, 1997. In a note dated July 9, 1997, excerpted below, the U.S. Department of State responded formally to Mexico's diplomatic notes, recapping the actions it had taken. The response also apologized for the apparent failure to notify Tristan Montoya of his right to consular notification as required by Article 36(1)(b) of the VCCR.

The full text of the U.S. July 9 note is also available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

With respect to the case of Mr. Tristan Montoya, the Department of State has taken the matters raised in the Embassy's notes with the utmost seriousness, and made extensive inquiries into the circumstances of Mr. Tristan Montoya's case. The Department sought information from a number of sources, and made a formal request on June 12, 1997, to the Governor of the State of Texas to provide information about Mr. Tristan Montoya's case. . . .

The Office of the Governor was unable to find any information that Mr. Tristan Montoya was informed before his conviction of his right to consular notification under Article 36(1)(b) of the Vienna Convention. The Department of State extends, on behalf of the United States, its most profound apology for the apparent failure of the competent authorities to inform Mr. Tristan Montoya that he could have a Mexican consular officer notified of his detention.

As the Governor of Texas considered the clemency petition then before him, the Department believed it appropriate to request that he take into account the U.S. obligation to provide consular notification and the fact that Mr. Tristan Montoya apparently was not informed that he could have a consular officer notified of his detention. The Department so advised the Governor's office

on June 17. The Department was assured that the Governor would consider this factor carefully, and this assurance was formalized in the enclosed June 18 letter from the Governor's office. The Department formally acknowledged this assurance later that day in a letter that is also enclosed for the Embassy's information. Nonetheless, the Governor declined to grant the petition for clemency, and Irineo Tristan Montoya was executed by lethal injection later that evening.

With respect to the specific requests . . . concerning communications with judicial and civil authorities in the United States, the Department notes that as a general matter the Government of Mexico may make appropriate direct communications in any specific legal proceeding in which one of its nationals is a party. The Department has previously issued circular diplomatic notes (*see, e.g.*, the circular diplomatic note of August 17, 1978, to all Chiefs of Mission at Washington, D.C.) clarifying that when foreign governments wish to make their views known to courts in the United States, they should do so directly under relevant court rules, which normally permit filing briefs as *amici curiae*. . . . In the occasional instance when U.S. courts have expressed reluctance to receive such views, the Department has encouraged them to do so (*see, e.g., Westinghouse Uranium Antitrust Litigation (1980)*). The Department remains willing to assist in this way.

The Department further notes that, in the case of Mr. Tristan Montoya, information provided to the Department suggests that Mexican consular officials provided affidavits and statements to be attached to petitions submitted on behalf of Mr. Tristan Montoya to the Texas Board of Pardons and the to the Texas Court of Criminal Appeals, and that the views of Mexican federal and state officials were communicated directly to the Governor of Texas. . . .

* * * *

Mexico's response, dated August 5, 1997, expressed appreciation for the United States apology, but noted Mexico's concern about the increasing number of Mexicans on death row in the United States (then 36) and the fact that Mexico had allegedly received consular notification in none of them. The lack of notification "cause[d] the Government of Mexico

to be unable to support their defense, to assist the defending attorneys, to assure that the arrested individuals understand the seriousness of the charges and the rights that assist them in their defense and to help to obtain mitigating evidence which might be found in Mexico. Thus, [Mexico] considers that the due process of law is sensibly affected."

(iv) Mario Benjamin Murphy

On June 25, 1997, the Embassy of Mexico sent a note to the U.S. Department of State about the pending execution of another Mexican national, Mario Benjamin Murphy. Murphy was sentenced to death after being convicted of a murder for hire and conspiracy to commit capital murder. In the note, Mexico claimed that Murphy had not been informed of his right to consular notification in violation of Article 36 of the VCCR and Article VI of the U.S.-Mexico Consular Convention, stated its belief that notification "may have resulted in a different sentence than the one imposed on him," and expressed the opinion that because "international treaties approved by the U.S. congress are a Supreme Law of the United States, the trial conducted against Mario B. Murphy may even have contained violations of constitutional provisions concerning the due process of law." Mexico asked that the Department of State "swiftly" convey Mexico's views to the U.S. Fourth Circuit Court of Appeals. (The diplomatic notes discussed in this section are set forth in Memorial of Mexico (*Mexico v. United States of America*), 2003 I.C.J.(Annex 17) 1 (June 20, 2003), at A256–A271.)

A subsequent diplomatic note, dated September 8, 1997, reiterated Mexico's views and requested that they be conveyed to the Governor of Virginia "since, in any case, the Governor is the depositary of the last resort which, at a specific moment—if the judicial authorities do not allow for a stay of execution—may free Mario B. Murphy from being executed by commuting his sentence."

In a third diplomatic note, dated September 10, 1997, from Jesus Silva-Herzog, Ambassador of Mexico to the United

States, to Jeffrey Davidow, Assistant Secretary of State for Inter-American Affairs, Ambassador Silva-Herzog referred to a conversation of September 9 concerning Mexico's September 8 note, and expressed his concern that "the State Department still does not consider the denial of Article 36 rights as affecting the outcome of this or other cases." He attached an analysis by Murphy's attorneys of "how, factually and legally, our Consul's early participation could significantly have assisted Murphy," but added that the VCCR "gives foreign nationals Article 36 rights in every instance and the very denial of these rights should be protected irrespective of whether in any case their exercise would 'have affected the outcome' of any given matter." He asked that the Department of State join Mexico in asking the Governor of Virginia to commute Murphy's sentence.

Subsequently, the Department of State advised the Embassy of Mexico by diplomatic note that it was assessing the information it had received concerning the case of Murphy, including a report from the Commonwealth of Virginia, and observed that Mexico appeared to have presented its views to the appropriate officials, including by filing a clemency petition with the Governor of Virginia, George Allen.

On September 17, the Governor of Virginia, George Allen, issued a press release explaining why he had decided not to grant clemency to Murphy. He specifically considered the alleged violation of Article 36 of the VCCR in a section of the press release set forth below (italics in the original). Murphy was executed that day.

The full text of Governor Allen's press release is available at *www.state.gov/s/l/c8183.htm*. *See* section 1.a, *supra*, for a discussion of U.S. court litigation over the consular notification issue in Murphy's case.

---

* * * *

I am mindful of the deep interest of the government of Mexico in this case. I certainly respect their concerns about the Vienna

Convention issue, as to whether Murphy was allowed to contact the Mexican consulate, but there are some pertinent facts to be considered in analyzing this issue.

First, Murphy had lived in the United States since he was three years old, which was 16 years prior to the murder of James Radcliff. It can fairly be said that he was raised in the United States, and at the time of his arrest was as fluent in English as any U.S. citizen who had grown up in the United States. Given his surname, English fluency and long-time residence in Virginia Beach, there was absolutely no reason for the Virginia Beach authorities to suspect upon his arrest that Murphy was a citizen of Mexico.

Second, neither Murphy nor his attorney ever requested to talk to any officials from the Mexican government until several years after his conviction. When he requested such a contact, it was allowed. *There is absolutely no evidence that Murphy or his attorneys were ever prevented from contacting the Mexican authorities when he expressed a desire to do so.*

Moreover, the central issue is whether this apparent violation of the treaty caused a violation of Murphy's fundamental right to due process of law and a fair trial. Both the U.S. District Court and the U.S. Fourth Circuit Court of Appeals considered this question and both concluded that it did not. They both found that Murphy was not prejudiced by any purported violation of the treaty. The U.S. Supreme Court chose not to disturb those rulings.

To overturn a valid sentence of a confessed murderer based on such a procedural issue—especially when the courts have said that no prejudice against Murphy resulted—would be an abdication of the oath that I took as Governor to the people of Virginia to uphold the laws and constitution of the Commonwealth of Virginia.

I respect the position of the Mexican government. *But just as citizens of the United States must respect and obey the laws of any country they visit, we expect that visitors from other nations to Virginia will obey our laws, and suffer the same consequences that criminals in Virginia suffer when they break our laws. Regardless of a person's nationality, one must be responsible and accountable for one's actions.*

We cannot tolerate a double standard of justice: one standard for citizens of Virginia, and a lesser standard for someone who

freely chooses to live permanently in Virginia, but who retains citizenship in another country and who belatedly invokes that citizenship in an effort to evade the justice imposed in a fair trail for a crime committed in Virginia against a Virginia citizen.

* * * *

In a September 23, 1997, diplomatic note to the Embassy of Mexico, the Department of State reviewed the exchanges it had with Governor Allen's office concerning Murphy's clemency petition and apologized for the apparent failure of the authorities to inform Murphy that he could have a Mexican consular officer notified of his detention.

A September 25, 1997 diplomatic note from the Embassy of Mexico rejected the apology as "insufficient, since [Mexico] expects the Department of State to conduct specific actions to guarantee the compliance of Article 36" of the VCCR.

The full text of the September 23 U.S. note, excerpted below, is also available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

[T]he Office of the Governor of the Commonwealth of Virginia was unable to find any evidence that Mr. Murphy was informed before his conviction of his right to consular notification under Article 36(1)(b) of the Vienna Convention. The Department extends, on behalf of the United States, its most profound apology for the apparent failure of the competent authorities to inform Mr. Murphy that he could have a Mexican consular officer notified of his detention.

The report of the Governor's office in this case assured the Department that, as he considered the clemency petitions pending before him, the Governor would take into account the U.S. obligation to provide consular notification and the fact that Mr. Murphy apparently was not informed that he could have a consular official notified of his detention. The Department believed this consideration was appropriate in the circumstances, and the Legal Adviser so informed the Governor's office on September 16. . . . The Legal Adviser also conferred with legal counsel to

the Governor on September 17, and emphasized the importance of the consular notification obligation. Later that day, Governor George F. Allen released a public statement announcing his decision not to grant the petitions for clemency. . . .

* * * *

d. Alleged violations of Article 36 in death penalty cases brought before international commissions and courts

(1) Individual complaints to the Inter-American Commission on Human Rights

(i) Cesar Fierro

A complaint was filed on behalf of Cesar Fierro in the Inter-American Commission on Human Rights on July 21, 1994. Case 11.331, Inter-Am. C.H.R., OEA/ser. L/V/II.118 (1994). Fierro was convicted of the murder of a taxi driver in El Paso, Texas, and sentenced to death. His execution was scheduled for August 10, 1994. The complaint alleged that Fierro's conviction was based on a coerced confession elicited from him as a result of Mexican police threats to torture his mother and step-father, and argued that, had Fierro been informed of his right to contact the Mexican consul, the consul could have taken steps to secure the release from police custody of Fierro's parents and thus eliminated the circumstances that coerced Fierro's statement. U.S. responses dated October 21, 1994, and September 19, 1996, suggested that the petition should be dismissed because Fierro had not exhausted domestic remedies in accordance with Articles 37 and 41 of the Commission's Regulations. The case lay in abeyance until 2002 when the Commission decided to consider the merits prior to ruling on admissibility. In March 2003, the Commission concluded both that Fierro's claims were admissible and that the United States had violated Articles XVIII and XXVI of the American Declaration on the Rights of Man by failing to inform him of his right

to consular notification under Article 36 of the VCCR. The Commission issued its final report on December 29, 2003. Rept. No. 99/03, Case 11.331 (Merits).

(ii) Ramón Martinez Villareal

On May 16, 1997, the Center for Justice and International Law filed a petition against the United States of America with the Inter-American Commission on Human Rights on behalf of Ramón Martinez Villareal, a Mexican national sentenced to death on May 20, 1983, for committing two murders. Case No. 11.753. The petition alleged that the United States violated Martinez Villareal's rights under Articles I, XVIII, and XXVI of the American Declaration of the Rights and Duties of Man because his attorney failed to provide him with effective representation; because he was mentally ill and therefore incompetent to stand trial or be sentenced to death; and because he was not informed of his right to consular notification under Article 36 of the VCCR.

In a response dated December 18, 1997, the United States attached a response by the State of Arizona, excerpted below, rejecting the Article 36 claim on the ground that the Mexican Government was aware of Martinez Villareal's case from the news media and other sources and could have helped him had it chosen to do so. *See also* the discussion of *United Mexican States v. Woods* in section A.1.a., *supra*. For post-1999 developments in the Commission, including the Commission's ultimate conclusion that Martinez Villareal's conviction and sentence were inherently flawed because of lack of consular notification at the time of arrest, Report No. 52/02, *see Digest 2002* at 48–52.

The full text of the U.S. response, with attachment, is available at *www.state.gov/s/l/c8183.htm*.

* * * *

Because no issue of treaty compliance was raised until 1997, little information is available about what steps may have been taken to

inform representatives of Mexico about the case. However, it is plain that the Mexican government was in a position to know about the case, from the news media and other sources, and that Defendant was in fact visited by someone from the Mexican consulate on the first day of the trial. Mexico maintains consulates in Nogales (where Defendant was held in jail and tried) and in Tucson. When current counsel for Defendant was investigating what pretrial publicity there might have been, he was unable to find any repository that had kept copies of the Nogales newspapers for that time period. However, he did locate one story published in the Arizona Daily Star (Tucson), dated January 8 1983 (i.e., more than three months before the April 1983 trial), reflecting that Defendant, a Mexican national, would be tried for the murders and that the prospective jurors were aware of the case. Under such circumstances, it must be assumed that the Mexican consular staffs in both Tucson and Nogales also were aware of the case, even if there had not been formal notification.

However, Mexican governmental awareness of the case is more than an assumption. Tom McGrew (son of one of the victims) has sworn in an affidavit that he personally contacted a Mexican consular official in Nogales about the case and was told that "the Mexican Government was concerned with the proceedings and would monitor those proceedings." Moreover, examination of the records of the Santa Cruz County jail has disclosed that Defendant received a visit from someone from the Mexican consulate on the evening of April 19, [1983], the first day of the trial. [footnote omitted] Thus, it is clear that the government of Mexico was aware of Defendant and his case, so that it could have assisted him had it wished to do so.

* * * *

(2) Claims in the International Court of Justice

(i) The Breard Case

Angel Francisco Breard, a Paraguayan national, was convicted of attempted rape and capital murder in Virginia. On August

20, 1996, he filed a motion for federal *habeas corpus* relief under 28 U.S.C. § 2254 in which he argued for the first time that his conviction and sentence should be overturned because the arresting authorities failed to inform him that, as a foreign national, he had the right to contact the Paraguayan Consulate under Article 36(1)(b) of the VCCR. The District Court rejected the petition on the grounds that he had failed to show cause or prejudice for failing to raise the claim in state court, *Breard v. Netherland*, 949 F. Supp. 1255, 1266 (E.D. Va. 1996), and the Fourth Circuit affirmed, *Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1998).

In September 1996 the Republic of Paraguay, the Ambassador of Paraguay to the United States and the Consul General of Paraguay to the United States ("Paraguay") brought suit in federal district court against certain Virginia officials, alleging that the failure to inform Breard of his rights under Article 36(1)(b) violated their separate rights under the VCCR. The Consul General in addition asserted a claim under 42 U.S.C. § 1983. The district court concluded that it had no subject-matter jurisdiction because Paraguay's claim was not a "continuing violation of federal law" and therefore was barred by the Eleventh Amendment to the U.S. Constitution. *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1272–73 (E.D. Va. 1996). The Fourth Circuit affirmed, *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998).

On April 3, 1998, Paraguay filed *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248, against the United States in the International Court of Justice ("ICJ"), seeking to void the conviction and death sentence imposed by Virginia on Breard, on the grounds that the United States had failed, as required by Article 36(1)(b) of the Vienna Convention on Consular Relations, to inform him that he had the right to have a Paraguayan consular post notified of his arrest and detention. Paraguay also requested an indication of provisional measures to stop Breard's execution, scheduled for April 14, 1998.

In a hearing convened before the ICJ on April 7 regarding Paraguay's request for the indication of provisional measures,

the United States acknowledged that there had been a breach of the U.S. obligation under Article 36(b)(1) to inform Breard that he could ask that a Paraguayan consular post be notified of his arrest and detention. The United States explained that, consistent with state practice in such cases, the United States had thoroughly investigated the case, had expressed its regret to Paraguay for the breach, and was taking measures to avoid any recurrence. The United States further noted that its investigation of the case provided no basis for believing that consular assistance would have altered the outcome because Breard had a good command of English, had lived in the United States for many years, was represented by two competent defense attorneys, and decided to testify to his guilt against the advice of his attorneys and family. As for the specific relief requested, the United States challenged the jurisdiction of the ICJ over the case on the grounds that it did not involve a dispute over the "interpretation or application" of the VCCR. It further questioned the ICJ's jurisdiction to invalidate Breard's conviction or postpone his execution as neither the VCCR's language, its history nor state practice supported Paraguay's claim that invalidation of a subsequent conviction and sentence of an alien was an available remedy for failure of consular notification. With respect to Paraguay's request for provisional measures, the United States further contended that suspension by the ICJ of the execution would amount to a decision for Paraguay on the merits and would constitute a major and unprecedented intrusion by the Court into domestic criminal processes. The oral presentations, excerpted below, were made principally by Catherine Brown, Assistant Legal Adviser for Consular Affairs, John Crook, Assistant Legal Adviser for United Nations Affairs, and Michael Matheson, Deputy Legal Adviser.

All oral and written pleadings as well as the ICJ's orders in *Breard* are available at *www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm*.

Ms. Brown:

* * * *

2.2. My task is to explain to the Court the factual background of this dispute. I will review how the United States has responded to the concerns expressed by the Government of Paraguay, including the results of our investigation into the facts of Mr. Breard's case. First, however, I will address the nature of the consular function and the practice of States with regard to consular notification, in so far as those facts are relevant to the issues of this case.

I. The Consular Function

2.3. The principal function of consular officers is to provide services and assistance to their country's nationals abroad. The Vienna Convention on Consular Relations, to which both the United States and Paraguay are parties, enumerates a wide range of general consular functions in Article 5. Article 36 addresses the specific issue of consular officers communicating with their nationals abroad.

* * * *

2.6. Article 36, paragraph 1 *(b)*, concludes with the "consular notification" obligation that is at issue in this case: it provides that "the said authorities shall inform the person concerned without delay of his rights under this paragraph". Virginia authorities apparently did not so advise Mr. Breard, at the time of his arrest, or at any time prior to his conviction and sentence, that he could communicate with a consular official. But that does not mean that he was impeded or dissuaded from obtaining consular assistance. He, or his family, or his attorneys, might at any time have enlisted the assistance of a consul, as is frequently the case. The option of calling one's embassy or consul for help is widely known, and many governments advise their own nationals to call their embassy or consul in an emergency abroad.

2.7. Article 36, paragraph 1 *(c)*, provides that consular officials may visit their nationals in detention, converse and correspond

with them, and arrange for their legal representation. Again, there was no deliberate effort to interfere with this right, and since becoming aware of Mr. Breard's detention Paraguayan consular officials have been able to visit and communicate with him. With respect to legal representation, arrangements were made by the State of Virginia for two clearly competent lawyers to represent Mr. Breard. Thus a consul proved unnecessary to perform this function.

2.8. Finally, Article 36, paragraph 1 *(c)*, concludes that a consular officer shall refrain from taking action on behalf of a national who is in prison if he expressly opposes such action. This provision is of particular interest here because Mr. Breard did not accept—indeed he adamantly resisted and even rejected—the advice not only of his attorneys, but also of his mother, a Paraguayan national.

2.9. Several additional points are noteworthy. First, neither Article 5 nor Article 36 imposes any obligations on consular officers themselves. A consular officer may or may not choose to undertake any particular function on behalf of his countrymen. Consequently, the practice of States—and even of individual consuls—in assisting their nationals varies widely. Some countries are very active, while others are passive or even quite frankly uninterested or unable to provide any significant consular assistance. A country may have just one or two consular officials in a capital city, and none at a more remote location. A country's consular officials may make frequent prison visits or visit only selectively, if at all. Each country decides for itself what it will do. This in turn creates expectations among its nationals as to whether seeking consular assistance would be worthwhile.

2.10. Second, nothing in these Articles elevates the rights of foreign nationals above those of citizens of the host country. A foreign national is expected to obey the host country's laws, and is subject to its criminal justice system. Consular officers assist their nationals within this context. Consistent with this, Article 5 *(i)* of the Vienna Convention limits the rights of consular officers to represent or to arrange representation of their nationals before the tribunals of the receiving State. They may do so only "subject to the practices and procedures obtaining in the receiving State".

The United States does not permit foreign consular officials to act as attorneys in the United States, nor may its own consular officers abroad act as attorneys for American citizens. We believe that this is the general practice of states.

2.11. Third, the Vienna Convention does not make consular assistance an essential element of the host country's criminal justice system. This is inevitable, given that consular officers have no obligations to act in any particular way vis-à-vis a host country's criminal justice system. A consul may do nothing at all, leaving the justice system to run its course. Or, the consul may visit the detainee; may ensure that the detainee's family is aware of the detention; may assist the detainee in securing counsel, if necessary; and may follow developments so that any questions about the fairness of the proceedings can, if appropriate, be discussed with host country officials. But the consular officer is not responsible for the defense because he cannot act as an attorney.

II. State Practice With Respect to Consular Notification

2.12. Two additional aspects of state practice are relevant: how faithfully do governments provide notification and what remedies, if any, are provided by governments for failures to notify? Because it is important that the United States respond appropriately to allegations of violations of consular notification, the Department of State recently made inquiries to all of our Embassies and, through them, directly to governments on these matters. While our information remains incomplete, we believe that it fairly reflects the range of state practice.

2.13. Practice with respect to notification: Compliance with respect to the obligation to notify the detainee of the right to see a consul in fact varies widely. At one end of the spectrum, some countries seem to comply unfailingly. At the other end, a small number seem not to comply at all. Rates of compliance seem partly to be a function of such factors as whether a country is large or small, whether it has a unitary or federal organization, the sophistication of its internal communication systems, and the way in which the country has chosen to implement the obligation.

Countries have chosen to implement the obligation in different ways, including by providing only oral guidance, by issuing internal directives, and by enacting implementing legislation. Some apparently provide no guidance at all.

2.14. If a detainee requests consular notification or communication, actual notification to a consul may take some time. It may be provided by telephone, but sometimes a letter or a diplomatic note is sent. As a result there may be a significant delay before notification is received and, consequently, critical events in a criminal proceeding may have already occurred before a consul is aware of the detention. And, as noted previously, the consul may then respond in a variety of ways. For these reasons, and because of the wide variation in compliance with the consular notification requirement, it is quite likely that few, if any, states would have agreed to Article 36 if they had understood that a failure to comply with consular notification would require undoing the results of their criminal justice systems.

2.15. Practice with respect to remedies: Let me turn now to what our inquiries revealed about state practice with respect to remedies. Typically when a consular officer learns of a failure of notification, a diplomatic communication is sent protesting the failure. While such correspondence sometimes goes unanswered, more often it is investigated either by the foreign ministry or the involved law enforcement officials. If it is learned that notification in fact was not given, it is common practice for the host government to apologize and to undertake to ensure improved future compliance. We are not aware of any practice of attempting to ascertain whether the failure of notification prejudiced the foreign national in criminal proceedings. This lack of practice is consistent with the fact and common international understanding that consular assistance is not essential to the criminal proceeding against a foreign national.

2.16. Notwithstanding this practice, Paraguay asks that the entire judicial process of the State of Virginia—Mr. Breard's trial, his sentence, and all of the subsequent appeals, which I will review momentarily—be set aside and that he be restored to the position he was in at the time of his arrest because of the failure of

notification. Roughly 165 States are parties to the Vienna Convention. Paraguay has not identified *one* that provides such a *status quo ante* remedy of vacating a criminal conviction for a failure of consular notification. Neither has Paraguay identified any country that has an established judicial remedy whereby a foreign government can seek to undo a conviction in its domestic courts based on a failure of notification.

* * * *

2.18. It is not difficult to imagine why such remedies do not exist. As noted, consular assistance, unlike legal assistance, is not regarded as a predicate to a criminal proceeding. Moreover, if a failure to advise a detainee of the right of consular notification automatically required undoing a criminal procedure, the result would be absurd. In particular, it would be inconsistent with the wide variation that exists in the level of consular services provided by different countries. But it would be equally problematic to have a rule that a failure of consular notification required a return to the *status quo ante* only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. Doing so would require access to normally inviolable consular archives and testimony from consular officials notwithstanding their usual privileges and immunities. In this case, for example, one might wish to examine Paraguay's consular instructions and practices as of the time when Mr. Breard was arrested and inquire into the resources then available to Paraguay's consular officers. Surely governments did not intend that such questions become a matter of inquiry in the courts.

III. The United States Response To The Failure of Notification

2.19. Against this background, I would now like to advise the court of the steps taken by the United States relating to this case in an effort to be responsive to Paraguay's concerns.

2.20. The United States received official notice of Mr. Breard's case in April 1996 through a diplomatic note from Paraguay's

Embassy in Washington. Significantly, the note did not allege a breach of the Article 36 consular notification obligation. It did not request consultations to discuss the case. It did not ask for any United States government intervention other than to facilitate efforts to obtain information from Virginia, which the Department of State did. The Department later learned, from Mr. Breard's attorneys, that those attorneys were attempting to challenge Mr. Breard's conviction based on an apparent failure of consular notification and litigation brought by Mr. Breard.

2.21. In September 1996, Paraguay filed suit against Virginia in a federal trial court. The suit sought to restore the *status quo ante* for Mr. Breard on the theory that only such action could vindicate Paraguay's governmental rights in consular notification.

The Department of State discussed the case with representatives of Paraguay in October 1996 and later received a request from the Paraguayan Ambassador for assistance in obtaining a new trial for Mr. Breard. That request failed to provide any evidence that consular law or practice would require such a result. Nevertheless, United States officials met with counsel for Paraguay about the matter and gave the issues raised by the suit careful consideration. Ultimately, the United States concluded that Paraguay's remedy for the consular notification failure lay in diplomatic communications with the Department of State. The United States so advised both the court in which Paraguay's case was pending and Paraguay's Ambassador. The United States did not object to Mr. Breard's own efforts to raise the consular notification issues in the courts, but neither did it support them.

2.22. On 3 June 1997, the Department received another letter from the Ambassador. . . . In it the Ambassador advised that Paraguay thought that the dispute should be resolved in the domestic courts of the United States, and not by this Court, but that Paraguay nevertheless would agree with the United States to come to this Court. This proposal was conditioned: the domestic United States proceedings should be stayed and the United States should waive any jurisdictional objections it might have to the jurisdiction of this Court and the United States should agree to require Virginia to accept this Court's decision. Like Paraguay's previous correspondence, this letter again failed to offer any

serious explanation of why the remedy Paraguay was seeking was appropriate.

2.23. The Department of State nevertheless then decided to undertake an investigation into the case. In our investigation, we received the full co-operation of Virginia and we reviewed all facts relevant to the consular notification issue. This included the critical portions of the transcript, including Mr. Breard's testimony and an affidavit from his defense lawyers concerning their efforts on his behalf.

2.24. Through this process, we learned the following relevant facts:

(1) Mr. Breard unquestionably committed the offences for which he was tried. He was arrested while attempting a rape. . . .

(2) Mr. Breard had almost immediate and thereafter continuing contact with his family. . . . Contacting family members is normally one of the first and most important things that a consular officer does when a national is detained, but here consular assistance to accomplish this proved unnecessary;

(3) Mr. Breard first came to the United States in 1986 and thus had been resident in the United States for about six years at the time of his arrest. He had been married briefly to an American. This made it difficult to accept Paraguay's contention that Mr. Breard did not understand American culture;

(4) Mr. Breard had a good command of English. His lawyers had no difficulty communicating with him in English. He testified at his trial in English and the transcript of his testimony attests to his command of the language. Mr. Breard told the judge that he had no problems with English and was comfortable speaking it. Moreover, the state would have provided an interpreter had one been needed. Thus, Paraguay's implication that Mr. Breard was tried unfairly in a language he did not understand is demonstrably false. While a consular officer might help interpret for a detained foreign national, such assistance was not needed by Mr. Breard;

(5) Mr. Breard was represented by two criminal defence lawyers experienced in death penalty litigation. They spent at least 400 hours—the equivalent of 50 days—on his case. United States courts subsequently concluded that their legal representation met the requirements of the United States Constitution for the effective assistance of counsel. These attorneys worked closely with Mr. Breard, his mother, a female cousin, and his religious counsellor from jail, who was of Bolivian origin, to prepare his defense. They communicated with Mr. Breard's personal friends to find witnesses who could testify on his behalf. They communicated with persons in Paraguay to find evidence that would assist in his defense. They arranged for the court to appoint three experts to examine Mr. Breard's mental competence, and they obtained his medical records from Paraguay and from Argentina, so as to explore fully the possibility of an insanity defense and to develop mitigation evidence. Paraguay's assertion that it could have paid for witnesses from Paraguay appears irrelevant, because both his mother and cousin came from Paraguay to assist and there is no indication that there were other witnesses who were not used because of financial constraints;

(6) Mr. Breard decided to plead "not guilty" and to testify in both the penalty and sentencing phases of his trial contrary to the advice of his legal counsel and his mother—a strategy that was clearly unwise. This is the principal tactical decision Paraguay asserts it could have changed, but it is clear that Mr. Breard was advised against it by his own lawyers and his mother, yet rejected their advice. He was fully apprised of the risks of his strategy in the context of the American legal system. Access to a consular officer, who would have been less familiar with that system than his own lawyers, would not have made Mr. Breard's tactical decisions more informed;

(7) There is no credible evidence that Mr. Breard's decision to plead "not guilty" and testify was founded on a cultural misunderstanding. . . . Significantly, as noted, his mother

was also Paraguayan and yet she as a Paraguayan understood the error of his judgment well enough to advise him not to do what he did. And again, finally, his lawyers unequivocally explained to him that his strategy would not work. He signed a statement confirming that he was rejecting their advice and was not afraid of the outcome even if it resulted in a sentence of death;

(8) Although Mr. Breard's legal counsel apparently thought that Breard had the opportunity to plead guilty in exchange for a life sentence, at best only very general preliminary discussions were held on this matter and they were never seriously pursued. . . .

(9) Objective evidence indicates that the jury and the judge could easily have decided on the death penalty even if Mr. Breard had not testified. . . .

(10) Finally, Mr. Breard had the full protection of the criminal justice system. In addition to competent court appointed counsel, he had full judicial review. His conviction and sentence were reviewed and sustained by the Virginia trial court and the Virginia Supreme Court, and subsequently by a federal district court and a federal appeals court. The consular notification issue was being raised only after these procedures had been completed, in yet two more entirely separate legal proceedings.

2.25. In July 1997, the Department reported the results of its investigation in a letter to the Ambassador. . . . Because it found no evidence of consular notification or access, the Department expressed deep regret that such notification apparently was not provided to Mr. Breard. The Department advised, however, that there was no basis for concluding that consular assistance would have altered the outcome. It further stated that it saw no appropriate role for this Court.

2.26. Significantly, the Government of Paraguay has never responded to that letter, either to contest its factual assumptions or to address the Department's conclusion that consular notification would not have made a difference. Even so, the United States has continued to have periodic communications and discussions about

the case with Paraguay. These discussions included assurances given as recently as February of this year by senior Paraguayan government officials that they recognized that this case was unprecedented and unlikely to succeed. On 30 March, however, Paraguay unexpectedly advised the United States that it would file this suit unless the United States engaged in consultations and stayed Mr. Breard's execution. Still prepared to address in diplomatic channels any issues relating to consular notification, the United States agreed to engage in such consultations. The United States did so even though it was unable to stay the execution—which is in the hands of the United States Supreme Court and the Governor of Virginia—and even though it continues to believe that this Court is not an appropriate forum to address Paraguay's concerns.

2.27. In addition to these specific measures relating to Mr. Breard's case, the United States has also intensified its long-standing efforts to ensure that all federal, state, and local law enforcement officials in the United States are aware of and comply with the consular notification and access requirements of Article 36. Guidance on these requirements has been issued regularly by the Department of State for many years. Recently, however, the Department has issued a new and comprehensive guidance on this subject, along with a pocket-sized reference card for law enforcement officers to carry on the street. These materials have been personally provided by the Secretary of State to the United States Attorney-General and to the Governor of every state of the United States including, of course, Virginia. They have also been provided by the Department's Legal Adviser, Mr. Andrews, to every state Attorney-General, and they are being disseminated throughout the United States. In addition, the Departments of State and Justice have begun conducting briefings on these issues for state and federal prosecutors, and law enforcement officials, focusing particularly on areas with high concentrations of foreign nationals. Through these and other efforts, the United States is both acting to correct the circumstances that led to the failure of consular notification in Mr. Breard's case and acting in a manner consistent with state practice. . . .

* * * *

Mr. Crook:

* * * *

I. The Significance of Provisional Measures

* * * *

3.4. The basic factors guiding the Court's decision whether or not to use its exceptional power to indicate provisional measures are laid down in the Statute of the Court. Article 41 envisions that the Court will carry out two separate, although inter-related, examinations. . . .

3.5. . . . First, the Court's decision whether to indicate provisional measures is to be guided by an assessment of the overall context or circumstances of the case before it. Second, any measures to be indicated are of a nature "which ought to be taken to preserve the respective rights of either party". . . .

II. Provisional measures are not warranted in these circumstances

* * * *

No Jurisdiction.

* * * *

3.10. Article I of the Optional Disputes Settlement Protocol to the Vienna Convention on Consular Relations gives the Court jurisdiction over disputes arising out of the "interpretation or application" of the Convention. However, there is no dispute here about either the interpretation or the application of the Convention. The Parties do not disagree on what it means to "inform" a foreign national of his rights under Article 36, paragraph 1 *(b),* of the Convention. Nor do they dispute that Mr. Breard was not so informed.

3.11. Instead, Paraguay's claim in this case, in essence, is that under the Vienna Convention the Court can void Mr. Breard's criminal conviction and sentence, and require that he be given a new trial. As I will show, the Vienna Convention does not provide for such an extraordinary form of relief. Paraguay may object to

the appropriateness of a criminal conviction and sentence under United States law and practice, but this is not a dispute about the interpretation or application of the Vienna Convention.

3.12. Paraguay tries to meet this difficulty by invoking the doctrine of *restitutio in integrum*. [citation omitted] Paraguay cannot, however, create a right that does not otherwise exist under the Vienna Convention on Consular Relations—the Court's sole basis for jurisdiction in this case—simply by invoking a general principle of the law on reparation. Paraguay has failed to make a prima facie showing that the Court has jurisdiction to grant the exceptional relief it seeks here. . . .

* * * *

The Merits of Paraguay's Claim.

3.14. Obviously, the Court cannot consider the merits at this stage in a case that is 96 hours old. Nevertheless, in addition to assessing whether it has jurisdiction to proceed, the Court must weigh the totality of circumstances bearing on Paraguay's request for preliminary measures. In so doing, the Court must consider the doubtful nature of the core legal proposition that Paraguay is advancing—that the Convention requires the invalidation of every conviction and sentence of any person who has not received consular notification required by the Convention.

* * * *

A. Plain Meaning of the Text

3.16. What are the legal difficulties? To begin with, Paraguay's claim conflicts with the plain meaning of the text. Absolutely nothing in the language of Article 36, paragraph 1, of the Vienna Convention on Consular Relations (or in any other Article of the Convention) offers support for Paraguay's claim that failure of consular notification requires invalidation of any subsequent conviction and sentence of an alien.

* * * *

3.21. Mr. President, there are very few situations in which States actually have agreed by treaty that the failure to observe specific standards can be the basis for appeal to an international

tribunal for possible reversal of a conviction or sentence. I have in mind here, for example, regional instruments and institutions such as the European Convention on Human Rights and the Strasbourg Court. Where States have elected to create such mechanisms, they have done so expressly and with great precision. They have not created such additional remedies by indirection or implication, as Paraguay asks the Court do here. . . .

B. Negotiating History

3.22. Likewise, there is no support for Paraguay's claim there. We know of nothing in the history—and Paraguay has pointed to nothing—even hinting that the parties intended failure to comply with Article 36, paragraph 1, to invalidate subsequent criminal proceedings.

3.23. The Vienna Convention was negotiated on the basis of draft articles prepared by the International Law Commission. The relevant ILC proposals do not contain the obligation to inform an arrested person that their consul could be notified. That was added at the Conference. We have found nothing in the debates of the conference supporting Paraguay's claim, but there are a number of indications to the contrary.

3.24. Article 36 was negotiated with great difficulty at the Vienna Conference. The final version was only agreed upon two days before the Conference ended. Some delegations supported the ILC's initial draft of Article 36, which would have required that receiving States automatically notify sending States' consuls if a national was arrested. A large number of other States strongly opposed this requirement. They argued, among other things, that it would impose an excessive administrative burden on the receiving State and that the national might not want his government authorities to know about his arrest. (Luke T. Lee, *Consular Law and Practice* (1990), pp. 138–139.)

3.25. Ultimately, a compromise had to be reached. The compromise involved a series of amendments to the ILC draft. I will not try to trace all of these for you, but I will mention one because it helps to show that States at the Conference clearly did not intend that failure of consular notification would invalidate subsequent legal proceedings. The negotiations began with the

ILC draft providing for consular notification in the case of arrest. That was widely criticized as unreasonably burdensome and impractical. Accordingly, various narrowing amendments were offered by groups of countries.

3.26. One, offered by Egypt and accepted by the Conference, changed the initial language to state that the obligation to inform the sending State only arises if the national so requests. The delegate of Egypt explained his amendment as follows:

> "The purpose of the amendment is to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. *The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to the pressure of work or other circumstances, there was a failure to report the arrest of a national of the sending State.*" (Twentieth Plenary Meeting on 20 April, 1963, United Nations Conference on Consular Relations, Official Records, p. 82, at para 62. Emphasis added.)

The explanation of this amendment (which was adopted by the Conference) clearly suggests that the Conference saw the normal processes of diplomatic adjustment as the means to address failure of a notification requirement. The Conference did not foresee that defects of consular notification would result in the invalidation of subsequent criminal proceedings. Had the parties thought so, the many States that already expressed fears about the burden of the notification requirement would surely have voted down the text that is before you today.

3.27. Other statements during the Conference reinforce that the Parties did not intend the Convention to alter the operation of domestic criminal proceedings. The delegate from the USSR stated that "the matters dealt with in Article 36 were connected with the criminal law and procedure of the receiving State, which were outside the scope for the codification of consular law" (*ibid.*, p. 40, para. 3). The delegate from Belarus expressed similar views, noting that "the Conference was drafting a consular convention, not an

international penal code, and it had no right to attempt to dictate the penal codes of sovereign States" (*ibid.*, p. 40, para. 8). Such statements directly conflict with Paraguay's claim today. Thus, the negotiating history does not support Paraguay's broad view of the consequences of non-compliance with Article 36, and a variety of statements made during the debate support a contrary view.

C. State Practice

3.28. Likewise, there is no support in state practice for Paraguay's position. As Ms Brown explained, after the Breard case initially came to the attention of the United States federal authorities, the United States Department of State surveyed the practice of the States parties to the Vienna Convention. That survey found no State—none—that adopted the position Paraguay urges on the Court here. Paraguay has referred to no such State practice here.

3.29. The few national court cases that we know have considered the matter have not reached the result urged by Paraguay.

* * * *

D. No Injury to Mr. Breard

3.30. Finally, as Ms. Brown has explained, the notion that Mr. Breard suffered injury because of any failure of consular notification is speculative and unpersuasive. Paraguay's Application asks this Court to indicate provisional measures largely on the basis of some bold assumptions about what Paraguay's consul might have done. In doing so, the Application presents an inflated and unrealistic description of a consul's functions in criminal matters. A consul is not a defense attorney. Consular protection does not immunize a national from local criminal jurisdiction. What a consul can do is help arrested persons arrange means for their own defense. A consul can notify an arrested person's family, or help to ensure that the defendant has local defense attorneys. A consul does not typically retain lawyers to defend her nationals; the United States does not do so, and Paraguay has not established that it normally does so either.

3.31. But, as we have shown, Mr. Breard was able to accomplish all these things quite effectively without the assistance of Paraguay's consul. He spoke English and had lived in the United

States since 1986. After his arrest, he was in regular contact with his family. He was defended by able attorneys throughout his trial and the many subsequent legal proceedings. A consul could not have done more to enhance the effectiveness of Mr. Breard's legal defense.

E. Conclusion

3.32. For all of these reasons—the lack of any textual basis in the Convention, the lack of support in the negotiating history and State practice, and the absence of injury to Mr. Breard—Paraguay's basic claim in these proceedings lacks legal foundation. Because there is no basis for the remedy Paraguay seeks in the Convention, the Court lacks jurisdiction. The weakness of Paraguay's legal claim is also a compelling reason for declining to indicate provisional measures.

* * * *

Mr. Matheson:

* * * *

4.2. Article 41 of the Statute of the Court provides in part that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken . . .". This language clearly indicates that the Court may or may not choose to exercise this power in a particular case, depending on whether it believes the circumstances require it and whether it believes the particular measures proposed ought to be taken. [citation omitted]

4.3. It follows from this that the Court should only grant provisional measures where it is satisfied that this would not only be fair and beneficial to the parties to the immediate dispute, but also would be consistent with the proper role of the Court, the interests of the Parties to the convention in question, and the good of the general international community.

4.4. In the present case, Paraguay has asked the Court to suspend decisions of the criminal courts of a State. To our knowledge, this is the first occasion on which the Court has been asked to do so. In its request for provisional measures, Paraguay has asked the Court, in a matter of a few days, to scrutinize and

suspend for an indefinite period the considered decisions of the trial and appellate courts of Virginia and the United States—decisions that have been taken after extensive judicial proceedings over a period of years.

4.5. This would be a very serious step, and one which could threaten serious disruption of the criminal justice systems of the parties to the Vienna Convention, and of the work of this Court as well.

4.6. There are currently over 160 parties to the Vienna Convention, of which over 50 have adhered to the Optional Protocol on Compulsory Settlement of Disputes. The Parties to the Protocol include a number of populous States, such as France, Germany, India, Japan, the United Kingdom and the United States, where very large numbers of foreign nationals have immigrated or travelled for various reasons. It is inevitable that a significant number of crimes will occur in any population group of such a size, and in fact this has occurred. It is also to be expected that in a number of these cases, law enforcement authorities may commit, or be alleged to have committed, errors in the process of consular notification called for under the Vienna Convention.

4.7. The question is not whether such errors should be remedied. Rather, it is whether this should be left to the diplomatic process and to the domestic criminal authorities of the State in question, or whether this Court should assume the role of a supreme court of criminal appeals to deal with such cases by staying, reviewing and reversing domestic court decisions. Once the Court opens itself to this process, it can be expected that a great many defendants will press the States of their nationality to take recourse to it. This would include not only those who received no consular notification at all, but also those who may wish to claim that the notification received was deficient, incomplete, or tardy. It would include not only those who were genuinely prejudiced by the failure of consular notification, but also those who suffered little or no prejudice because they were nonetheless accorded full assistance of competent counsel and all the requirements of due process.

4.8. In principle, if such a remedy were available for violations of the Vienna Convention, why would it not also be available for

alleged violations of other conventions when committed against foreign nationals in detention for criminal offenses, such as bilateral treaties with provisions for consular protection, the International Covenant on Civil and Political Rights, or other agreements with provisions concerning rights to be accorded to aliens or to any person accused of criminal offences? If States may ask this Court to stay executions and nullify convictions on the basis of violations of the Vienna Convention, would they not feel able to do so under these other agreements as well?

4.9. It is difficult to believe that the parties to these conventions really intended that this Court serve as a supreme court of criminal appeals in this manner. It is difficult to believe that they intended to subject their domestic criminal proceedings, which typically include both trial proceedings and one or more levels of appellate review, to yet another stage of review by an international tribunal. As Mr. Crook demonstrated, we know this was not the case with respect to the Vienna Convention. We also know that such a role was not contemplated by the framers of the United Nations Charter and the Statute of the Court.

4.10. Yet this is precisely the message that the Court would give in granting the provisional measures sought by Paraguay in the present case. Delay of the execution of Mr. Breard until the Court's final disposition of the case, as Paraguay requests, would in practice mean the suspension of domestic criminal proceedings for years, whatever the final outcome. Many other defendants in many States could be expected to demand the same treatment, whether the alleged violations were serious or minor, and whether or not those violations led to any significant failures of due process in their conviction.

4.11. In other words, the indefinite stay of execution requested by Paraguay would not be a minor measure that simply preserves the status quo. It would be a major and unprecedented intrusion by the Court into the domestic criminal process that could have far-reaching and serious effects on the administration of justice in many States, and on the role and functioning of the Court.

4.12. All States have compelling interests in the orderly administration and finality of their criminal justice systems, particularly with respect to heinous crimes of the type committed

by Mr. Breard. All States have compelling interests in avoiding external judicial intervention that would interfere with the execution of a sentence that has been affirmed following an orderly judicial process meeting all relevant human rights standards.

4.13. We submit that the Court should not take a step having such potentially far-reaching consequences on the basis of a few days of hurried consideration of a suit filed at the very last moment. Before taking any action to intrude into the criminal process of a State, the Court should require Paraguay to show that it does indeed have a basis for its claim in accordance with the normal, orderly process of full proceedings under Part III of the Rules of Court. In this connection, the Court should go through the process called for by Article 63 of the Statute of the Court, which calls for notification of all States parties to the Vienna Convention so as to afford them the possibility of intervention or other submission of views to protect their own vital interests in the interpretation and application of the Convention.

4.14. Given these compelling reasons for refraining from the provisional measures sought, has Paraguay identified any basis for justifying such an extraordinary remedy? We maintain that this is not the case, since Paraguay has shown nothing to indicate that consular notification would have changed the result of the Breard case.

* * * *

On April 9, 1998, the ICJ issued an order of provisional measures stating that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order." That day, the Legal Adviser to the Department of State, David A. Andrews, wrote to the Governor of Virginia, James S. Gilmore, bringing the ICJ order to his attention and requesting that the Governor give consideration to the ICJ's indication of provisional measures.

Both Breard and Paraguay petitioned the Supreme Court for writs of certiorari. Paraguay also filed a motion for leave

to file an original action in the Supreme Court, and Breard also filed a petition for a writ of *habeas corpus*. In its brief in opposition, filed April 16, 1998, the United States argued that neither Paraguay nor its official representatives had a cause of action that would afford a judicial remedy of vacatur of a criminal conviction of a Paraguayan national; that Breard could not seek in his *habeas corpus* petition to invalidate his conviction and sentence because of a past violation of the Vienna Convention; and that the petitioners had not shown that a judicial stay of execution was warranted. Brief for Amicus Curiae United States, *Breard v. Greene*, (Nos. 97–8214 and 97–1390).

On April 13 Secretary of State Madeleine Albright wrote to the Governor of Virginia, James S. Gilmore, requesting that he stay the execution of Breard.

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

---

* * * *

I am writing to seek a stay of the execution of Angel Francisco Breard, who is sentenced to be executed by the Commonwealth of Virginia tomorrow, April 14.

The United States has throughout vigorously defended Virginia's right to go forward with the sentence imposed on Mr. Breard by Virginia's courts. Counsel for the U.S. Government argued strongly before the International Court that the Court should not issue the relief sought by Paraguay. We maintain, for the reasons we presented to the Court at its hearing last week, that consular notification would not have changed the outcome and that the Vienna Convention on Consular Relations does not require that Mr. Breard's conviction and sentence be vacated.

The International Court, however, was not prepared to decide the issues we raised in its urgent proceedings last week. Using non-binding language, the court said that the United States should "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." The Court concurrently set an expedited briefing

schedule in the case, apparently intending to hold its final hearing this fall.

In light of the Court's request, the unique and difficult foreign policy issues, and other problems created by the Court's provisional measures, I therefore request that you exercise your powers as Governor and stay Mr. Breard's execution. It is only with great reluctance that I make this request, especially given the aggravated character of the crime for which Mr. Breard has been convicted and sentenced and our view of the merits of Paraguay's legal claims. As Secretary of State, however, I have a responsibility to bear in mind the safety of Americans overseas.

I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention. The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.

* * * *

On April 14, 1998, the Supreme Court denied the petitions and motions in *Breard v. Greene*, 523 U.S. 371 (1998) and issued a per curiam opinion, with three Justices dissenting and one issuing a separate statement. The Court's opinion is excerpted below.

---

* * * *

It is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts. Nevertheless, in their petitions for certiorari, both Breard and Paraguay contend that Breard's Vienna Convention claim may be heard in federal court because the Convention is the "supreme law of the land" and thus trumps the procedural default doctrine. . . . This argument is plainly incorrect for two reasons.

First, while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. [citations omitted] This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Article 36(2), [1970] 21 U.S. T., at 101. It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. [citation omitted] Claims not so raised are considered defaulted. [citation omitted] By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review.

Second, although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. We have held "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Reid v. Covert*, 354 U.S. 1 . . . (1957) (plurality opinion); see also *Whitney v. Robertson*, 124 U.S. 190 . . . (1888) (holding that if a treaty and a federal statute conflict, "the one last in date will control the other"). The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969. But in 1996, before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a habeas petitioner alleging that he is held in violation of "treaties of the United States" will,

as a general rule, not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. A §§ 2254(a), (e)(2) (Supp. 1998). Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently-enacted rule, just as any claim arising under the United States Constitution would be. This rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him. Without a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him. That limitation, Breard also argues, is not justified because his Vienna Convention claims were so novel that he could not have discovered them any earlier. Assuming that were true, such novel claims would be barred on habeas review under *Teague v. Lane*, 489 U.S. 288 . . . (1989).

Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial. [citation omitted] In this case no such showing could even arguably be made. Breard decided not to plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been. Breard's asserted prejudice—that had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty—is far more speculative than the claims of prejudice courts routinely reject in those cases where an inmate alleges that his plea of guilty was infected by attorney error. [citation omitted]

As for Paraguay's suits (both the original action and the case coming to us on petition for certiorari), neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions. The Eleventh Amendment provides a separate reason why Paraguay's suit might not succeed.

That Amendment's "fundamental principle" that "the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State" was enunciated in *Principality of Monaco v. Mississippi*, 292 U.S. 313 . . . (1934). Though Paraguay claims that its suit is within an exemption dealing with continuing consequences of past violations of federal rights, see *Milliken v. Bradley*, 433 U.S. 267 . . . (1977), we do not agree. The failure to notify the Paraguayan Consul occurred long ago and has no continuing effect. The causal link present in *Milliken* is absent in this case.

Insofar as the Consul General seeks to base his claims on § 1983, his suit is not cognizable. Section 1983 provides a cause of action to any "person within the jurisdiction" of the United States for the deprivation "of any rights, privileges, or immunities secured by the Constitution and laws." As an initial matter, it is clear that Paraguay is not authorized to bring suit under § 1983. Paraguay is not a "person" as that term is used in § 1983. [citations omitted] Nor is Paraguay "within the jurisdiction" of the United States. And since the Consul General is acting only in his official capacity, he has no greater ability to proceed under § 1983 than does the country he represents. Any rights that the Consul General might have by virtue of the Vienna Convention exist for the benefit of Paraguay, not for him as an individual.

It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it on the basis of law. The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.

* * * *

Late on April 14 Governor Gilmore decided not to stay the execution and Breard was executed. The Governor issued a press statement, excerpted below.

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

* * * *

The concerns expressed by the Secretary of State are due great respect and I have given them serious consideration. However, it is but one of the various concerns that I must take into consideration in reaching my decision.

As Governor of Virginia my first duty is to ensure that those who reside within our borders—both American citizens and foreign nationals—may conduct their lives free from the fear of crime. Our criminal justice system is designed to provide the greatest degree of safety for law abiding citizens and foreign visitors alike while ensuring substantial procedural safeguards to those accused of crime. Indeed, in this case Mr. Breard received all of the procedural safeguards that any American citizen would receive.

I am concerned that to delay Mr. Breard's execution so that the International Court of Justice may review this matter would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court. Should the International Court resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry out the jury's sentence despite the rulings [of] the International Court.

The U.S. Department of Justice, together with Virginia's Attorney General, make a compelling case that the International Court of Justice has no authority to interfere with our criminal justice system. Indeed, the safety of those residing in the Commonwealth of Virginia is not the responsibility of the International Court of Justice. It is my responsibility and the responsibility of law enforcement and judicial officials throughout the Commonwealth. I cannot cede such responsibility to the International Court of Justice.

Breard having committed a heinous and depraved murder, his guilt being unquestioned, and the legal issues being resolved against him, and the U.S. Supreme Court having denied the petitions of

Breard and Paraguay, I find no reason to interfere with his sentence. Accordingly, I decline to do so.

In accordance with the schedule established for the merits phase of its case in the ICJ, Paraguay filed its Memorial on October 9. On November 2, 1998, however, it informed the Court that it wished to discontinue the proceedings with prejudice. On November 3, the United States informed the Court that it did not oppose Paraguay's request. The same day, the U.S. Embassy in Asuncion, Paraguay, released a statement, excerpted below, which again apologized for the violation of the VCCR in Breard's case on behalf of the United States of America. The ICJ issued an order on November 10, 1998, placing the discontinuance on record and ordering that the case be removed from its list of pending cases.

The full text of the U.S. press statement is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

On Tuesday, April 14, a Paraguayan national was executed by the State of Virginia after exhausting his legal appeals to the courts of the United States.

Mr. Breard had not been told that Paraguay's consular officials could be notified of his arrest, and that he could seek their assistance. Such notification was required by the Vienna Convention on Consular Relations and should have been made by competent United States authorities. That failure to notify Mr. Breard was unquestionably a violation of an obligation owed to the Government of Paraguay.

The Government of the United States fully recognizes the violation of the Vienna Convention in this case, and conveys its apologies to the Government and people of Paraguay.

Recognizing that United States compliance with the requirements of the Vienna Convention must improve, the Government of the United States has undertaken efforts to better educate officials throughout the United States of the consular notification requirements. . . . Consular notification is no less important to

Paraguayan and other foreign nationals in the United States than to U.S. nationals outside the United States. We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard.

* * * *

(ii) The LaGrand Case

On March 2, 1999, Germany filed a case in the International Court of Justice claiming that the United States failed to inform two German brothers of their right to have German consular authorities notified following their 1982 arrest for murder in violation of Article 36, paragraph 1(b) of the VCCR. *See Digest 2000* at 43–93 and *Digest 2001* at 21–24 for a discussion of the case.

(3) Advisory opinion of the Inter-American Court of Human Rights

On December 9, 1997, Mexico requested an advisory opinion from the Inter-American Court of Human Rights concerning the minimum judicial guarantees and due process rights accorded to foreign nationals who were not informed of their right to consular access and were subsequently sentenced to death. Mexico's request was made under Article 64(1) of the American Convention on Human Rights, 1144 U.N.T.S. 123 (opened for signature Nov. 22, 1969, entered into force July 18, 1978, reprinted in 9 ILM 673 (1970) and OAS Treaty Series No. 36, OEA/ser. A/16 (English) (1977)), which authorizes members of the Organization of American States to consult the Court concerning the interpretation of the American Convention "or of other treaties concerning the protection of human rights in the American states." Consistent with Article 61(1) of the Rules of the Court, the Inter-American Commission of Human Rights and a number of governments, including the United States (which is not a

State Party to the Convention), submitted written observations on the request.

In its written submission dated June 1, 1998 (corrected on June 10), the United States argued that it was procedurally inappropriate for the Inter-American Court of Human Rights to consider Mexico's request in the context of an advisory opinion because the Vienna Convention on Consular Relations was not a human rights treaty under Article 64(1) of the American Convention; because considerations of comity should preclude any review of the Vienna Convention while proceedings were pending before the International Court of Justice (in *Breard, supra*); and because the petition was actually a contentious case directed against the United States in the guise of a request for an advisory opinion. On the substance of the request, the United States argued that the Vienna Convention does not create a right to consular assistance because the obligation of the receiving State to notify a detained foreign national under the Vienna Convention of the right to seek consular assistance does not give rise to an obligation for the sending state's consular authorities to provide consular assistance. Also, the United States contended, compliance with the Vienna Convention is not required for the observance of human rights in criminal cases because the international human rights instruments invoked by Mexico, and presumably the relevant municipal laws of all OAS member states, provide foreign detainees with specific fair trial rights and procedural protections. These rights must be applied in all cases, regardless of the nationality of the foreign national. Although special measures may be appropriate in some cases to ensure the effective enjoyment of human rights, the need for such measures was case specific. The United States also explained why Mexico's proposed remedies for failures to observe Article 36 were inappropriate.

Footnotes have been omitted from the excerpt of the United States written submission provided below. The full text is available at *www.state.gov/s/l/c8183.htm*.

* * * *

II. Jurisdiction

Article 64 of the American Convention permits the Court to consider requests for advisory opinions on the interpretation of the Convention itself and "of other treaties concerning the protection of human rights in the American states.". . . .

In the present case, the issue turns on an interpretation of the obligations of States parties to the VCCR, which manifestly is *not* a human rights treaty. Nor is the VCCR a treaty "concerning" or "dealing with" the protection of human rights so as to confer jurisdiction upon this Court. Indeed, to paraphrase the Court's own words, the VCCR is one of those "multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States," and readily distinguished in character from "modern human rights treaties." See para. 29, OC-2/82 of September 24, 1982, "Effect of Reservations on the entry into Force of the American Convention on Human Rights," Series A. No. 2, 22 ILM 37 (1983). . . . Nor does the fact that one provision in the VCCR may authorize beneficial assistance to certain individuals in certain circumstances transform the VCCR into a human rights instrument containing "binding unilateral commitments not to violate the human rights of individuals within their jurisdiction." Id. at para. 33. Treaties concerning investment, trade, and other aspects of bilateral reciprocal relations such as ownership of land and rights of inheritance, for example, confer not only benefits but also rights on individuals, but such treaties are not considered human rights treaties within the jurisdiction of the Court.

There are other compelling reasons why the Court should, in this instance, act both judiciously and with caution. The VCCR is not in any sense a regional treaty; nor does it belong to the Inter-American system. Rather, it was adopted under the auspices of the United Nations to establish a uniform global regime for the conduct of consular relations between States. The prospect of differing interpretations of State obligations on a regional basis is inconsistent with that objective. Second, there is already pending before the International Court of Justice ("ICJ") a contentious proceeding involving the same issue that Mexico has raised in this

proceeding. Indeed, that case was brought against the United States by the Republic of Paraguay, a State that has indicated an intent to participate in this proceeding. Thus, this case will necessarily involve many of the same legal and factual issues that are now before the ICJ. Prudence, if not considerations of comity, should lead this Court to defer its consideration of the pending request until after the ICJ has rendered its decision interpreting the obligations of States party to the VCCR.

Still another reason the Court should decline to exercise jurisdiction in the present proceeding is that Mexico has in fact presented a contentious case in the guise of a request for an advisory opinion. The Court has on several occasions expressed its concern over this possibility. [citations omitted]

That the subject matter of the current proceeding involves a contentious case is evident from the fact that the disputes presented by Mexico's application cannot be resolved without reference to specific facts. . . . As this is a request under Article 64(1), the Court must limit itself to the question of interpretation in general terms, without considering the particular laws and practices of a particular country. *See* Advisory Opinion, OC-14/94, of December 9, 1994, "International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)," Series A No. 14.

While Mexico alludes to a number of cases in the United States involving the death penalty and consular notification issues, the judicial record in *none* of the cases is before this Court. Indeed, the submission of Mexico does not even specifically identify the majority of cases on which it bases its request for an advisory opinion, and many of them apparently remain in litigation in U.S. courts. . . . [A] decision by this Court, even of an advisory nature, would necessarily involve a judicial characterization of those cases, and of the rights of the individuals and governments concerned. Moreover, such a decision could seriously compromise the integrity of the judicial systems in which these cases are pending.

* * * *

III. Summary of Why Mexico's Submission Must In Any Event Be Rejected On the Merits

. . . [T]here is no support, either in the VCCR or in relevant human rights instruments, for Mexico's efforts to transform the VCCR's consular notification obligations into a necessary and universal prerequisite for the observance of human rights, or into an obligation that, if not observed, invalidates the results of a state's criminal justice system.

First, and contrary to the suggestion in Mexico's submission, the VCCR does not create a right to consular *assistance*. . . .

Second, the VCCR's consular notification obligation is not a prerequisite for the observance of human rights in criminal case. It does not constitute a human right enforceable in national courts in order to invalidate criminal proceedings that otherwise satisfy relevant human rights norms as reflected in national law. . . .

IV. The Vienna Convention on Consular Relations

* * * *

A. *The obligations and practice of State parties under Article 36*

* * * *

Article 36 provides that both notification obligations must be carried out "without delay." No more specific definition of "without delay" is to be found in the VCCR's text or in its negotiating record, and there is no basis for Mexico's suggestion that the notification must occur precisely at the time of the arrest. Rather, a defendant should be informed about consular notification following his detention or arrest, within a limited, reasonable period of time that allows authorities to determine whether the defendant is a foreign national and to complete the necessary formalities.

As a practical matter, notification at the time of arrest may not be possible. An arrest may occur in exigent circumstances, or may involve little or no communication between the arresting official and the detainee. Typically it is only when a detainee arrives at a detention facility, at the earliest, that detaining officials have

a reasonable opportunity to ascertain the detainee's nationality and to advise the detainee of the possibility of notification to his consul. In some cases, the fact that a detainee is a foreign national is not known—and even cannot be known—until long after the arrest. In the United States, for example, detained foreign nationals may lie about or conceal their nationality to avoid deportation and there often is no obvious distinction between an American citizen and a foreign national.

When States have wished to agree to specify a precise time by which the consular notification procedure must be completed, they have done so by concluding agreements separate from the VCCR. For example, the United States and other States have negotiated bilateral consular agreements that provide enhanced consular protections, beyond those contained in the VCCR. In some of these enhanced agreements, the States parties have allowed each other up to four days to provide consular notification following a detention or arrest. [citation omitted] The existence of such agreements is inconsistent with Mexico's suggestion that consular notification under the VCCR must occur at the time of arrest or before a foreign national provides a statement to the authorities.

That Mexico's suggestion is untenable is also evident from the fact that Article 36 does not specify the *manner* in which notification to consular officials must be provided. Indeed, some countries provide notification by diplomatic note, a formal and frequently lengthy process. Notification may also occur by mail, phone, or facsimile, or even in person. Depending on the means chosen, there may be a significant delay before notification is received by consular authorities. Moreover, even in countries where notification is normally provided by telephone, completing notification depends upon the particular consular facility being open. Persons arrested in the evening or at night, on weekends or on holidays, often cannot have their detention notified to a consular official until the next business day for the consular facility, which may mean a delay of several days. During this time, even under the best of circumstances, criminal proceedings take the same course for both aliens and nationals. As a result, statements, pleas, or other events significant to a criminal proceeding may well occur either before the detainee is notified of the right to consular

notification; before consular notification, if requested, is made; or before the accused speaks to a consular official. Thus, nothing in the VCCR or in state practice under the VCCR supports Mexico's suggestion that procedures in criminal cases must be brought to a halt until notification occurs.

. . . [W]hile Article 36(1)(c) establishes that consular officials must be permitted to visit their nationals in detention, to converse and correspond with them, and to arrange for their legal representation, detained persons are not required to accept such assistance, and a consular officer must refrain from taking any action on behalf of a detainee that the detainee opposes. A detainee may in fact reject consular assistance for a variety of reasons, including to protect his privacy or because of a general distrust of his own government, or because he considers it unnecessary (*e.g.*, in the case of a long-term, assimilated resident).

More importantly, the VCCR does not obligate consular officials to provide any measure of substantive consular assistance in any case, whatever the nature of the charges or the potential penalty. . . . Governments need not assist their nationals, and some do not do so consistently, or at all. Given this practice, to suggest that there is an obligation for the receiving State to hold its criminal justice process in abeyance pending the provision of such services is untenable. . . .

. . . Indeed, Mexico's portrayal of consular assistance as a universal prerequisite to the protection of human rights proceeds from a largely imaginary and inaccurate view of the consular function.

* * * *

. . . Providing a high level of consular assistance requires a commitment of human and financial resources that is beyond the capacity of many States. . . . Even countries with significant resources may limit their consular services if providing such services is not a priority for that country. Others may vary their focus on consular assistance in light of the host country involved.

Ultimately, each State decides for itself what it can and will do in aid of its nationals. Thus neither the text nor the negotiating history nor state practice supports the existence of a "right to

consular assistance." On no basis, therefore, could this Court find that consular assistance is a human right, in any context. . . .

It is also relevant to note that there are significant legal limits on the prerogatives of consular authorities. Article 5(i) of the VCCR limits the rights of consular officers to represent or to arrange representation of their nationals before the authorities of the receiving State. They may do so only "subject to the practices and procedures obtaining in the receiving State." The United States does not permit foreign consular officials to act as attorneys in the United States (nor may its own consular officers abroad act as attorneys for American citizens). We believe that this is the general practice of States. Moreover, a consular official could seriously interfere with a foreign national's legal defense if the official were to undertake to provide legal advice with respect to a criminal proceeding notwithstanding the official's lack of competence to do so, or to second-guess the views of the detainees' lawyers.

Finally, Article 36 makes no distinction among different kinds of detentions. It applies regardless of the types of charges a detainee might face. . . . This is consistent with the fact that consular notification has not been understood to be an essential component of a national criminal justice proceeding against a foreign national. . . .

B. *VCCR remedies and enforcement*

The VCCR does not provide for a remedy in national courts for the failure of a host State to fulfill its consular notification obligation. Nor does the VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes specify such a remedy. The VCCR does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation. Instead, the practice of States concerned about consular notification has been to follow a process of diplomatic communication and negotiation initiated by an aggrieved State.

. . . In this connection, the United States believes that the sending State has some responsibility to call to the receiving State's attention situations in which the sending State is dissatisfied with Article 36 compliance. U.S. consular officers, for example, are

under standing formal instructions to raise issues of compliance with the receiving State. Conversely, when the United States hears little or nothing from a sending State about consular notification issues in the United States, it may fairly assume that the sending State is satisfied with the level of compliance, and in any event has no way of knowing if additional measures are required to improve compliance. . . .

When a consular officer learns of and is concerned about a failure of notification, a diplomatic communication may be sent to the host government protesting the failure. While such correspondence sometimes goes unanswered, more often it is investigated either by the foreign ministry or the relevant law enforcement officials of the host government. If it is learned that notification in fact was not given, it is common practice for the host government to apologize and to undertake to ensure improved future compliance. To the best of our knowledge, no State has demanded a remedy outside of the diplomatic process until consular notification recently became a subject of dispute between the United States and certain other States concerned about death sentences imposed by U.S. courts in certain cases involving their nationals. . . .

* * * *

VI. Consular Notification is Not a Prerequisite For the Exercise and Protection of Human Rights.

* * * *

Indeed, to find a "human right" in the treaty obligation to notify a detained foreign national of the further right to have a consular official notified of the detention would create profoundly illogical results. It would imply that a foreign national's human rights are violated regardless of his need for consular notification (*e.g.*, he may already be aware of the option); regardless of his need for consular assistance (*e.g.*, he may be a long-term resident who is, for all practical purposes, like a national of the host country); and regardless of what assistance might actually have been provided (*e.g.*, his country of nationality might have provided no services at all). And, because the general requirements of

consular notification and access pertain only if there are consular relations between governments (and the specific provisions of Article 36 pertain only between State parties to the VCCR), the Mexican proposal would imply that some individuals have greater human rights than others.

* * * *

A. *The purpose of the VCCR is not to establish or protect individual human rights.*

It is evident from a reading of the VCCR's many related provisions that the essence of the VCCR is not the elaboration or even the protection of individual human rights. Rather its intent and effect are to establish legal rules governing relations between States, not to create rules that operate between States and individuals. . . . [T]he VCCR's text creates a body of international law rules regulating the activities of State parties as they engage in consular functions—issues such as the establishment of consular relations, the appointment of consular staff, and various exemptions from host state regulation. . . .

[T]he VCCR's very terms emphasize that it articulates the rights of States and that it was not concluded, in the first instance, to protect the rights of individuals. Consistent with this, it should not be viewed as a source of individual human rights. In two phrases, indisputably, Article 36 expresses ideas in the vocabulary of "rights." But it is important to bear in mind that Article 36 does so, not because of any notion that a human right to notification existed or should be established, but because it reflects a compromise between those countries that advocated notification to consular officials of all detentions (sometimes known as "mandatory notification") and those who argued that notification should be made only when specifically requested by the detainee. Had mandatory notification been adopted, there would have been no reference in Article 36 to the right of the individual at all, and notification to consular officials would have occurred regardless of the individual's wishes. Opponents of mandatory notification argued primarily that it would place an unmanageable burden on host countries, given the inherent difficulties of compliance. Others were concerned that the privacy interests of

the detainees would be ignored—*i.e.*, they were interested in preserving the individual's "right to privacy." Opponents of requiring notification only upon specific request were concerned that the detainee would not know that he could request notification. Ultimately, it was agreed that the detainee would be advised of the possibility of consular notification, and that notification to consular officials would be required if requested. Strictly speaking, therefore, the provision is a compromise between the State's right to consular notification and the individual's right to privacy *vis-à-vis* the State. This compromise was incorporated into the VCCR as a requirement to inform the individual of a "right" to have consular officials notified . . .

B. *Consular notification is not a prerequisite to protecting the human rights of individuals subject to criminal proceedings.*

Consular notification may in particular circumstances assist in the vindication of human rights, but it is not a necessary precondition for their observance; indeed, human rights must be observed in the absence or the presence of consular notification, access, or assistance. Certainly the obligation of States to provide individuals with consular notification does not rise to the level of the human rights recognized in the provisions of the American Declaration, the OAS Charter, or the ICCPR.

In relevant part, Article 14 of the ICCPR guarantees individuals accused of crimes equality before the courts; a fair trial before a competent tribunal; and adequate time and facilities for the preparation of a defense. The American Declaration states (in Articles II and XXVI) that individuals accused of crimes are to be presumed innocent, afforded impartial judicial hearings, and treated equally before the law, without distinction as to race, nationality, sex, and other factors. Article 3(l) of the OAS Charter, which Mexico invokes, does not enumerate specific rights, but rather makes reference in more general terms to "the fundamental rights of the individual." This Court has interpreted this as referring to the rights set forth in the American Declaration. (See Advisory Opinion OC 10/89 of July 14, 1989.) . . .

Nothing in these international instruments suggests that there exists a human right to consular notification or that such

notification is a necessary prerequisite to the exercise of the rights that these instruments enshrine. And nothing in these texts indicates that consular notification—or even consular *assistance*—is relevant to the fair trial protections which they explicitly enumerate. . .

* * * *

C. *Other means assure the effective protection of human rights in the United States.*

The U.S. criminal justice system gives full effect to the important fair trial protections and procedural guarantees invoked by Mexico. These procedures and guarantees are not dependent upon consular notification, access, or assistance. . . . The U.S. Constitution—which governs both federal and state criminal proceedings—establishes a wide range of rights and legal protections for individuals charged with criminal offenses, as do other federal and state laws and regulations. These protections ensure that all persons, including foreign nationals unfamiliar with English or the U.S. judicial system, will have adequate interpreters and competent legal counsel who can advise them. Failure to honor these protections and guarantees can be corrected through appeals or other judicial remedies.

Among the most important U.S. constitutional protections are the following [citations omitted]:

1. Criminal defendants are guaranteed the right to be tried before a fair and impartial tribunal under the Fifth and Fourteenth Amendments to the U.S. Constitution.
2. The Fifth and Fourteenth Amendments also guarantee that persons shall not be subject to discrimination by federal and state authorities based on their race, gender, ethnicity or national origin.
3. Under the Fifth Amendment, authorities must inform detained persons of the privilege against self-incrimination (the "right to remain silent"). This privilege prevents authorities from incriminating a defendant with his own statements unless the individual has "knowingly and intelligently" waived this constitutional privilege. Waiver of this privilege would not be considered "knowing" if the

defendant did not comprehend his rights, whether because of language difficulties, or for other reasons.

4. Under the Sixth Amendment, defendants are entitled to (1) be informed promptly, and in detail, of all charges made against them; (2) a public trial by jury in all criminal prosecutions; (3) effective legal representation—supplied at public expense if they cannot afford an attorney; and (4) adequate time and opportunity to prepare a defense and consult with counsel.
5. Of particular importance to some foreign nationals is the fact that U.S. courts have interpreted the Fifth and Sixth Amendments to embrace the right to be assisted by an interpreter if a defendant does not understand English language proceedings.
6. While Mexico suggests that consular assistance is needed to ensure that evidence on the defendant's behalf is discovered, in fact U.S. courts have interpreted the Sixth and Fourteenth Amendments as providing a constitutional right to the assistance of investigators and experts where a particularized need for such assistance can be demonstrated.
7. The *ex post facto* clause of the U.S. Constitution, Article I, Section 9, bars retroactive increases in the penalties available in criminal cases. The operation of this clause forbids the government from imposing a penalty (including the death penalty) on an offender for a crime that was not subject to such punishment at the time it was committed.
8. The death penalty may be carried out only under laws in effect at the time the crime was committed, subject to the extensive due process and equal protection requirements of the U.S. Constitution, and after exhaustive appeals. U.S. law provides special protections for those accused of capital offenses. For example, in addition to the usual requirements enumerated above:
   — Automatic review of the conviction as well as the sentence is mandatory in nearly every state whose laws provide for capital punishment. Such review serves to safeguard against the possibility that capital punishment

might be imposed capriciously, arbitrarily, or disproportionately. Typically, review is undertaken regardless of the defendant's wishes and is conducted by the state's highest appellate court.

— In those few states not providing for automatic review, the defendant may elect to appeal the sentence, the conviction, or both.

— The U.S. Supreme Court has determined that when a sentencing jury is empowered to impose either capital punishment or a sentence of life imprisonment, the jury must be informed whether, in the latter case, the defendant would be ineligible for parole. This is because ineligibility for parole may cause a jury to recommend a life sentence instead of death.

— A state may not prohibit acts of executive clemency, including amnesty, pardon, and commutation of sentence. Such measures may provide relief from convictions that have been affirmed when no further recourse to the judicial process is available, including in cases where new evidence suggests the possibility of innocence.

— Persons who were under sixteen years of age at the time of the crime may not receive capital punishment in the United States.

— Both Federal and State law provide significant protection against the trial, conviction and punishment of individuals with significant mental infirmities or disabilities. U.S. law prohibits the execution of the insane. In many states, a defendant cannot be held responsible if he or she reacted to an "irresistible impulse" or is incapable of acting responsibly by reason of mental or emotional disability. Moreover, no one who is not mentally competent can be forced to stand trial in the United States. Similarly, an individual cannot be executed unless he or she is both aware of the punishment and of the reason why it is to be imposed. The legal standard for competence, together with the bar on the prosecution of the insane and the other

> defenses mentioned above, limit significantly the prosecution of persons with mental disabilities.

Foreign nationals in the U.S. criminal justice system enjoy all of these rights under international law and U.S. law. The United States and the several states of the United States are obligated to honor these rights, regardless of the status of consular notification, and regardless of whether defendants have received substantive consular assistance. If fair trial and due process protections have been violated, the affected individuals are entitled to judicial remedies, no matter their nationality, and no matter the status of consular notification. The failure to provide consular notification does not, however, violate these rights and protections, and cannot itself cause or constitute a violation of them. These rights must be provided in any event.

In its submission to the Court, Mexico expresses concern that the fair trial rights and due process protections of Mexican nationals in U.S. criminal proceedings will not be vindicated in the absence of consular notification. Mexico merely makes the point that consular assistance—if and when it is provided—may *enhance* the operation of the rights and protections traditionally recognized under international law. This could be true in a particular case, but it does not compel or even justify the legal conclusion that consular notification must be accorded the status of a human right that may be enforced through domestic legal systems to set aside otherwise valid convictions and sentences.

It is unnecessary, and it would be unwise, to create a universal presumption that failure to provide consular notification must invalidate subsequent criminal convictions. Such a presumption would be diametrically at odds with the VCCR and the practice of States, which do not link consular notification to the criminal process, and would ignore the large variety of real-world circumstances that may exist in a particular case. Moreover, whether or not consular notification has occurred, if there exists a question about the fundamental fairness of a judicial proceeding, or (in the United States) about compliance with one of the specific rights just described, the resulting inquiry properly focuses on whether

such rights explicitly guaranteed by international instruments (and, in turn, by municipal law) have been violated. For example: Was the defendant's right to prepare an adequate defense given effect? And did the defendant receive the assistance of competent, effective counsel?

These are important questions. They can be answered only upon a proper judicial inquiry into the facts of each case in which a human rights violation has been alleged. Mexico confuses and distorts the inquiry by asking this Court to deem the failure to provide consular notification to be a violation of fair trial rights and due process protections *per se*—that is, in every present and future case, without regard to the particular facts and circumstances. . . .

* * * *

E. *Consular notification has no special role in cases involving application of the death penalty.*

Mexico has stressed its concern regarding cases involving potential application of the death penalty. It has suggested that special protections should be extended to criminal defendants who may be sentenced to death. . . .

Mexico asks the Court to enshrine a new human right to consular notification, without which the death penalty cannot lawfully be prescribed. Mexico has not argued and cannot demonstrate, however, that the numerous and rigorous protections already provided to defendants in capital cases in the United States are insufficient under international law. . . . Moreover, it is difficult to see how standards for the protection of human rights can properly be set at a much higher level in death penalty cases than in other equally or more serious cases that may lead to penalties other than death, such as life or other lengthy imprisonment; or indeed than in any other criminal matter. If the right to consular notification is essential to the protections of human rights, then it properly attaches, at a minimum, in any legal proceeding which threatens a significant deprivation of a defendant's liberty.

* * * *

F. *Mexico's argument has serious implications for the criminal justice systems of VCCR parties.*

. . . If the Court were to follow Mexico's suggestion, it would call into question the basic fairness and sufficiency of *any criminal proceeding potentially resulting in significant imprisonment*, in which consular notification regrettably did not occur—even if the defendant was served by competent counsel, investigators, and translators. There is no basis in international law, logic, or morality for such a judgment and for the resulting disruption and dishonor to the many States parties to the VCCR.

VII. The Failure to Provide Consular Notification Is Not Discriminatory and Does Not Violate the Right to Equality Before the Law.

In its request, the Government of Mexico makes reference to the rights to non-discrimination and equality before the law. One must ask, therefore, in what respect and under what circumstances the failure to provide consular notification bears on either of these rights.

* * * *

We do not understand the Government of Mexico to be raising the question of discrimination or equality as between persons of differing nationalities, however. Rather, it appears that the question of possible discrimination or inequality is raised as between citizens of the State which is responsible for the detention and citizens of other States. In this context, it is not the presence or absence of consular notification which is relevant (since consular notification is never given to nationals of the detaining State). Rather, the question is whether there is discrimination or unequal treatment with respect to the enjoyment of recognized due process and other relevant rights.

Foreign nationals are entitled to the same access to courts, and the same treatment before the courts, as are citizens of a host country. The U.S. Constitution enshrines this principle in its Fifth and Fourteenth Amendment, as do the constitutions of the constituent states of the United States. . . .

Mexico's submission appears to suggest, however, that foreign nationals merit *special* protections of their human rights, above and beyond those applicable to citizens of a host State. Mexico has invited the Court to declare the existence of a special form of human rights protection that benefits only a narrow class of persons detained in a foreign country—foreign nationals of States that have consular relations with the host State.

While it is recognized that special measures in some cases may be appropriate to ensure the adequate and effective enjoyment of human rights, this analysis is highly case- and fact-specific. . . . Accordingly, this Court should reject any conclusion that the right to non-discrimination or equality before the law is violated *per se* on the basis of nationality. Ultimately, the suggestion that foreign nationals merit special rights is itself contrary to the principles of non-discrimination and equality.

VIII. Conclusion

For the reasons stated above, the United States submits that the Court should decline Mexico's invitation to rule that the individual rights and protections applicable in criminal proceedings and expressed in the American Declaration, the OAS Charter and the International Covenant on Civil and Political Rights encompass a human right to consular notification; that notification must be given at the time of arrest or before a statement is made by the detainee; and that any particular remedy is required when the death penalty is imposed in cases involving failures of notification.

Instead, the Court should conclude that:

1. Compliance with the consular notification requirements of Article 36 is important and all States party to the VCCR should endeavor to improve their compliance.
2. Consular notification is not a human right, as such, but rather a duty of States that have entered into consular relations with other States that is intended to benefit individuals as well as States.

3. Consular notification does not imply a right to or require any particular level of consular assistance.
4. Where consular relations exist between States, consular notification nevertheless may result in consular assistance that could assist a foreign national who is subject to criminal proceedings in the receiving State.
5. The essence of the individual rights and protections applicable in criminal proceedings is as expressed in the American Declaration, the OAS Charter, and the International Covenant on Civil and Political Rights.
6. All persons are entitled to fair criminal proceedings, regardless of the penalty that may be imposed, and foreign nationals must be accorded fair criminal proceedings regardless of whether they receive consular notification.
7. The failure of a host State to inform a foreign national that consular authorities may be notified of his detention may properly result in diplomatic measures that seek to address such a failure and improve future compliance; in any event, the appropriate remedy for a failure of notification can only be evaluated on a case-by-case basis in light of the actual practice of States and the consular relations between the States concerned.

* * * *

Along with a number of other governments and various intergovernmental organizations, the United States Government presented its views at the oral proceedings held on June 12 and 13, 1998.

The Inter-American Court issued its advisory opinion on October 1, 1999. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999).

Section XIII of the Court's opinion is set forth below. The full text is available at *http://www.corteidh.or.cr/seriea_ing/Seriea_16_ing.doc.*

---

* * * *

XIII
OPINION

141. . . .

THE COURT

DECIDES

unanimously

That it is competent to render the present Advisory Opinion.

IT IS OF THE OPINION

Unanimously,

1. That Article 36 of the Vienna Convention on Consular Relations confers rights upon detained foreign nationals, among them the right to information on consular assistance, and that said rights carry with them correlative obligations for the host State.

Unanimously,

2. That Article 36 of the Vienna Convention on Consular Relations *concerns* the protection of the rights of a national of the sending State and is part of the body of international human rights law.

Unanimously,

3. That the expression "without delay" in Article 36(1)(b) of the Vienna Convention on Consular Relations means that the State must comply with its duty to inform the detainee of the rights that article confers upon him, at the time of his arrest or at least before he makes his first statement before the authorities.

Unanimously,

4. That the enforceability of the rights that Article 36 of the Vienna Convention on Consular Relations confers upon the individual is not subject to the protests of the sending State.

Unanimously,

5. That articles 2, 6, 14 and 50 of the International Covenant on Civil and Political Rights *concern* the protection of human rights *in the American States*.

Unanimously,

6. That the individual's right to information established in Article 36(1)(b) of the Vienna Convention on Consular Relations allows the right to the due process of law recognized in Article 14 of the International Covenant on Civil and Political Rights to have practical effects in concrete cases; Article 14 establishes minimum guarantees that can be amplified in the light of other international

instruments such as the Vienna Convention on Consular Relations, which expand the scope of the protection afforded to the accused.
By six votes to one,
7. That failure to observe a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life "arbitrarily", as stipulated in the relevant provisions of the human rights treaties (e.g. American Convention on Human Rights, Article 4; International Covenant on Civil and Political Rights, Article 6), with the juridical consequences that a violation of this nature carries, in other words, those pertaining to the State's international responsibility and the duty to make reparation.
Judge Jackman dissenting.
Unanimously,
8. That the international provisions that concern the protection of human rights in the American States, including the right recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, must be respected by the American States Party to the respective conventions, regardless of whether theirs is a federal or unitary structure.

* * * *

The United States subsequently made clear that it disagreed with and would not accept the Court's decision. *See, e.g.*, Counter-Memorial of the United States filed in the International Court of Justice in *Avena and Other Mexican Nationals (Mexico v. the United States of America)* at 6.84, excerpted in *Digest 2003 at 43–103* and available at *www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.*

2. Consular Assistance

a. Department of State travel advisory system

On May 22, 1992, Acting Secretary of State Lawrence Eagleburger approved a new travel advisory system for the

Department of State designed to expand the type of information distributed to U.S. citizens traveling and residing abroad, to make it more understandable, and to reinforce the "no double standard" policy that the government should not disseminate threat information to U.S. government employees without similarly advising U.S. citizens subject to the same threat. For discussion of the previous policies on travel advisories, *see 1 Cumulative Digest 1981–1988*, at 624–26.

Excerpts from a telegram dated July 22, 1992, sent to all diplomatic and consular posts announcing the new system, which would use two categories of travel advisories, follow below.

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

---

* * * *

2. As you know, the Bureau of Consular Affairs has long provided information to the American traveling public in the form of travel advisories. This is an extremely important discretionary activity undertaken as part of the Department's consular responsibilities for assisting U.S. citizens overseas. . . .

3. Essentially the new system will pare the three general categories of travel advisories—warnings, cautions, and notices—down to two: Travel Warnings and Consular Information Sheets. Warnings will be issued only when we recommend avoidance of travel to a certain country when a situation is so dangerous or unstable that a U.S. citizen is likely to be adversely affected by travel to that country and the U.S. Government's ability to assist that citizen is severely constrained as in the case of an embassy drawdown or closure. Cautions and notices will be consolidated into the new Consular Information Sheets. The information sheets will provide factual information on every country.

4. Consular Information Sheets will include such information as the location of the U.S. embassy or consulate in the subject country, unusual immigration practices, health conditions, minor political disturbances, unusual currency and entry regulations, crime and security information (including terrorist incidents), drug

penalties and areas of instability. Countries for which deferral of travel is recommended will have Travel Warnings as well as Consular Information Sheets.

5. If an unstable situation in a country does not warrant a warning, we would appropriately and factually include a description of the unstable area in an information sheet. Thus, it provides the public with the same degree of information but with greater consistency to enable them to make an informed decision about travel plans to a country or portion thereof. On limited occasions and to avoid a double standard we will restate in the information sheet any embassy security advice given to official employees.

6. I expect this system to be implemented in a manner consistent with the Department's "no double standard" policy, under which we do not disseminate important security information to only selective potential travelers when the information is relevant to a broader group. All Department personnel involved in implementing the system should be aware that this policy has a statutory basis, in that we are prohibited by law from notifying a civil aviation threat to only selective potential travelers, unless the threat applies only to them. This mandate reflects strong concern that the Government should not protect U.S. Government employees without similarly protecting U.S. citizens subject to the same threat. The "no double standard" rule accordingly is now applied by the Department to all threat notifications, not just to those involving civil aviation. The Department will adhere strictly to this policy in implementing the new travel advisory system. Thus, if an embassy is giving important security advice to its employees, this information will be quoted in the information sheets unless it clearly is relevant only to Government employees.

* * * *

A third category of travel advisory, "public announcements," was added subsequently, as described in the following excerpt from a May 29, 1998, telegram from the Department of State to all diplomatic and consular posts concerning the travel advisory program. The full text of the telegram is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

PUBLIC ANNOUNCEMENTS (PA)
4. Events of a transitory nature concerning safety, security, and sometimes health . . . affect a country, only part of a country, or several countries in a region such that inclusion in the more general CIS [Consular Information Sheet] or TW [Travel Warning] would be inappropriate. PA's do not address matters such as hotel room shortages; this type of information is available through travel agencies and other private sector sources. They are not used to warn about endemic or epidemic diseases or health conditions unless they are so grave that local authorities have taken measures directly affecting the traveling public (e.g., quarantine of an area). In general, PA's are used to disseminate information quickly about terrorist threats and other relatively short-term and/or transnational conditions posing significant risks to the security of U.S. citizen travelers unless they are so grave that local authorities have taken measures directly affecting the traveling public (e.g., quarantine of an area). In extraordinary circumstances, a PA concerning a worldwide threat may be issued. PA's are frequently used to share with the broader U.S. public information to be released by a particular post through its warden network. This ensures that all citizens have access to relevant information and helps avoid a "double standard" problem. Consular PA's should be crafted to provide comprehensive information about a potentially dangerous situation. . . . Public Announcements have expiration dates. If the situation meriting the PA in a specific country is likely to extend beyond the expiration date of the PA, the CIS for the country should be revised to include information on the circumstances that triggered the PA. All posts are notified . . . whenever a PA is issued or rescinded.

* * * *

b. Provision of information on certain violent crimes abroad to victims and victims' families

Section 307 of the Intelligence Authorization Act for Fiscal Year 1998, Pub. L. No. 105–107, 111 Stat. 2248, enacted November 20, 1997, set forth below, required the Secretary of State to take appropriate actions to make information

(including classified information) that the U.S. Government possessed concerning the killing, abduction, torture, or other serious mistreatment of U.S. citizens abroad available to the victims of such crimes, or, when appropriate, to U.S. citizen family members of such victims.

---

* * * *

SEC. 307. PROVISION OF INFORMATION ON CERTAIN VIOLENT CRIMES ABROAD TO VICTIMS AND VICTIMS' FAMILIES.

* * * *

(b) RESPONSIBILITY.—The Secretary of State shall take appropriate actions to ensure that the United States Government takes all appropriate actions to—
(1) identify promptly information (including classified information) in the possession of the departments and agencies of the United States Government regarding the killing, abduction, torture, or other serious mistreatment of United States citizens abroad; and
(2) subject to subsection (c), promptly make such information available to—
(A) the victims of such crimes; or
(B) when appropriate, the family members of the victims of such crimes if such family members are United States citizens.
(c) LIMITATIONS.—The Secretary shall work with the heads of appropriate departments and agencies of the United States Government in order to ensure that information relevant to a crime covered by subsection (b) is promptly reviewed and, to the maximum extent practicable, without jeopardizing sensitive sources and methods or other vital national security interests, or without jeopardizing an on-going criminal investigation or proceeding, made available under that subsection unless such disclosure is specifically prohibited by law.

* * * *

The Conference Report, H.R. Conf. Rep. No. 105–350, at 22 (1997), clarified that the "term 'information' [is intended]

to be construed to mean information that is not available to the victims or families unless provided to them by the United States Government."

c. Deaths and estates of United States citizens overseas

(i) Consular officer functions

Section 234(b) of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorizations Act, Fiscal Years 2000 and 2001, H.R. 3427, 106th Cong. (1999), which was enacted into law by § 1000(a)(7) of the Consolidated FY2000 Appropriations Act, Pub. L. No. 106–113, 113 Stat. 1501A-426, (codified as 22 U.S.C. § 2715c (2004)), replaced and modernized the existing statutory provisions relating to the traditional consular function of protection, conservation and disposition of the estates of Americans who die overseas in certain circumstances. The report of the Senate Foreign Relations Committee on the Foreign Relations Authorization Act, Fiscal Years 2000–2001, S. Rep. No. 106–43, at 13–14 (1999), excerpted below, explained the new provisions.

---

* * * *

This section would repeal 22 U.S.C. 4195 and replace it with new provisions in the State Department Basic Authorities Act to provide a revised statutory basis for the traditional consular function of protection and conservation, and ultimately disposition, of the estates of Americans who die overseas in those cases where a legal representative is not appointed by the heirs or other beneficiaries within a reasonable time. This section also provides a number of specific authorities not found in the original law which have been proposed by the Department of State based on its experience with the current law.

Subsection (b) amends the State Department Basic Authorities Act to provide for reports of death and notification of next-of-kin in certain cases of American citizens dying overseas. The new section 43A of the Act would specifically authorize reports of

presumptive death to be issued in the absence of a report by a local authority pursuant to regulations promulgated by the Secretary.

The new section 43B would deal with the overseas conservation and disposition of estates of Americans who die abroad. It authorizes a consular officer to act as the provisional conservator of the U.S. citizen decedent's estate and take possession of the personal effects within his or her jurisdiction. Until 1996, 22 U.S.C. 4195 provided for consular officers to transfer unclaimed estates to the General Accounting Office and for that Office to conserve the property by various means, including sale of personal property and deposit of the net proceeds in the Treasury in trust for potential claimants. However, in the absence of valid claims after a period of years, such proceeds would be turned over to the U.S. State of last known domicile or, if not known, placed in miscellaneous receipts of the Treasury.

In 1996, P.L. 104–316 substituted the Department of State or Secretary of State for the General Accounting Office, but made no procedural changes. Experience since that time, given the increasing number of Americans who establish permanent residence overseas and acquire interests in real property, and the related number of them who die intestate without clear ties to any particular U.S. State, has led the Department of State to propose expanded, more flexible authority to deal with both real and personal property, particularly where legal representatives or claimants cannot be located within a reasonable time. . . . Section 43B also provides authority to conserve and settle estates, including passage of title to the State Department for disposition of unclaimed property in accordance with the rules for domestic surplus United States Government property. Under the proposed procedures, after an initial waiting period of one year, followed by a further period of five full fiscal years, subsequent claims would be paid as refunds from the Treasury, which would have received the net proceeds of disposition as miscellaneous receipts. Title to any real property in an estate which is unclaimed by the end of an identified waiting period, shall pass to the Secretary who would retain the property if useful to the Department or dispose of the estate in the same manner as surplus U.S. Government-owned property. Such property would be considered foreign excess property under

title IV of the Federal Property and Administrative Services Act of 1949.

* * * *

(ii) Disposition of unidentified remains of victims of aviation disasters

In a February 17, 1998, response to a letter from James Hall, Chairman of the National Transportation Safety Board, excerpted below, Katherine Peterson, the Managing Director of Overseas Citizens Services for the Department of State's Bureau of Consular Affairs, described the Department's experience with respect to the disposition of unidentified remains of victims of aviation disasters abroad.

---

* * * *

. . . The question arose in connection with the crash of KAL Flight 801 in Guam. I understand that the Government of Korea has proposed that all of the unidentified remains be sent to Korea for interment. In as much as some of those remains are American citizens, we have some serious reservations about that course of action. We would endorse, however, the concept of the cremation of the unidentified remains, including remains of possible U.S. citizen victims, and distribution of the ashes to family members of unidentified victims including both Americans and Koreans, and perhaps the interment of some ashes in a memorial at the site of the crash in Guam, provided the families receive prior consultation.

A review of the State Department's collective experience regarding disposition of remains of victims of foreign aviation disasters over the past twenty years reflects that, traditionally, unidentified remains have been buried locally in the place where the disaster occurred. In circumstances where culture, health regulations, or the condition of the remains dictate that cremation take place, ashes have been interred locally. Whether burial or cremation takes place, a collective memorial service for the victims

has been conducted in the country where the tragedy occurred. In the bombing of Pan Am Flight 103, for example, unidentified remains were buried in Lockerbie, Scotland, where a memorial service occurred. More recently, in the 1997 crash of a Garuda flight in Indonesia, unidentified remains, including the possible remains of a U.S. citizen, were interred in a single burial site in Indonesia following a memorial service.

* * * *

I understand that the concept under consideration for resolution of the disposition of the unidentified remains from the KAL 801 disaster is that the remains be cremated, and ashes shared among the families of the Koreans and U.S. citizen victims. This proposal is similar to a practice offered by the Department of Defense POW/MIA Office regarding disposition of co-mingled ashes of POW/MIA military and U.S. civilian victims of the war in South East Asia. . . .

We believe it is essential that the families of the U.S. citizen victims of KAL 801 should be consulted carefully before any agreement is reached with the Government of Korea regarding the disposition of unidentified remains. Shipment of unidentified remains or ashes abroad in a domestic commercial aviation disaster would constitute a meaningful precedent, and therefore should be approached with particular concern for the U.S. citizen victims and their families and for the sensibilities of the local authorities where the disaster occurred.

* * * *

d. Performance of consular functions by civil service employees rather than foreign service officers

Section 127 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103–236, as amended by section (1)(mm)(2) of Pub. L. No. 103–415, 22 U.S.C. § 4221 (2004), authorized the Secretary of State to designate U.S. citizen employees abroad, other than consular officers, to perform notarial and passport services. Section 2222 of the

Omnibus Appropriations Act, 1999, Pub. L. No. 105–277, 122 Stat. 2681 (1998), further authorized the Secretary to designate U.S. citizen employees of the Department of State with appropriate training to issue consular reports of birth abroad (22 U.S.C. § 2705); to authenticate foreign documents for use in U.S. criminal cases (including taking testimony on oral or written interrogatories pursuant to the commission of a U.S. court) (22 U.S.C. § 4191 and 18 U.S.C. §§ 3492–3496); to administer oaths for patent purposes (35 U.S.C. § 115); and to make determinations of nationality under the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101(a)(9).

B. CHILDREN

1. International Child Abduction

a. Interpretation and application of the Hague Convention on the Civil Aspects of International Child Abduction by U.S. courts

(1) Wrongful removal

Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, T.I.A.S. No. 11670 ("the Hague Abduction Convention" or "Hague Convention") provides:

The removal or the retention of a child is to be considered wrongful where—

> 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 removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

(i) Habitual residence of the child

In *Friedrich v. Friedrich* ("*Friedrich I*"), 983 F.2d 1396 (6th Cir. 1993), excerpted below, the U.S. Court of Appeals for the Sixth Circuit elucidated how a child's "habitual residence" was to be determined under Article 3 of the Hague Abduction Convention.

---

* * * *

In December 1989, Emanuel Friedrich married Jeana Friedrich in the Federal Republic of Germany. Mrs. Friedrich, a citizen of the United States, was a member of the United States Army stationed in Bad Aibling, Germany. Mr. Friedrich, a citizen of Germany, was employed on the military base as a bartender and club manager.

On December 29, 1989, the Friedrichs' only child, Thomas David Friedrich, was born in Bad Aibling. During 1990 and early 1991, Thomas lived with both of his parents in Bad Aibling off the military base. The Friedrichs' marriage was a rocky one from the start. . . .

On the evening of July 27, 1991, the Friedrichs had a heated argument at their apartment. During the argument, Mr. Friedrich ordered Mrs. Friedrich to leave the apartment with Thomas and put most of their belongings in the hallway, including some of Thomas's toys. Mrs. Friedrich, however, did not leave the apartment until the next morning when she obtained assistance from friends in the United States Army. Together, they took Thomas and removed her possessions to on-base visiting quarters, where she lived with Thomas for the next four nights, until August 1, 1991. Mr. Friedrich did not interfere with the removal of Mrs. Friedrich's possessions or with the removal of his child. He explained that he was intimidated by the soldiers and wanted to avoid a scene in front of Thomas.

. . . In the late evening of August 1, 1991, without Mr. Friedrich's permission, consent or knowledge, Mrs. Friedrich left Bad Aibling en route to the United States with Thomas.

* * * *

Mr. Friedrich discovered that Thomas had been removed to the United States on August 3, 1991, and filed a claim in Germany seeking to obtain parental custody soon afterward. On August 22, 1991, a Municipal Court-Family Court in Rosenheim, Germany granted Mr. Friedrich parental custody of Thomas. Mrs. Friedrich did not receive notice of that judicial proceeding. Friedrich filed this action on September 23, 1991, alleging that Mrs. Friedrich had wrongfully removed Thomas from Germany in violation of the Hague Convention on Civil Aspects of International Child Abduction. On January 10, 1992, the district court denied Mr. Friedrich's claim.

* * * *

The Convention does not define "habitual residence." Little case law exists on the Convention in general; no United States cases provide guidance on the construction of "habitual residence." The British courts have provided the most complete analysis. In In Re Bates, No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989), the High Court of Justice concluded that there is no real distinction between ordinary residence and habitual residence. Id. At 10. The court also added a word of caution:

> "It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions."

Id. (quoting Dicey & Morris, The Conflicts of Laws 166 (11th ed.)). We agree that habitual residence must not be confused with domicile. To determine the habitual residence, the court must focus

on the child, not the parents, and examine past experience, not future intentions.

Thomas was born in Germany to a German father and an American mother and lived exclusively in Germany except for a few short vacations before Mrs. Friedrich removed him to the United States. Mrs. Friedrich argues that despite the fact that Thomas's ordinary residence was always in Germany, Thomas was actually a habitual resident of the United States because: 1) he had United States citizenship; 2) his permanent address for the purpose of the United States documentation was listed as Ironton, Ohio; and 3) Mrs. Friedrich intended to return to the United States with Thomas when she was discharged from the military. Although these ties may be strong enough to establish legal residence in the United States, they do not establish habitual residence.

A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward. All of the factors listed by Mrs. Friedrich pertain to the future. Moreover, they reflect the intentions of Mrs. Friedrich; it is the habitual residence of the child that must be determined. Mrs. Friedrich undoubtedly established ties between Thomas and the United States and may well have intended for Thomas to move to the United States at some time in the future. But before Mrs. Friedrich removed Thomas to the United States without the knowledge or consent of Mr. Friedrich, Thomas had resided exclusively in Germany. Any future plans that Mrs. Friedrich had for Thomas to reside in the United States are irrelevant to our inquiry.

The district court appears to agree that before the argument of July 27, 1991, Thomas was a habitual resident of Germany. The district court, however, found that Thomas's habitual residence was "altered" from Germany to the United States when Mr. Friedrich forced Mrs. Friedrich and Thomas to leave the family apartment.

Habitual residence cannot be so easily altered. Even if we accept the district court's finding that Mr. Friedrich forced Mrs. Friedrich to leave the family apartment, no evidence supports a finding that Mr. Friedrich forced Mrs. Friedrich to remove Thomas from Germany; Mr. Friedrich was not even aware of the removal until after the fact. Thomas's temporary three-day stay on a United

States military base did not transfer his habitual residence to the United States, even if it was precipitated by Mr. Friedrich's angry actions in a marital dispute. As a threshold matter, a United States military base is not sovereign territory of the United States. The military base in Bad Aibling is on land which belongs to Germany and which the United States Armed Services occupy only at the pleasure of the German government. See Dare v. Secretary of Air Force, 608 F. Supp. 1077, 1080 (D. Del. 1985).

More fundamentally, Thomas's habitual residence in Germany is not predicated on the care or protection provided by his German father nor does it shift to the United States when his American mother assumes the role of primary caretaker. Thomas's habitual residence can be "altered" only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before the questionable removal; here, the removal precipitated the change in geography. If we were to determine that by removing Thomas from his habitual residence without Mr. Friedrich's knowledge or consent Mrs. Friedrich "altered" Thomas's habitual residence, we would render the Convention meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence.

* * * *

See also Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995) (Poland was habitual residence when family moved to Poland for father's two-year job and had no settled plans after that);
—*Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995) (child's habitual residence was Australia, even though the mother "did not intend to remain in Australia permanently" after moving from the United States with the father and her child, because her intent did "not void the couple's stated purpose to live as a family" in Australia);
—*Zuker v. Andrews*, 1999 U.S. App. LEXIS 6964 (1st Cir. Apr. 9, 1999) (evidence supported finding that parents had a present shared intent that the child would stay at least temporarily in Massachusetts and fact they had not agreed where family ultimately would settle was immaterial);

—*Shalit v. Coppe*, 182 F.3d 1124 (9th Cir. 1999) (child's three-year stay in Israel changed his habitual residence to Israel, despite mother's unilateral intention that he return to Alaska permanently);
—*Toren v. Toren*, 191 F.3d 23 (1st Cir. 1999) (mother had not wrongly retained children who had been in Massachusetts four years pursuant to separation agreement approved by Israeli court that said they would live there until July 2000 by filing request with Massachusetts court to modify separation agreement);
—*Meredith v. Meredith*, 759 F. Supp. 1432 (D. Ariz. 1991) (child's habitual residence did not switch from the United States to England when mother kept her beyond planned vacation time and concealed whereabouts);
—*Levesque v. Levesque*, 816 F. Supp. 662 (D. Kan. 1993) (where husband agreed wife would return to Germany with the child for some period of time, Germany was the child's habitual residence);
—*Ponath v. Ponath*, 829 F. Supp. 363 (C.D. Utah 1993) (child's habitual residence did not shift to Germany where father forced mother and child to remain there);
—*Slagenweit v. Slagenweit*, 841 F. Supp. 264 (N.D. Iowa 1993) (when mother sent daughter to father in Iowa for an indefinite period and child had received significant medical and developmental treatment there, child's habitual residence was Iowa);
—*Wanninger v. Wanninger*, 850 F. Supp. 78 (D. Mass. 1994) (father's consent to short visit to United States did not change children's habitual residence from Germany);
—*Prevot v. Prevot*, 855 F. Supp. 915 (W.D. Tenn. 1994) (Parties clearly went to France with intention of settling and opening up a restaurant, and France was thus the child's habitual residence), *overruled on other grounds by* 59 F.3d 556 (6th Cir. 1994), *cert denied*, 516 U.S. 1161 (1996);
—*Falls v. Downie*, 871 F. Supp. 100 (D. Mass. 1994) (although 2-year-old had only been in the United States for 8 months, his habitual residence was the United States because he had become completely accustomed to life in the United States with his father, barely knew his mother, and mother had consented to an indefinite stay);

—*Walton v. Walton*, 925 F. Supp. 453 (S.D. Miss. 1996) (Australia was child's habitual residence when U.S. parents had moved and lived together there);
—*In re Morris*, 55 F. Supp. 2d 1156 (D. Colo. 1999) (sabbatical leave of 10 months did not change habitual residence where shared intent of parents was to remain in Switzerland for only a limited time);
—*Pesin v. Rodriguez*, 77 F. Supp. 2d 1277 (S.D. Fla. 1999) (23 days in Florida following the date of unlawful retention was not sufficient to change children's habitual residence from Venezuela to the United States);
—*Kanth v. Kanth*, 79 F. Supp. 2d 1317 (D. Utah 1999) (family's move to Australia for husband's temporary academic job did not change children's habitual residence to Australia);
—*Isaac v. Rice*, 1998 U.S. Dist. LEXIS 12602 (N.D. Miss. 1998) (child's habitual residence was not changed to Israel even after 11 years there, because father concealed whereabouts);
—*Cohen v. Cohen*, 602 N.Y.S.2d 994 (N.Y. Sup. Ct. 1993) (petition of husband who had taken children to Israel from their habitual residence in New York denied where mother's testimony as to intent found more credible);
—*David B. v. Helen O.*, 625 N.Y.S.2d 436 (N.Y. Fam. Ct. 1995) (father's petition could not be granted because Nigeria, a non-party to the Hague Abduction Convention, was the habitual residence of the children);
—*Harsacky v. Harsacky*, 930 S.W.2d 410 (Ky. Ct. App. 1996) (Kentucky was habitual residence because parents had moved there with intent to stay indefinitely);
—*Brennan v. Cibault*, 643 N.Y.S.2d 780 (N.Y. App. Div. 1996) (mother's agreement for child to remain with father in New York for limited period did not alter child's habitual residence from France);
—*Harkness v. Harkness*, 577 N.W.2d 116 (Mich. Ct. App. 1998) (habitual residence of children had not changed because apartment in Germany was last place parties had resided as a family and no indication parties intended to abandon residence);
—*Flores v. Contreras*, 981 S.W.2d 246 (Tex. Ct. App. 1998) (infant's habitual residence was Mexico, where he lived for 50 days with mother until she brought him to the United

States for a two-week vacation and the father refused to let him leave).

(ii) "Right of custody"

In *Croll v. Croll*, 66 F. Supp. 2d 554 (S.D.N.Y. 1999), a U.S. district court held that a *ne exeat* clause requiring a non-custodial father's consent to remove the child from the country conferred a "right of custody" on the father within the meaning of Article 3 of the Hague Abduction Convention. The U.S. Court of Appeals for the Second Circuit reversed and remanded in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000) ("A foundational assumption in the Convention is that the remedy of return will deliver the child to a custodial parent who (by definition) will receive and care for the child. It does not contemplate return of a child to a parent whose sole right—to visit or veto—imposes no duty to give care."), *cert. denied*, 534 U.S. 949 (2001). *See also Loos v. Manuel,* 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994) (German foster parents did not have "rights of custody"); *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Ariz. 1991) (mother with no rights of custody could not petition for return of daughter to England); *Morton v. Morton*, 982 F. Supp. 675 (D. Neb. 1997) (court gave "full faith and credit" to holding by Utah state court that father's visitation rights coupled with requirement that parents give 90 days notice of intent to move constituted a "right of custody"); *Bromley v. Bromley*, 30 F. Supp. 2d 857 (E.D. Pa. 1998) (where mother had sole custody, court had no jurisdiction to enforce father's visitation rights); *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991) (relying in part on respondent's contemptuous conduct in removing children in violation of order prohibiting removal of the children from Ontario in deciding that petitioner had a right of custody within the meaning of the Convention); *Viragh v. Foldes*, 612 N.E.2d 241 (Mass. 1993) (Convention does not provide remedy of return for denial of rights of visitation); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (temporary order granting custody to respondent and

prohibiting removal of child from Greece gave petitioner a right of custody within the meaning of the Convention).

(iii) "Exercise" of custody rights

In the second round of litigation in *Friedrich v. Friedrich ("Friedrich II")*, 78 F.3d 1060 (6th Cir. 1996), excerpted below with footnotes omitted, the U.S. Court of Appeals for the Sixth Circuit set forth the legal standard for determining when a parent is "exercising" custody rights to a child at the moment of removal. *See also Pesin v. Rodriguez*, 77 F. Supp. 2d 1277 (S.D. Fla. 1999) (although father stayed in separate quarters during vacation and later did not live with children, he "exercised" his custody rights by eating dinner with, visiting, and telephoning children).

---

* * * *

Mrs. Friedrich also argues that, even if Mr. Friedrich had custody rights under German law, he was not *exercising* those custody rights as contemplated by the Hague Convention. She argues that, since custody rights include the care for the person and property of the child, Mr. Friedrich was not exercising custody rights because he was not paying for or taking care of the child during the brief period of separation in Germany.

The Hague Convention does not define "exercise." As judges in a common law country, we can easily imagine doing so ourselves. One might look to the law of the foreign country to determine if custody rights existed *de jure*, and then develop a test under the general principles of the Hague Convention to determine what activities—financial support, visitation—constitute sufficient exercise of *de jure* rights. The question in our immediate case would then be: "was Mr. Friedrich's single visit with Thomas and plans for future visits with Thomas sufficient exercise of custodial rights for us to justify calling the removal of Thomas wrongful?" One might even approach a distinction between the exercise of "custody" rights and the exercise of "access" or "visitation" rights. If Mr. Friedrich, who has *de jure* custody, was

not exercising sufficient *de facto* custody, Thomas's removal would not be wrongful.

We think it unwise to attempt any such project. Enforcement of the Convention should not to be made dependent on the creation of a common law definition of "exercise." The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find "exercise" whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.

We see three reasons for this broad definition of "exercise." First, American courts are not well suited to determine the consequences of parental behavior under the law of a foreign country. It is fairly easy for the courts of one country to determine whether a person has custody rights under the law of another country. It is also quite possible for a court to determine if an order by a foreign court awards someone "custody" rights, as opposed to rights of "access." Far more difficult is the task of deciding, prior to a ruling by a court in the abducted-from country, if a parent's custody rights should be ignored because he or she was not acting sufficiently like a custodial parent. A foreign court, if at all possible, should refrain from making such policy-oriented decisions concerning the application of German law to a child whose habitual residence is, or was, Germany.

Second, an American decision about the adequacy of one parent's exercise of custody rights is dangerously close to forbidden territory: the merits of the custody dispute. The German court in this case is perfectly capable of taking into account Mr. Friedrich's behavior during the August 1991 separation, and the German court presumably will tailor its custody order accordingly. A decision by an American court to deny return to Germany because Mr. Friedrich did not show sufficient attention or concern for Thomas's welfare would preclude the German court from addressing these issues—and the German court may well resolve them differently.

Third, the confusing dynamics of quarrels and informal separations make it difficult to assess adequately the acts and motivations of a parent. An occasional visit may be all that is available to someone left, by the vagaries of marital discord, temporarily without the child. Often the child may be avoided, not out of a desire to

relinquish custody, but out of anger, pride, embarrassment, or fear, vis a vis the other parent. Reading too much into a parent's behavior during these difficult times could be inaccurate and unfair. Although there may be situations when a long period of unexplainable neglect of the child could constitute non-exercise of otherwise valid custody rights under the Convention, as a general rule, any attempt to maintain a somewhat regular relationship with the child should constitute "exercise." This rule leaves the full resolution of custody issues, as the Convention and common sense indicate, to the courts of the country of habitual residence.

We are well aware that our approach requires a parent, in the event of a separation or custody dispute, to seek permission from the other parent or from the courts before taking a child out of the country of its habitual residence. Any other approach allows a parent to pick a "home court" for the custody dispute *ex parte*, defeating a primary purpose of the Convention. We believe that, where the reason for removal is legitimate, it will not usually be difficult to obtain approval from either the other parent or a foreign court. Furthermore, as the case for removal of the child in the custody of one parent becomes more compelling, approval (at least the approval of a foreign court) should become easier to secure.

Mrs. Friedrich argues that our approach cannot adequately cope with emergency situations that require the child and parent to leave the country. . . . [I]f an emergency forces a parent to take a child to a foreign country, any such emergency cannot excuse the parent from returning the child to the jurisdiction once return of the child becomes safe. Nor can an emergency justify a parent's refusal to submit the child to the authority of the foreign court for resolution of custody matters, including the question of the appropriate temporary residence of the child. *See Viragh v. Foldes*, 415 Mass. 96, 612 N.E.2d 241 (Mass. 1993) (child removed to America by one parent without notification to other parent may remain in America in light of decision by Hungarian court in parallel proceeding that best interests of the child require exercise of sole custody by parent in America).

We therefore hold that, if a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights

under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child. Once it determines that the parent exercised custody rights in any manner, the court should stop—completely avoiding the question whether the parent exercised the custody rights well or badly. These matters go to the merits of the custody dispute and are, therefore, beyond the subject matter jurisdiction of the federal courts. 42 U.S.C. § 11601(b)(4).

* * * *

(2) Defenses to return

The Hague Abduction Convention provides five exceptions to the mandatory return of a child who has been wrongfully removed or retained. Where the exceptions apply, the judicial or administrative authority is not bound to return the child, but may do so nonetheless. Article 12 provides that, if the petition for return is filed more than one year from the date of the wrongful removal or retention, the child shall be returned "unless it is demonstrated that the child is now settled in its new environment." Article 13 provides three other exceptions:

> . . . [T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child

> objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Finally, Article 20 provides that:

> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

(i) Child well-settled in new environment

A U.S. district court explained the "well-settled" exception in *In re Robinson*, 983 F. Supp. 1339 (D. Colo. 1997), excerpted below, a case in which the petition was filed more than one year after the removal. *See also Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998) (in a case where children were abducted to the United States from Germany by their father and his mother, who concealed their whereabouts, children were not "well settled" in their new environment); *Wojcik v. Wojcik*, 959 F. Supp. 413 (E.D. Mich. 1997) (children were settled in their new environment where they were attending school or day care consistently, they had friends and relatives in the area, and they attended church regularly with their mother); *In re Coffield*, 644 N.E.2d 662 (Ohio Ct. App. 1994) (child not settled in new environment when, because of father's attempt to conceal whereabouts, child was not enrolled in school or other activities and had not made friends in the community at large).

---

* * * *

When are the children "settled"? Unfortunately, that term is not defined in the Convention or ICARA. Perez-Vera [the official reporter of the session at which the Convention was adopted] provides no real assistance other than to make clear that the issue

is not a custody determination in the traditional sense.[5] The State Department's legal analysis gives a hint of substance by providing that the burden to resist an Order of Return because the child is allegedly settled in the new environment should require "nothing less than substantial evidence of the child's significant connections to the new country. . . ." Public Notice 957, 51 Fed. Reg. at 10,509.

Nor is "settled" a legal term of art in my experience. It is not used in the Uniform Dissolution of Marriage Act (Colo. Rev. Stat. §§ 14–10–101 to 133 (1997)). . . .

* * * *

Of course, the Convention and its purposes ultimately provide the context for meaning in this case. Without more, its object is the prompt return of wrongfully removed children. However, there are exceptions and the one relevant to the decision here is premised on the passage of time, namely at least one year. Although there is nothing magical about one year,[7] its basic purpose is designed to serve the best interests of the child which remain "of paramount importance in matters relating to their custody. . . ." Convention, Preamble, 51 Fed. Reg. at 10,498. It would seem that, just as it is harmful to wrongfully remove the children from their habitual residence, it may also be harmful to remove them again if they have become connected to or "settled" in the new environment. However, it is not the mere passage of time which determines the issue or the Convention would have so provided (fn. omitted).

---

[5] Perez-Vera notes that the Convention avoided the potential pitfall of having subjective value judgments made on the "best interests of the child." Perez-Vera Report at 431. The Convention purposes are served when a return is ordered or when it is determined that the child is settled in the new environment. After that determination has been made then there may be "an examination of the merits of the custody rights . . . which is outside the scope of the Convention." *Id.* at 458.

[7] Perez-Vera discusses the importance of the role of a specific time limit and how, although the one year may be arbitrary, it serves as an important watershed separating the required return of the child from allowing consideration of its best interests after it has been settled in a new environment. Perez-Vera Report at 458–59.

Rather, there must also be evidence that the children are in fact settled in or connected to the new environment so that, at least inferentially, return would be disruptive with likely harmful effects. The Department of State says there must be "substantial evidence of the child's significant connections." Public Notice 957, 51 Fed. Reg. at 10,509 (fn. omitted). To simply provide some sort of rule, such as a presumption or otherwise, based solely on the passage of time would invite the person who wrongfully removed the child to hide out or avoid service of process.

(ii) Defense to return—acquiescence

In *Friedrich II, supra,* the U.S. Court of Appeals for the Sixth Circuit also rejected the abducting mother's arguments that the court should decline to return her son to Germany under Article 13(a) of the Hague Abduction Convention because his father allegedly acquiesced to his removal to the United States. *See also Currier v. Currier*, 845 F. Supp. 916 (D.N.H. 1994) (private custody agreement not approved by German court and rescinded before removal of children did not constitute acquiescence); *Wanninger v. Wanninger*, 850 F. Supp. 78 (D. Mass. 1994) (finding no acquiescence where, *inter alia*, petition was filed within three months of wrongful removal and within a few days of learning that petitioner's marriage was irreconcilable); *Freier v. Freier*, 969 F. Supp. 436 (E.D. Mich. 1996) (finding no acquiescence or consent where, *inter alia*, petition was filed within days of wrongful removal); *Zarate v. Perez*, 1996 U.S. Dist. LEXIS 19047 (N.D. Ill. Dec. 23, 1996) (finding no acquiescence or consent where, *inter alia*, petitioner sought assistance through Central Authority of Mexico to obtain return of child "shortly" after wrongful retention); *Pesin v. Rodriguez*, 77 F. Supp. 2d 1277 (S.D. Fla. 1999), *appeal dismissed*, 244 F.3d 1250 (11th Cir. 2001) (timely filing of petition after 6 months of serious and concerted efforts at reconciliation was not evidence of acquiescence); *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991) (finding no acquiescence where petition was

filed two months after wrongful removal, though judicial proceedings did not commence for another 12 months).

Excerpts from *Friedrich II* follow (footnotes omitted).

---

* * * *

Mrs. Friedrich also claims that the district court erred in ordering Thomas's return because Mrs. Friedrich proved by a preponderance of the evidence that Mr. Friedrich (i) consented to, and (ii) subsequently acquiesced in, the removal of Thomas to America.

Mrs. Friedrich bases her claim of consent to removal on statements that she claims Mr. Friedrich made to her during their separation. Mr. Friedrich flatly denies that he made these statements. The district court was faced with a choice as to whom it found more believable in a factual dispute. There is nothing in the record to suggest that the court's decision to believe Mr. Friedrich, and hold that he "did not exhibit an intention or a willingness to terminate his parental rights," was clearly erroneous. In fact, Mr. Friedrich's testimony is strongly supported by the circumstances of the removal of Thomas—most notably the fact that Mrs. Friedrich did not inform Mr. Friedrich that she was departing. [citation omitted] The deliberately secretive nature of her actions is extremely strong evidence that Mr. Friedrich would not have consented to the removal of Thomas. For these reasons, we hold that the district court did not abuse its discretion in finding that Mrs. Friedrich took Thomas to America without Mr. Friedrich's consent.

Mrs. Friedrich bases her claim of subsequent acquiescence on a statement made by Mr. Friedrich to one of her commanding officers, Captain Michael Farley, at a cocktail party on the military base after Mrs. Friedrich had left with Thomas. Captain Farley, who cannot date the conversation exactly, testified that:

> During the conversation, Mr. Friedrich indicated that he was not seeking custody of the child, because he didn't have the means to take care of the child.

[citation omitted] Mr. Friedrich denies that he made this statement. The district court made no specific finding regarding this fact.

We believe that the statement to Captain Farley, even if it was made, is insufficient evidence of subsequent acquiescence. Subsequent acquiescence requires more than an isolated statement to a third-party. Each of the words and actions of a parent during the separation are not to be scrutinized for a possible waiver of custody rights. *See Wanninger*, 850 F. Supp. at 81–82 (refusing to construe father's personal letters to wife and priest as sufficient evidence of acquiescence where father consistently attempted to keep in contact with child). Although we must decide the matter without guidance from previous appellate court decisions, we believe that acquiescence under the convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.

By August 22, 1991, twenty-one days after the abduction, Mr. Friedrich had secured a German court order awarding him custody of Thomas. He has resolutely sought custody of his son since that time. It is by these acts, not his casual statements to third parties, that we will determine whether or not he acquiesced to the retention of his son in America. Since Mrs. Friedrich has not introduced evidence of a formal renunciation or a consistent attitude of acquiescence over a significant period of time, the judgment of the district court on this matter was not erroneous.

* * * *

(iii) Grave risk of physical or psychological harm

In *Friedrich II, supra,* the U.S. Court of Appeals for the Sixth Circuit also rejected the abducting mother's arguments that the court should decline to return her son to Germany under Article 13(b) of the Hague Abduction Convention because return would create a grave risk of physical or psychological harm.

See also Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995) (citation of authorities that recognized separation of child from primary caregiver could cause psychological harm was

not adequate to justify not returning child on basis of Article 13(b));

—*Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995) (mother's testimony concerning mistreatment, primarily of herself, was not sufficient to invoke Article 13(b), and, return to Mexico "does not specify the logistics of the return", remanded);

—*Blondin v. Dubois*, 189 F.3d 240 (2d Cir. 1999) (court of appeals agreed with district court that children should not be returned to their home country in their father's custody where father had routinely beaten mother, hit child, twisted electrical cord around child's neck and threatened to "kill everyone," but remanded to district court to consider availability of temporary arrangements that would comply with Hague Convention's mandate to deliver abducted children to their country of habitual residence while protecting them from "grave risk" of harm) (*see Digest 2000* at 105–15 for discussion of later developments in the case);

—*Krishna v. Krishna*, 1997 U.S. Dist. LEXIS 4706 (N.D. Cal. Apr. 11, 1997) (refusing return that would put child back into psychologically damaging environment of prior abuse, but also finding that removal was not "wrongful" where father acquiesced in child's leaving country);

—*Steffen F. v. Severina P.*, 966 F. Supp. 922 (D. Ariz. 1997) (separating child from mother to whom he was closely attached and bonded would pose "grave risk" of psychological harm);

—*Freier v. Freier*, 969 F. Supp. 436 (E.D. Mich. 1996) (mother's evidence that child's return would pose "grave risk" because Israel was a war zone was insufficient, and conflict was not ongoing in all of Israel and in particular not in city where child would live);

—*In re Walsh*, 31 F. Supp. 2d 200 (D. Mass. 1998) (intemperate and unkind spanks and slaps and constant exposure to violence and physical conflict in home were not sufficient to deny return under Article 13(b), but father was required to provide undertakings rebehavior and support),

rev'd, *Walsh v. Walsh*, 221 F. 3d 204 (1st Cir. 2000) (holding that section 13(b) exception must be applied because district court underestimated risk to children from father's violence and overestimated efficacy of undertakings);

—*Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456 (D. Md. 1999) (son's testimony about beatings by father was sufficient to warrant denial of return under Article 13(b));

—*Tahan v. Duquette*, 613 A.2d 486 (N.J. Super. Ct. 1992) (proposed testimony concerning nature of child's life in United States relevant to subsequent custody decision, not to determination of "grave risk" in country of habitual residence);

—*In re Coffield*, 644 N.E.2d 662 (Ohio Ct. App. 1994) (psychological testing and evidence concerning mother's prior lifestyle similarly irrelevant to "grave risk" exception);

—*Wipronik v. Superior Ct.*, 73 Cal. Rptr. 2d 734 (Cal. Ct. App. 1998) (order to return child to Israel was appropriate where child's habitual residence was Israel, and mother did not prove father used marijuana and was abusive);

—*Turner v. Frowein*, 1998 Conn. Super. LEXIS 3781 (Conn. Super. Ct., June 25, 1998) (return denied under Article 13(b) based on overwhelming evidence that father abused son), *rev'd and remanded*, 752 A.2d 955 (Conn. 2000) (district court instructed to explore modalities of returning child that would not put him at "grave risk");

—*Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (uncorroborated expert testimony of husband's "violent temperament" and alleged abuse found unconvincing and insufficient to demonstrate "grave risk" of harm, and no evidence Greek courts could not protect child's interests), *cert. denied*, 531 U.S. 811 (2000) (*see Digest 2000* at 93–105 for brief of U.S. in Supreme Court opposing grant of certiorari).

Excerpts from *Friedrich II* follow (footnotes omitted).

---

* * * *

Mrs. Friedrich alleges that she proved by clear and convincing evidence in the proceedings below that the return of Thomas to

Germany would cause him grave psychological harm. Mrs. Friedrich testified that Thomas has grown attached to family and friends in Ohio. She also hired an expert psychologist who testified that returning Thomas to Germany would be traumatic and difficult for the child, who was currently happy and healthy in America with his mother. . . .

If we are to take the international obligations of American courts with any degree of seriousness, the exception to the Hague Convention for grave harm to the child requires far more than the evidence that Mrs. Friedrich provides. Mrs. Friedrich alleges nothing more than *adjustment* problems that would attend the relocation of most children. There is no allegation that Mr. Friedrich has ever abused Thomas. The district court found that the home that Mr. Friedrich has prepared for Thomas in Germany appears adequate to the needs of any young child. The father does not work long hours, and the child's German grandmother is ready to care for the child when the father cannot. There is nothing in the record to indicate that life in Germany would result in any permanent harm or unhappiness.

Furthermore, even *if* the home of Mr. Friedrich were a grim place to raise a child in comparison to the pretty, peaceful streets of Ironton, Ohio, that fact would be irrelevant to a federal court's obligation under the Convention. We are not to debate the relevant virtues of Batman and *Max und Moritz*, Wheaties and *Milchreis*. The exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest. That decision is a custody matter, and reserved to the court in the country of habitual residence.

Mrs. Friedrich advocates a wide interpretation of the grave risk of harm exception that would reward her for violating the Convention. A removing parent must not be allowed to abduct a child and then—when brought to court—complain that the child has grown used to the surroundings to which they were abducted. Under the logic of the Convention, it is the *abduction* that causes the pangs of subsequent return. The disruption of the usual sense of attachment that arises during most long stays in a single place with a single parent should not be a "grave" risk of harm for the purposes of the Convention.

In thinking about these problems, we acknowledge that courts in the abducted-from country are as ready and able as we are to protect children. If return to a country, or to the custody of a parent in that country, is dangerous, we can expect that country's courts to respond accordingly. . . . And if Germany really is a poor place for young Thomas to grow up, as Mrs. Friedrich contends, we can expect the German courts to recognize that and award her custody in America. When we trust the court system in the abducted-from country, the vast majority of claims of harm —those that do not rise to the level of gravity required by the Convention—evaporate.

The international precedent available supports our restrictive reading of the grave harm exception. In *Thomson v. Thomson*, 119 D.L.R. 4th 253 (Can. 1994), the Supreme Court of Canada held that the exception applies only to harm "that also amounts to an intolerable situation." *Id. at 286*. The Court of Appeal of the United Kingdom has held that the harm required is "something greater than would normally be expected on taking a child away from one parent and passing him to another." *In re A.*, 1 F.L.R. 365, 372 (Eng. C.A. 1988). And other circuit courts in America have followed this reasoning in cases decided since *Friedrich I*. *See Nunez-Escudero*, 58 F.3d at 377 (citing *Thomson*, 119 D.L.R. 4th at 286, and *In re A.*, 1 F.L.R. at 372); *Rydder*, 49 F.3d at 373 (affirming district court order for return of child over abducting parent's objection that return would cause grave harm). Finally, we are instructed by the following observation by the United States Department of State concerning the grave risk of harm exception.

> This provision was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an *intolerable* situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.
>
> A review of deliberations on the Convention reveals that "intolerable situation" was not intended to encompass

> return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an "intolerable situation" and subjected to a grave risk of psychological harm.

Public Notice 957, 51 FR 10494, 10510 (March 26, 1986) (emphasis added).

For all of these reasons, we hold that the district court did not err by holding that "the record in the instant case does not demonstrate by clear and convincing evidence that Thomas will be exposed to a grave risk of harm." Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute—*e.g.*, returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. Psychological evidence of the sort Mrs. Friedrich introduced in the proceeding below is only relevant if it helps prove the existence of one of these two situations.

* * * *

(iv) Return not permitted by fundamental principles of United States concerning human rights and fundamental freedoms

The district court in *Freier v. Freier*, 969 F. Supp. 436 (E.D. Mich. 1996) concluded that an Israeli court's restraining order

precluding the mother and child from leaving Israel pending resolution of the custody dispute did not mean that the child's return to Israel would violate the "fundamental principles" of the United States.

(3) Applicability to diplomats

On October 1, 1982, Ronald Parson, a U.S. citizen and a Foreign Service Officer employed by the Department of State, married a German national. They subsequently had two daughters. While Parson was assigned to the U.S. Embassy in London, accompanied by his family, Mrs. Parson filed for divorce. On July 25, 1997, she filed a petition before the United Kingdom's High Court of Justice, Family Division, seeking an order preventing Parson from bringing the children to the United States and permitting her to take them to Germany. *In the Matter of the Children Act 1989 and In the Matter of the Supreme Court Act 1981*, No. CP-1316–1997 (High Court of Justice, Family Division). A British solicitor and barrister successfully argued on behalf of Parsons and the United States that the British court lacked jurisdiction over Mrs. Parson and her children due to their diplomatic immunity, and the U.K. High Court for Justice, Family Division, in an order dated August 7, 1997, dismissed Mrs. Parson's petition for lack of jurisdiction.

On August 7, 1997, the Embassy informed Parson that the Department of State had curtailed his tour of duty in London effective immediately, and that he was reassigned to Washington, D.C. The Department of State provided travel orders for the entire family to return to the United States, and Mrs. Parson returned with her husband and daughters at U.S. government expense on August 8, 1997. She and the children moved to one residence in Falls Church, Virginia, while Parson lived elsewhere in Falls Church. On August 11, Mrs. Parson filed a petition for the return of the children to the United Kingdom under the Hague Abduction Convention. In September 1997, she also filed a petition in the Juvenile

and Domestic Relations Court of Arlington Country, Virginia, in which she sought to have the children returned to the United Kingdom under the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11610 (1989), which implements the Hague Convention in the United States, and the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 115 (1988). She contended that Parson wrongfully removed the children when he brought them to the United States following the curtailment of his diplomatic assignment to London, where she claimed the children were habitually resident. Parson filed a custody case seeking custody of his daughters in the same Virginia court.

On November 7, 1997, Mrs. Parson also filed an appeal of the High Court of Justice decision in the United Kingdom's High Court of Justice, Family Division seeking a declaration pursuant to Section 8 of the U.K. Child Abduction and Custody Act 1984 that the removal of the children from the United Kingdom by the father was a wrongful removal within the meaning of Article 3 of the Hague Convention. An order was granted *ex parte* with leave for the father to apply; subsequently, an order was issued to determine the preliminary issue of jurisdiction.

On November 13, 1997, the United States filed a statement of interest in the Arlington County case pursuant to 18 U.S.C. § 517 to inform the court of its interpretation of the Hague Convention.

The full text of the statement of interest, excerpted below with footnotes deleted, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

. . . Mrs. Parson's request is fundamentally at odds with the fact that she, Mr. Parson, and the Parson children were cloaked with diplomatic immunity while in the United Kingdom. The United States submits that, because the Hague Convention did not vest jurisdiction over this custody dispute with the courts of the United Kingdom, the Hague Convention equally provides no basis for

treating the departure of the Parson children from the United Kingdom as a "wrongful removal." A contrary ruling would be directly at odds with settled principles of diplomatic law, and would significantly impair the United States' ability to conduct its foreign relations. The United States takes no position with respect to the ultimate issue of custody.

* * * *

THE HAGUE CONVENTION

. . . The Hague Convention seeks to prevent forum-shopping for the resolution of custody disputes by establishing a rule of jurisdiction—i.e., that custody jurisdiction generally lies with the country of the child's place of habitual residence prior to any wrongful removal of the child by a parent. H.R. Rep. No. 100–525 (1988), reprinted in 1988 U.S.C.C.A.N. 386, 386–87 ("The international abductor is denied legal advantage from the abduction to or retention in the country where the child is located. . . .") (quoting President Ronald Reagan's Letter of Transmittal to U.S. Senate of 10/30/85); *Rydder*, 49 F. 3d at 372. The fundamental premise of the rule, however, is that the place of habitual residence prior to any wrongful removal therefrom was a place with jurisdiction over any custody issues. *See* Hague Convention.

* * * *

ARGUMENT

I. THE UNITED STATES' INTERPRETATION OF THE HAGUE CONVENTION IS ENTITLED TO SUBSTANTIAL DEFERENCE

The United States' interpretation of the Hague Convention's applicability to this case in light of the Hague Convention is entitled to substantial deference. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 178, 184–85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *Tabion v. Mufti*, 73 F. 3d 535, 538 (4th Cir. 1996) (according "substantial deference" to United States Statement of Interest, filed on Department of State's behalf, in interpreting provision of Vienna Convention).

II. THE VIENNA CONVENTION'S GRANT OF DIPLOMATIC IMMUNITY TO MR. PARSON AND THE CHILDREN PREVENTS THE HAGUE CONVENTION FROM VESTING JURISDICTION OVER THE CUSTODY OF THE CHILDREN IN THE BRITISH COURTS

The United Kingdom was not a jurisdiction that could have resolved the Parsons' custody dispute. Accordingly, Mr. Parson's return to the United States with his family upon the curtailment of his diplomatic assignment to the United Kingdom was wholly outside the scope of the Hague Convention. The Hague Convention does not operate to vest jurisdiction over child custody issues in a court that could not otherwise exercise jurisdiction. Rather, it is a choice-of-forum convention that operates in the context of competing possible jurisdictions and provides that, when a child is wrongfully removed from a jurisdiction of habitual residence to a second jurisdiction, the child custody issues should be decided by the jurisdiction of habitual residence. In the case of a diplomat's child, however, even leaving aside the substantial question of whether a "receiving state" could be a diplomatic child's "habitual residence," the Vienna Convention's grant of diplomatic immunity prevents the exercise of jurisdiction by the courts of the receiving state. Absent express waiver by the "sending state" (here, the United States) or applicability of certain enumerated exceptions not relevant here, the Vienna Convention prevents jurisdiction over any matter involving a diplomat or members of his/her household from vesting in the receiving state's courts (here, the British courts). Vienna Convention arts. 31–32, 37. The United States did not waive the diplomatic immunity conferred on Mr. Parson and his household while they were in the United Kingdom. Thus, as the British High Court of Justice found, Mr. Parson and the children were diplomatically immune from British courts' jurisdiction while they were in that country.

The Vienna Convention prevented the British courts from exercising jurisdiction over the custody of the children based on the children' presence in the United Kingdom. Because the Hague Convention does not create jurisdiction where it would not otherwise exist, there is no basis under the Hague Convention for regarding the United Kingdom as a place that, but for the removal

of the Parson children, could have exercised jurisdiction over their custody.

III. MR. PARSON'S RETURN TO THE UNITED STATES WITH HIS FAMILY UPON THE CURTAILMENT OF HIS ASSIGNMENT TO THE UNITED KINGDOM WAS NOT A "WRONGFUL REMOVAL" UNDER THE HAGUE CONVENTION

Because the United Kingdom had no jurisdiction over the Parson family and because the Parsons left the United Kingdom in conjunction with the termination of Mr. Parson's diplomatic assignment, there is no basis for a finding that the children's departure from that country constituted a "wrongful removal" under the Hague Convention. Clearly, this is not a situation to which the Hague Convention was intended to apply. As noted above, the Convention is designed to undo a wrongful act by one parent and restore jurisdiction, where there has been a wrongful removal, to the habitual residence of children so that jurisdiction's courts may decide issues of custody and visitation. As discussed above, because the British courts lacked jurisdiction over Mr. Parson and the children by virtue of their diplomatic immunity, there was no legal basis on which the custody of the children could have been determined if they had remained in the United Kingdom. Moreover, to find a "wrongful removal" in this case would create a direct conflict with long-standing diplomatic practices, and the Vienna Convention. The Court should not permit this result. It is legally incorrect and would not serve the policy objective of the Hague Convention, which is to deter parents from crossing international boundaries in search of a sympathetic court. There was no court of jurisdiction in the United Kingdom, and the Parsons returned home because of Department of State travel orders. Given these circumstances, the Court should not find that Rebecca and Christina Parson were wrongfully removed from the United Kingdom or that they should therefore be returned.

Finally, the Court should not consider the Parsons' children "habitually resident" of the United Kingdom for the purposes of the Hague Convention. They are not British nationals. They resided in that country only temporarily during their father's diplomatic

assignment and were, at all times, immune from that country's jurisdiction.

IV. A FINDING THAT MR. PARSON VIOLATED THE HAGUE CONVENTION WOULD IMPAIR THE UNITED STATES' ABILITY TO CONDUCT ITS FOREIGN RELATIONS

The United States' ability to conduct its foreign relations would be significantly compromised if the Hague Convention were found to apply in instances such as this, where children depart from a foreign country because the Department of State curtails a parent's diplomatic assignment or the assignment otherwise ends. To staff overseas U.S. missions the Department of State and other U.S. foreign affairs agencies assign and reassign employees according to applicable laws and regulations, reflecting relevant personnel policies and agency needs . . . Applying the Hague Convention's terms in circumstances such as these would impair the ability of the Department of State, as well as other U.S. foreign affairs agencies, to assign employees with families to overseas posts by enabling officers' spouses to attempt to control such relocations by invoking the Hague Convention.

In addition, application of the Hague Convention to situations such as this would subject U.S. Foreign Service Officers and other foreign affairs personnel to accusations of international child abduction if they take their children from a foreign post when leaving that post on reassignment in compliance with official U.S. Government travel orders. This result would undermine the privileges and immunities that the United States is entitled to have protect its diplomatic personnel, and ultimately would make it difficult for the Department of State to recruit, assign, and retain employees with families for service overseas . . . The United States submits that this result was not intended by the Hague Convention's drafters.

* * * *

The High Court of Justice ruled on the immunity issue on January 22, 1998, holding that there was no immunity under the Diplomatic Immunity Act based on the Vienna Convention on Diplomatic Relations, but that there was state

immunity based on the State Immunity Act. Both sides appealed to the U.K. Supreme Court of Judicature in the Court of Appeal (Civil Division). Meanwhile, in a hearing held on February 11, 1998, before the Arlington County Juvenile and Domestic Relations Court, Mrs. Parson's attorney agreed to drop the Hague Abduction Convention claim if the Supreme Court of Judicature ruled that the United Kingdom did not have jurisdiction. The U.K. Supreme Court of Judicature dismissed the appeals on the grounds that a declaration would serve no purpose as all the concerned parties were in the United States, where legal proceedings were being pursued. *In the Matter of RE: P (Minors)*, FC3 98/5515 CMS2: FC3 98/5520 CMS2: FAFMI 98/0189 (March 11, 1998). In an unpublished decision of March 19, 1998, the Arlington County Juvenile and Domestic Relations Court found that the March 11 decision had determined that England had no jurisdiction and ruled that Mrs. Parson was barred from pursuing her Hague Convention claim.

b. International Parental Kidnapping Crime Act of 1993

In 1993 the International Parental Kidnapping Crime Act of 1993 ("the IPKCA"), Pub. L. No. 103–173, 107 Stat. 1998 (codified as amended at 18 U.S.C. § 1204), was enacted as federal law, as set forth below. For treatment of parental kidnapping under extradition treaties, *see* Chapter 3.A.1.c.

---

* * * *

(a) Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

* * * *

(c) It shall be an affirmative defense under this section that—

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act and was in effect at the time of the offense;

(2) the defendant was fleeing an incidence or pattern of domestic violence; or

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

(d) 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 House Committee on the Judiciary described the purpose of the IPKCA in H.R. Rep. No. 103–390 (Nov. 20, 1993), excerpted below with footnotes omitted.

---

* * * *

In the international cases which are the subject of this bill, the lack of a federal offense—and the federal criminal justice system consequences that would flow from such an offense—handicaps the pursuit of an effective remedy by the custodial, or "left-behind," parent. This is primarily because violations of state parental kidnapping statutes—even though they may be felony offenses—do not in international practice provide an adequate basis for effective pursuit and extradition.

* * * *

There is . . . little effective legal process with which to enforce the criminal sanctions of state law in international child abduction cases.

There is an international civil mechanism relating to these cases, the Hague Convention on International Parental Child Abduction, for which Congress passed implementing legislation in 1988. As a result of this convention, the signatories will recognize the custody decrees of other signatories, thereby facilitating the return of abducted children. However, most countries are not signatories to the Convention, thus leaving individual countries to take whatever legal unilateral action they can to obtain the return of abducted children.

Creating a federal felony offense responds to these problems in four ways.

> First, making international parental kidnapping a federal crime provides a direct basis for the United States to request extradition of the kidnapping parent from those countries with which we have extradition treaties.
>
> Second, the federal criminal penalty will deter at least some abductions by ensuring that the kidnapping offender will be pursued by the United States government. At present, most abducting parents have little to fear with regard to effective pursuit.
>
> Third, the offense will provide the basis for Federal warrants, which will in turn enhance the force of U.S. diplomatic representations seeking the assistance of foreign governments in returning abducted children.
>
> Fourth, enacting such a felony offense will make clear to other nations the gravity with which the United States views these cases.
>
> * * * *
>
> In his signing statement, 29 WEEKLY COMP. PRES. DOC. 2493 (Dec. 6, 1993), President William J. Clinton explained the relationship of the IPKCA to the Hague Abduction Convention as follows.

---

* * * *

H.R. 3378 recognizes that the international community has created a mechanism to promote the resolution of international parental

kidnapping by civil means. This mechanism is the Hague Convention on the Civil Aspects of International Child Abduction. H.R. 3378 reflects the Congress' awareness that the Hague Convention has resulted in the return of many children and the Congress' desire to ensure that the creation of a Federal child abduction felony offense does not and should not interfere with the Convention's continued successful operation.

This Act expresses the sense of the Congress that proceedings under the Hague Convention, where available, should be the "option of first choice" for the left-behind parent. H.R. 3378 should be read and used in a manner consistent with the Congress' strong expressed preference for resolving these difficult cases, if at all possible, through civil remedies.

* * * *

In *United States v. Amer*, 110 F.3d 873 (2d Cir. 1997), the U.S. Court of Appeals for the Second Circuit refused to permit a defendant father who abducted his children to Egypt to present defenses available under the Hague Convention that were not found in the IPKCA. The court of appeals also found that the prosecution would not "detract from" the Hague Convention because Egypt was not a State party, and the Hague Convention therefore did not apply to the abduction.

The U.S. Court of Appeals for the Tenth Circuit refused to dismiss the indictment of a father who removed his children from Colorado in violation of their maternal grandmother's visitation rights under state law, because such rights were "parental rights" within the meaning of IPKCA. *United States v. Alahmad*, 28 F. Supp. 2d 1273 (D. Colo. 1998), *aff'd* 211 F.3d 538 (10th Circ. 2000), *cert. denied*, 531 U.S. 1080 (2001).

2. Intercountry Adoption Convention

On June 11, 1998, President William J. Clinton transmitted to the Senate for advice and consent to ratification the Convention on Protection of Children and Co-operation in

Respect of Intercountry Adoption, adopted and opened for signature at the conclusion of the seventeenth session of the Hague Conference on Private International Law on May 29, 1993, 32 I.L.M. 1134. Excerpts from the letter of the President transmitting the Convention to the Senate for advice and consent and the Report of the Department of State to the President attached to that letter, contained in S. Treaty Doc. No. 105–51 (1998), are found in *Digest 2000* at 142–45.

C. PRISONER ISSUES

1. Inter-American Convention on Serving Sentences Abroad

On September 30, 1996, President William J. Clinton transmitted to the Senate for its advice and consent to ratification the Inter-American Convention on Serving Criminal Sentences Abroad, drawn up by the Committee on Juridical and Political Affairs within the Permanent Council of the Organization of American States ("OAS"), composed of representatives of the member states. S. Treaty Doc. No. 104–35 (1996).

Excerpts below from the Report of the Department of State to the President, attached to the President's letter transmitting the Convention to the Senate for advice and consent, contained in S. Treaty Doc. No. 104–35, explained the purpose of, and need for, the Convention. *See Digest 2001* at 51–55 for a discussion of U.S. ratification and implementation of the Convention.

---

* * * *

The purpose of the Convention is to facilitate the transfer of foreign prisoners to their home countries by establishing procedures that can be initiated by prisoners who prefer to serve their sentences there. The means employed to achieve this purpose are basically similar to those embodied in bilateral prisoner transfer treaties that are now in force between the United States and eight other countries, and in the multilateral Council of Europe Convention

on the Transfer of Sentenced Persons. The major advantages of concluding a multilateral convention with the OAS Member States are the establishment of uniform procedures and the saving of resources that would be required to negotiate and bring into force bilateral treaties with a large number of countries in the hemisphere.

Although the United States is already a party to the multilateral Council of Europe Convention on the Transfer of Sentenced Persons, which entered into force for the United States, following Senate advice and consent to ratification, on July 1, 1985, only two other OAS Member States have become parties to that Convention. Ratification of the Inter-American Convention on Serving Criminal Sentences Abroad would help fill a void by providing a mechanism for the reciprocal transfer of persons incarcerated in prisons in OAS Member States, to permit those individuals to serve their sentences in their home countries. A multilateral prisoner transfer convention for the Americas would also reduce, if not eliminate, the need for the United States to negotiate additional bilateral prisoner transfer treaties with countries in the hemisphere.

* * * *

2. United States-Hong Kong Prisoner Exchange Treaty

By a letter dated May 5, 1997, President William J. Clinton transmitted to the Senate for its advice and consent to ratification the Agreement Between the Government of the United States and the Government of Hong Kong for the Transfer of Sentenced Persons, signed at Hong Kong on April 15, 1997. S. Treaty Doc. No. 105–7.

Excerpts below from the Report of the Department of State to the President attached to that letter, contained in S. Treaty Doc. No. 105–7, explained the purpose of, and need for, the Convention given Hong Kong's scheduled reversion to the sovereignty of the People's Republic of China.

---

* * * *

The purpose of the Agreement is to facilitate, after Hong Kong reverts to the sovereignty of the People's Republic of China on July 1, 1997, the transfer of persons sentenced in the United States and in Hong Kong to their home territory to serve their sentences. The Agreement achieves this purpose by establishing procedures that can be initiated by sentenced persons who prefer to serve their sentences in their home territory. The means employed to achieve this purpose are similar in all important respects to those embodied in existing bilateral prisoner transfer treaties in force between the United States and eight other countries, and in the multilateral Council of Europe Convention on the Transfer of Sentenced Persons.

The United States and Hong Kong have been exchanging prisoners under the terms of the Council of Europe Convention, to which the United States and the United Kingdom are parties and which has been extended by the latter to Hong Kong and other specific territories under U.K. sovereignty. The People's Republic of China is not a party to the Council of Europe Convention and has not agreed that the Convention should continue to apply to Hong Kong after reversion to Chinese sovereignty on July 1, 1997. Nonetheless, the Chinese government, acting through the Sino-U.K. Joint Liaison Group, authorized the Hong Kong government to negotiate a bilateral agreement on transfer of sentenced persons with the United States to apply after reversion.

* * * *

D. JUDICIAL ASSISTANCE

Assistance to Foreign and International Tribunals

28 U.S.C. § 1782, set forth below, gives U.S. district courts discretionary authority to issue orders to give testimony or to produce documentary evidence for use in proceedings in foreign or international tribunals:

> (a) The district court of the district in which a person resides or is found may order him 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. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.
>
> (b) This chapter [28 USCS §§ 1781 et seq.] does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

When it amended § 1782 in 1964, Congress substantially broadened the power of federal courts to assist foreign litigants in obtaining oral and documentary evidence in the United States, in the hope that the initiative would lead foreign governments similarly to liberalize their judicial assistance procedures. S. Rep. No. 88–1580 (1964).

a. Pendency of adjudicative proceeding

In 1991 the U.S. Court of Appeals for the Second Circuit examined the question whether an adjudicative proceeding must be pending to satisfy the requirements of 18 U.S.C. § 1782 in *General Universal Trading Corp. v. Morgan Guaranty Trust Co. (In re Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil)*, 936 F. 2d 702 (2d Cir. 1991). The court of appeals held that a proceeding need not actually be pending, but rather that a proceeding must be "imminent—very likely to occur and very soon to occur." This standard was similar to the "very likely to occur" standard previously enunciated by the U.S. Court of Appeals for the Eleventh Circuit, in *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988), but contrasted with the U.S. Court of Appeals for the District of Columbia's standard in *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686 (D.C. Cir. 1989) (requiring that a proceeding be "in reasonable contemplation") (for a description of the case, *see Cumulative Digest 1981–1988*).

In 1996 Congress added the phrase "including criminal investigations conducted before formal accusation" to the first sentence of 28 U.S.C. § 1782 to make clear that assistance could be provided for foreign government officials with respect to criminal investigations prior to the initiation of judicial proceedings. Section 1342(b), Div. A, Title XIII, Subtitle E of Pub. L. No. 104–106, 110 Stat. 186 (1996).

b. Discoverability under the laws of the foreign jurisdiction

In cases decided between 1991 and 1999, the U.S. Circuit Courts of Appeals split on the issue whether discovery sought pursuant to § 1782 must be information that would be discoverable under the laws of the foreign jurisdiction in which the proceeding was pending. The First Circuit construed § 1782(a) to contain a foreign-discoverability requirement.

See In re Application of Asta Medica, S. A., 981 F.2d 1, 7 (1st Cir. 1992). Earlier the Eleventh Circuit had reached the same conclusion in *In re Request for Assistance from Ministry of Legal Affairs*, 848 F.2d 1151, 1156 (11th Cir. 1988). The Fourth and Fifth Circuits held that no such requirement existed if the § 1782(a) applicant was a foreign sovereign. *See United States v. Morris (In re Letter of Request from the Amtsgericht Ingolstadt)*, 82 F.3d 590, 592 (4th Cir. 1996); *In re Letter Rogatory from First Court of First Instance in Civil Matters*, 42 F.3d 308, 310–311 (5th Cir. 1995). The Second and Third Circuits rejected a foreign-discoverability requirement. *See In re Application of Gianoli Aldunate*, 3 F.3d 54, 59–60 (2d Cir. 1993); *In re Bayer AG*, 146 F.3d 188, 193–194 (3d Cir. 1998).

The U.S. Supreme Court resolved the split in the circuits in 2004, holding that § 1782 did not impose a "foreign-discoverability" requirement. *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004); *see also Digest 2002* at 875–77, *Digest 2003* at 873–76.

Cross-references

Parental kidnapping under extradition treaties, **Chapter 3.A.1.c.**
Federal preemption of state regulations of rights of aliens, **Chapter 5.A.3.c.**

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE AND RELATED ISSUES

1. Extradition

a. Extradition practice of the United States

On May 3, 1999, Jamison S. Borek, Deputy Legal Adviser, U.S. Department of State, and Mary Lee Warren, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, testified before the House Subcommittee on Criminal Justice, Drug Policy and Human Resources on extradition matters. *International Law: The Importance of Extradition: Hearing Before the Subcomm. On Criminal Justice, Drug Policy, and Human Resources of the House Comm. On Government Reform,* 106th Cong. (1999). Excerpts from their testimony follow.

Ms. Borek:

* * * *

Extradition is an essential tool in [the effort to fight international crime], providing the most effective means of obtaining the return of international fugitives. In recent years, our extradition requests have resulted in the return to the United States of some of the world's most notorious criminals, such as those responsible for

the 1993 World Trade Center bombings in New York City. As you are aware, extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment. Although States have no general obligation in international law to extradite persons, the practice has become widespread and is nearly universal. Because of the many unique national legal systems around the world, however, there is no single set of rules that govern the process of international extradition and the conditions upon which extradition may be granted vary widely. Under U.S. law, fugitives can only be extradited from the United States pursuant to authorization granted by statute or treaty.

The general rules of extradition for the United States are found in Title 18, United States Code, beginning at section 3181. Virtually all extraditions from the United States take place pursuant to bilateral extradition treaties or conventions. There are, however, some other possible bases. For instance, extraditions are possible to the war crimes tribunals for the Former Yugoslavia and for Rwanda pursuant to statutory authority granted by Congress combined with executive agreements between the United States and each of the tribunals. In addition, there is currently a limited exception for extradition without a treaty—a 1996 amendment to Section 3181 of the U.S. Criminal Code permits extradition from the United States, even in the absence of a treaty, of foreign nationals who have committed violent crimes against U.S. nationals outside of the United States. At this point, the United States has approximately 110 extradition treaty relationships with countries throughout the world. Under these treaties, the extradition process can be initiated either through a formal request for extradition or a provisional arrest request, which initially requires less supporting documentation. The provisional arrest or "PA" request is made in cases of urgency, such as where the fugitive is likely to flee. Once a fugitive is apprehended pursuant to a provisional arrest request, the Requesting State will have a set number of days to file a formal request for extradition. For example, the U.S.-Canada and the U.S.-Mexico extradition treaties provide that a formal request must be made within 60 days following the provisional arrest of a fugitive.

Extradition requests by the United States are made by the Department of State, at the initiation of the Department of Justice, after formal charges are brought by federal, state and local prosecutors. Extradition may be sought for felonies ranging from terrorism and narcotic offenses to common crimes such as murder, arson and fraud. The government of the country receiving an extradition request will typically conduct a preliminary review to determine whether the request appears to fall within the scope of the applicable extradition treaty. If it determines that additional information is required, the government will inform the Requesting State of that fact through diplomatic channels. If provided by the Requesting State, such additional information can then be used in proceedings in the Requested State that may lead to extradition.

A government's decision to extradite is typically subject to some form of judicial review under its national laws. Thus, in the United States, following initial review by the executive branch to determine whether an extradition request meets the facial requirements of the relevant treaty, the extradition request is presented to a U.S. court for a decision as to extraditability. At this stage, a magistrate or district judge needs to: confirm the identity of the fugitive; determine whether "probable cause" exists to believe that the fugitive committed the offense charged; and ascertain that no valid defense to extradition under the applicable treaty has been asserted. If these conditions are fulfilled, the judge or magistrate will issue a certificate of extraditability, which is subject to challenge through a petition for a writ of habeas corpus and subsequent appeal. Under U.S. law, the final decision on whether a fugitive will be extradited is made by the Secretary of State.

Not all legal systems are the same as ours, and judicial and executive branch authorities may play a greater or smaller role in extradition. Moreover, the extent of the judicial proceeding and the evidentiary requirements differ among legal systems. Although an extradition hearing is not supposed to be a full-fledged trial on the merits, the evidentiary requirements vary from legal system to legal system and do not necessarily mirror the requirements for our own "probable cause" standard. We have been engaged in a constant process of seeking to enter into new extradition relationships, as well as to update and improve existing ones.

* * * *

Our goal is to negotiate and to bring into force as many treaty relationships as possible that have no restrictions on the extradition of nationals. There are many success stories in international extradition and many fugitives have been returned to face justice for their crimes. The process, however, is not simple and sometimes results in delays or denials of extradition. Apart from the nationals issue I just discussed, many countries are concerned about the penalties that may be imposed in the Requesting State, such as the death penalty or even life sentences. For example, many countries—including Australia, Belgium, Hungary, Switzerland, and Thailand—may decide not to extradite fugitives unless they receive assurances that the death penalty will not be imposed in the Requesting State. Further, other considerations may factor into an extradition decision, such as a state's obligations to abide by the Torture Convention or other relevant international instruments.

In some countries, the judicial process is lengthy and subject to multiple reviews that can delay extradition for years. Confusion can result from differing legal systems, different standards of proof, different rules of admissibility, and so forth. Despite these difficulties, we are working hard with countries around the world to enhance our international extradition program, and to improve the possibility that fugitives may be returned for trial and punishment to countries with jurisdiction over their crimes. . . .

* * * *

Ms. Warren:

* * * *

Progress on General Extradition Issues.

One of the Justice Department's primary initiatives in recent years has been the improvement and expansion of our extradition relationships worldwide, with a particular emphasis on persuading other countries to authorize the extradition of their nationals. We have spent enormous time and energy at every level, and particularly through the repeated and vigorous efforts of Attorney General Reno, in advocating the benefits of extradition to our international counterparts and colleagues, based on the logic of

extradition in calling fugitives to account for their crimes in the country whose laws they violated, the efficiency and effectiveness of extradition in ensuring that the prosecution of accused criminals takes place in the national jurisdiction where the evidence and witnesses are located, and the equity of extradition in recognizing the rights and sensitivities of the victims, the victims' families, the witnesses, and the society most directly and adversely affected by the criminal conduct at issue. We have, of course, also supported deportation as an alternative to extradition in appropriate cases because it too results in the return of the fugitive to the country of the crime. We have been less enthusiastic about the alternative of having fugitives prosecuted in their country of nationality, an option interjected by a number of countries to dispel the need to extradite citizens. We are generally dissatisfied with domestic prosecution because the costs involved in transferring proceedings to another country can be extraordinary, because evidence gathered pursuant to one criminal justice process may not be legally transferrable to or admissible or given the same weight and effect in another, and because the potential hardship to victims and witnesses who may be required to travel long distances to participate in foreign court systems in foreign languages in order to achieve justice seems unjustified and inequitable.

Fortunately, we believe that real progress is being made in terms of a growing acceptance of modern extradition mechanisms and, in a somewhat surprising number of venues, with longstanding and previously impenetrable bars to the extradition of nationals. The European Union Convention specifically recognizes the need to reform domestic laws to allow nationals to be extradited. Israel, a nation particularly sensitive to the situation of its citizens, has now passed a law allowing those citizens to be surrendered for trial in the country of their alleged offenses. Portugal and Italy have departed from tradition by legally recognizing the need to extradite nationals for particularly significant international criminality.

It is in Latin America, however, that we have found the most marked change of attitude on extraditing fugitives, regardless of nationality. Chile, Guatemala, and Uruguay have broken with tradition by creating no barriers to extradition based on nationality. Our bilateral treaty with Bolivia now mandates the extradition of

citizens for serious offenses. The Senate has approved a new treaty with Argentina and we have signed a treaty with Paraguay with affirmative provisions on surrendering nationals. After decades of disappointment, we are now developing a productive extradition relationship with the Dominican Republic under a recent law there that recognizes the government's authority to extradite Dominicans.

Since 1996, the Government of Mexico has found that in exceptional cases, the extradition of Mexican nationals may be justified (a topic discussed more fully below). Colombia has gone so far as to amend its constitution on this issue, and El Salvador has proposed a similar constitutional change. Even in those countries in Latin America where the historic bar to extraditing nationals has not been dropped and our bilateral treaties are in most ways seriously outdated, we have been able to secure the surrender of significant U.S. or third-country national narcotics traffickers, either through the invocation of the 1988 U.N. Drug Convention or through the application by the other country of its domestic laws.

* * * *

U.S.-Mexico Extradition and Fugitive Relationship.

It is our understanding that this Subcommittee has a particular interest in the extradition process in Mexico, which is similar to those in many other civil law jurisdictions and not particularly complicated until the appeal or amparo process begins. . . .

* * * *

Thus far in 1999, two fugitives have been extradited by Mexico, one a U.S. citizen and the other a Mexican national who had escaped from a U.S. federal correctional facility following conviction and sentencing on substantial narcotics related charges. As many observers and critics of the extradition relationship have noted, no major Mexican narcotics trafficker has yet been extradited by Mexico to the United States. This fact is clearly a disappointment to the Department of Justice, as we know it is to the members of this Subcommittee. We believe it is important to note, however, that the executive branch of the Government of Mexico, through the SRE, issued 19 orders of extradition in 1998,

including five orders against Mexican citizens facing significant drug trafficking charges in the United States. . . .

* * * *

An extremely effective working relationship [exists] between Mexican immigration authorities and the FBI and the U.S. Marshals Service personnel posted at our Embassy in Mexico City. In 1998, this relationship led to the identification, location, and expulsion of over 30 U.S. citizens who are fugitives from U.S. justice, but whose removal from Mexico was based on their illegal immigration status in that country rather than on the existence of U.S. criminal charges. This proactive program resulted in three times as many fugitive deportations from Mexico in 1998 as in any other year in which we have tracked such actions.

* * * *

b. Ratification of new extradition treaties

During the period 1991–1999, the United States entered into 32 bilateral extradition treaties. These included a number modernizing pre-existing treaties, others replacing existing treaty relationships between the United States and former British territories that had been based on application of U.S.-U.K. extradition treaties, and a few with countries with whom the United States had not previously had a treaty relationship. Excerpts below from testimony before the Senate Foreign Relations Committee ("SFRC") and questions and answers submitted to the SFRC on these extradition treaties, which were transmitted for advice and consent of the Senate to ratification, highlight key developments in the treaties during the period. A list of U.S. bilateral treaties is available at 18 U.S.C. § 3181, note.

(1) Dual criminality and temporary surrender

On April 8, 1992, Alan J. Kreczko, Deputy Legal Adviser, U.S. Department of State, testified before the SFRC in support of

four extradition treaties: Extradition Treaty with The Bahamas, Mar. 9, 1990, U.S.-Bah., S. Treaty Doc. No. 102–17 (1991); Protocol Amending the 1974 Extradition Treaty with Australia, Sept. 4, 1990, U.S.-Austl., S. Treaty Doc. No. 102–23 (1992); Supplementary Extradition Treaty with the Federal Republic of Germany, Oct. 21, 1986, U.S.-F.R.G., S. Treaty Doc. No. 100–6 (1987); and Second Supplementary Extradition Treaty with Spain, Feb. 9, 1988, U.S.-Spain, S. Treaty Doc. No. 102–24 (1992).

Mr. Kreczko's prepared statement highlighted key advantages of the new treaties, including replacement of list treaties with dual criminality and provision for temporary surrender, as set forth below. The Senate granted advice and consent to ratification on May 13, 1992. 138 CONG. REC. S6592 (daily ed. May 13, 1992).

The full text of Mr. Kreczko's testimony is available at S. Hrg. Doc. No. 102–674 (1992). See also 86 Am. J. Int'l. L. 547 (1992).

---

* * * *

Each of the new treaties replaces a traditional list of offenses with a modern dual criminality formula which provides for extradition based on the underlying criminal conduct rather than the designation of a particular offense. This dual criminality formula permits extradition for any crime that is punishable in both countries by imprisonment for more than one year. Such a provision obviates the need to renegotiate or supplement the treaty, as new offenses, such as computer-related crimes or money laundering, become punishable under the laws of both states. The treaty with The Bahamas, for example, would now make conspiracy, attempt, mail or wire fraud, extortion, and firearm offenses extraditable offenses between our two countries. The Supplementary Treaty with Germany would incorporate U.S. racketeering and continuing criminal enterprise offenses, as well as criminal association offenses under German law. . . .

Another new feature which has been introduced in each of these treaties is a provision that permits the requested state to

surrender temporarily a person while he is still serving a sentence in that state in order to expedite a prosecution in [the] requesting state for offenses other than those for which the sentence was imposed. At the end of the prosecution in the requesting state, the person would be returned to the requested state to serve the remainder of the sentence. At the present time, under each of the treaties being amended or replaced, the only option of the requested state in this situation has been to postpone extradition until the sentence has been served in its territory or to forego the service of that sentence in favor of extradition. This modification serves the interest of justice in both states by permitting early trial in the requesting state while the evidence and witness recollections are fresh, while preserving the interests of the requested state in having its full sentence served. . . .

(2) Extradition in death penalty cases; extradition of nationals

On July 17, 1996, and September 15, 1998, Jamison S. Borek, Deputy Legal Adviser, U.S. Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, appeared before the SFRC in support of pending law enforcement treaties. S. Hrg. Doc. No. 105–730 (1998).

Treaties before the SFRC in 1996 included seven bilateral extradition treaties: a treaty and a supplementary treaty to promote the repression of terrorism with Belgium (Apr. 27, 1987, U.S.-Belg., S. Treaty Doc. Nos. 104–7,8 (1995)), and treaties with Bolivia (June 27, 1995, U.S.-Bol., S. Treaty Doc. No. 104–22 (1995)); Hungary (Dec. 1, 1994, U.S.-Hung., S. Treaty Doc. No. 104–5 (1995)); Malaysia (with related exchange of notes) (Aug. 3, 1995, U.S.-Malay., S. Treaty Doc. No. 104–26 (1995)); the Philippines (Nov. 13, 1994, U.S.-Phil., S. Treaty Doc. No. 104–16 (1995)); and Switzerland (Nov. 14, 1990, U.S.-Switz., S. Treaty Doc. No. 104–9 (1995)). The treaties received advice and consent from the Senate on August 2, 1996, 142 CONG. REC. S9661 (daily ed. Aug. 2, 1996).

In 1998 sixteen comprehensive extradition treaties were pending before the SFRC: Antigua and Barbuda, Dominica, Grenada, and St.Lucia (*final signature* Oct. 31, 1996, S. Treaty Doc. No. 105–24 (1996)), Argentina (June 10, 1997, U.S.-Arg., S. Treaty Doc. No. 105–18 (1996)), Austria (Jan. 8, 1998, U.S.-Aus., S. Treaty Doc. No. 105–50 (1996)), Barbados (Feb. 28, 1996, U.S.-Barb., S. Treaty Doc. No. 105–20 (1996)), Cyprus (June 17, 1996, U.S.-Cyprus, S. Treaty Doc. No. 105–16 (1996)), France (Apr. 23, 1996, U.S.-Fr., S. Treaty Doc. No. 105–13 (1996)), India (June 25, 1997, U.S.-India., S. Treaty Doc. No. 105–30 (1996)), Luxembourg (Oct. 1, 1996, U.S.-Lux., S. Treaty Doc. No. 105–10 (1996)), Poland (July 10, 1996, U.S.-Pol., S. Treaty Doc. No. 105–14 (1996)), St. Kitts and Nevis (*final signature* Feb. 4, 1998, U.S.-St. Kitts & Nevis, S. Treaty Doc. No. 105–37 (1996)), St. Vincent and the Grenadines (Jan. 8, 1998, U.S.-St. Vincent, S. Treaty Doc. No. 105–44 (1996)), Trinidad and Tobago (Mar. 4, 1996, U.S.-Trin. & Tobago, S. Treaty Doc. No. 105–21 (1996)), and Zimbabwe (July 25, 1997, U.S.-Zimb., S. Treaty Doc. No. 105–33 (1996)), as well as two supplementary treaties with Spain (Mar. 12, 1996, U.S.-Spain, S. Treaty Doc. No. 105–15 (1996)), and Mexico (Nov. 13, 1997, U.S.-Mex., S. Treaty Doc. No. 105–46 (1996)). Ten of the comprehensive treaties replaced existing treaty relationships between the United States and former British territories that had been based on the 1931 or 1972 U.S.-U.K. extradition treaties, five of them updated existing treaties, and one, with Zimbabwe, created a new treaty relationship. The eighteen treaties received advice and consent to ratification on October 21, 1998, 144 CONG. REC. S12974–79 (daily ed. Oct. 21, 1998).

In her 1998 testimony, which addressed a number of new mutual legal assistance treaties ("MLATs") and a prisoner transfer treaty as well as the extradition treaties, Ms. Borek described the International Crime Control Strategy announced by President William J. Clinton in May, 1998, as follows:

> . . . The growth in transborder criminal activity, especially violent crime, terrorism, drug trafficking, and the

laundering of proceeds of organized crime, 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 are one important part of the President's comprehensive International Crime Control Strategy, which was announced last May. That Strategy recognizes the increasing threat of international crimes such as terrorism, organized crime and arms and drug trafficking. 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 crime cases. One of the Strategy's eight goals is to deny safe haven to international criminals and the negotiation of new extradition and mutual legal assistance treaties is one of the objectives necessary to reaching that goal. Replacing outdated extradition treaties with modem ones and negotiating extradition treaties with new treaty partners is necessary to create a seamless web for the prompt location, arrest and extradition of international fugitives. The Strategy also underscores that mutual legal assistance treaties are vitally needed to provide rapid, mutual access to witnesses, records and other evidence in a form admissible in criminal prosecutions. The instruments before you today will be important tools in achieving this goal.

Testimony on the pending treaties and written questions and answers submitted to the SFRC addressed, among other things, the importance of agreement to extradite nationals of the requested country and issues concerning availability of the death penalty, as excerpted below. *See also* 91 Am. J. Int'l L. 93, 98 (1997); 92 Am. J. Int'l L. 44 (1998).

Ms. Borek (1996)

* * * *

These treaties . . . address two of the most difficult issues in our extradition treaty negotiations: extradition of nationals of the Requested State and extraditions where the fugitives may be subject to the death penalty in the Requesting State. As a matter of longstanding policy, the U.S. Government extradites U.S. nationals. Most civil law countries, however, are prohibited by their constitutions or domestic law from extraditing their nationals. The U.S. Government has made it a high priority to convince states to agree to extradite their nationals, notwithstanding laws or traditions to the contrary. This is, however, a very sensitive and deep-seated issue.

The treaty with the Philippines is the clearest and best expression of our efforts. Paragraph 6 of that treaty provides that "Extradition shall not be refused on the ground that the person sought is a citizen of the Requested State." In the case of our extradition relations with the Philippines, this provision is especially useful since a relatively large percent of fugitives wanted by the United States in that country are of Philippine nationality.

Our treaty with Bolivia similarly provides that the Requested State is obligated to extradite its nationals to the Requesting State to stand trial for certain specified serious offenses including murder, kidnapping, rape, sexual offenses involving children, armed robbery, certain fraud offenses, organized criminal activity, drug and terrorism related offenses, and other offenses punishable in both states for a maximum penalty of at least ten years. This treaty represents a watershed in our efforts to convince civil law countries in the western hemisphere to oblige themselves to extradite their nationals to the United States. We are already using this treaty as precedent in our efforts with other civil law nations in Latin America and elsewhere. In practical terms, this treaty should help the United States to bring to justice narcotics traffickers of Bolivian nationality who reside or may be found in Bolivia.

The treaties with Belgium, Hungary, Malaysia, and Switzerland permit, but do not require, a Requested State to extradite its nationals. In each of these treaties, should a Requested State refuse extradition on that basis, it is obliged upon request of the Requesting State to submit the case to its competent authorities for prosecution.

Although the U.S. delegations pursued this point very strenuously, the domestic laws of Belgium, Hungary, and Switzerland prohibit the extradition of nationals, while the law in Malaysia expressly gives the Malaysian executive the discretion to refuse extradition of nationals. Based on representations made by the Malaysian negotiators, it is the expectation of the U.S. Government that the Malaysian Government will not ordinarily exercise such discretion, but would extradite its nationals in most cases. We are continuing our efforts to convince these and all other countries to remove such restrictions on the extradition of nationals.

The second typically difficult issue in modern extradition treaties involves extraditions in cases in which the fugitive may be subject to the death penalty in the Requesting State. To understand this issue, it is important to keep in mind that a large number of countries in the world that have prohibited capital punishment domestically also, as a matter of law or policy, prohibit the extradition of persons to face the death penalty. To deal with this situation, the majority of recent U.S. extradition treaties have contained provisions under which a Requested State may request an assurance from the Requesting State that the fugitive will not face the death penalty. Provisions of this sort appear in the extradition treaties with Belgium, Bolivia, Hungary, the Philippines, and Switzerland. A relevant article also appears in the Malaysia treaty, which provides that the parties shall consult about and agree to the submission of a request which involves a capital offense in the Requesting State that is not subject to the death penalty in the Requested State. This somewhat different approach reflects the accommodation of Malaysian Government concerns that the role of their judiciary precludes their being able to give such assurances in any case.

* * * *

Mr. Richard (1998):

* * * *

The extradition treaty with Argentina highlights a development in the field of international extradition. There is almost universal agreement among nations on the value of international extradition,

but there is less agreement on whether nations should extradite their own nationals to other nations. Most countries with a common law tradition, like the United States, do extradite their citizens, on request, to the country where the crime was committed, provided there is a treaty in force and there is evidence to support the charges. Many countries with a civil law tradition, however, have historically refused or been reluctant to extradite their nationals. These nations typically deny extradition and offer instead to prosecute the national within their own legal system for crimes committed abroad, a process referred to as "domestic prosecution."

Our experience has been that such "domestic prosecutions" are appealing in theory but woefully ineffective and inefficient in practice. Evidence collected in one country often cannot be transferred from the country where the offense occurred to the country of the offender's nationality because rules of evidence differ, or other technical, legal, or procedural differences interfere. Witnesses and victims themselves are often unable or unwilling to travel long distances to participate in judicial proceedings whose language and procedures they do not understand. Moreover, as the Attorney General has often stated, it is more appropriate to have the defendant tried where the victims are located and where the major harm was committed.

As a matter of fundamental law enforcement policy, the Administration believes that persons should be brought before the courts in those countries which have suffered the major criminal harm and which are best positioned to ensure fair and effective prosecution. The Administration further believes that criminals should never escape justice based simply on their citizenship or nationality.

We are especially pleased to see the growing number of countries like Argentina that are willing to re-examine past policies prohibiting or discouraging extradition of nationals. For instance, Italy, faced with the serious threat to society posed by international organized crime organizations, was one of the first countries to reverse its position, and began in the 1980s to extradite its citizens to the U.S. Bolivia and Uruguay have also broken with civil law tradition and dismantled barriers to extradition of nationals, and other states, such as Poland, are also re-evaluating their laws. For these reasons, the treaty with Argentina is an especially timely

development, and will be an important precedent that we will encourage other Latin American nations to follow.

The extradition treaties reflect our law enforcement relations and priorities with our treaty partners. We have tried to emphasize negotiations of the extradition treaties that will be of paramount practical value to U.S. law enforcement.

* * * *

(3) Other issues

During the 1991–1999 period, extradition treaties with Jordan (Mar. 28, 1995, U.S.-Jordan, S. Treaty Doc. 104–3 (1995)), Hong Kong (Dec. 20, 1996, U.S.-H.K., S. Treaty Doc. No. 105–3 (1997)), and the Republic of Korea (June 9, 1998, U.S.-Korea, S. Treaty Doc. No. 106–2 (1999)), also entered into force following individual hearings before the SFRC and advice and consent to ratification. Issues raised in the context of specific treaties are discussed below.

(i) U.S.-Jordan extradition treaty

On May 3, 1995, the Senate gave advice and consent to ratification of a new extradition treaty between the United States and Jordan, transmitted by the President on April 24, 1995. S. Treaty Doc. No. 104–3 (1995); 141 CONG. REC. S6126 (daily ed. May 3, 1995). The report of the SFRC to the full Senate recommending advice and consent included State Department answers to questions posed by committee members on, among other things, the extradition of U.S. nationals to Jordan, as excerpted below. S. Exec. Rept. No. 104–2 (1995). *See also* 90 Am. J. Int'l L. 79, 80 (1996). The U.S.-Jordan extradition treaty entered into force on November 21, 1995. Subsequently, questions were raised in Jordan as to whether it had properly completed its domestic procedures for ratification. The United States continues to consider the treaty as in force.

---

* * * *

Question. Under what circumstances or for what reasons may the United States legally, under the treaty, refuse extradition to Jordan of a U.S. citizen?
Answer. The treaty provides a number of grounds under which the United States may deny extradition of U.S. citizens and of non-U.S. citizens. For example, the United States can deny extradition if the offense for which extradition is sought does not comply with the treaty's dual criminality provisions (Article 2); if the crimes charged are political or military offenses, or if the charges are politically motivated (Article 4); if the fugitive has been convicted or acquitted of the charges in the United States (Article 5); if assurances regarding the death penalty are requested by the United States but not granted by Jordan (Article 7); if Jordan does not submit the documentation required to support a request for extradition (Article 8); if the fugitive is not removed from the Requested State once extradition has been granted (Article 12); or if the fugitive is extradited to another state (Article 14). In addition, extradition may be delayed until a United States prosecution or punishment of the fugitive sought by Jordan is completed. Moreover, the treaty does not in any way alter existing U.S. law which requires, as a prerequisite for extradition, that a U.S. court must find, based on the information submitted by the country requesting extradition, that there is probable cause to believe that the crime charged was committed and that the person whose extradition is sought committed that crime.

Question. Could the United States refuse extradition in the case of a U.S. citizen who is charged with a crime for which the penalty in Jordan is significantly more severe than the penalty in the United States?
Answer. The United States could refuse extradition in circumstances where a particular crime was punishable by the death penalty in Jordan but not in the United States. Article 7 of the Treaty provides that when the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the Requested State may refuse extradition unless the Requesting State provides such assurances as the Requested State

considers sufficient that the death penalty, if imposed, shall not be carried out.

In other cases, in keeping with modern U.S. extradition treaty practice, a crime will be extraditable if it is punishable under the laws in both Contracting States by deprivation of liberty for a period of more than one year or by a more severe penalty, regardless of whether the punishment might be more severe in one or the other Contracting State. Because the United States frequently imposes more severe penalties for crimes than our treaty partners, we do not negotiate provisions that would allow one party to refuse extradition based on the severity of the penalty, with the exception of the special death penalty provision noted above. We note that under United States law, the Secretary of State has the ultimate discretion to refuse extradition to another government under any extradition treaty.

* * * *

(ii) U.S.-Hong Kong extradition treaty

Jamison S. Borek, Deputy Legal Adviser, U.S. Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, appeared before the Senate Foreign Relations Committee on June 3, 1997 to provide testimony in support of a bilateral extradition treaty with Hong Kong. Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders, S. Treaty Doc. No. 105–3 (1997). The treaty received advice and consent from the Senate on October 23, 1997, 143 CONG. REC. S11165 (daily ed. Oct. 23, 1997), and was ratified by the President on January 21, 1998. *See also* Chapter 4.A.4. for discussion of Hong Kong's status and the role of the United Kingdom and the People's Republic of China in the treaty.

The full text of the testimony, excerpted below, and related documents, is available in S.Exec. Rept. 105–2 (1997).

Ms. Borek:

* * * *

Hong Kong is one of our most valuable allies in this fight against international crime, and law enforcement is an important and vital element of our bilateral relationship. The ability to pursue fugitives who flee to Hong Kong and extradite them to the United States for trial is an essential part of that relationship. Since 1991 alone, Hong Kong has extradited over 60 fugitives to the United States and we have sent seven to Hong Kong under the 1972 treaty between the United States and the United Kingdom and the 1985 Supplementary Treaty, both made applicable to the Crown Colony of Hong Kong. This treaty, however, will cease to be effective for Hong Kong as of July 1, 1997, when Hong Kong reverts to the sovereignty of the People's Republic of China. Because of the importance of our law enforcement relationship with Hong Kong, we have anticipated this change and have negotiated the new treaty that you have before you. To complete the picture, we have also negotiated new treaties in the areas of mutual legal assistance and prisoner transfer which have recently been submitted to you as well for advice and consent.

This new treaty, the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders ("the Treaty") will, when ratified, provide the basis under U.S. law for extraditions from the United States and for requesting extraditions from Hong Kong. The Treaty is entered into with the sovereign assent and authorization of both the United Kingdom and the People's Republic of China ("PRC"). The Treaty itself expressly provides that Hong Kong enters into it with the authorization of "the sovereign government which is responsible for its foreign affairs." At present, that is the United Kingdom. However, the PRC has also specifically authorized the negotiation and conclusion of the Treaty, as well as its continuation in force after the reversion on July 1, 1997.

To date Hong Kong has followed this same process to negotiate and sign agreements for surrender of fugitive offenders with six countries in addition to the United States: the Netherlands, Canada,

Australia, Malaysia, Philippines, and Indonesia. With your permission, I would also provide the committee with a diplomatic note for the record from the Government of the United Kingdom explaining in some detail the process established for authorizing and approving these new agreements and the role of the Joint Liaison Group.

After July 1, Hong Kong will continue to operate autonomously in the field of law enforcement. The status of Hong Kong after reversion is spelled out in two important documents. First, the 1984 Sino-British Joint Declaration on the Question of Hong Kong, which is an international agreement registered with the United Nations, provides for the transition of sovereignty from the United Kingdom to China. In so doing it embodies the concept of "one country, two systems" for Hong Kong, under which Hong Kong will retain a high degree of autonomy in all matters except foreign affairs and defense. In addition, the 1990 Basic Law promulgated by the People's Republic of China provides the fundamental governing framework for implementing the principles of the Joint Declaration in the future Hong Kong Special Administrative Region.

Together these instruments explicitly provide for the continuation of the capitalist system and way of life unchanged in the HKSAR for 50 years; for continuity of the legal system and laws; for an independent judiciary and for independent prosecution. They also provide for the continued applicability of the International Covenant on Civil and Political Rights to the HKSAR and provide other specific protections for individual rights and basic freedoms. The Basic Law expressly prohibits interference by the PRC in affairs administered by the HKSAR.

In sum, they provide that law enforcement and criminal justice, including police force, prosecution, trial and imprisonment will be a matter administered independently by the HKSAR by Hong Kong courts under Hong Kong law.

* * * *

. . . Certain . . . provisions have been included that are of particular value given the special circumstances of Hong Kong, including protections for fugitives after Hong Kong's reversion.

Article 16, for instance, provides the customary protections referred to as the "rule of specialty." This provides that an extradited fugitive cannot be tried or punished nor transferred outside the jurisdiction of the requesting Party for crimes committed prior to surrender unless the sending Party consents or the person has had an opportunity to leave the jurisdiction and has chosen not to do so or has left and voluntarily returned. In the Treaty, the specialty provision has been specifically adapted to take account of the precise situation of Hong Kong, and thus prohibits the surrender or transfer of a fugitive anywhere beyond the jurisdiction of the Special Administrative Region of Hong Kong.

Furthermore, under Article 20, these protections are made expressly applicable to persons who have been surrendered between the parties prior to its entry into force. That is, the Treaty expressly extends these protections to persons who have already been extradited under the existing treaty. We believe that the specialty protection of the current treaty would continue to apply to such persons even in the absence of the new treaty. These provisions, however, make clear that anyone we extradite to Hong Kong is fully protected from being tried for other crimes or surrendered outside of Hong Kong to other parts of the PRC or anywhere else for the same or prior crimes without the express consent of the United States.

* * * *

Mr. Richard:

* * * *

Among the other crimes that will become extraditable for the first time are intellectual property offenses, computer crimes, bail jumping, gambling, money laundering related to any extraditable crime, and weapons offenses. The agreement envisions that as a general rule, extradition will not be denied on the basis of nationality. This principle, found in Article 3, is consistent with long-standing U.S. policy favoring the extradition of nationals. However, the agreement contains narrow exceptions that take into account Hong Kong's unique status under the Chinese "one country, two systems" approach to reversion. Under Article 3 of

the agreement, the executive authorities of both the United States and Hong Kong have the right to refuse the surrender of nationals(in the case of Hong Kong, this means Chinese nationals) if the requested surrender relates to the defense, foreign affairs, or essential public interest of the requested Party. Article 3 also permits the executive authority in Hong Kong to refuse the surrender of a Chinese national who does not have what is called the "right of abode" in Hong Kong or has not "entered Hong Kong for the purpose of settlement," if the P.R.C. has jurisdiction over the offense and has commenced or completed proceedings for the prosecution of that person. (The term "right of abode" refers to legal residents of Hong Kong, and the language concerning entry "for the purpose of settlement" is a term of art referring to an ongoing family reunification policy in Hong Kong). Article 3 also provides that in the event that the surrender of a national is refused, the case may be submitted to the competent authorities of the requested Party for possible domestic prosecution.

* * * *

In providing advice and consent to the extradition treaty with Hong Kong, the Senate included provisions specifically tailored to the political situation in Hong Kong, set forth below. 143 CONG. REC. S11165 (daily ed. Oct. 23, 1997).

---

* * * *

(a) UNDERSTANDINGS. The Senate's advice and consent is subject to the following two understandings, which shall be included in the instrument of ratification, and shall be binding on the President:

(1) THIRD PARTY TRANSFERS. The United States understands that Article 16(2) permits the transfer of persons surrendered to Hong Kong under this Agreement beyond the jurisdiction of Hong Kong when the United States so consents, but that the United States will not apply Article 16(2) of the Agreement to permit the transfer of persons surrendered to the Government of Hong Kong to any other

jurisdiction in the People's Republic of China, unless the person being surrendered consents to the transfer.

(2) HONG KONG COURTS' POWER OF FINAL ADJUDICATION. The United States understands that Hong Kong's courts have the power of final adjudication over all matters within Hong Kong's autonomy as guaranteed in the 1984 Sino-British Joint Declaration on the Question of Hong Kong, signed on December 19, 1984, and ratified on May 27, 1985. The United States expects that any exceptions to the jurisdiction of the Hong Kong courts for acts of state shall be construed narrowly. The United States understands that the exemption for acts of state does not diminish the responsibilities of the Hong Kong authorities with respect to extradition or the rights of an individual to a fair trial in Hong Kong courts. Any attempt by the Government of Hong Kong or the Government of the People's Republic of China to curtail the jurisdiction and power of final adjudication of the Hong Kong courts may be considered grounds for withdrawal from the Agreement.

(b) DECLARATIONS. The Senate's advice and consent is subject to the following two declarations, which shall be binding on the President:

(1) REPORT ON THE HONG KONG JUDICIAL SYSTEM. One year after entry into force, the Secretary of State, in coordination with the Attorney General, shall prepare and submit a report to the Committee on Foreign Relations that addresses the following issues during the period after entry into force of the Agreement: (i) an assessment of the independence of the Hong Kong judicial system from the Government of the People's Republic of China, including a summary of any instances in which the Government of the People's Republic of China has infringed upon the independence of the Hong Kong judiciary; (ii) an assessment of the due process accorded all persons under the jurisdiction of the Government of Hong Kong; (iii) an

assessment of the due process accorded persons extradited to Hong Kong by the United States; (iv) an accounting of the citizenship and number of persons extradited to Hong Kong from the United States, and the citizenship and number of persons extradited to the United States from Hong Kong; (v) an accounting of the destination of third party transfer of persons who were originally extradited from the United States, and the citizenship of those persons; (vi) a summary of the types of crimes for which persons have been extradited between the United States and Hong Kong;

* * * *

c. Treaty interpretation: extradition for parental child abduction

As noted above, older U.S. extradition treaties, generally those signed before 1980, were most typically "list" treaties. Such treaties did not include "parental child abduction" or "parental kidnapping" or a similar phrase or concept among the list of extraditable offenses. At the time the treaties were negotiated, parental child abduction was not a criminal offense in most countries, including in the United States. By the mid-nineties, however, every state in the United States and the District of Columbia had criminalized the act of parental abduction. In 1993, the International Parental Kidnapping Crime Act of 1993, Pub. L. No. 103–173, 107 Stat. 1998 (codified as amended at 18 U.S.C. § 1204) was enacted at the federal level; *see* Chapter 2.B.1.b.

Normally, the interpretation of "list" treaties would have evolved 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. In 1976 a notice in the Federal Register stated that "extradition is an instrument of criminal law enforcement, and it is believed that it might be frequently misused if applied to domestic relations problems such as custody disputes." *See*

41 Fed. Reg. 51,897 (Nov. 24, 1976). *See also Digest 1978* at 391; *I Cumulative Digest 1981–1988* at 700–01.

This issue did not arise with extradition treaties that, as discussed above, replaced the list of extraditable crimes with a "dual criminality" provision, thus providing for extradition to and from any country which also criminalizes parental child abduction.

To remedy the situation, the State and Justice Departments brought the issue to the attention of Congress in 1997. As a result, the Extradition Treaties Interpretation Act of 1998, Pub. L. No. 105–323, 112 Stat. 3029 (codified as amended at 22 U.S.C. § 2708), was enacted, clarifying that "kidnapping" in extradition list treaties may include parental kidnapping, thus reflecting the major changes that had occurred in this area of criminal law in the previous 20 years. The change in the U.S. practice of interpreting extradition list treaties was also announced in the Federal Register on January 25, 1999. 64 Fed. Reg. 3735 (Jan. 25, 1999), excerpted below.

---

* * * *

This change in the interpretation of "kidnapping" for purposes of extradition treaties is entirely unrelated to and would have no effect whatsoever on the use of civil means for the return of children, in particular under the Hague Convention on the Civil Aspects of International Parental Child Abduction. It addresses only countries with which we have "list" extradition treaties and would have no effect with respect to countries with which the United States has no extradition relationship or countries where we have a dual criminality treaty.

The adoption of this expanded interpretation with respect to each specific treaty, however, will depend of course on the views of the other country in question, as the interpretation of terms in a bilateral treaty must depend on a shared understanding between the two parties. The United States recognizes that not all countries have criminalized parental kidnapping, and many continue to treaty custody of children as a civil or family law matter that is not an appropriate subject for criminal action. We also recognize that this

is an evolving area of criminal law and that some countries which do not currently criminalize this conduct may decide to do so in future years. For this reason, we will consult with our list treaty partners and will adopt the expanded interpretation only where there is a shared understanding to this effect between the parties.

* * * *

d. Roles of judiciary and Secretary of State in U.S. extradition practice

(1) Rule of non-inquiry

On March 20, 1997, the U.S. Court of Appeals for the First Circuit reversed a grant of *habeas corpus* by the U.S. District Court for the District of Massachusetts in a case challenging an extradition to Hong Kong. *United States v. Lui Kin-Hong,* 110 F.3d 103 (1st Cir. 1997), *as corrected* April 9, 1997, *stay of mandate denied,* 520 U.S. 1206 (1997). Lui, formerly Director of Exports of the British American Tobacco Co. (Hong Kong) Ltd., was charged in Hong Kong with conspiring to receive and receiving over $3 million in bribes and $1.5 million in unsecured loans during a five-year period. The payments were allegedly in exchange for a virtual monopoly on the export of certain brands of cigarettes to the People's Republic of China ("PRC") and to Taiwan. Hong Kong requested Lui's extradition from the United States on February 13, 1996, under the U.S.-U.K. extradition treaty, applicable at that time to Hong Kong as a crown colony of the U.K. (The 1931 U.S.-U.K. treaty was made applicable to Hong Kong, among other British territories, by an exchange of diplomatic notes on October 21, 1976. Extradition Treaty with the United Kingdom, 28 U.S.T. 227. The U.S.-U.K. treaty and the Supplementary Treaty, S. Treaty Doc. No. 99–8 (1985), were applicable to Hong Kong by their terms.)

Lui was found extraditable by a U.S. magistrate on August 29, 1996. *In re Extradition of Lui Kin-Hong*, 939 F. Supp. 934 (D. Mass. 1996). The U.S. District Court for the District

of Massachusetts granted Lui's petition for writ of *habeas corpus* on January 7, 1997, based on the effects of the scheduled reversion of Hong Kong to the PRC on July 1, 1997. *Lui Kin-Hong v. United States*, 957 F. Supp. 1280 (D. Mass. 1997). As subsequently summarized by the court of appeals, the district court reasoned that:

> because the Crown Colony could not try Lui and punish him before the reversion date, the extradition treaty between the United States and the UK, which is applicable to Hong Kong, prohibited extradition . . . Because no extradition treaty between the United States and the new government of Hong Kong has been confirmed by the United States Senate, . . . the magistrate judge lacked jurisdiction to certify extraditability . . .

In reversing this order, the First Circuit concluded that Lui's concerns as to treatment after extradition were for the Secretary of State to consider rather than the courts, relying, *inter alia*, on the "rule of non-inquiry." *Lui-Kin Hong*, 110 F.3d at 110. The Supreme Court denied Lui's petition for a stay of mandate on May 12, 1997. 520 U.S. 1206 (1997). Lui was extradited to Hong Kong in May 1997 where he was tried, convicted, and sentenced under Hong Kong law. Excerpts below from the First Circuit opinion describe the extradition process in the United States and provide the court's views of the relevance of the reversion of Hong Kong and the rule of non-inquiry and its applicability to this case. International citations have been omitted.

---

* * * *

Lui does not claim that he faces prosecution in Hong Kong on account of his race, religion, nationality, or political opinion. He does not claim to be charged with a political offense. The treaties give the courts a greater role when such considerations are present. Here, Lui's posture is that of one charged with an ordinary crime. His claim is that to surrender him now to Hong Kong is, in effect, to send him to trial and punishment in the People's Republic of

China. The Senate, in approving the treaties, could not have intended such a result, he argues, and so the court should interpret the treaties as being inapplicable to his case. Absent a treaty permitting extradition, he argues, he may not be extradited.

While Lui's argument is not frivolous, neither is it persuasive. The Senate was well aware of the reversion when it approved a supplementary treaty with the United Kingdom in 1986. The Senate could easily have sought language to address the reversion of Hong Kong if it were concerned, but did not do so. The President has recently executed a new treaty with the incoming government of Hong Kong, containing the same guarantees that Lui points to in the earlier treaties, and that treaty has been submitted to the Senate. [Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders, signed Dec. 20, 1996] In addition, governments of our treaty partners often change, sometimes by ballot, sometimes by revolution or other means, and the possibility or even certainty of such change does not itself excuse compliance with the terms of the agreement embodied in the treaties between the countries. Treaties contain reciprocal benefits and obligations. The United States benefits from the treaties at issue and, under their terms, may seek extradition to the date of reversion of those it wants for criminal offenses.

Fundamental principles in our American democracy limit the role of courts in certain matters, out of deference to the powers allocated by the Constitution to the President and to the Senate, particularly in the conduct of foreign relations. Those separation of powers principles, well rehearsed in extradition law, preclude us from rewriting the treaties which the President and the Senate have approved. The plain language of the treaties does not support Lui. Under the treaties as written, the courts may not, on the basis of the reversion, avoid certifying to the Secretary of State that Lui may be extradited. The decision whether to surrender Lui, in light of his arguments, is for the Secretary of State to make.

This is not to say American courts acting under the writ of habeas corpus, itself guaranteed in the Constitution, have no independent role. There is the ultimate safeguard that extradition proceedings before United States courts comport with the Due

Process Clause of the Constitution. On the facts of this case, there is nothing presenting a serious constitutional issue of denial of due process. Some future case may, on facts amounting to a violation of constitutional guarantees, warrant judicial intervention. This case does not.

* * * *

A. United States Extradition Procedure

In the United States, the procedures for extradition are governed by statute. See 18 U.S.C. ch. 209. The statute establishes a two-step procedure which divides responsibility for extradition between a judicial officer (fn. omitted) and the Secretary of State. The judicial officer's duties are set out in 18 U.S.C. § 3184. In brief, the judicial officer, upon complaint, issues an arrest warrant for an individual sought for extradition, provided that there is an extradition treaty between the United States and the relevant foreign government and that the crime charged is covered by the treaty. See id. If a warrant issues, the judicial officer then conducts a hearing to determine if "he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty." Id. If the judicial officer makes such a determination, he "shall certify" to the Secretary of State that a warrant for the surrender of the relator "may issue." Id. (emphases added). The judicial officer is also directed to provide the Secretary of State with a copy of the testimony and evidence from the extradition hearing. Id.

It is then within the Secretary of State's sole discretion to determine whether or not the relator should actually be extradited. See 18 U.S.C. § 3186 ("The Secretary of State may order the person committed under section[] 3184 . . . of this title to be delivered to any authorized agent of such foreign government. . . .") . . . The Secretary has the authority to review the judicial officer's findings of fact and conclusions of law de novo,[8] and to reverse the judicial

[8] While not required to by statute, the Department of State routinely accepts written submissions from relators in conjunction with its review of extraditability. 4 Abbell & Ristau, International Judicial Assistance: Criminal-Extradition, § 13–3–8(5), at 274 (1995).

officer's certification of extraditability if she believes that it was made erroneously. (fn. and citations omitted) The Secretary may also decline to surrender the relator on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations. Additionally, the Secretary may attach conditions to the surrender of the relator.[10] The State Department alone, and not the judiciary, has the power to attach conditions to an order of extradition.

Thus, under 18 U.S.C. § 3184, the judicial officer's inquiry is limited to a narrow set of issues concerning the existence of a treaty, the offense charged, and the quantum of evidence offered. The larger assessment of extradition and its consequences is committed to the Secretary of State. This bifurcated procedure reflects the fact that extradition proceedings contain legal issues peculiarly suited for judicial resolution, such as questions of the standard of proof, competence of evidence, and treaty construction, yet simultaneously implicate questions of foreign policy, which are better answered by the executive branch. Both institutional competence rationales and our constitutional structure, which places primary responsibility for foreign affairs in the executive branch., see, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–22, 81 L. Ed. 255, 57 S. Ct. 216 (1936), support this division of labor.

In implementing this system of split responsibilities for extradition, courts have developed principles which ensure, among other things, that the judicial inquiry does not unnecessarily impinge upon executive prerogative and expertise. For example, the executive branch's construction of a treaty, although not binding upon the courts, is entitled to great weight. Another principle is that extradition treaties, unlike criminal statutes, are to be construed liberally in favor of enforcement because they are "in the interest of justice and friendly international relationships." These principles of construction require courts to:

---

[10] The United States has, for example, imposed conditions as to the type of trial the relator would receive (e.g., in civil, rather than martial law, court) and as to security arrangements for the relator. 4 Abbell & Ristau, supra, § 13–3–8(4), at 273 n.1.

> interpret extradition treaties to produce reciprocity between, and expanded rights on behalf of, the signatories: "[Treaties] should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason, if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred."

Howard, 996 F.2d at 1330–31 (quoting Factor, 290 U.S. [276] at 293–94).

Another principle that guides courts in matters concerning extradition is the rule of non-inquiry. More than just a principle of treaty construction, the rule of non-inquiry tightly limits the appropriate scope of judicial analysis in an extradition proceeding. Under the rule of non-inquiry, courts refrain from "investigating the fairness of a requesting nation's justice system," id. at 1329, and from inquiring "into the procedures or treatment which await a surrendered fugitive in the requesting country." Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983). The rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers. See United States v. Smyth, 61 F.3d 711, 714 (9th Cir. 1995) (fn. omitted). It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed (fn. omitted).

The principles of reciprocity and liberal construction also counsel against construing the Treaties so as to prohibit Lui's extradition. Hong Kong, through the United Kingdom, has entered bilateral treaties with the United States. The United States has sought extradition of criminals from Hong Kong in the past, and may wish to continue to do so up until July 1, 1997. If the executive chooses to modify or abrogate the terms of the Treaties that it negotiated, it has ample discretion to do so. However, if this court were to read a cut-off date vis-a-vis extraditions to Hong Kong

into the Treaties, it would risk depriving both parties of the benefit of their bargain.

None of these principles, including non-inquiry, may be regarded as an absolute. We, like the Second Circuit, "can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principles" discussed above. . . . This is not such a case. Lui is wanted for economic, not political, activities whose criminality is fully recognized in the United States. His extradition is sought by the current Hong Kong regime, a colony of Great Britain, which, as Lui himself points out, is one of this country's most trusted treaty partners. Moreover, Lui has been a fugitive from Hong Kong since 1994. He has been subject to extradition since entering the United States in December 1995. Now that only a few months remain before the reversion of Hong Kong is partly attributable to strategic choices made by Lui himself. There is nothing here which shocks the conscience of this court.

* * * *

(2) Constitutional challenges to extradition statute

During the 1990s several suits were filed challenging the constitutionality of the statutory scheme for extradition from the United States set forth at 18 U.S.C. § 3181 et seq. The challenges focused on language in section 3184, described by the First Circuit in *Lui Kin-Hong*, *supra*.

The cases discussed below alleged that the provision, enacted in 1848, violated separation of powers by providing for review of a judicial decision by the executive branch. Ultimately none was successful.

(i) LoBue v. Christopher; DeSilva v. DiLeonardi

In 1995 the U.S. District Court for the District of Columbia found the extradition statute unconstitutional for violation

of separation of powers. *LoBue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995). Plaintiffs in *LoBue,* Anthony and Albert DeSilva, Anthony LoBue and Thomas Kulekowskis, had been found extraditable to Canada by a U.S. magistrate judge in the Northern District of Illinois on charges of kidnapping Anthony DeSilva's paraplegic wife from Canada to the United States. *In re Extradition of Kulekowskis*, 881 F.Supp. 1126 (N.D. Ill. 1995). The four individuals then brought an action in the U.S. District Court for the District of Columbia against the Secretary of State, the Department of State, and the United States challenging the constitutionality of the federal extradition statute and seeking declaratory relief and an injunction barring the United States from carrying out their extradition. The district court granted the relief sought, concluding that, "while is it quite clear that the Constitution forbids the Executive branch from reviewing the legal decisions of the federal Judiciary, this is precisely the effect of the statute."

On September 15, 1995, in an unpublished order, the district court also certified a class of all persons "who presently or in the future will be under the threat of extradition" pursuant to the existing extradition statute, extended its declaratory judgment to all potential extraditees, and enjoined the Secretary of State from extraditing any fugitives from the United States to foreign countries. The injunction was stayed by the U.S. Court of Appeals for the District of Columbia on September 29, 1995. *See Lo Duca v. United States*, 1996 U.S. App. LEXIS 28746, n.1. (2d Cir. Aug. 29, 1996).

On August 30, 1996, the court of appeals vacated the district court decision and remanded for dismissal of the case. *LoBue v. Christopher*, 82 F.3d 1081 (D.C. Cir. 1996). It did so on grounds that the district court lacked jurisdiction because plaintiffs "are in the constructive custody of the U.S. Marshal for the Northern District of Illinois [and] they can challenge the statute through a petition for *habeas corpus* there. (In fact, they have filed a *habeas* petition.)" The D.C. Circuit did not address the constitutional issues. *Id*. at 1082.

The U.S. District Court for the Northern District of Illinois initially granted writs of *habeas corpus* for which the plaintiffs

in *LoBue* had applied. *Kulekowskis v. DiLeonardi*, 941 F. Supp. 741 (N.D. Ill. 1996). The district court concluded that the requirement under the U.S.-Canada extradition treaty for "dual criminality" i.e., that the conduct be criminal in both the United States and Canada, was not met in the case because of DeSilva's status as guardian of his wife, whom the four were charged with kidnapping. *Id*. at 744. Because the court found the absence of dual criminality dispositive, it did not address petitioners' other claims, including a challenge to the constitutionality of the statute.

The U.S. Court of Appeals for the Seventh Circuit reversed. As to the dual criminality requirement, the court of appeals disagreed with the district court's analysis of U.S. guardianship law, concluding that "[a] guardian who moves an adult ward across state or national boundaries, against her will, . . . may be convicted of kidnapping." The court of appeals also addressed the constitutional claim, concluding that § 3184 did not violate the doctrine of separation of powers because, like a search warrant or an order approving deportation, "it authorizes, but does not compel, the executive branch of government to act in a certain way." *Desilva v. DiLeonardi*, 125 F.3d 1110 (1997), *cert. denied*, 525 U.S. 810 (1998). The Seventh Circuit analysis of the constitutional issue is set forth below.

---

* * * *

The magistrate judge certified the charges under § 3184 and left to the Secretary of State the ultimate decision whether to honor Canada's request. Petitioners submit that § 3184 violates Article III of the Constitution and the doctrine of separation of powers "by requiring federal courts to give advisory opinions that are subject to plenary review and revision by the Executive branch." . . .

An argument that certification for extradition is an advisory opinion does not have much force, as magistrate judges do not serve under Article III of the Constitution and therefore are free to issue advisory opinions if a statute requires that step. The current proceeding—the quest for writs of habeas corpus—is anything but

advisory. If the writ issues, it must be obeyed. But even the proceeding before the magistrate judge was an Article III case or controversy. A certificate of extradition is no different from a search warrant or an order approving a deportation: it authorizes, but does not compel, the executive branch of government to act in a certain way. The police may change their mind about the need for a search; the Board of Immigration Appeals may grant the alien's request for reopening. The Constitution itself allows the President to block enforcement of a criminal judgment by issuing a pardon. Judgments give victorious litigants rights but not duties; only the losers are placed under obligations, and a judgment may be called "advisory" only when it does not bind the unsuccessful litigant. A victor in civil litigation may forego collecting the award of damages; no one thinks that this makes the judgment advisory. The police need not search, the Attorney General need not deport, the victorious plaintiff need not collect—and the Secretary of State need not extradite. A federal court had the constitutional authority to certify the petitioners for extradition. Accord, *Lo Duca v. United States*, 93 F.3d 1100 (2d Cir. 1996) (reaching the same conclusion by a different route).

* * * *

In 1998 the U.S. District Court for the Northern District of Illinois rejected additional claims brought by the same petitioners, including a claim that the Constitution prohibited magistrate judges from making extradition decisions and that the role of the U.S. Attorney as an advocate of extradition violated the Emoluments Clause of the Constitution because it made him a de facto officer of a foreign nation. *LoBue v. DiLeonardi*, 1999 U.S. Dist. LEXIS 3317 (N.D. Ill. Mar. 8, 1999). The Seventh Circuit affirmed. *DeSilva v. DiLeonardi*, 181 F.3d 865 (7th Cir. 1999).

(ii) Lo Duca v. United States

In 1996 the U.S. Court of Appeals for the Second Circuit also affirmed a district court decision denying a challenge to the constitutionality of 18 U.S.C. § 3184. *Lo Duca v. United States*,

1996 U.S. App. LEXIS 28746 (2d Cir. Aug. 29, 1996), *correcting* 93 F.3d 1100 (2d Cir. 1996), *cert. denied*, 519 U.S. 1007 (1996). In 1993 LoDuca was convicted in Italy for various narcotics-related offenses and sentenced to nineteen years in prison after being tried in absentia. He was arrested in the United States and found extraditable by a magistrate judge in the Eastern District of New York in 1994 pursuant to a request by Italy under the U.S.-Italy extradition treaty. LoDuca sought a writ of *habeas corpus* from the district court, arguing that insufficient documents had been presented and that the offense for which he was being extradited did not meet the dual-criminality requirement of the treaty. The district court denied the writ.

On appeal Lo Duca for the first time argued that 18 U.S.C. § 3184 was unconstitutional. While acknowledging the general rule that a federal appellate court does not consider issues not addressed below, the court nevertheless exercised its discretion to consider the issue because it found that "the constitutional issues advanced by Lo Duca are sufficiently important that they should be assessed on their merits."

Excerpts below set forth the Second Circuit's analysis of the constitutional challenge and its conclusion that the statute did not violate separation of powers because judicial officers acting pursuant to section 3184 did not exercise the "judicial power" of the United States under Article III of the Constitution and because the judicial officers' actions pursuant to the extradition statute did not constitute unconstitutional authorization to engage in extrajudicial activities. Internal citations have been omitted.

---

* * * *

The federal extradition statute, 18 U.S.C. § 3184, was first enacted nearly 150 years ago to provide a legal framework for extradition proceedings involving fugitives found in the United States. Prior to 1848, extradition was largely a matter committed to the discretion of the Executive Branch. The primary function of section

3184 is to "interpose the judiciary between the executive and the individual."[2] . . .

The extradition hearing conducted pursuant to section 3184 "is not . . . in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him . . ." Instead, it is "essentially a preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation." As the Supreme Court has stated, "The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction." The judicial officer who conducts an extradition hearing "thus performs an assignment in line with his or her accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense."

If the extradition officer issues a certificate of extraditability, the Secretary of State "may" order the fugitive to be delivered to the extraditing nation. 18 U.S.C. § 3184. The Secretary of State, however, is under no legal duty to do so. . . .

* * * *

Lo Duca presents two alternative contentions, consideration of which depends upon our resolution of an initial question: do judicial officers acting pursuant to section 3184 exercise the "judicial power" of the United States under Article III of the Constitution? If an extradition officer does exercise Article III power, then Lo Duca contends that the statutory scheme is unconstitutional since it subjects Article III judgments to revision by the Executive Branch. On the other hand, if an extradition officer does not

[2] In the absence of section 3184, the Executive Branch would retain plenary authority to extradite. See Fong Yue Ting v. United States, 149 U.S. 698, 714, 37 L.Ed. 905, 3 S.Ct. 1016 (1893) ("The surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the President alone, when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate.").

exercise Article III power, then Lo Duca contends that Congress has unconstitutionally authorized federal judges and magistrate judges to engage in extrajudicial activities.

This is not the first time that our Circuit has considered the question of whether extradition officers exercise Article III power. In Austin, we recently held that the function performed by an extradition officer is not an exercise of the judicial power of the United States. Austin, 5 F.3d [598] at 603. [2d Cir. 1993]. This holding accords with the decisions of the First, Eleventh, and District of Columbia Circuits.

* * * *

. . . The fact that decisions of extradition officers are non-appealable strongly indicates that such officers do not exercise Article III power.

This conclusion is bolstered by the fact that, although direct judicial review of an extradition proceeding is not available, there is the possibility for what has been called "executive revision," pursuant to the discretionary authority of the Executive Branch to refuse extradition. . . .

* * * *

In United States v. Ferreira, 54 U.S. (13 How.) 40, 14 L. Ed. 42 (1852) (Little Brown & Co. 1870), the Supreme Court considered a . . . statute authorizing federal district judges in Florida to adjust certain claims made by the Spanish inhabitants of that state against the United States. Id. at 45. Those determinations were subject to approval by the Secretary of the Treasury. Id. The Supreme Court held that "such a tribunal is not a judicial one. . . . The authority conferred on the respective judges was nothing more than that of a commissioner. . . ." Id. at 47. As the Supreme Court elaborated:

> The powers conferred by these acts of Congress upon the judge . . . are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money

> under a treaty. . . . [It] is not judicial . . . , in the sense in which judicial power is granted by the constitution to the courts of the United States.

Id. at 48. Thus, the Supreme Court found it unexceptional that the judges, as commissioners, acted in an "adjudicatory" capacity.[5]

. . . Ferreira relied on the fact that the decisions of the district judges were subject to executive revision. The Supreme Court found it "too evident for argument" that the statute did not confer Article III power since

> neither the evidence, nor [the judge's] award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise.

Id. at 46–47. Thus, the fact of executive revision led the Supreme Court in Ferreira to hold that those judges, acting as commissioners, did not exercise Article III power. Similarly, in this case, it is dispositive U.S. Const. art. III, § 1 ("The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). The use of the word "judges" in section 3184 is more consistent with a statute appointing commissioners "by official, instead of personal descriptions." Hayburn's Case, 2 U.S. (2 Dall.) at 410 n.1. that, since the decisions of extradition officers are

---

[5] The Constitution itself provides numerous situations where some form of adjudication is required outside the context of Article III. For example, the executive decision to grant a Presidential pardon may be based on a review of the law and facts that would normally be reserved to the province of courts. Similarly, the executive decision to veto legislation may be based on an opinion that such legislation is unconstitutional. See Bator et al., Hart & Wechsler's The Federal Courts and the Federal System, supra, at 471 ("The concept of 'the judicial power' cannot be defined so as . . . to create a monopoly for the judges in the adjudicatory task of finding facts and determining the meaning and applicability of provisions of law.") . . .

subject to revision by the Secretary of State, those officers do not exercise judicial power within the meaning of Article III. See Doherty, 786 F.2d at 499 n.10 ("The . . . function of issuing the certificate [of extraditability is] nonjudicial because . . . the Secretary of State is not bound to extradite even if the certificate is granted.").

Lastly, we point out that, as a matter of statutory language, section 3184 closely tracks the holdings of Metzger, Hayburn's Case, and Ferreira by granting jurisdiction over extradition complaints not to "courts" but to individual enumerated "justices," "judges," and "magistrates," including judges of state courts of general jurisdiction. See 18 U.S.C. § 3184. Thus, by its terms, "§ 3184 vests individual judges with jurisdiction over extradition requests." Mackin, 668 F.2d at 130 n.11. This distinction between "courts" and "judges" in the context of extradition proceedings has been long recognized. We note that, traditionally, it is "courts" and not "judges" that exercise Article III power. See U.S. Const. Art. III, Sect. 1 ("The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.") The use of the word "judges" in section 3184 is more consistent with a statute appointing commissioners "by official, instead of personal descriptions." Hayburn's Case, 2 U.S. (2 Dall.) at 410 n.1.

* * * *

Having examined the text of the statute, its structural correlation with Article III, and the relevant historical precedents, we conclude that our holding in Austin was correct—extradition officers do not exercise judicial power under Article III of the Constitution. Austin, 5 F.3d at 603. We therefore turn to Lo Duca's following arguments, which contend that section 3184 is unconstitutional precisely because it does not confer Article III power.

* * * *

In cases reaching as far back as Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), the Supreme Court has held that Congress may not expand the jurisdiction of federal courts beyond the limits established by Article III. Lo Duca relies on these cases to contend that the Constitution prevents Congress

from vesting federal courts with jurisdiction over non-Article III extradition complaints.

Without questioning these cases, the Government responds that federal courts are not the subject of section 3184. Rather, "§ 3184 vests individual judges with jurisdiction over extradition requests." This distinction between "courts" and "judges" is dispositive. . . . Only individual justices, judges, and magistrate judges are authorized to act under the statute. Since they function, as in Hayburn's Case and in Ferreira, as commissioners, they are not bound by the limits of Article III.

* * * *

Lo Duca next argues that, insofar as section 3184 requires judges to act in an extrajudicial capacity, the statute runs afoul of Mistretta v. United States, 488 U.S. 361, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989). In Mistretta, the Supreme Court was concerned with the possibility that Congress might compromise the independence of Article III judges by requiring them to participate in extrajudicial activities. This concern, however, does not apply with equal force to those who are not Article III judges. Thus, Lo Duca's claim founders at the outset since his extradition proceedings were conducted solely by federal magistrate judges. Then-Magistrate Judge Ross issued the warrant under which Lo Duca was arrested. Magistrate Judge Gold conducted the subsequent extradition hearing and granted the certificate of extraditability. . . . Since federal magistrate judges are not Article III judges, the Constitution does not accord them the same protections against Congressional expansion of their duties. . . .

In any event, even if Lo Duca's extradition proceedings had been conducted by a federal judge, there would be no violation of Mistretta. On the contrary, Mistretta expressly states that federal judges may participate in extrajudicial activities as long as two requirements are met. First, the judge must be acting "in an individual, not judicial, capacity." Mistretta, 488 U.S. at 404. Second, "a particular extrajudicial assignment [must not] undermine[] the integrity of the Judicial Branch." Id. n9 We have already held that judges acting pursuant to section 3184 do so as commissioners in an individual capacity. . . .

* * * *

Mistretta was also concerned with the possibility that certain extrajudicial activities might undermine the integrity of the Judicial Branch by weakening public confidence. We believe that, in this particular context, history sufficiently allays this concern. For nearly 150 years, federal judges have adjudicated extradition complaints under section 3184 with no indication of any adverse consequences. Of course, this is hardly surprising since an extradition proceeding is "an essentially neutral endeavor and one in which judicial participation is peculiarly appropriate." We conclude that the extrajudicial duties authorized by section 3184 do not undermine the integrity of the Judicial Branch, and Mistretta does not prohibit federal judges from hearing extradition complaints.

(iii) Other cases

The U.S. Court of Appeals for the Ninth Circuit also upheld the constitutionality of the extradition statute in a case involving an extradition to the United Kingdom, adopting the Seventh Circuit's reasoning in *DeSilva*. *United States v. Artt*, 158 F.3d 462 (9th Cir. 1998). That opinion, however, was withdrawn when the Ninth Circuit granted the U.S. petition for rehearing on other issues. 183 F.3d 944 (9th Cir. 1999). In 2000 the appeals were dismissed as moot, and the case was remanded to the district court with direction to withdraw its opinion and order for extradition and dismiss the case as moot when the United Kingdom withdrew its request for extradition. 249 F.3d 831 (9th Cir. 2000).

In *United States v. Lui Kin-Hong*, 110 F.3d 103 (1st Cir. 1997), the First Circuit commented on the question of the constitutionality of section 3184 in a footnote, as follows:

> Although at first glance this procedure might appear to be of questionable constitutionality because it subjects judicial decisions to executive review, rendering them non-final, cf. Hayburn's Case, 2 U.S. (2Dall.) 409, 1 L.Ed. 436 (1792), it has been held that the judicial officer in an extradition proceeding "is not exercising 'any part

> of the judicial power of the United States,' " and instead is acting in "a non-institutional capacity." United States v. Howard, 996 F.2d 1320, 1325 (1st Cir. 1993) (quoting In re Kaine, 55 U.S. (14 How.) 103, 120, 14 L.Ed. 345 (1852)).

(3) Application of supplementary treaty with United Kingdom: In re Extradition of Smyth

In 1994 the District Court for the Northern District of California denied certification of extradition of James Joseph Smyth to the United Kingdom. *In re Extradition of Smyth*, 863 F. Supp. 1137 (N.D. Cal. 1994). Smyth had been convicted of the attempted murder of a prison officer in Belfast, Northern Ireland in 1978 and sentenced to 20 years. He escaped from prison in 1983 and fled to the United States. The United Kingdom sought Smyth's extradition to serve the remainder of his sentence under the terms of the 1972 U.S.-U.K. Extradition Treaty, June 8, 1972, U.S.-U.K., 28 U.S.T. 227, and the 1985 Supplementary Extradition Treaty, June 25, 1985, U.S.-U.K., S. Treaty Doc. No. 99–8 (1985).

The case presented the first instance in which a defendant raised a defense under Article 3(a) of the Supplementary Treaty to challenge his extradition to Northern Ireland. On July 27, 1995, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's decision. 61 F.3d 711 (9th Cir. 1995), *as amended by* 73 F.3d 887 (9th Cir. 1995). As to the history of Article 3, the Ninth Circuit explained:

> [b]eginning in 1979, a series of United States court decisions denied extradition of [Irish Republican Army ("IRA")] members because the underlying offenses constituted "political acts." *See In re McMullin*, No. 3–78–1899 M.G. (N.D. Cal. 1979), reprinted in 132 CONG. REC. 16,585 (1986); *In re Mackin*, No. 86 Cr. Misl., appeal denied, 668 F.2d 122 (2d Circ. 1981); *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984). These decisions angered the British Government, which viewed them as condoning violent terrorist conduct.

In denying extradition in the referenced cases, U.S. courts had relied on the then standard political-offense exception to extradition in article V of the 1972 Treaty. Article 1 of the 1985 Supplementary Treaty, as ratified, provided a number of exceptions to this limitation on extradition, listing violent offenses that "shall not be considered of a political character."*

The Senate gave advice and consent to the supplementary treaty in July 1986, with certain proposed amendments, which the Government of the United Kingdom found acceptable. *See 1 Cumulative Digest 1981–1988* at 771–782. The amendments included a new Article 3, creating a defense to extradition for those crimes to which the political offense exception was made expressly inapplicable. Section 3(a) provided:

> Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

---

* Offenses listed in Article 1 were:

"(a) an offense for which both Contracting parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;
(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; and
(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense."

Section 3(b) limited applicability of 3(a) to "offenses listed in Article 1" and provided for appeal of decisions made under 3(a).

After reviewing the record from the district court decision denying certification of Smyth's extradition under article 3(a), the Ninth Circuit reversed "because we hold that the record does not establish by a preponderance of the evidence that this extradition will lead to detention and punishment on account of Smyth's race, religion, nationality, or political opinions rather than on account of his conviction for attempted murder." 61 F.3d at 713. Excerpts from the Ninth Circuit decision commenting on the unique role of the courts under article 3 and the appropriate standard of decision are provided below. Following unsuccessful efforts to obtain a stay of his extradition, Smyth was extradited in August 1996 and returned to prison.

---

* * * *

If this were a traditional extradition, we likely would not concern ourselves with the operation of the justice system in Northern Ireland. The long-standing "rule of noninquiry" has traditionally circumscribed the breadth of a court's inquiry into such matters. Under that doctrine, "an extraditing court will generally not inquire into the procedures or treatment which await a surrendered fugitive in the requesting country." *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983). Undergirding this principle is the notion that courts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems. *See* Michael P. Scharf, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 Stan. J. Int'l L. 257, 269 (1988). ("The State Department is in a superior position to consider the consequences of a nonextradition decision upon foreign relations than the courts and it has diplomatic tools, not available to the judiciary, which it can use to insure that the requesting state provides a fair trial.").

* * * *

The Senate Report described the Supplementary Treaty as "one of the most divisive and contentious issues the Committee [on Foreign Relations] has faced this Congress. The Committee has worked long and hard to develop a compromise that can win broad, bipartisan support." S. Exec. Rep. No. 17, 99th Cong., 2d Sess., 6 (1986). The Report further characterized the compromise as "an effort to balance anti-terrorism concerns and the right of due process for individuals." *Id.* at 3. As such, Article 3(a) is not a mere reformulation of the political offense exception; the provision invites an altogether new inquiry in the extradition context. Rather than focusing on the motivations of the accused (which the political offense exception encourages), the Article 3(a) defense to extradition focuses on the treatment the accused will likely receive at the hands of the requesting country's criminal justice system.

Even after the language of what is now Article 3(a) had been penned, the discussion of its proper interpretation continued. The most contested issue centered on how broad an inquiry into the operation of Northern Ireland's system of justice was to be authorized by the treaty's language. A colloquy inserted by the Senate Foreign Relations Committee into the Executive Report accompanying the Supplementary Treaty explained the Committee majority's view and that of the amendment's principal sponsor, Committee chairman Senator Lugar: that the inquiry should not be limited to the procedures utilized at trial.[3]

* * * *

[3] The excerpted colloquy transpired as follows:

* * * *

Senator BIDEN. Let me make sure as part of this colloquy that I understand the nature of the rule of inquiry into the justice system in Northern Ireland that we are establishing here. My understanding is this: That notwithstanding that probable cause has been established in an American court; notwithstanding that the accused is the person sought; notwithstanding that it is in an extraditable offense under the terms of this treaty we are about to vote on; and notwithstanding that otherwise it is an offense for which extradition would lie; and notwithstanding that it is an offense under this treaty for which the political offense doctrine would not otherwise apply; notwithstanding all of that, the

This is the first case in which a person challenging extradition to Northern Ireland has raised a defense under Article 3(a) of the Supplementary Treaty. Because of the lack of precedent, the district court held several preliminary hearings to decide the scope of the evidence that would be discoverable and admissible to support the Article 3(a) defense. . . .

Legal problems became thornier when the court proceeded to address specific discovery requests. Smyth sought discovery of several government documents that the U.K. refused to produce. Three such documents involved U.K. government-sponsored investigations into possible misconduct by police and security forces in Northern Ireland in the 1980s. . . . The U.K. objected to producing these documents on the grounds that they were irrelevant and protected by several privileges including the state secret privilege, deliberative process privilege and investigatory files privilege.

* * * *

Smyth then filed a motion to dismiss the petition for extradition. He argued that because the government was the moving party and was depriving him of materials necessary to his defense, dismissal was appropriate. . . . The court determined that because Smyth had made a "strong showing of necessity for disclosure" of the requested reports, both privileged and non-privileged, and because the U.K. had failed to produce documents for which it could not claim a valid privilege, the former warranted a remedy and the latter, a sanction. [*In Re Extradition of Smyth*, 826 F.Supp. 316, 322–23 (N.D.Cal. 1993)]. Rather than dismissing the petition

---

defendant will have an opportunity in Federal court to introduce evidence that he or she would personally, because of their race, religion, nationality or political opinion, not be able to get a fair trial because of the court system *or any other aspect of the judicial system in a requesting country*, or that the person's extradition has been requested with a view to try or punish them on account of their race, their religion, nationality or political opinion.

The CHAIRMAN [Senator LUGAR]. My answer is yes.

S. Exec. Rep. No. 17 at 4–5 (emphasis added).

for extradition . . . the court granted the following rebuttable presumptions in favor of Smyth:

> (1) Catholic Irish nationals accused or found guilty of offenses against members of the security forces or prison officials are subjected systematically to retaliatory harm, physical intimidation and death in Northern Ireland.
> (2) Members of the security forces in Northern Ireland either participate directly or tacitly endorse these actions.

Unrebutted, the presumptions effectively establish that Smyth would suffer retaliatory harm at the hands of security forces in Northern Ireland upon his return. It is significant for purposes of our review, however, that the presumptions do not directly address that prong of Article 3(a) requiring the person sought for extradition to establish that the retaliation or detention would be on account of "race, religion, nationality or political opinions."

* * * *

[Following a five-week evidentiary hearing beginning in September 1993], [t]he district court made extensive findings of fact regarding the background of political violence in Northern Ireland and the government efforts to combat it, the history of problems with the security forces, the conditions in the Maze Prison, and the background of Smyth, all in an effort to predict what would occur on Smyth's return to Northern Ireland. In its final order, the district court denied the request for certification of extradition on three independent grounds:

First, the U.K. did not rebut the presumption that Smyth would face retaliatory punishment and harm upon his return to Northern Ireland. Second, even if the presumption had not been awarded, Smyth established that he would be punished upon return to prison in Northern Ireland. Third, and again without the benefit of the presumption, Smyth established that he would be punished, detained and restricted in his personal liberty upon release into the general population at the conclusion of his prison term in Northern Ireland.

* * * *

Here, we conclude the district court erred in at least two respects. In the first place, resort to the withholding of deportation regulation that presumes a *present* danger of persecution from past experience of persecution cannot validate the district court's presumption of a risk of persecution two to five years in the *future*. Second, the district court erred in relying extensively upon evidence of the general discriminatory effects of the Diplock system upon Catholics and suspected Republican sympathizers. That evidence does not relate to the treatment Smyth is likely to receive as a consequence of extradition, as required under Article 3(a).

Article 3(a) fashioned a compromise between two extreme positions. On the one extreme was the provision of the old treaty that barred any extradition if the underlying crime was a political act, even an act of violent terrorism. At the other extreme was the view espoused by the Reagan administration that the political nature of a crime, and necessarily any punishment or retaliatory treatment that might flow from it, should be irrelevant to the extradition inquiry. The Supplementary Treaty struck a balance between these extremes: it abolished the political act doctrine for some crimes but permitted judicial inquiry into the probable consequences of a given extradition, including imprisonment and other restrictions on liberty that would flow from religious or political discrimination. Article 3(a) thus must be read within both the context of the controversy that gave rise to it and the overall purpose of extradition treaties generally, which is to facilitate criminal prosecution and punishment. *See Restatement*, vol. 1, pt. IV, ch. 7, subchapter B, ("Extradition"), intro. note, 556–57. "Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment."

* * * *

The presumptions the district court imposed did not address whether the presumed punishment or restriction on liberty that the security forces would inflict would be on account of Smyth's religion, nationality, or political opinions. Article 3(a), however, clearly contains such a requirement. It does not authorize denial of extradition on account of the punishment, official or unofficial,

that will be imposed for the underlying criminal act of attempted murder. It was to avoid such a result that the Supplementary Treaty abrogated the political act doctrine for enumerated crimes and that Article 3(a) was adopted. In concluding that the unrebutted presumptions constituted an independent ground for denying extradition, the district court permitted Smyth to avoid bearing his burden of showing discriminatory motivation and therefore failed to satisfy the requirements of Article 3(a).

* * * *

We conclude that the evidence was insufficient to support a finding that Smyth would face mistreatment in prison on account of his political or religious beliefs. In predicting Smyth's probable treatment in prison, the district court did not distinguish between the relative importance of Smyth's crime and his escape on the one hand, and his political and religious views on the other. The evidence does not support a finding that Smyth would be punished upon his return to prison by reason of his "race, religion, nationality, or political opinions" as required by the Supplementary Treaty. The last ground for the district court's ruling is therefore also infirm.

2. Irregular Rendition

a. Transborder abduction from Mexico

(1) U.S. v. Alvarez-Machain

On June 15, 1992, in a case of first impression, the U.S. Supreme Court reversed and remanded a decision by the U.S. Court of Appeals for the Ninth Circuit holding that U.S. courts lacked jurisdiction to prosecute a person whom the district court determined had been brought to the United States in violation of the extradition treaty between the United States and Mexico. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). Dr. Humberto Alvarez-Machain, a citizen and resident of Mexico, was indicted in the United States for participating in the kidnap and murder of U.S.

Drug Enforcement Administration ("DEA") agent Enrique Camarena-Salazar and a Mexican pilot working with him. The case was described as follows in the Supreme Court's opinion (footnotes omitted):

> On April 2, 1990, respondent was forcibly kidnapped from his medical office in Guadalajara, Mexico, to be flown by private plane to El Paso Texas, where he was arrested by DEA officials. The District Court concluded that DEA agents were responsible for respondent's abduction, although they were not personally involved in it. United States v. Caro-Quintero, 745 F. Supp. 599, 602–604, 609 (CD Cal. 1990).
>
> . . . The District Court rejected [Alvarez-Machain's] outrageous governmental conduct claim, but held that it lacked jurisdiction to try respondent because his abduction violated the [U.S.-Mexico] Extradition Treaty. . . .
>
> The Court of Appeals affirmed the dismissal of the indictment and the repatriation of respondent [ordered by the district court], relying on its decision in *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (CA9 1991), cert. pending, No. 91–670. 946 F.2d 1466 (1991). In *Verdugo*, the Court of Appeals held that the forcible abduction of a Mexican national with the authorization or participation of the United States violated the Extradition Treaty between the United States and Mexico.
>
> Although the Treaty does not expressly prohibit such abductions, the Court of Appeals held that the "purpose" of the Treaty was violated by a forcible abduction . . . which, along with a formal protest by the offended nation, would give a defendant the right to invoke the Treaty violation to defeat jurisdiction of the District Court to try him. . . .

On remand, Alvarez-Machain was acquitted and returned to Mexico. For a discussion of subsequent litigation by Dr. Alvarez-Machain against certain U.S. government officials and Mexican citizens, *see Digest 2001* at 326–34, *Digest 2003* at 380–83.

Excerpts from the Court's analysis in reversing the Ninth Circuit are set forth below (most footnotes and internal citations omitted). *See also United States v. Verdugo-Urquidez*, in (2) below.

---

* * * *

. . . In the absence of an extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution. The Treaty thus provides a mechanism which would not otherwise exist, requiring, under certain circumstances, the United States and Mexico to extradite individuals to the other country, and establishing the procedures to be followed when the Treaty is invoked.

The history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty. As the Solicitor General notes, the Mexican Government was made aware, as early as 1906, of the *Ker* doctrine, and the United States' position that it applied to forcible abductions made outside of the terms of the United States-Mexico Extradition Treaty. Nonetheless, the current version of the Treaty, signed in 1978, does not attempt to establish a rule that would in any way curtail the effect of *Ker*. Moreover, although language which would grant individuals exactly the right sought by respondent had been considered and drafted as early as 1935 by a prominent group of legal scholars sponsored by the faculty of Harvard Law School, no such clause appears in the current Treaty.[13]

---

[13] In Article 16 of the Draft Convention on Jurisdiction with Respect to Crime, the Advisory Committee of the Research in International Law proposed:

> "In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures." Harvard Research in International Law, 29 Am. J. Int'l L. 442 (Supp. 1935)

Thus, the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms. The remaining question, therefore, is whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant's presence is obtained by means other than those established by the Treaty. Respondent contends that the Treaty must be interpreted against the backdrop of customary international law, and that international abductions are "so clearly prohibited in international law" that there was no reason to include such a clause in the Treaty itself. The international censure of international abductions is further evidenced, according to respondent, by the United Nations Charter and the Charter of the Organization of American States. Respondent does not argue that these sources of international law provide an independent basis for the right respondent asserts not to be tried in the United States, but rather that they should inform the interpretation of the Treaty terms.

The Court of Appeals deemed it essential, in order for the individual defendant to assert a right under the Treaty, that the affected foreign government had registered a protest. Respondent agrees that the right exercised by the individual is derivative of the nation's right under the Treaty, since nations are authorized, notwithstanding the terms of an extradition treaty, to voluntarily render an individual to the other country on terms completely outside of those provided in the treaty. The formal protest, therefore, ensures that the "offended" nation actually objects to the abduction and has not in some way voluntarily rendered the individual for prosecution. Thus the Extradition Treaty only prohibits gaining the defendant's presence by means other than those set forth in the Treaty when the nation from which the defendant was abducted objects.

This argument seems to us inconsistent with the remainder of respondent's argument. The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation. In *Rauscher*, the Court noted that Great Britain had taken the position in other cases that the Webster-Ashburton Treaty

included the doctrine of specialty, but no importance was attached to whether or not Great Britain had protested the prosecution of Rauscher for the crime of cruel and unusual punishment as opposed to murder.

More fundamentally, the difficulty with the support respondent garners from international law is that none of it relates to the practice of nations in relation to extradition treaties. In *Rauscher*, we implied a term in the Webster-Ashburton Treaty because of the practice of nations with regard to extradition treaties. In the instant case, respondent would imply terms in the Extradition Treaty from the practice of nations with regards to international law more generally. Respondent would have us find that the Treaty acts as a prohibition against a violation of the general principle of international law that one government may not "exercise its police power in the territory of another state." There are many actions which could be taken by a nation that would violate this principle, including waging war, but it cannot seriously be contended that an invasion of the United States by Mexico would violate the terms of the Extradition Treaty between the two nations.

In sum, to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice. In *Rauscher*, the implication of a doctrine of specialty into the terms of the Webster-Ashburton Treaty, which, by its terms, required the presentation of evidence establishing probable cause of the crime of extradition before extradition was required, was a small step to take. By contrast, to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited by respondent simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international abductions.

Respondent and his *amici* may be correct that respondent's abduction was "shocking," Tr. of Oral Arg. 40, and that it may be in violation of general international law principles. Mexico has

protested the abduction of respondent through diplomatic notes, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch. We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of *Ker* v. *Illinois* is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.

* * * *

On July 24, 1992, Alan J. Kreczko, Deputy Legal Adviser, Department of State, testified before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on legal and policy issues relating to the Supreme Court decision in *Alvarez-Machain* and transborder abductions generally.

The full text of Mr. Kreczko's testimony, excerpted below, is available in 3 Dep't St. Dispatch No. 31 at 614 (Aug. 3, 1992), *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*

---

* * * *

In *Alvarez-Machain*, the Supreme Court reaffirmed its long-standing principle that US courts have jurisdiction over a criminal defendant regardless of the means by which that defendant was brought before the court. This is the so-called *Ker-Frisbie* doctrine, which reaches back to the 19th century in the Court's jurisprudence. The Court held that a breach of general international law principles would not affect the jurisdiction of a domestic court. In a dictum, the Supreme Court did acknowledge that in certain circumstances, the breach of an extradition treaty might divest a court of jurisdiction. However, after examining the text and negotiating record of the US-Mexico Extradition Treaty, the Court concluded that a non-consensual abduction from Mexican territory would not violate the treaty.

The Department of State believes that the Court properly interpreted the US-Mexico Extradition Treaty. US extradition treaties—and the Mexico treaty is no exception—do not constitute the exclusive means of recovering fugitives. The United States has, for example, relied on other means such as exclusion, expulsion, or deportation to obtain a fugitive even when extradition treaties exist.

We also agree with the Court that Mexico's understandable concerns about the abduction and the judicial procedures that followed are matters for diplomatic resolution. The United States and Mexico have been, and will remain, involved in intensive diplomatic discussions on this matter. Diplomatic history reveals that states have found a variety of resolutions to disputes over cross-border arrests. In some cases, individuals are returned for prosecution in the original country. In other cases, the individual is retained and prosecuted in the arresting country. We agree that the courts should not interrupt this diplomatic process absent a treaty requirement to that effect.

The Justice Department will explain the reasoning of the Court on the domestic law issues. I would note, however, that the core holding of the Court—that domestic courts generally retain jurisdiction over an individual without regard to how the individual was brought before the court—is not unique to US jurisprudence. It is our understanding that this judicial approach is also followed in, for example, the United Kingdom and the Federal Republic of Germany.

Reactions of Foreign Governments

The Supreme Court's decision has caused considerable concern among a wide range of governments, particularly in the Americas, but elsewhere as well. Many governments have expressed outrage that the United States believes it has the right to decide unilaterally to enter their territory and abduct one of their nationals. Governments have informed us that they would regard such action as a breach of international law. They have also informed us that they would protect their nationals from such action, that such action would violate their domestic law, and that they would vigorously prosecute such violations. Some countries, as well, have

told us that they believe that such actions would violate our extradition treaties with them. Some have also suggested that they will challenge the lawfulness of such abductions in international forums. Some have indicated that the decision could affect their parliaments' review of pending law enforcement agreements with the United States. At the same time, some have noted in private that the decision will cause narcotics traffickers to have an increased fear of apprehension by the United States.

As would be expected, the reaction has been strongest in Mexico, and I will discuss that situation in detail. However, the reaction has been strong throughout Latin America and the Caribbean, for example:

> —The Presidents of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay issued a declaration on June 26 expressing their concern with the US Supreme Court decision and requesting that the Inter-American Juridical Committee of the Organization of American States (OAS) issue an opinion on the "international juridical validity" of the *Alvarez-Machain* decision. That request was made formally to the Permanent Council of the OAS on July 15, which adopted a resolution referring this matter to the Juridical Committee.

* * * *

The reaction has not been confined, of course, to official government statements. Political leaders in and out of government, and commentaries in the media, have generally criticized the decision and the attitude of the US Government that that decision is supposed to represent.

The kind of heated reaction that we have seen is illustrated by an extradition proceeding in Chile entirely unrelated to the *Alvarez-Machain* controversy. On June 25, the Chilean Supreme Court upheld by a 3-2 vote the Supreme Court president's prior decision to extradite an individual requested by the United States. The two dissenting judges voted to release the individual expressly because the United States, according to them, violates extradition treaties with other countries. Although the Chilean High Court, in

summarizing the arguments of the dissent, did not refer directly to *Alvarez-Machain*, the motivation behind the dissenters' views was clear. Negative reactions, while strongest in Latin America and the Caribbean, have also been voiced more broadly. The Supreme Court's decision led to a rigorous debate in the Canadian Parliament. The Canadian Minister of External Affairs told the Canadian Parliament that any attempt by the United States to kidnap someone in Canada would be regarded as a criminal act and a violation of the US-Canada Extradition Treaty. Spain's President publicly criticized the decision as "erroneous." And the media in Europe generally has been critical of the decision.

These negative reactions reflect a concern that the *Alvarez-Machain* decision constitutes a "green light" for international abductions. The reactions are grounded in the desire of countries to preserve their sovereignty and territorial integrity and to reassure their nationals. We expect that countries will continue to press this concern with us, bilaterally and multilaterally. As noted above, this matter has already been brought before the OAS.

The US Government has moved actively to isolate the question of whether domestic legal authority exists from the separate question of whether the President will, in fact, exercise that authority. We have reassured other countries that the United States has not changed its policies toward cooperation in international law enforcement, and that the *Alvarez-Machain* case does not represent a "green light" for the United States to conduct operations on foreign territory.

Specifically, immediately following the Supreme Court's decision, the White House issued a public statement reaffirming that:

> . . . the United States strongly believes in fostering respect for international rules of law, including, in particular, the principles of respect for territorial integrity and sovereign equality of states. US policy is to cooperate with foreign states in achieving law enforcement objectives. Neither the arrest of Alvarez-Machain, nor the . . . Supreme Court decision reflects any change in this policy.

[28 WEEKLY COMP. PRES. DOC. 1063 (1992)]

The State Department also made it clear that the President has directed that a strict inter-agency procedure be followed before any such decision could be authorized that will ensure that questions of sovereignty and international law—and our foreign relations with friendly governments—are a fundamental part of the decision-making process.

At the same time, we are not prepared categorically to rule out unilateral action. It is not inconceivable that in certain extreme cases, such as the harboring by a hostile foreign country of a terrorist who has attacked US nationals and is likely to do so again, the President might decide that such an abduction is necessary and appropriate as a matter of the exercise of our right of self-defense. This necessary reservation of right for extreme cases does not, however, detract from our strong support for the principles of sovereignty and territorial integrity generally. To reinforce this point, the White House statement also noted the Administration has in place procedures designed to ensure that US law enforcement activities overseas fully take into account foreign relations and international law. These procedures require that decisions as to extraordinary renditions from foreign territories be subject to full inter-agency coordination and that they be considered at the highest levels of the government.

* * * *

(2) United States v. Verdugo-Urquidez

As mentioned in *Alvarez-Machain*, *supra*, Rene Martin Verdugo-Urquidez, a citizen and resident of Mexico, was indicted in the United States on charges of smuggling narcotics from Mexico. *See Digest 1989–1990* at 100–07.

He was also charged with participation in the kidnapping and torture-murder of DEA Special Agent Enrique Camarena Salaza. In his trial on murder charges, Verdugo-Urquidez raised, among other things, a claim that he had been unlawfully kidnapped from Mexico in violation of the U.S.-Mexico extradition treaty. The U.S. Court of Appeals for the Ninth Circuit reversed a district court decision rejecting

Verdugo's claims. *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991). The Ninth Circuit held that the United States had breached its obligations under the extradition treaty by authorizing the forcible abduction of Verdugo in Mexico without the consent of the Mexican government. The U.S. Supreme Court vacated the Ninth Circuit decision and remanded in light of its holding in *United States v. Alvarez-Machain*, *supra*. *United States v. Verdugo-Urquidez*, 505 U.S. 1201 (1992). *See* 29 F.3d 637 (9th Cir. 1994) (unpublished table decision).

b. Arrest by Canadian official in United States

In a diplomatic note dated April 8, 1991, the U.S. Embassy at Ottawa informed the Canadian Department of External Affairs that a Windsor city police officer had reportedly arrested an American citizen on January 4, 1991, at least 200 yards on the U.S. side of the border line in the Windsor-Detroit tunnel, and had brought the American in a Windsor police cruiser through the tunnel to the Canadian side.

The U.S. Government was gravely concerned, the embassy continued, by the reported infringement of U.S. territorial sovereignty and requested a complete statement of the facts surrounding the incident. If they were confirmed, the U.S. Government wished to know what steps the Government of Canada proposed to take with respect to the American and with respect to the officer who apprehended him, and, also, what remedies were available to the American under Canadian law. The embassy's note stated further:

> As the Government of Canada is aware, under United States law judicial dismissal of criminal charges, or judicially ordered release, of a criminal defendant over government objection is not an appropriate remedy for a violation of territorial sovereignty. The United States Government has taken the position that any remedy for such a violation is properly a matter for diplomatic resolution by the states concerned. In this regard, the

> Embassy notes that the Department of External Affairs has previously encouraged through diplomatic channels the release of abducted individuals in such cases. The Embassy therefore requests a statement from the Government of Canada of its intentions in this case. In view of the extensive bilateral cooperation between our two governments, particularly in the law enforcement field, and our respective foreign relations concerns about unlawful transborder seizures, the United States Government looks forward to an amicable resolution of this matter.

The Department of External Affairs replied on May 2, 1991, that it regretted the infringement of U.S. territorial sovereignty. It had requested that the Attorney General of Ontario, through the Canadian Department of Justice, seek the release of the individual in question. This had been done, and Canadian authorities understood that he had returned to the United States. In the meantime, documentation in support of a Canadian request for his provisional arrest and extradition under the U.S.-Canada Treaty on Extradition had been prepared, and the individual had been arrested in the United States pursuant to the request. The Canadian note also stated: "The Extradition Treaty, along with the relevant multilateral conventions, if any, established the only means under which to obtain the return of fugitive offenders."

In response, by its Note No. 133, dated May 23, 1991, the American Embassy welcomed a "cordial, growing and mutually beneficial law enforcement cooperation relationship with the Government of Canada," but stated:

> There is nothing in the texts of either the bilateral extradition treaty or the relevant multilateral conventions, or their negotiating record, which provides a basis for the assertion that these treaties are, or were ever intended to be, the exclusive means by which fugitive offenders can be transferred between Canada and the United States.

See also 86 Am. J. Int'l L. 109 (1992).

3. Mutual Legal Assistance in Criminal Matters

Ratification of new treaties

(1) Senate consideration of treaties

During the period 1991–1999, the United States entered into 29 new bilateral treaties providing for mutual legal assistance in criminal matters ("MLATs"), bringing the number of such treaties in force to a total of 38 at the end of 1999. In hearings on law enforcement treaties awaiting advice and consent to ratification during the 1990's before the Senate Foreign Relations Committee ("SFRC"), testimony by Department of State and Department of Justice officials addressed key issues of the MLATs and their role in the increasingly trans-border nature of serious crime. Discussion of extradition treaties in the same hearings and reports is discussed in A.1. *supra.*

On April 8, 1992, Alan J. Kreczko, Deputy Legal Adviser of the Department of State, testified before the SFRC in support of four MLATs, with Jamaica (July 7, 1989, U.S.-Jam., S. Treaty Doc. No. 102–16 (1991)); Spain (Feb. 9, 1988, U.S.-Spain, S. Treaty Doc. No. 102–21 (1992)); Argentina (Dec. 4, 1990, U.S.-Arg., S. Treaty Doc. No. 102–21 (1992)); and Uruguay (May 6, 1991, U.S.-Uru., S. Treaty Doc. No. 102–19 (1991)). The Senate granted advice and consent to ratification on July 2, 1992. 138 CONG. REC. D844 (daily ed. July 2, 1992).

The full text of Mr. Kreczko's testimony is available in S. Hrg. Doc. No. 102–674 (Apr. 8, 1992). *See also* 86 Am. J. Int'l L. 547 (1992).

---

* * * *

Since our first Mutual Legal Assistance Treaty entered into force with Switzerland in 1977 [May 25, 1973, TIAS No. 8302, 20 UST 2019 (entered into force January 23, 1977)], our MLATs have become an increasingly important tool in the United States' war on crime, in particular transnational crimes such as narcotics

trafficking, terrorism, money laundering and export control violations, which require the close cooperation of law enforcement authorities throughout the world.

The proliferation of bilateral mutual legal assistance treaties in recent years reflects the considered judgment and determination of the United States, as well as of our treaty partners, to enhance cooperation in legal assistance and to devise the most efficient and expeditious methods possible within our respective legal systems to facilitate the investigation and prosecution of crime, as well as to support related proceedings.

It is our firm desire to have these kinds of treaty arrangements in place generally around the world. We are limited in meeting this objective by resources and by the readiness of other states for legal or policy reasons to enter into the kinds of arrangements that we seek. We have therefore focused our attention on those countries with which the need and the will on both sides are clear.

* * * *

I would now like to give you a brief overview of the provisions common to all four mutual legal assistance treaties under consideration today. Mutual legal assistance treaties are generally intended to enable law enforcement authorities to obtain evidence abroad in a form admissible in our courts. They supplement rather than supplant existing international arrangements on exchange of information and evidence, such as INTERPOL, law enforcement liaison relationships, and judicial assistance/letters rogatory procedures. (Letters rogatory are written requests from a court in one country to a court in another country for assistance in obtaining evidence.)

One of the most significant U.S. objectives that each of these treaties serves is the establishment of direct, expedited channels of communication through the Central Authorities. . . .

Each of the treaties provides for the same types of assistance which are generally catalogued in the first article. These include service of documents, provision of records, locating persons, taking the testimony of persons, production of documents, execution of requests for search and seizure, and the transfer of persons in custody for testimonial purposes. Some types of assistance available

under the MLATs, such as transfer of persons in custody for testimonial purposes, may not be available through letters rogatory. Moreover, MLATs establish a framework that ensures the provision of evidence in admissible form in the requesting state's courts.

One article of particular significance in each of the treaties covers the immobilization, forfeiture and transfer of assets to the extent permitted by each state's internal laws. The evolution in this area of cooperation over the last decade has been striking a reflection of the importance that the United States as well as the world community attaches to the use of these tools in attacking the organization and profitability of international drug trafficking. Although this evolution may not be evident from the language of the MLATs themselves, it is reflected in the commitment of parties to the 1988 United Nations Convention Against Illicit Trafficking in Narcotics Drugs and Psychotropic Substances to adopt measures to enable the confiscation of drug proceeds and to cooperate in the implementation of those measures. The United States and Spain are already parties to this Convention. Argentina and Jamaica and Uruguay have signed but are still in the process of ratifying the Convention.

Because this is still an evolving area, the MLAT provisions in each treaty are drafted in a manner that will take full advantage of new innovations as they develop under the internal laws of each of the parties. The relevant article provides for notification whenever the proceeds of criminal activity are believed to be located in the territory of the other party. This extends to the instrumentalities of crime in the treaties with Argentina and Uruguay. Each treaty requires assistance in forfeiture and restitution proceedings to the extent permitted by each party's internal laws. This obligation extends to assistance in the collection of criminal fines in the treaties with Argentina, Jamaica and Uruguay. The treaties with Argentina, Spain and Uruguay contain a newly developed paragraph which provides for the disposition of forfeited property in accordance with the internal law of the forfeiting state and for the transfer to the other party of the property or proceeds from the sale thereof to the extent permitted by its internal laws. This new dimension to the article was added to U.S. negotiating texts after the adoption of U.S. sharing statutes (18 USC 981(i)(1),

21 USC 881(e) and 19 USC 1616a) which authorize asset transfers to foreign governments under certain circumstances. Although the treaty with Jamaica does not contain this additional paragraph, the article is sufficiently broad to authorize the use of U.S. sharing statutes in the appropriate case.

* * * *

In 1995 a mutual legal assistance treaty with Panama (April 11, 1991, U.S.-Pan., S. Treaty Doc. No. 102–15 (1991)) received Senate advice and consent. 141 CONG. REC. D609 (May 16, 1995); *see* 3.a.(2) below. On July 17, 1996, Jamison S. Borek, Deputy Legal Adviser, U.S. Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, appeared before the SFRC in support of twelve law enforcement treaties, including five bilateral mutual legal assistance treaties. A sixth MLAT, with Nigeria, was referred to the SFRC, but was not considered at that time.

The five mutual legal assistance treaties were with Austria (Feb. 23, 1995, U.S.-Aus., S. Treaty Doc. No. 104 –21 (1995)), Hungary (Dec. 1, 1994, U.S.-Hung., S. Treaty Doc. No. 104–20 (1995)), Republic of Korea, with related exchange of notes (Nov. 23, 1993, U.S.-S. Korea, S. Treaty Doc. No. 104–1 (1995)), Philippines (Nov. 13, 1994, U.S.-Phil., S. Treaty Doc. No. 104–18 (1995)), and United Kingdom, with related exchange of notes (Jan. 6, 1994, U.S.-U.K., S. Treaty Doc. No. 104–2 (1995)). The five treaties received advice and consent to ratification by the Senate on August 2, 1996. 142 CONG. REC. S9661–62 (daily ed. Aug. 2, 1996).

Senator Jesse Helms, Chairman of the Senate Committee on Foreign Relations, submitted a number of questions to the Departments of State and Justice in connection with the hearings on the above-mentioned treaties, including the exchange provided below.

See also 91 Am. J. Int'l L. 93, 100–104 (1997).

---

* * * *

Question:
Defendants do not have access to information through MLAT procedures. This disparity between prosecution and defendant in access to MLAT procedures has led some to question the fairness and even the constitutionality of MLATs denying individual rights. At the core of the legal objections is the belief that it is improper in our adversarial system of justice to deny defendants compulsory process and other effective procedures from compelling evidence abroad if those procedures are available to the prosecution. Are there any outstanding legal challenges to existing MLATs? What is the position of the Justice Department regarding the constitutionality of MLATs? Are there any efforts to provide access to information under consideration in current negotiations?
Answer:
There are no legal challenges to any of our existing MLATs. It is the position of the Department of Justice that the MLATs are clearly and unquestionably constitutional. In 1992, Michael Abbell, then-counsel to some members of the Cali drug cartel, did suggest to the Committee that MLATs should permit requests by private persons such as defendants in criminal cases. To our knowledge, no court has adopted the legal reasoning at the core of that argument.

The Department of Justice believes that the MLATs before the Committee strike the right balance between the needs of law enforcement and the interests of the defense. The MLATs were intended to be law enforcement tools, and were never intended to provide benefits to the defense bar. It is not "improper" for MLATs to provide assistance for prosecutors and investigators, not defense counsel, any more than it would be improper for the FBI to conduct investigations for prosecutors and not for defendants. The Government has the job of assembling evidence to prove guilt beyond a reasonable doubt, so it must have the tools to do so. The defense does not have the same job, and therefore does not need the same tools.

None of the MLATs before the Senate provides U.S. officials with compulsory process abroad. None of the treaties require the treaty partner to compel its citizens to come to the United States, and none permit any foreign Government to compel our citizens

to go abroad. Rather, the MLATs oblige each country to assist the other to the extent permitted by their laws, and provide a framework for that assistance. Since the Government does not obtain compulsory process under MLATs, there is nothing the defense is being denied.

The MLATs do not deprive criminal defendants of any rights they currently possess to seek evidence abroad by letters rogatory or other means. The MLATs were designed to provide solutions to problems that our prosecutors encountered in getting evidence from abroad. There is no reason to require that MLATs be made available to defendants, since many of the drawbacks encountered by prosecutors in employing letters rogatory had largely to do with obtaining evidence before indictment, and criminal defendants never had those problems.

Finally, it should be remembered that the defendant frequently has far greater access to evidence abroad than does the Government, since it is the defendant who chose to utilize foreign institutions in the first place. For example, the Government often needs MLATs to gain access to copies of a defendant's foreign bank records; in such cases, the defendant already has copies of the records, or can easily obtain them simply by contacting the bank.

* * * *

On September 15, 1998, Jamison S. Borek, Deputy Legal Adviser, U.S. Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, testified in support of 38 treaties concerning international law enforcement cooperation, including nineteen bilateral mutual legal assistance treaties. The MLATs were those with Antigua and Barbuda (Oct. 31, 1996, U.S.-Ant. & Barb., S. Treaty Doc. No. 105–24 (1997)), Australia (Apr. 30, 1997, U.S.-Aus., S. Treaty Doc. No. 105–27 (1997)), Barbados (Feb. 28, 1996, Barb., S. Treaty Doc. No. 105–23 (1997)), Brazil (Oct. 14, 1997, U.S.-Braz., S. Treaty Doc. No. 105–42 (1998)), Czech Republic (Feb. 4, 1998, U.S.-Czech Rep., S. Treaty Doc. No. 105–47 (1998)), Dominica (Oct. 10, 1996, U.S.-Dominica, S. Treaty Doc. No. 105–24 (1997)), Estonia (Apr. 2, 1998, U.S.-Est., S. Treaty Doc. No. 105–52

(1998)), Grenada (May 30, 1996, U.S.-Gren., S. Treaty Doc. No. 105–24 (1997)), Hong Kong (Apr. 15, 1997, U.S.-H.K., S. Treaty Doc. No. 105–6 (1997)), Israel (Jan. 26, 1998, U.S.-Isr., S. Treaty Doc. No. 105–40 (1998)), Latvia (June 13, 1997, U.S.-Lat., S. Treaty Doc. No. 105–34 (1998)), Lithuania (Jan. 16, 1998, U.S.-Lith., S. Treaty Doc. No. 105–41 (1998)), Luxembourg, (Mar. 13, 1997, U.S.-Lux., S. Treaty Doc. No. 105–11 (1997)) Poland (July 10, 1996, U.S.-Pol., S. Treaty Doc. No. 105–12 (1997)), St. Kitts and Nevis (Sept. 18, 1997, U.S.-St. Kitts & Nevis, S. Treaty Doc. No. 105–37 (1998)), St. Lucia (Apr. 18, 1996, U.S.-St. Lucia, S. Treaty Doc. No. 105–24 (1997)), St. Vincent and the Grenadines (Jan. 8, 1998, U.S.-St. Vincent, S. Treaty Doc. No. 105–44 (1998)), Trinidad and Tobago (Mar. 4, 1996, U.S.-Trin. & Tobago, S. Treaty Doc. No. 105–22 (1997)), and Venezuela (Oct. 12, 1997, U.S.-Venez., S. Treaty Doc. No. 105–38 (1998)). The treaties received advice and consent from the Senate on October 21, 1998. 144 CONG. REC. S12,974–79 (daily ed. Oct. 21, 1998). In his testimony, Mr. Richard provided an overview of the function of MLATs, set forth below. *See also* 92 Am. J. Int'l L. 44 (1998).

The full text of the testimony is available in S. Hrg. Doc. No. 105–730 (1998).

---

* * * *

. . . Mutual legal assistance treaties are intended to enable law enforcement to obtain evidence and information abroad in a form admissible in our courts. MLATs supplement existing arrangements on international exchange of information between police agencies, such as law enforcement liaison relationships, or Interpol. MLATs perform much the same function as letters rogatory in international cooperation.

A letter rogatory is a written request from a court in one country to a court in another country asking the receiving court to aid the requesting court, as a matter of comity, in obtaining evidence located beyond the requesting court's reach. Since we have too few MLATs in force, we use letters rogatory to secure

evidence from foreign countries where no MLAT or executive agreement on cooperation is in force. The MLAT provisions build on the authority given to us by Congress in 18 U.S.C. section 1782 to assist foreign countries in the gathering of evidence in the U.S.

A comparison of the way in which letters rogatory requests are made with the MLAT process illustrates the law enforcement benefits of the treaties before the Committee. In the case of letters rogatory, a prosecutor, such as an Assistant United States Attorney, must apply to the court in the U.S. for the issuance of letters rogatory. Once the letter rogatory is signed by the court, it is transmitted through diplomatic channels to the foreign country, traveling to the Department of Justice in Washington, to the State Department, to the appropriate U.S. Embassy abroad, to the Ministry of Foreign Affairs of the foreign country, then to its Ministry of Justice, and finally to the foreign court. Once the foreign court receives the letter rogatory, that court will execute it, in accordance with the foreign country's rules of evidence and procedure. The evidence obtained through the process is transmitted back to United States through the same torturous route used to present the request.

The MLAT request process is much more efficient for law enforcement purposes. Each of the MLATs establishes a Central Authority for the processing of requests, and the Attorney General is the Central Authority for the United States. By regulation, the Attorney General has delegated her duties to the Criminal Division's Office of International Affairs. The prosecutor seeking evidence under an MLAT works directly with the Office of International Affairs in preparing the request, and the request is signed by the Director of that office. The signed MLAT request is sent directly from the U.S. Central Authority to the Central Authority of the MLAT partner, which will either execute the request immediately, or refer it to the appropriate court or law enforcement agency for execution. Once the requested evidence is obtained, it is returned to the U.S. by the same route. The more streamlined handling of requests is but one reason why MLATs are superior to letters rogatory in obtaining evidence abroad. There are several other reasons.

First, an MLAT obligates each country, consistent with the terms of the treaty, to provide evidence or other assistance. Letters rogatory, on the other hand, are executed solely as a matter of comity, and often completely at the discretion of the requested country's court. Thus, predictability of the response is of critical importance in planning for an upcoming prosecution.

Second, an MLAT, either by itself or together with implementing legislation, can provide a means to overcome the bank secrecy and business confidentiality laws that so often frustrate effective law enforcement. This is especially helpful in the investigation of financial fraud, money laundering, and drug trafficking. Too often, letters rogatory are of limited utility to us because the foreign country's laws on letters rogatory do not permit piercing bank secrecy. For example, the MLAT with the Cayman Islands has been especially valuable to law enforcement in part because that MLAT, coupled with the Cayman Islands' implementing legislation for it, clearly provides the terms upon which bank and business confidentiality must give way to legitimate law enforcement needs.

Third, an MLAT provides an opportunity to devise procedures that permit us to obtain evidence in a form that will be admissible in our courts. The rules of evidence used in our courts may be unheard of in foreign countries, especially countries that have a civil law rather than common law legal system. MLAT negotiations permit the establishment of a procedural framework for ensuring that the evidence produced for us comports with our evidentiary requirements, such as the use of sworn certificates to authenticate bank records in accordance with Title 18, United States Code, Section 3505, or the examining and cross-examining of witnesses in depositions abroad.

(2) Conditions on ratification

In providing advice and consent to the U.S.-Panama MLAT on May 16, 1995, the Senate included a proviso addressing government involvement in narcotics production or distribution:

> . . . The Senate's advice and consent is subject to the following . . . proviso[], which shall not be included in the instrument of ratification to be signed by the President: . . . Pursuant to the rights of the United States under this Treaty to deny requests which prejudice its essential public policy or interest, the United States shall deny a request for assistance when the Central Authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this Treaty is engaged in or facilitates the production or distribution of illegal drugs.

141 CONG. REC. S 6764 (daily ed. May 16, 1995).

On August 2, 1996, the Senate adopted resolutions of advice and consent to ratification of five mutual legal assistance treaties then pending (with Korea, the United Kingdom, Austria, Hungary, and the Philippines), subject to a broader proviso, providing:

> . . . Pursuant to the rights of the United States under this Treaty to deny requests which prejudice its essential public policy or interest, the United States shall deny a request for assistance when the Central Authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this Treaty is engaged in a felony, including the facilitation of the production or distribution of illegal drugs.

142 CONG. REC. S9661–62 (daily ed. Aug. 2, 1996). *See also* 91 Am. J. Int'l L. 93 (1997). Similar language was attached to MLATs thereafter.

Conditions placed on advice and consent to ratification of MLATs concerning cooperation with the International Criminal Court beginning in 1998 are discussed in C.2. below.

B. INTERNATIONAL CRIMES

1. Acts of Terrorism

a. Libya terrorist case: Pan Am 103

On December 21, 1988, Pan Am Flight 103 exploded over the town of Lockerbie, Scotland, killing 270 people. In 1991 the United States and the United Kingdom both indicted two Libyans, Abdel Basset al-Megrahi and Lamen Khalifa Fhiman, on charges of placing a bomb on the aircraft. In the United States a grand jury of the U.S. District Court for the District of Columbia indicted the two for committing the federal crimes of (i) criminal conspiracy to destroy Pan Am 103 and murder those aboard; (ii) sabotage of a U.S.-registered aircraft operating in foreign commerce; (iii) destruction of a U.S.-registered aircraft operating in foreign commerce; (iv) malicious destruction of property used in or affecting interstate or foreign commerce, causing deaths; and (v) terrorist murder of U.S. nationals outside the United States. 18 U.S.C. §§ 32, 371, 844, 2332.

On November 27, 1991, the Governments of the United Kingdom and the United States issued virtually identical statements declaring that Libya must surrender the indicted individuals for trial, accept responsibility for the actions of Libyan officials, provide all relevant evidence and information, and pay appropriate compensation. For the U.S. statement, see Letter dated December 20, 1991, from the Permanent Representative of the United States of America to the Secretary-General, U.N. Doc. A/46/827-S/23308 (1991).

On December 20, 1991, France called for Libya to produce all material evidence in its possession and to facilitate access to documents useful in the judicial inquiry in connection with a bomb that destroyed Union de Transports Aeriens Flight 772 ("UTA 772") while in the air over Niger on September 19, 1989. The flight was carrying 170 passengers and crew, all of whom were killed, including seven U.S. citizens. Letter dated December 20, 1991, from the Permanent

Representative of France to the Secretary-General, U.N. Doc. A/46/825-S/23306 (1991).

Also in December 1991, the United States, France and the United Kingdom issued a joint declaration on terrorism, reaffirming their "complete condemnation of terrorism in all its forms" and denouncing "any complicity of States in terrorist acts." Noting that they had presented specific demands in connection with the bombings of Pan Am 103 and UTA 772, the declaration concluded:

> [The three States] require that Libya comply with all these demands, and in addition, that Libya commit itself concretely and definitively to cease all forms of terrorist actions and all assistance to terrorist groups. Libya must promptly, by concrete actions, prove its renunciation of terrorism.

Letter dated December 20, 1991 from the Permanent Representatives of France, the United Kingdom and the United States of America to the Secretary-General, U.N. Doc. A/426/828-S/23309 (1991).

(1) UN Security Council resolutions

On January 21, 1992, the UN Security Council unanimously adopted Resolution 731, which strongly deplored Libya's failure to respond effectively to the British, U.S., and French requests. U.N. Doc. S/RES/731 (1992). In the resolution, the Security Council urged Libya to provide a "full and effective response to those requests so as to contribute to the elimination of international terrorism." Ambassador Pickering, U.S. Representative to the United Nations, stated: "The Council was faced in this case with clear implications of Government involvement in terrorism as well as with the absence of an independent judiciary in the implicated State."

When Libya failed to comply with Resolution 731, the United States and others began to discuss the possibility of further Security Council action. At the same time, Libya initiated proceedings in the International Court of Justice

("ICJ") against both the United States and the United Kingdom on March 3, 1992, discussed below.

On March 31, 1992, acting under Chapter VII of the UN Charter, the Security Council adopted Resolution 748, in which it decided that "the Libyan Government must now comply without any further delay with paragraph 3 of Resolution 731 (1992) regarding the requests" by the United States, the United Kingdom and France. U.N. Doc. S/RES/748 (1992). It also decided that "the Libyan Government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups," and take concrete actions to demonstrate its renunciation of terrorism. Resolution 748 also required states to impose certain sanctions. *See* Chapter 16.A.4.c.

On August 13, 1993, the three governments issued a declaration on Libyan terrorism. It stated in part:

> The United States, the United Kingdom and France . . . in the interests of giving Libya one last chance, have asked the Secretary-General of the United Nations to look into the matter and take the necessary steps to achieve the full implementation by the Libyan Government of Resolution 731 (1992) within 40 to 45 days.
>
> If, by October first, the Libyan Government has failed to comply with Resolutions 731 (1992) and 748 (1992), including the transfer to United States or United Kingdom jurisdiction of the Lockerbie suspects and compliance with the requests of French justice on UTA flight 772, we will table a resolution strengthening the sanctions in key oil-related financial and technological areas.
>
> Once more, our three Governments reiterate that they have no hidden agenda and that, on the contrary, upon full implementation by Libya of Security Council resolutions 731 (1992) and 748 (1992), the conditions would be met for the lifting of sanctions by the Security Council.

Letter dated August 13, 1993, from the Representatives of France, the United Kingdom and the United States of

America to the Secretary-General, U.N. Doc. A/48/314-S/26304 (1993).

In the absence of compliance by Libya, on December 1, 1993, the Security Council adopted Resolution 883, *see* Chapter 16.A.4.c. Resolution 883 included a limited assets freeze, an embargo on aircraft or aircraft components, controls on oil production equipment, and language closing certain gaps in the civil aviation sanctions imposed by Resolution 748. Through operative paragraph 16 of the Resolution, the Council expressed readiness to review the sanctions against Libya "with a view to suspending them immediately if the Secretary-General reports to the Council that the Libyan Government has ensured the appearance of those charged with the bombing of Pan Am 103 for trial before the appropriate United Kingdom or United States court and has satisfied the French judicial authorities with respect to the bombing of UTA 772, and with a view to lifting them immediately when Libya complies fully with the requests and decisions in Resolutions 731 (1992) and 748 (1992). . . ."

(2) International Court of Justice

As noted above, on March 3, 1992, Libya filed cases against the United States and the United Kingdom in the International Court of Justice, alleging violations of the Montreal Convention, including failure to turn over evidence against the two accused terrorists to Libya so that it could try them. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie *(Libya v. U.S.)*, 1992 I.C.J. 89 (Mar. 3); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie *(Libya v. U.K.)*, 1992 I.C.J. 88 (Mar. 3).

(i) Request for provisional measures

On April 14, 1992, the Court denied Libya's request for provisional measures. *Libya v. United States*, 1992 I.C.J. 89

(Order of Apr. 14). Excerpts below from the Court's order describe Libya's application to the Court, its request for provisional measures, views of the United States, and the Court's conclusion.

---

* * * *

7. Whereas Libya, in its Application, asks the Court to adjudge and declare:

"(a) that Libya has fully complied with all of its obligations under the Montreal Convention;
(b) that the United States has breached, and is continuing to breach, its legal obligations to Libya under Articles 5, (2), 5 (3), 7, 8 (2) and 11 of the Montreal Convention; and
(c) that the United States is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya";

8. Whereas, later on 3 March 1992, the day on which the Application was filed, the Libyan Government also filed an "urgent request that the Court indicate provisional measures which ought to be taken promptly to preserve the rights of Libya", referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court; and whereas in that request Libya, referring to Article 74, paragraph 4, of the Rules of Court, also requested the President, pending the meeting of the Court, to exercise the power conferred on him by that provision to call upon the Parties to act in such a way as to enable any Order the Court might make on Libya's request for provisional measures to have its appropriate effects;

* * * *

14. Whereas, by a letter of 6 March 1992, a copy of which was transmitted to Libya by the Registrar, the Legal Adviser of

the United States Department of State, referring to the specific request made by Libya under Article 74, paragraph 4, of the Rules of Court, in its request for the indication of provisional measures, stated inter alia that

> taking into account both the absence of any concrete showing of urgency relating to the request and developments in the ongoing action by the Security Council and the Secretary-General in this matter . . . the action requested by Libya . . . is unnecessary and could be misconstrued;
>
> * * * *
>
> 35. Whereas, by a letter of 2 April 1992, a copy of which was transmitted to Libya by the Registrar, the Agent of the United States drew the Court's attention to the adoption of Security Council resolution 748 (1992) the text of which he enclosed; and whereas, in that letter, the Agent stated:
>
> That resolution, adopted pursuant to Chapter VII of the United Nations Charter, 'decides that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) of 21 January 1992 regarding the requests contained in documents S/23306, S/23308 and S/23309'. It will be recalled that the referenced requests include the request that Libya surrender the two Libyan suspects in the bombing of Pan Am flight 103 to the United States or to the United Kingdom. For this additional reason, the United States maintains its submission of 28 March 1992 that the request of the Government of the Great Socialist People's Libyan Arab Jamahiriya for the indication of provisional measures of protection should be denied, and that no such measures should be indicated;
>
> * * * *
>
> 40. Whereas in its observations on Security Council resolution 748 (1992), presented in response to the Court's invitation, the United States observes that that resolution was adopted under

Chapter VII rather than Chapter VI of the Charter and was framed as a "decision" and contended that, given that binding decision, no object would be served by provisional measures; that, irrespective of the right claimed by Libya under the Montreal Convention, Libya has a Charter-based duty to accept and carry out the decisions in the resolution, and other States have a Charter-based duty to seek Libya's compliance; that any indication of provisional measures would run a serious risk of conflicting with the work of the Security Council; that the Council had rejected (inter alia) Libya's contention that the matter should be addressed on the basis of the right claimed by Libya under the Montreal Convention, which Libya asks the Court to protect through provisional measures; and that the Court should therefore decline the request;

41. Whereas the Court, in the context of the present proceedings on a request for provisional measures, has in accordance with Article 41 of the Statute, to consider the circumstances drawn to its attention as requiring the indication of such measures, but cannot make definitive findings either of fact or of law on the issues relating to the merits, and the right of the Parties to contest such issues at the stage of the merits must remain unaffected by the Court's decision;

42. Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;

43. Whereas the Court, while thus not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures;

44. Whereas, furthermore, an indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United States by virtue of Security Council resolution 748 (1992);

* * * *

46. [The Court] . . . [f]inds that the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

(ii) Preliminary objections

In June 1995 the United States and the United Kingdom filed preliminary objections in the cases pending against them. The United States argued that the Court lacked jurisdiction under the Montreal Convention, contending that it was not at issue in the case; that the Libyan Application was inadmissible because its claims were superseded by Security Council resolutions; that the intervening Security Council resolutions had rendered the Libyan claims moot; and, in the alternative, that the Court should resolve the case in substance at the preliminary stage and dismiss Libya's claims.

Oral proceedings on these preliminary objections were held from October 13–22, 1997. The United States was represented by David R. Andrews, Legal Adviser of the U.S. Department of State, Michael J. Matheson, Principal Deputy Legal Adviser, John R. Crook, Assistant Legal Adviser, Sean D. Murphy, Counselor for Legal Affairs, U.S. Embassy, The Hague; Oscar Schachter, Professor, Columbia University School of Law, and Elisabeth Zoller, Professor, University of Paris II. Excerpts below provide the views of the United States on the inapplicability of the Montreal Convention and on the role of the Court in the circumstances of this case, involving binding Security Council resolutions under chapter VII of the UN Charter.

On February 27, 1998, the Court rejected the preliminary objections. *See Libya v. United States*, 1998 I.C.J. 9 (Judgment of Feb. 27, 1998). The Court found that it had jurisdiction,

that the Application was admissible and that the objection as to mootness did not, "in the circumstances of the case, have an exclusively preliminary character." As to the U.S. request that it resolve the case in substance now "by deciding, as a preliminary matter, that the relief sought by Libya is precluded," the Court concluded that the United States, "had made a procedural choice the effect of which, according to the express terms of Article 79, paragraph 3, is to suspend the proceedings on the merits" and that the Court "cannot therefore uphold the claim of the United States."

Following actions taken by Libya including surrender of the two accused terrorists for trial by a court in the Netherlands and settlement of claims by individuals against Libya discussed in (3) below, the case was removed from the list of the Court on September 10, 2003, by agreement of the parties. *See Digest 2003* at 166. All public documents connected with the case, including transcripts of the oral pleadings, are available at *www.icj-cij.org*. Because the Court did not reach the merits of the case, the written pleadings are not available.

Excerpts below from the oral proceedings of October 1997 provide the views of the United States.

---

* * * *

Mr. Andrews:

* * * *

1.3. . . . [This case] poses a fundamental challenge to the authority of the United Nations Security Council in maintaining international peace and security. In the origins of the Pan Am 103 murders, the Council identified a threat to peace and security. It specified measures that Libya, the United States, and other countries are obliged to take in response to that threat. Libya comes before this Court contending that actions taken by the United States violate its rights under the Montreal Convention, a treaty designed to bring aircraft terrorists to justice. As we will show in the course of

our presentations, Libya's claims are nothing more than collateral attacks on the decisions taken by the Security Council in its efforts to maintain international peace and security. It is our view that the Court does not have jurisdiction over such attacks. This Court should decline to accept Libya's claims in any event because the claims are inadmissible, and have been rendered moot and without practical purpose by the decisions of the Council. Even if the Court believes it should exercise jurisdiction, it should dismiss the Libyan claims in substance on the basis of the legal effect of the Council's decisions.

* * * *

1.16. First, the Court does not have jurisdiction to entertain these claims. The Court only has jurisdiction over a dispute involving "the interpretation or application" of the Montreal Convention. Libya, however, does not raise any valid claim under the Montreal Convention. Even if Libya could make such a claim, any such claims are superseded by the relevant decisions of the Security Council under Chapter VII of the United Nations Charter, which impose different obligations. Thus, Libya's claims can be seen for what they really are—a challenge to the lawfulness of the Council's actions under the Charter. That is not a dispute with the United States over the interpretation or application of the Montreal Convention.

1.17. Second, even assuming the Court had jurisdiction under the Montreal Convention, the Court should dismiss Libya's claims because they are inadmissible. Acceptance of these claims would require the Court to overturn binding decisions of the Security Council that were adopted in the exercise of the Council's Chapter VII functions. We believe that the Council's decisions were plainly lawful and that the proper role for the Court must be to deny Libya's claims for relief.

1.18. Third, even if the Court had jurisdiction to consider these claims and considered them to be admissible, the Court should decline to grant the relief requested by Libya because its claims have been rendered moot by the Council's resolutions. Under the Charter, the obligations created by the Council's decisions under Chapter VII take precedence over inconsistent obligations

that might otherwise apply. Ruling on Libya's claims under the Montreal Convention therefore would have no practical effect and serve no valid purpose, and Libya's claims therefore must be dismissed.

1.19. Fourth, should the Court decide that it has and should exercise jurisdiction, and that Libya's claims are admissible, it should resolve the case in substance at this preliminary objections stage. The Court should decide, as a preliminary matter, that the decisions of the Security Council preclude the relief sought by Libya. This case can be disposed of on this basis; there is, therefore, no justification for further proceedings on Libya's claims under the Montreal Convention.

* * * *

Mr. Murphy:

* * * *

2.4. . . . [T]he Montreal Convention is not the exclusive means by which one State may pursue criminal jurisdiction over a suspect located in another State, even when the two States are parties to the Montreal Convention. The Montreal Convention was intended to *increase* the opportunities for bringing offenders to justice, but was *not* intended to *foreclose* other opportunities outside the Convention. As such, pursuit of those other opportunities by the United States cannot be said to violate any rights of Libya under the Montreal Convention and, concomitantly, cannot give rise to a dispute cognizant under Article 14.

2.5. My second proposition is that, whether or not the Montreal Convention is the exclusive source of law in this area, none of the provisions of the Montreal Convention identified by Libya prohibit, expressly or implicitly, a party from pursuing through peaceful, diplomatic means the surrender for trial of an offender. . . . Consequently, since none of the actions of the United States identified by Libya can reasonably be regarded as potentially violating the Montreal Convention, there is no basis for the Court's jurisdiction in this case.

* * * *

2.21. . . . [T]he United States has not, at any time, sought the surrender for trial of the two suspects by invoking the Montreal Convention. Rather, the United States has sought to exercise its own national criminal jurisdiction without reference to the Montreal Convention, as Article 5, paragraph 3, of the Convention makes clear it is permitted to do. The United States has criminal jurisdiction to prosecute the two Libyans implicated in the bombing of Pan Am 103, based on the US nationality of the aircraft and on the US nationality of many of the passengers and crew. In the exercise of that jurisdiction, the US is fully empowered to seek custody of these alleged offenders. The Montreal Convention, by its terms, expressly states that such efforts are *not* excluded.

2.22. Seen in this light, the core issue in this case does not concern Libya's rights under the Montreal Convention; it concerns the right of the United States under general principles of international law to pursue a diplomatic initiative for the surrender for trial of the suspects. Like any other State, the United States has sovereign rights to conduct diplomatic relations, and, more specifically, to seek the surrender for trial of persons alleged to have committed certain crimes against US persons and aircraft.

2.23. The United States also has the right under the United Nations Charter to bring situations which might lead to international friction to the attention of the Security Council and of the General Assembly (United Nations Charter, Art. 35, para. 1). For years prior to and after the adoption of the Montreal Convention, States have referred to the United Nations situations concerning terrorism against civil aviation, as well as international terrorism generally (see US Preliminary Objections, Chap. III). In light of that history, it is simply untenable for Libya to argue that membership in the Montreal Convention precludes referral of a situation of aviation terrorism to the United Nations, or indeed to any other fora, simply because a suspect has turned up in another member State. Were the Court to accept this argument, it could have severe consequences for the ability of States to refer situations to the United Nations concerning not just aviation terrorism, but other forms of terrorism, war crimes, human rights, and drug trafficking as well, since in all of these areas there are treaties with

"prosecute or extradite" provisions similar to that of the Montreal Convention. . . .

* * * *

Mr. Crook:

* * * *

[Following a discussion of the terms of Security Council Resolutions 731, 748 and 883]

3.31. . . . The superiority of obligations under the Charter over obligations under subsequent treaties is clear in international law. This is reflected in Article 30, paragraph 1, of the Vienna Convention on the Law of Treaties, which states the rule that the treaty later in time generally prevails. However, this rule is made expressly "[s]ubject to Article 103 of the Charter of the United Nations". The Montreal Convention does not override Article 103 of the Charter.

3.32. Libya's contrary position would fundamentally weaken the Charter. Libya's claim would allow States to "opt out" of Chapter VII, or out of any other inconvenient part of the Charter, by concluding inconsistent new treaties. This is a dangerous and wholly unsupported doctrine. It should not be accepted by the Court.

3.33. Libya also contends that it need not comply with the Security Council's Chapter VII resolutions because those resolutions are not based on the Charter or somehow go beyond the scope of the Council's powers under the Charter (Observations and Submissions at para. 4.2). This argument also fails. The Charter gives the Members of the Security Council the responsibility for determining which measures are required to maintain or restore international peace and security. Once the Council has made a decision under Chapter VII, an individual Member of the United Nations cannot refuse to comply because it claims to disagree with the validity of that decision.

3.34. As with the previous argument, Libya's position here is one that could lead to grave damage to the legal order established by the Charter. But, in any case, as I shall show in the last part of

my presentation, the measures taken by the Council were quite reasonable and appropriate in relation to the threat to peace and security associated with the bombings of Pan Am 103 and UTA 772.

3.35. It has also been suggested that Article 103 of the Charter, which speaks of obligations, may not extend as well to *rights* under a treaty or under general international law. Thus, it is appropriate to consider whether the rights of a State under a treaty or general international law can be superseded by action of the Security Council.

3.36. The obligation to comply with Security Council decisions applies fully both to decisions affecting the *rights* and to those affecting the *obligations* of States. The relevant provisions of the Charter are phrased broadly and are intended to be broad in effect. They must be in order to assure the effectiveness of the régime of Chapter VII and in interpreting this aspect of the Charter, this Court has not recognized any distinction between "rights" and "obligations". Instead, the Court has stressed the breadth and importance of these Charter provisions (see, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 440). The scholarly literature has also stressed the breadth of States' obligations to carry out the decisions of the Council. It does not support the view that this duty does not apply to "rights" (see, e.g., *The Charter of the United Nations. A Commentary* (B. Simma, ed.), pp. 1120 *et seq*.).

3.37. Moreover, this suggested limitation creates serious difficulties. Suppose a bilateral treaty gives the nationals of each party the right to invest in the territory of the other. Surely the Charter gives the Security Council the power in a Chapter VII situation to require that one party prohibit investments by its nationals in the territory of the other, notwithstanding these treaty provisions.

3.38. The explanation for this is to be found, not just in Article 103, but also in Articles 25 and 48. Their clear language requires

States to carry out the decisions of the Security Council. If a State must forego the exercise of some treaty right in order to carry out the binding decisions of the Council, that is simply what the Charter requires. Embargoes, bans on the sale of arms, other compulsory measures adopted by the Council often prevent States from exercising rights under treaties or under general international law. A State may well be prevented by Council action from exercising rights under treaties, such as the right to carry on bilateral air traffic. But that is what the clear language of the Charter requires.

3.39. This Court summarized the situation aptly in its Advisory Opinion in the *Namibia* case:

> "[W]hen the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision . . . To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116.)

The Court Has Recognized the Effect of the Security Council's Resolutions Under Articles 25 and 103.

3.40. Mr. President, the Court has recognized and given effect to these legal principles regarding Articles 25 and 103 of the Charter. At the Interim Measures stage in 1992, the Court decided that it could not then finally decide the legal effect of resolution 748. Nevertheless, the Court's Order clearly recognized the legal authority of the rules that it established, and stressed States' duties to comply with them. This is clear in paragraph 42 of the Court's Order:

> "Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 45 of the Charter; whereas the Court, at the stage of proceedings on provisional measures, considers that

> prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, obligations of the Parties in that respect prevail over their obligations under any international agreement, including the Montreal Convention."

(*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*, Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 126.)

The Court in 1992 thus concluded that prima facie the obligations imposed by resolution 748 governed the case. Libya has shown no reason to arrive at a different conclusion now, when the matter can be finally decided by the Court. The Court should now decide definitively that the obligations imposed by resolutions 748 and 883 govern the disposition of this case. Mr. President, I will now turn to the third main head of my argument, to show how these resolutions were validly adopted by the Council.

* * * *

The Council Is Not Precluded from Requiring Transfer of Persons for Trial.

3.71. Libya contends that the "principles of a sound administration of Justice render it inappropriate or even *ultra vires* for the Council to adopt resolutions 748 and 883 (e.g., Libyan Observations and Submissions, paras. 4.16, *et seq.*)

3.72. The contention seems to be that the Council cannot act in matters that have a legal aspect, and in particular, it cannot require the transfer of persons for trial. This cannot stand. The Charter does not place such limits on the Council's powers. Judge Bedjaoui, while questioning the actions of the Council in other respects, confirms that the Council's demand that these individuals be transferred for trial "did not in itself, of course, lie beyond the Council's powers" (M. Bedjaoui, *The New World Order and the Security Council*, p. 70). The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has also upheld the power of the Council to require the transfer of persons for trial in the *Tadic* case.

3.73. Libya cites the principle of *aut dedere aut judicare*, that a State may elect whether to prosecute or extradite the alleged offender. It also urges that general international law leaves Libya sole discretion to decide whether to transfer Libyan nationals for prosecution abroad. Libya sometimes contends as well that its constitution precludes the extradition of Libyan nationals.

3.74. I have previously answered Libya's broad claim that the Security Council cannot affect or alter the international legal rights and obligations of States. The Council clearly has extensive power to do so. Many of the forms of mandatory Council action listed in Article 41 of the Charter, such as the interruption of economic relations or of sea, postal or other forms of communication, are likely to impair or supersede pre-existing rights under treaties, customary law, or national law. Nevertheless, there is no doubt that the Council can adopt such measures.

* * * *

Prof. Schachter:

* * * *

4.2. As Members of the Court have recognized, a central legal issue raised in this case concerns the relationship of the Security Council and the Court. The Court is faced with a challenge to binding decisions of the Security Council adopted pursuant to Chapter VII of the United Nations Charter. Underlying this challenge is the Libyan contention that the Court in the exercise of its judicial power has the authority and responsibility to judge the legality of the Council's decision. My comments will be addressed mainly to this argument.

4.3. Let me say, first, that the United States recognizes that the United Nations Security Council is an organ whose powers are defined and limited by the Charter of the United Nations. The pertinent resolutions of the Security Council, in this case resolutions 748 and 883, were adopted under the general authority of the Council in Articles 24 and 25 and pursuant to the specific powers laid down in Chapter VII of the Charter, in particular Articles 39 and 41. Article 48 of the Charter also affirms that the actions required to carry out the decisions of the Council shall be taken

by all or some of the Members as the Council shall determine. Pursuant to these Articles, the Council has imposed binding obligations not only on Libya but on all other Members of the United Nations.

4.4. Such enforcement measures have the effect in many respects of depriving or curtailing the legal rights of the affected States, and most drastically the rights of the target State, Libya. When a State appeals to this Court to vindicate its legal rights as against the Council's sanctions, the juridical question, as Judge Shahabuddeen remarked, "results not from any collision between the competence of the Security Council and that of the Court" (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992*, *I.C.J. Reports 1992*, p. 141). Rather, he went on to say, it is more precisely and correctly a collision between rights that the State may have under treaties and the obligations imposed by the mandatory measures of the Council.

4.5. What then is the role of the Court, if it were properly seized of a case under a treaty, faced with a challenge to the validity of the mandatory Council decision? Libya has argued that in that case the Court has the intrinsic authority and responsibility to exercise its judicial function as laid down in the Charter and its Statute. The argument is important and we do not take it lightly. The United States places a high value on the role of the judiciary in international disputes and in particular on the contribution of this Court as a principal organ of the United Nations to the understanding of the Charter and the commitments of member States. We agree with Judge Lachs' much-quoted comment that the Court is the "guardian of legality", though we would add, not the sole guardian. The member States and the other principal organs are all bound to respect and conform to the Charter and international law.

4.6. The issue in the present case cannot be resolved simply by referring to the pre-eminent role of the Court in exercising its judicial function. The challenge by Libya to the Security Council calls into question the basic constitutional structure of the United Nations and the understanding of member States as to powers delegated to the organs and the manner of their application. True,

this Court has recognized in one of its first cases that the "political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment" (*Conditions of Admission of a State to Membership in the United Nations*, *Advisory Opinion*, *I.C.J. Reports 1948*, p. 64). But it has also recognized that the Court "[u]ndoubtedly . . . does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned" (*Legal Consequences of States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971*, p. 45). Both of these propositions have been generally accepted; we regard them as unimpeachable principles of United Nations law and relevant jurisprudence on the issues raised in this case.

4.7. The present case presents its own distinctive facts and juridical configuration. The Court is faced for the first time with a contentious case in which a State claims that a Council decision which has overridden its legal rights has violated the Charter and basic principles of international law. As we already indicated, we do not deny that the Council is obliged to comply with the Purposes and Principles of the Charter and to act within the limits of the powers granted to it.

4.8. However, the salient fact of juridical relevance is that the resolutions in question were decisions taken by the Council in the exercise of its supreme—and unique—responsibility under the Charter. The Council's determination that the situation constituted a threat to international peace and security and that enforcement measures were necessary did not rest on conjecture or theory. The acts of terrorism had cost hundreds of lives; intensive factual investigation pointed to the responsibility of agents of Libya. The worldwide reaction called for effective responses. It was reasonable—one might say, inevitable—that a majority of the Security Council would regard the situation as a threat to international peace and security and take action to ensure that those responsible for the attack would be punished. The Council took action under Chapter VII and imposed the sanctions that it alone was authorized to take.

* * * *

Mr. Andrews:

* * * *

7.8. I would only add that Libya's request to this Court—in effect, that the Court review and invalidate resolution 748—would be a step of fundamental significance that would, in our view, drastically alter the existing relationship between the Court and the Council, to the detriment of both institutions. If the Council's decisions under Chapter VII concerning the existence of a threat to peace, and the measures to be adopted to deal with such a threat, were subject to review and reversal by the Court, then the work of both the Court and the Council could be seriously compromised. In particular, the invalidation by the Court of the Council's decisions in the present case would have a dramatic and negative effect on the credibility of the Council's actions to deal with international terrorism.

7.9. The viability of the Council's decisions under Chapter VII rests in very large part on their acceptance by States as binding decisions of the United Nations which must be promptly complied with. For example, the effectiveness and security of United Nations peacekeeping missions depend heavily on the prompt acceptance by States of a legal duty to comply with the Council decisions on which they are based. The review and reversal of such a decision by any other body could seriously compromise the authoritative character of those decisions in general, and gravely complicate the resolution of the threat to the peace in the situation in question. In particular, review of such decisions by the Court could be expected (as in the present case) to take years, during which period the validity and effectiveness of Council decisions would hang in dangerous suspense. For this very reason, the framers of the Charter gave to the Council the responsibility for making the determinations called for in Chapter VII and rejected the notion of judicial review over those determinations.

* * * *

Prof. Zoller:

3.1. . . . What Libya complains of is that the Montreal Convention has been "set aside": what it requests the Court to do is to "set aside" the Security Council resolutions. In this game of discard, or *écarté*, each player chooses its law. . . .

3.2. Libya asks the Court to recognize that it has the right to choose its law. The reason it advances—since such an extravagant claim must be justified on one ground or another—is that these resolutions are vitiated by an *excès de pouvoir*. In this the Libyan approach is characterized by breathtaking effrontery. It is the first time that a State has come before the Court asking it to review the acts of the Security Council. . . . [The United States] has explained to the Court that, owing to the split between contentious and advisory jurisdiction, should the Court have jurisdiction to review the acts of the organs of the organization, such jurisdiction may only validly be exercised in an advisory framework. . . . [I]t is therefore not a question that "the Court remains silent." . . . It is a question of whether the Court chooses to speak in a context which is worthy of its functions as a tribunal and which gives it the assurance of being heard. Such a context, in the opinion of the Government of the United States, can only be that of advisory proceedings.

3.3. Libya made no reply to this argument. Or rather, it replied by rewording its Application, reducing its scope. For Libya, it is in no way a matter of "annulling" the decisions of the Security Council . . . it is a matter of "interpreting" them . . . ; it is merely a matter of "obtaining clarification". . . . In order to comply with Libya's request, the Court would have to do much more than interpret resolutions 731, 748 and 883 of the Security Council. It would have to set them aside. This is what Libya requests the Court to do. . . .

* * * *

(3) Agreement to try indicted Libyans in Scottish court in the Netherlands

On August 24, 1998, the United States and the United Kingdom proposed to the UN Secretary General that the two

Libyans be tried in the Netherlands by Scottish judges. In their letter to the Secretary General, the two countries explained the proposal as set forth below. Attached to the letter were the texts of an intended agreement between the governments of The Netherlands and the United Kingdom and legislation to enable a Scottish court to proceed in The Netherlands. U.N. Doc. S/1998/795 (1998). *See also* statement of Secretary of State Madeleine Albright at *http://secretary.state.gov/www/statements/1998/980824a.html.*

---

* * * *

3. . . . [I]n the interest of resolving this situation in a way which will allow justice to be done, our Governments are prepared, as an exceptional measure, to arrange for the two accused to be tried before a Scottish court sitting in the Netherlands. After close consultation with the Government of the Kingdom of the Netherlands, we are pleased to confirm that the Government of the Netherlands has agreed to facilitate arrangements for such a court. It would be a Scottish court and would follow normal Scots law and procedure in every respect, except for the replacement of the jury by a panel of three Scottish High Court judges. The Scottish rules of evidence and procedure, and all the guarantees of fair trial provided by the law of Scotland, would apply. Arrangements would be made for international observers to attend the trial. . . .

4. The two accused will have safe passage from the Libyan Arab Jamahiriya to the Netherlands for the purpose of the trial. While they are in the Netherlands for the purpose of the trial, we shall not seek their transfer to any jurisdiction other than the Scottish court sitting in the Netherlands. If found guilty, the two accused will serve their sentence in the United Kingdom. If acquitted, or in the event of the prosecution being discontinued by any process of law preventing any further trial under Scots law, the two accused will have safe passage back to the Libyan Arab Jamahiriya. Should other offences committed prior to arrival in the Netherlands come to light during the course of the trial, neither of the two accused nor any other person attending the court,

including witnesses, will be liable for arrest for such offences while in the Netherlands for the purpose of the trial.

5. The two accused will enjoy the protection afforded by Scottish law. They will be able to choose Scottish solicitors and advocates to represent them at all stages of the proceedings. The proceedings will be interpreted into Arabic in the same way as a trial held in Scotland. The accused will be given proper medical attention. If they wish, they can be visited in custody by the international observers. The trial would of course be held in public, adequate provision being made for the media.

6. Our two Governments are prepared to support a further Security Council resolution for the purpose of the initiative (which would also suspend sanctions upon the appearance of the two accused in the Netherlands for the purpose of trial before the Scottish court) and which would require all States to cooperate to that end. Once that resolution is adopted, the Government of the United Kingdom will legislate to enable a Scottish court to hold a trial in the Netherlands. . . .

7. This initiative represents a sincere attempt by the Governments of the United Kingdom and the United States to resolve this issue, and is an approach which has recently been endorsed by others, including the Organization of African Unity, the League of Arab States, the Movement of Non-Aligned States and the Organization of the Islamic Conference (S/1994/373, S/1995/834, S/1997/35, S/1997/273, S/1997/406, S/1997/497, S/1997/529). We are only willing to proceed in this exceptional way on the basis of the terms set out in the present letter (and its annexes), and provided that the Libyan Arab Jamahiriya cooperates fully by:

(a) Ensuring the timely appearance of the two accused in the Netherlands for trial before the Scottish court;
(b) Ensuring the production of evidence, including the presence of witnesses before the court;
(c) Complying fully with all the requirements of the Security Council resolutions.

8. We trust that the Libyan Arab Jamahiriya will respond promptly, positively and unequivocally by ensuring the timely

appearance of the two accused in the Netherlands for trial before the Scottish court. If it does not do so, our two Governments reserve the right to propose further sanctions at the time of the next Security Council review. They also reserve the right to withdraw this initiative.

* * * *

On August 27, 1998, the UN Security Council passed Resolution 1192, "welcom[ing] the initiative" of the United States and the United Kingdom, deciding that Libya "shall ensure the appearance in The Netherlands of the two accused for the purpose of trial . . . and . . . that any evidence or witnesses in Libya are, upon the request of the court, promptly made available" at the trial. The resolution also reaffirmed the sanctions imposed under resolutions 748 and 883 and decided that they would be "suspended immediately if the Secretary-General reports to the Council that the two accused have arrived in The Netherlands for the purpose of trial . . . and that the Libyan Government has satisfied the French judicial authorities with regard to the bombing of UTA 772." The sanctions could also be suspended if the two appeared before an appropriate U.S. or U.K. court.

Libya surrendered Abdel Basset al-Megrahi and Lamen Khalifa Fhiman on April 5, 1999. On April 6, after the two men had been transferred to Scottish authorities in The Netherlands, they were charged with conspiracy, murder, and contravention of the U.K. Aviation Security Act of 1982. On January 31, 2001, the Scottish court found Abdel Basset al-Megrahi guilty of murder and concluded that there was insufficient evidence to find Al-Amin Khalifa Fahima guilty. The verdict was upheld on appeal by the Scottish High Court of Justiciary, sitting in The Netherlands. 2002 S.C.C.R. 509. *See Digest 2001* at 98–99; *Digest 2002* at 111–12.

b. Antiterrorism and Effective Death Penalty Act

The Antiterrorism and Effective Death Penalty Act of 1996 was signed into law on April 24, 1996, Pub. L. No. 104–132,

110 Stat. 1214 (1996) ("AEDPA"). Among other things, the AEDPA amended the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, to provide an exception to immunity for lawsuits against terrorist states (§ 221) (*see* Chapter 10.A.3.d.); amended the Victims of Crime Act of 1984, 42 U.S.C. § 10601 et seq., to provide assistance and compensation to victims of terrorism (§§ 231–234); authorized the Secretary of State to designate groups as "foreign terrorist organizations," triggering sanctions (§ 302, discussed below); criminalized the provision of material support or resources to designated foreign terrorist organizations (§ 303); prohibited assistance to terrorist states (§§ 321–330, discussed below); provided for removal of alien terrorists and exclusion of members and representatives of terrorist organizations and denial of asylum to alien terrorists (§§ 401–433) (*see* Chapter 1.C.2.c.); implemented U.S. obligations under the Convention on the Marking of Plastic Explosives for the Purpose of Detection (§§ 601–607) (*see* B.1.d. below); amended various criminal law provisions to counter terrorism (§§ 701–732, discussed below); and provided that the twelve-mile territorial sea of the United States is within the special maritime and territorial jurisdiction of the United States for the purposes of the U.S. criminal code. (§ 901) (*see* Chapter 12.A.6.a.(2).)

(1) Designation of foreign terrorist organizations

Section 301(b) of the AEDPA provides that the purpose of Subtitle A of the act, "Prohibition on International Terrorist Fundraising," is

> to provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities.

To that end, section 302 amended the Immigration and Nationality Act ("INA") by adding a new § 219, 8 U.S.C. § 1189, to authorize the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate foreign organizations engaging in terrorist activity that threatens the security of U.S. nationals or the national security of the United States as foreign terrorist organizations ("FTOs"). 8 U.S.C. § 1189(a)(1). For purposes of the act, the term terrorist activity is as defined in § 212(a)(3)(B) of the INA (8 U.S.C. § 1182(a)(3)(B)). Section 219 also authorized the Secretary of the Treasury to require U.S. financial institutions possessing or controlling assets of any designated foreign terrorist organization to block all financial transactions involving the assets. 8 U.S.C. § 1189(a)(2)(C). Section 219 also sets forth procedures for making a designation, requires creation of an administrative record, and provides for judicial review by designated organizations.

Section 303 of the AEDPA, among other things, added a new § 2339B to the U.S. criminal code, criminalizing provision of "material support or resources" to a designated foreign terrorist organization by anyone "within the United States or subject to the jurisdiction of the United States." 18 U.S.C. § 2339B(a). Section 2339B(d) provides expressly that "[t]here is extraterritorial Federal jurisdiction over an offense under this section." Section 303 also requires financial institutions to block and report funds in its possession or control in which a foreign terrorist organization or its agent has an interest, when the financial institution becomes aware of such funds. 18 U.S.C. § 2339B(a)(2).

On October 2, 1997, Secretary of State Madeleine K. Albright designated 30 FTOs, effective October 8, 1997. 62 Fed. Reg. 52,650 (Oct. 8, 1997). On the same date, the Office of Foreign Assets Control, Department of the Treasury, issued implementing regulations, entitled "Foreign Terrorist Organizations Sanctions Regulations." 62 Fed. Reg. 52,493 (Oct. 8, 1997). Designations were effective for two years, 8 U.S.C. § 1189(a)(4)(A). On October 8, 1999, the Secretary of State

redesignated 27 FTOs. 64 Fed. Reg. 55,112 (Oct. 8, 1999). In that designation the Secretary also designated al Qaida for the first time.

In 1998 the U.S. District Court for the Central District of California denied a preliminary injunction against enforcement of § 2339B, sought on broad constitutional grounds. It did, however, preliminarily enjoin two provisions of the statute as unconstitutionally vague—those concerning provision of "training" and "personnel" to foreign terrorist groups. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998). The court of appeals affirmed, finding the statutory provision constitutional, with the possible exception of the two terms noted by the district court. 205 F.3d 1130 (9th Cir. 2000). In 1999 the U.S. Court of Appeals for the District of Columbia upheld the constitutionality of designations challenged by two FTOs, *People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999). For further discussion of foreign terrorist organizations, including litigation involving their designation, see *Digest 2001* at 109–17; *Digest 2002* at 85–94; *Digest 2003* at 175–79.

(2) Prohibition on assistance to terrorist states

Subtitle B of the AEDPA, "Prohibition on Assistance to Terrorist States," created a number of new or modified provisions to the criminal code and amended the Foreign Assistance Act of 1961, as amended ("FAA"), to impose new restrictions on assistance to terrorist states and countries aiding terrorist states.

Section 321 of the AEDPA added § 2332d to title 18 of the U.S. Code making it an offense to engage in financial transactions with a government that has been designated as a state sponsor of terrorism under § 6j of the Export Administration Act of 1979 ("EAA"), 50 U.S.C. app. § 2405. Section 323 amended § 2339A of title 18 to criminalize, among other things, provision of material support or resources, knowing or intending that they are to be used in preparation

for, or in carrying out, a violation of § 2332a, criminalizing use of certain weapons of mass destruction.

Section 325 of the AEDPA added a new § 620G to the FAA, 22 U.S.C. § 2377, prohibiting assistance to the government of any country for which the Secretary of State has made a determination under § 620A (22 U.S.C. § 2371) that "the government of that country has repeatedly provided support for acts of international terrorism." Section 326 added a new § 620H to the FAA, 22 U.S.C. § 2378, prohibiting assistance to countries that provide lethal military equipment to a country the government of which the Secretary of State has determined is a terrorist government for the purposes of § 6(j) of the EAA or 620A of the FAA. Section 327 required the Secretary of the Treasury to instruct the U.S. executive director of each international financial institution to "use the voice and vote" of the United States to oppose any loan or other use of funds for a country for which the Secretary of State has made a determination under § 6(j) of the EAA or § 620A of the FAA. 22 U.S.C. § 262p–4q.

Section 330 amended the Arms Export Control Act to prohibit the sale or license for export of any defense article or defense service to a foreign country that the President determines "is not cooperating fully with United States antiterrorism efforts" unless the President determines that the transaction is important to the national interests of the United States. 22 U.S.C. § 2781. *See also* 1.g. below.

(3) Other criminal law modifications

Title VII of AEDPA, "Criminal Law Modifications to Counter Terrorism," among other things, added a new § 2332b to title 18 of the U.S. Code, creating a criminal offense entitled "Acts of terrorism transcending national boundaries." Subsection 2332b(a) enumerated certain crimes of violence and acts creating a risk of bodily injury associated with destruction or damage to "any structure, conveyance, or other real or personal property" within the United States "involving conduct transcending national boundaries" in

circumstances described in subsection (b). Such conduct was defined to mean "conduct occurring outside of the United States in addition to the conduct occurring in the United States."

The circumstances in which the offense would be covered by this new section were:

> (A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;
>
> (B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;
>
> (C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;
>
> (D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States;
>
> (E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or
>
> (F) the offense is committed within the special maritime and territorial jurisdiction of the United States.

Section 2332b(e) provided specifically that "[t]here is extraterritorial Federal jurisdiction" for crimes under § 2332b(a).

c. Freezing assets of terrorists disrupting Middle East peace process

On January 23, 1995, President William J. Clinton issued Executive Order No. 12947, "Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace

Process," effective January 24, 1995. 60 Fed. Reg. 5079 (Jan. 25, 1995). Finding that "grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," the President declared a national emergency to deal with that threat under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* A statement by the White House Press Secretary dated January 24, 1995, explained that

> [t]he President's action . . . provides the Administration with a new tool to combat fundraising in this country on behalf of organizations that use terror to undermine the Middle East peace process. The Executive order makes it harder for such groups to finance these criminal activities by cutting off their access to sources of support in the U.S. and to the U.S. financial system. It is also intended to reach charitable contributions to designated organizations to preclude diversion of such donations to terrorist activities. . . . The Administration will encourage other nations to take similar actions.

Press Release, White House Office of the Press Secretary, President Clinton Takes New Action Against Terrorist Groups that Threaten the Middle East Peace Process (Jan. 24, 1995) (on file with the Clinton White House Virtual Library at *http://clinton6.nara.gov/1995/01/1995-01-24-press-secretary-on-executive-order-on-terrorism.html.*) The executive order imposed sanctions to be administered by the Office of Foreign Assets Control, Department of the Treasury ("OFAC"), as set forth in excerpts from the order below.

Section 1. Except to the extent provided in section 203(b)(3) and (4) of IEEPA (50 U.S.C. 1702(b)(3) and (4)) and in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date:

(a) all property and interests in property of:

(i) the persons listed in the Annex to this order;
(ii) foreign persons designated by the Secretary of State, in coordination with the Secretary of the Treasury and the Attorney General, because they are found:
(A) to have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of disrupting the Middle East peace process, or
(B) to assist in, sponsor, or provide financial, material, or technological support for, or services in support of, such acts of violence; and
(iii) persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of, any of the foregoing persons, that are in the United States, that hereafter come within the United States, or that hereafter come within the possession or control of United States persons, are blocked;

(b) any transaction or dealing by United States persons or within the United States in property or interests in property of the persons designated in or pursuant to this order is prohibited, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of such persons;
(c) any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order, is prohibited.

* * * *

Sec. 3. I hereby determine that the making of donations of the type specified in section 203(b)(2)(A) of IEEPA (50 U.S.C. 1702(b)(2)(A)) by United States persons to persons designated in or pursuant to this order would seriously impair my ability to deal with the national emergency declared in this order, and hereby prohibit such donations as provided by section 1 of this order.

Sec. 4. (a) The Secretary of the Treasury, in consultation with the Secretary of State and, as appropriate, the Attorney General, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to me by IEEPA as may be necessary to carry out the purposes of this order. . . .

Sec. 5. 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.

* * * *

OFAC issued a list of "Specially Designated Terrorists Who Threaten To Disrupt the Middle East Peace Process" blocked by Executive Order 12947, also effective January 24, 1995. 60 Fed. Reg. 5084 (Jan. 25, 1995). Updated lists are published periodically in the Federal Register. As explained in the OFAC Federal Register notice,

> . . . The Order blocks all property subject to U.S. jurisdiction in which there is any interest of 12 terrorist organizations that threaten the Middle East peace process as identified in an Annex to the Order. The Order also blocks the property and interests in property subject to U.S. jurisdiction of persons designated by the Secretary of State, in coordination with the Secretary of Treasury and the Attorney General, who are found (1) to have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of disrupting the Middle East peace process, or (2) to assist in, sponsor or provide financial, material, or technological support for, or services in support of, such acts of violence. In addition, the Order blocks all property and interests in property subject to U.S. jurisdiction in which there is any interest of persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of, any other

person designated pursuant to the Order (collectively "Specially Designated Terrorists" or "SDTs").

On August 20, 1998, President Clinton issued Executive Order 13099, which amended E.O. 12947 by adding several names, including Usama bin Ladin and al Qaida, to the list of people and organizations targeted by the sanctions. 63 Fed. Reg. 45,167 (Aug. 25, 1998).

d. New multilateral terrorism treaties

(1) Convention on the Marking of Plastic Explosives for the Purpose of Detection

On June 29, 1993, President William J. Clinton transmitted the Convention on the Marking of Plastic Explosives for the Purpose of Detection, with technical annex, done at Montreal on March 1, 1991, to the Senate for advice and consent to ratification. S. Treaty Doc. No. 103–8 (1993). The Senate gave its advice and consent on November 20, 1993. 139 CONG. REC. S16,857 (daily ed. Nov. 21, 1993). Implementing legislation was enacted on April 24, 1996, Pub. L. No. 104–132, §§ 601–607 (1996), 18 U.S.C. § 841 note. The convention entered into force for the United States on April 24, 1997.

The letter from the President transmitting the treaty to the Senate and excerpts from the accompanying report of the Department of State are set forth below.

I transmit herewith, for the advice and consent of the Senate to ratification, the Convention on the Marking of Plastic Explosives for the Purpose of Detection with Technical Annex, done at Montreal on March 1, 1991. The report of the Department of State is also enclosed for the information of the Senate.

The terrorist bombing of Pan Am 103 in December 1988 with the resultant deaths of 270 (including 189 Americans), and the terrorist bombing of UTA flight 772 in September 1989 with the resultant deaths of 171 (including 7 Americans), dramatically

demonstrate the threat posed by virtually undetectable plastic explosives in the hands of those nations and groups that engage in terrorist savagery.

This Convention is aimed at precluding such incidents from recurring, as well as others where plastic explosives are utilized, by requiring States that produce plastic explosives to mark them at the time of manufacture with a substance to enhance their detectability by commercially available mechanical or canine detectors. States are also required to ensure that controls are implemented over the sale, use, and disposition of marked and unmarked plastic explosives.

Work on the Convention began in January 1990 under the auspices of the International Civil Aviation Organization (ICAO) on the basis of an initial draft prepared by a special subcommittee of the ICAO Legal Committee. That work was completed, and the Convention was adopted by consensus, at an international conference in Montreal in March 1991. The United States and 50 other States signed the Convention. Early ratification by the United States should encourage other nations to become party to the Convention.

I recommend that the Senate give early and favorable consideration to the Convention and give its advice and consent to ratification, subject to the declaration described in the accompanying report of the Secretary of State.

LETTER OF SUBMITTAL

* * * *

The United States was in the forefront of those supporting a multilateral agreement to ensure the detectability of plastic explosives and against the diversion of plastic explosives into the hands of terrorists. The United States approached the negotiations with certain considerations in mind, among them that in order to achieve its intended result any such agreement would have to be accepted by as many States as possible, provide for as universal form and as simple a detection regime as possible, take into account

the special circumstances and needs of military and police forces, and impose no dangers or burdens, technical or economic, on the explosives manufacturing industry.

The resulting Convention fully meets all U.S. objectives. It provides for an effective control regime that can be relatively cheaply implemented by all countries, and that will not impede the use, production or development of plastic explosives in their numerous legitimate military, police and industrial applications.

U.S. concerns in this respect were that the marking agent to be introduced into plastic explosives in the course of their manufacture would pose no health or other risks to workers, would not appreciably affect the costs of manufacture, would not affect the explosive characteristics of the material into which it is introduced, and would in fact be detectable by existing mechanical and canine means. Since the Convention was signed in March 1991, the Department of Defense has conducted an extensive testing program to determine whether these standards would be met by one of the marking agents identified in the Technical Annex to the Convention. That program has now been completed, and the agent selected (2,3 dimethyl-2,3 dinitrobutane, or DMNB) has satisfied all relevant criteria.

During the course of the negotiations the question arose whether actions or omissions in violation of the Convention ought to be criminalized in the international sense, that is, whether States should agree as a matter of international law to establish criminal jurisdiction over such offenses and agree, if they did not prosecute an offender found within their territory, to extradite such person. The United States opposed the concept on the grounds that such offenses (e.g. the possession of unmarked explosives) were not inherently sufficiently heinous as to merit being made international crimes, that acts of violence against civil aircraft and other terrorist acts involving such explosives could, as crimes, be adequately dealt with under existing international instruments, that making such behavior an international crime would impede early and widespread acceptance of the Convention by States, and that such matters were more appropriately left to national law. The United States view was widely shared by delegations and ultimately

prevailed, so that the Convention contains no international criminal provisions.

THE CONVENTION

The major features of the Convention may be summarized as follows:

(1) *Structure:* The Convention consists of two parts: the Convention itself, and a Technical Annex which is an integral part of the Convention.
(2) *Scope:* The Convention applies with respect to the manufacture, possession, use and importation and exportation of so-called plastic explosives, including explosives in flexible or sheet form, as more particularly described in Part 1 of the Technical Annex. Excluded are explosives manufactured or held in limited quantities solely for use in duly authorized research, development, testing, training or forensic science purposes. Also excluded are explosives which are destined to be incorporated, and are incorporated, as an integral part of duly authorized military devices in the territory of a producer State within three years of entry into force of the Convention for that State. An "unmarked" plastic explosive is one that has not had introduced into it one of the detection agents described in Part 2 of the Technical Annex.
(3) *Marking and Control of Plastic Explosives:* Parties are subject to a cluster of obligations designed to ensure effective control over unmarked plastic explosives in their respective territories. Thus, each State party must, among other things:

> —take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives;
> —take necessary and effective measures to prevent the movement of unmarked plastic explosives into or out of its territory, except for movements for police or military purposes not inconsistent with the purpose of the Convention and under State control (e.g., military sales and assistance programs, joint cross-border military exercises, and the like);

—take necessary measures to exercise strict and effective control over possession and transfer of unmarked explosives made in or imported into that State prior to the entry into force of the Convention for that State;
—take necessary measures to ensure that all stocks of such unmarked explosives not held by the State's military or police authorities are destroyed or consumed, marked or rendered permanently ineffective, within three years of the entry into force of the Convention for that State;
—take necessary measures to ensure that unmarked plastic explosives held by the State's military or police authorities, other than those incorporated as an integral part of a military device, are destroyed or consumed, marked or rendered permanently ineffective, within fifteen years of the entry into force of the Convention for that State;
—take necessary measures to ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date of entry into force of the Convention for that State, other than those intended for incorporation, and in fact incorporated, as an integral part of a military device within three years of entry into force of the Convention for that State and those limited quantities which may be required solely for research, testing, training and forensic science purposes.

* * * *

(2) International Convention for the Suppression of Terrorist Bombings

On September 8, 1999, President William J. Clinton transmitted to the Senate for advice and consent to ratification the International Convention for the Suppression of Terrorist Bombings. S. Treaty Doc. No. 106–6 (1999); *see also* 37 I.L.M. 249 (1998). Following enactment of implementing legislation (18 U.S.C. § 2332f), the Senate provided its advice and consent on December 5, 2001, 147 CONG. REC. S12,462–63 (daily ed. Dec. 5, 2001), and it entered into force

for the United States July 26, 2002. *See Digest 2001* at 100–04, 106–09.

The President's letter transmitting the treaty to the Senate, and excerpts from the accompanying report of the Department of State submitting the treaty to the President, are set forth below.

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the International Convention for the Suppression of Terrorist Bombings, adopted by the United Nations General Assembly on December 15, 1997, and signed on behalf of the United States of America on January 12, 1998. The report of the Department of State with respect to the Convention is also transmitted for the information of the Senate.

In recent years, we have witnessed an unprecedented and intolerable increase in acts of terrorism involving bombings in public places in various parts of the world. The United States initiated the negotiation of this convention in the aftermath of the June 1996 bombing attack on U.S. military personnel in Dhahran, Saudi Arabia, in which 17 U.S. Air Force personnel were killed as the result of a truck bombing. That attack followed other terrorist attacks including poison gas attacks in Tokyo's subways; bombing attacks by HAMAS in Tel Aviv and Jerusalem; and a bombing attack by the IRA in Manchester, England. Last year's terrorist attacks upon United States embassies in Nairobi and Dar es Salaam are recent examples of such bombings, and no country or region is exempt from the human tragedy and immense costs that result from such criminal acts. Although the penal codes of most states contain provisions proscribing these kinds of attacks, this Convention provides, for the first time, an international framework for cooperation among states directed toward prevention of such incidents and ensuing punishment of offenders, wherever found.

In essence, the Convention imposes binding legal obligations upon States Parties either to submit for prosecution or to extradite any person within their jurisdiction who commits an offense as defined in Article 2, attempts to commit such an act, participates as an accomplice, organizes or directs others to commit such an

offense, or in any other way contributes to the commission of an offense by a group of persons acting with a common purpose. A State Party is subject to these obligations without regard to the place where the alleged act covered by Article 2 took place.

Article 2 of the Convention declares that any person commits any offense within the meaning of the Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility, with the intent (a) to cause death or serious bodily injury or (b) cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss. States Parties to the Convention will also be obligated to provide one another legal assistance in investigations or criminal or extradition proceedings brought in respect of the offenses set forth in Article 2.

The recommended legislation necessary to implement the Convention will be submitted to the Congress separately.

This Convention is a vitally important new element in the campaign against the scourge of international terrorism. I hope that all states will become Parties to this Convention, and that it will be applied universally. I recommend, therefore, that the Senate give early and favorable consideration to this Convention, subject to the understandings and reservation that are described in the accompanying State Department report.

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

* * * *

Article 1 defines the four categories of locations mentioned in Article 2 where an attack gives rise to offenses under the Convention, i.e., a "place of public use," a "State or government facility," a "public transportation system," and an "infrastructure facility." These categories of locations were chosen during the negotiations and defined with a view toward criminalizing attacks

in locations where attacks would be of greatest concern to the general public. In addition, Paragraph 3 of Article 1 defines "explosive or other lethal device" as including not only conventional explosive or other incendiary devices, but also toxic chemicals, biological agents or toxins or similar substances, and radiation or radioactive material. Thus, the Convention addresses not only bombings using conventional explosives such as those used in the 1996 bombing attack on U.S. servicemen in Dhahran, Saudi Arabia, and the 1998 bombings on United States embassies in East Africa, but also attacks using materials such as those employed in the 1995 attacks on the Tokyo subway system.

* * * *

In a provision of crucial importance for the Convention, Paragraph 1 of Article 8 declares that a State Party which does not extradite an alleged offender in its territory shall "without exception whatsoever and whether or not the offense was committed on its territory" submit the case to its competent authorities for purposes of prosecution, through proceedings in accordance with the laws of that State. Those authorities are obligated to take their decision in the same manner as in the case of any other offense of a grave nature under the law of that State.

In an innovation over the prior counterterrorism conventions, the Convention includes a provision proposed by the United States in Paragraph 2 of Article 8, to the effect that the obligation in Paragraph 1 to extradite or submit for prosecution can be discharged by the temporary transfer of nationals for trial by those States Parties that could not otherwise extradite their nationals, provided both the Requesting and Requested States agree. . . .

* * * *

Article 19, Paragraph 1, provides that nothing in the Convention affects other rights, obligations and responsibilities of States and individuals under international law. Paragraph 2 of Article 19 contains two important exceptions from the scope of the Convention relating to activities of armed forces and military forces of a State.

Under the first exception, the Convention does not apply to the activities of "armed forces during an armed conflict," where such activities are governed by international humanitarian law. This exception is meant to exclude from the Convention's scope the activities of armed forces (which would include both armed forces of States and subnational armed forces), so long as those activities are in the course of an "armed conflict" and are governed by the law of war. Given that suspected offenders may claim the benefit of this "armed conflict" exception to avoid extradition or prosecution under the Convention, it would be useful for the United States to articulate an Understanding regarding the scope of this exception. In this respect, an appropriate source of authority would be the widely accepted provision in Paragraph 2 of Article 1 of Protocol II Additional to the Geneva Conventions of August 12, 1949, concluded at Geneva on June 10, 1977, which President Reagan transmitted to the Senate on January 29, 1987, for advice and consent to ratification. Specifically, Protocol II states that "armed conflict" does not include "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature." Through an understanding, the United States would make clear that isolated acts of violence that include the elements of the offenses of Article 2 would be encompassed in the scope of the Convention. As a separate matter, the term "international humanitarian law" is not used by United States armed forces and could be subject to varied interpretations. It would therefore be useful for the United States to articulate in the same understanding that for purposes of this Convention this phrase has the same substantive meaning as the law of war. I therefore recommend that the following understanding to Article 19 be included in the United States instrument of ratification:

> The United States of America understands that the term "armed conflict" in Article 19 does not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature and that the term "international humanitarian law" has the same substantive meaning as the law of war.

The second exception in Article 19(2) exempts from the Convention's scope of application activities undertaken by military forces of a State in the exercise of their official duties. The official activities of State military forces are already comprehensively governed by other bodies of international law, such as the international instruments relating to the law of war and the international law of state responsibility. This comprehensive exclusion of official activities of State military forces from the Convention's scope was an important U.S. objective in the drafting of this Convention. While such an exclusion might be thought to be implicit in the context of the Convention, the Convention's negotiators thought it best to articulate the exclusion in light of the relatively broad nature of the conduct described in Article 2 and the fact that this conduct overlaps with common and accepted activities of State military forces. Because of the importance of this provision, I recommend that the following understanding to Article 19 be included in the United States instrument of ratification:

> The United States of America understands that, pursuant to Article 19, the Convention does not apply in any respect to the activities undertaken by military forces of States in the exercise of their official duties.

The conduct of certain civilians who act in support of official activities of State military forces are also exempted from the Convention's scope of application. . . . In addition, because the Convention does not reach the official activities of State military forces, it similarly does not reach persons, including non-military policy-making officials of States, who might direct or organize the activities of State military forces or who might otherwise have been subject to the ancillary offenses in Article 2 if State military forces had not been excluded from the Convention's scope of application.

The Convention also provides in Article 20(1) that disputes between two or more States Parties concerning the interpretation or application of this Convention may be submitted to *ad hoc* arbitration, or, failing agreement on the organization of such arbitration, to the International Court of Justice. . . . I recommend

that the following reservation to Article 20(1) be included in the United States instrument of ratification:

> Pursuant to Article 20(2) of the Convention, the United States of America declares that it does not consider itself bound by Article 20(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

This reservation would allow the United States to agree to an adjudication by a chamber of the Court in a particular case, if that were deemed desirable.

* * * *

e. Proposed international conference to define terrorism

On December 4, 1989, the UN General Assembly requested the Secretary General to seek members' views on international terrorism, including the possibility of convening an international conference to define terrorism under UN auspices. G.A. Res. 29, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/29 (1989). In response to a December 14, 1990, letter from the Secretary General requesting the views of member states by April 15, 1991, the U.S. Permanent Representative to the United Nations submitted the views of the United States that the conference would not be useful as proposed, excerpted below.

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

---

* * * *

The United States believes that a conference to define terrorism and distinguish it from national liberation movements would not be useful. It would address a question on which there is little possibility of achieving consensus. Beginning with the 1937 League of Nations Convention for the Prevention and Punishment of

Terrorism, the International Community has repeatedly failed in its efforts to reach consensus on a generic definition of terrorism. Convening a conference to revisit this question once again would likely result in a nonproductive debate and would divert the UN's attention and resources from efforts to develop effective, concrete measures against terrorism.

In response to the difficulty in reaching consensus on a generic definition of terrorism, the international community has instead concluded a series of individual conventions that identify specific categories of acts which the entire international community condemn, regardless of the motives of the perpetrators and which require states parties to criminalize the specified conduct, prosecute or extradite the transgressors, and cooperate with other states for the effective implementation of these duties. As listed in Resolution 44/29, these Conventions cover aircraft sabotage, aircraft hijacking, attacks against officials and diplomats, hostage-taking, theft or unlawful use of nuclear material, violence at airports, and certain attacks on or against ships and fixed platforms. By focusing upon specific types of actions which are inherently unacceptable, rather than on questions of motivation or context, this approach has enabled the international community to make substantial progress in the effort to use legal tools to combat terrorism. The United States is concerned that an international conference to define terrorism and to differentiate it from the struggles of national liberation movements might send an ambiguous signal which would undercut the international community's consensus that the acts proscribed by the international anti-terrorism conventions are unacceptable whatever the rationale or context.

Rather than reviving a nonproductive debate over a generic definition of terrorism, the United States believes the UN should concentrate on the practical implementation of Resolution 44/29, which unequivocally condemned as criminal and not justifiable all acts, methods and practices of terrorism wherever and by whomever committed; called for the immediate and safe release of all hostages and for all states to use their political influence to accomplish that end; called on all states to fulfill their obligations under international law by refraining from organizing, instigating, assisting, participating in, encouraging, or acquiescing in terrorist activities or preparation; urged all states to adhere to their

obligations under existing international anti-terrorism conventions to prosecute or extradite offenders and to cooperate in the apprehension and prosecution of offenders; and appealed to all states that have not yet done so to become party to the existing international anti-terrorism conventions.

In this regard, the United States notes that while nearly every UN member state is party to the Aircraft Sabotage Convention, the Aircraft Hijacking Convention, and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, less than half of the UN member states have become party to the Hostage-taking Convention, less than a third have ratified the Convention on the Physical Protection of Nuclear Materials, and only a handful of countries have ratified the IMO Maritime Terrorism Convention and the ICAO Airport Security Protocol. The United States firmly believes that in order that these anti-terrorism conventions be made more effective, parties to these conventions should take all appropriate steps to encourage non-parties to accede to them, and parties should use their political influence to encourage other parties to abide by their obligations under these conventions.

In sum, the United States believes UN member states need to make these practical measures their priority rather than to pursue the convening of a conference which is more likely to undermine than strengthen the international consensus with regard to terrorism. . . .

f. Hijacking and hostage-taking

During the 1990s U.S. courts addressed jurisdictional questions raised in prosecutions of individuals charged under the Anti-Hijacking Act, Pub. L. No. 103–272 (1994), 198 Stat. 1240, 49 U.S.C. §§ 46501–02 and the U.S. Hostage Taking Act, Pub. L. No. 98–473 (1984), 98 Stat. 2186, 18 U.S.C. § 1203. These statutes implemented U.S. obligations under the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 ("Hague Convention"), 22 U.S.T. 1643, 860 U.N.T.S. 105, and the International Convention Against the Taking of Hostages of 1979, TIAS 11081, 1316 U.N.T.S. 205, respectively. Several key opinions are discussed below.

(1) United States v. Yunis

In *United States v. Yunis*, 924 F. 2d 1086 (D.C. Cir. 1991), the United States prosecuted five defendants who hijacked a Jordanian airliner in Beirut and attempted to fly it to Tunis to meet with a conference of the Arab League in 1985. At trial, the defendants were convicted of aircraft piracy, hostage-taking, and a conspiracy to commit same.

An American investigation identified Yunis as the probable leader of the hijackers. As the circuit court explained, "[u]ndercover FBI agents lured Yunis onto a yacht in the eastern Mediterranean Sea with promises of a drug deal, and arrested him once the vessel entered international waters." After his arrival in the United States, at which time he was arraigned on an original indictment charging him with conspiracy, hostage-taking, and aircraft damage, a grand jury added a charge of air piracy in a superseding indictment. Yunis moved to dismiss for lack of subject matter and personal jurisdiction. The U.S. Circuit Court for the District of Columbia affirmed the opinion of the district court rejecting defendant's arguments, as excerpted below.

---

* * * *

A. Jurisdictional Claims

Yunis appeals first of all from the district court's denial of his motion to dismiss for lack of subject matter and personal jurisdiction. See United States v. Yunis, 681 F. Supp. 896 (D.D.C. 1988). Appellant's principal claim is that, as a matter of domestic law, the federal hostage taking and air piracy statutes do not authorize assertion of federal jurisdiction over him. Yunis also suggests that a contrary construction of these statutes would conflict with established principles of international law, and so should be avoided by this court. Finally, appellant claims that the district court lacked personal jurisdiction because he was seized in violation of American law.

1. Hostage Taking Act

* * * *

Yunis claims that this statute cannot apply to an individual who is brought to the United States by force, since those convicted under it must be "found in the United States." But this ignores the law's plain language. . . . Since two of the passengers on Flight 402 were U.S. citizens, section 1203(b)(1)(A), authorizing assertion of U.S. jurisdiction where "the offender or the person seized or detained is a national of the United States," is satisfied. . . .

Appellant's argument that we should read the Hostage Taking Act differently to avoid tension with international law falls flat. Yunis points to no treaty obligations of the United States that give us pause. Indeed, Congress intended through the Hostage Taking Act to execute the International Convention Against the Taking of Hostages, which authorizes any signatory state to exercise jurisdiction over persons who take its nationals hostage "if that State considers it appropriate." International Convention Against the Taking of Hostages, opened for signature Dec. 18, 1979, art. 5, para. 1, 34 U.N. GAOR Supp. (No. 39), 18 I.L.M. 1456, 1458. See H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. 418 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 3710, 3714.

Nor is jurisdiction precluded by norms of customary international law. The district court concluded that two jurisdictional theories of international law, the "universal principle" and the "passive personal principle," supported assertion of U.S. jurisdiction to prosecute Yunis on hijacking and hostage-taking charges. See Yunis, 681 F. Supp. at 899–903. Under the universal principle, states may prescribe and prosecute "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism," even absent any special connection between the state and the offense. See Restatement (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423 (1987) [hereinafter Restatement]. Under the passive personal principle, a state may punish non-nationals for crimes committed against its nationals outside of its territory, at least where the state has a particularly

strong interest in the crime. See id. at § 402 comment g; United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984) (passive personal principle invoked to approve prosecution of Colombian citizen convicted of shooting U.S. drug agents in Colombia), cert. denied, 471 U.S. 1137, 105 S. Ct. 2679, 86 L. Ed. 2d 698 (1985).

* * * *

[T]he statute in question reflects an unmistakable congressional intent, consistent with treaty obligations of the United States, to authorize prosecution of those who take Americans hostage abroad no matter where the offense occurs or where the offender is found. Our inquiry can go no further.

2. Antihijacking Act

. . . The Antihijacking Act of 1974 was enacted to fulfill this nation's responsibilities under the Convention for the Suppression of Unlawful Seizure of Aircraft (the "Hague Convention"), which requires signatory nations to extradite or punish hijackers "present in" their territory. Convention for the Suppression of Unlawful Seizure of Aircraft. . . . This suggests that Congress intended the statutory term "found in the United States" to parallel the Hague Convention's "present in [a contracting state's] territory," a phrase which does not indicate the voluntariness limitation urged by Yunis. . . .

The district court correctly found that international law does not restrict this statutory jurisdiction to try Yunis on charges of air piracy. See Yunis, 681 F. Supp. at 899–903. Aircraft hijacking may well be one of the few crimes so clearly condemned under the law of nations that states may assert universal jurisdiction to bring offenders to justice, even when the state has no territorial connection to the hijacking and its citizens are not involved. . . . But in any event we are satisfied that the Antihijacking Act authorizes assertion of federal jurisdiction to try Yunis regardless of hijacking's status vel non as a universal crime. Thus, we affirm the district court on this issue.

3. Legality of Seizure

Yunis further argues that even if the district court had jurisdiction to try him, it should have declined to exercise that jurisdiction in

light of the government's allegedly outrageous conduct in bringing him to the United States. This claim was rejected by the district court before trial. *See United States v. Yunis*, 681 F. Supp. 909, 918–21 (D.D.C. 1988), *rev'd. on other grounds*, 859 F.2d 953 (*Yunis I*).

Principally, Yunis relies on *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), in which the court held that due process requires courts to divest themselves of personal jurisdiction acquired through "the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.* at 275. *Toscanino* establishes, at best, only a very limited exception to the general rule (known as the "*Ker-Frisbie* doctrine") that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" *Frisbie v. Collins*, 342 U.S. 519, 522, 96 L. Ed. 541, 72 S. Ct. 509 (1952) (citing, *inter alia, Ker v. Illinois*, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886)). *Toscanino's* rule has, moreover, been limited to cases of "torture, brutality, and similar outrageous conduct," *United States* ex rel. *Lujan v. Gengler*, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001, 95 S. Ct. 2400, 44 L. Ed. 2d 668 (1975), and the Supreme Court has since reaffirmed the *Ker-Frisbie* doctrine, *see Immigration and Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1039, 82 L. Ed. 2d 778, 104 S. Ct. 3479 (1984); *United States v. Crews*, 445 U.S. 463, 474, 63 L. Ed. 2d 537, 100 S. Ct. 1244 (1980).

Even assuming, arguendo, that a district court could correctly dismiss a case otherwise properly before it for the reasons given in *Toscanino*, we find no merit in Yunis' claim. In *Yunis I*, we reviewed the facts . . . in some detail, including the deception used to arrest Yunis, his injuries and hardships while in custody, and the delay between his arrest and arraignment in the United States. . . . [W]e concluded that while the government's conduct was neither "picture perfect" nor "a model for law enforcement behavior," the "discomfort and surprise" to which appellant was subjected did not render his waiver invalid. *Yunis I*, 859 F.2d at 969. Similarly, we now find nothing in the record suggesting the sort of intentional, outrageous government conduct necessary to sustain appellant's jurisdictional argument. . . .

* * * *

(2) United States v. Yousef

In *United States v. Yousef*, 927 F. Supp. 673 (S.D.N.Y. 1996), the United States prosecuted three defendants under the Anti-Hijacking Act for conspiracy and attempted bombings of U.S. commercial airliners operating in East Asia. Defendant Yousef was also charged in the actual bombing of a Philippines airliner. The defendants moved to dismiss for lack of subject matter jurisdiction, and also claimed that the charges required the prosecution to name a specific victim or target, actual or intended. The three defendants made different arguments, but "in substance each . . . challenge[d] the assertion of extraterritorial jurisdiction by United States courts where the offenses charged did not occur on United States soil, did not involve United States citizens as defendants, or did not result in the death or injury of a United States citizen." The district court rejected these arguments, finding that it not only had the authority to exercise extraterritorial jurisdiction in this case, but, "under treaty obligations of the United States, it is required to do so." The court held that the "exercise of extraterritorial jurisdiction in this case is reasonable, since the crimes charged have a 'substantial, direct, and foreseeable effect' in the United States and clearly affect United States interests, as would be required by principles of international law." The court also ruled that extraterritorial jurisdiction was appropriate for a conspiracy charge where it was appropriate for the underlying crime.

Finally, the court rejected claims by Yousef concerning his apprehension and presence in the United States. The court found that he had not established a factual basis for his allegations of U.S. involvement in alleged torture suffered while in Pakistan. It also dismissed his argument that he was not properly "found" within the United States as that term is used in the statute because he was extradited to the United States on other charges, citing the district court decision in *Yunis*, supra.

(3) United States v. Rezaq

In *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 834 (1998), Rezaq, a Palestinian, was accused of hijacking an Egyptian plane and fatally shooting two passengers before being apprehended. He served seven years' imprisonment in Malta for murder, attempted murder, and hostage-taking. On his release, he was arrested by U.S. authorities, tried, and convicted of aircraft piracy under the Anti-Hijacking Act. Rezaq appealed his conviction on several grounds, including that the Hague Convention barred sequential prosecutions for the same offense. The D.C. Circuit rejected his arguments, ruling that the U.S. Constitution's double-jeopardy clause did not apply to prosecutions by different sovereigns, and that it is not double jeopardy to be tried for aircraft piracy after being convicted of murder and hostage-taking.

As to the Hague Convention, the court rejected Rezaq's argument that his case was subject "to a more exacting standard than the traditional double-jeopardy one." Rezaq argued that the Hague Convention's requirement that states "either extradite or prosecute offenders . . . implies that extradition and prosecution are mutually exclusive options [and thus implies that] the Hague Convention intended to bar all sequential prosecutions, whether they occur after extradition or not." The court concluded that the

> injunction to extradite or prosecute is not meant to state mutually exclusive alternatives. The extradite-or-prosecute requirement is intended to ensure that states make some effort to bring hijackers to justice, either through prosecution or extradition. There is no indication that Article 4 is intended to go beyond setting a minimum, and limit the options of states. . . . [To read the provision otherwise] could also undermine the Convention's goal of ensuring "punishment of offenders."

Finally, the court rejected Rezaq's argument, like those of Yunis and Yousef, that he had not been "found in the

United States" as required by the statute. The court acknowledged that Yunis had originally been brought to the United States on other charges and indicted for air piracy while awaiting trial on those charges while Rezaq was brought to the United States "for the specific purpose of prosecution on hijacking charges." The court found, however, that this distinction did not alter the conclusions reached in *Yunis* that because the statute implemented the Hague Convention, "the word 'found' means only that the hijacker must be physically located in the United States, not that he must be first detected here."

g. Terrorism-related determinations

Pursuant to § 40A of the Arms Export Control Act, as amended, 22 U.S.C. § 2781, on May 6, 1999, Acting Secretary of State Strobe Talbott determined and certified that "the following countries are not cooperating fully with United States antiterrorism efforts: Afghanistan; Cuba; Iran; Iraq; Libya; North Korea; Sudan; and Syria." 64 Fed. Reg. 26,474 (May 14,1999).

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

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

On August 12, 1993, Secretary of State Warren Christopher determined "that Sudan is a country which has repeatedly provided support for acts of international terrorism. The list of 6(j) countries as of this time therefore includes Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria." 58 Fed. Reg. 52,523 (Oct. 4, 1993). The list remained unchanged throughout the 1990s.

2. War Crimes, Crimes Against Humanity and Genocide

a. U.S. War Crimes Act

On August 21, 1996, the United States adopted legislation implementing its obligations under the Geneva Conventions of 1949 to provide criminal penalties for certain war crimes. Pub. L. No. 104–192, § 2(a), 110 Stat. 2104 (1996), technical correction, Pub. L. No. 104–294, § 6–5(p)(1), 110 Stat. 3510 (1996).

As enacted in 1996, the War Crimes Act provided that "whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in [certain circumstances], shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death." The circumstances to which the provision applied were those in which the perpetrator or victim "is a member of the Armed Forces of the United States or a national of the United States." The act defined "grave breach" to mean "conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party." At the time of enactment two protocols had been drafted—Protocol I (Relating to the Protection of Victims of International Armed Conflicts) and Protocol II (Relating to the Protection of Victims of Non-International Armed Conflicts.) Neither has been ratified by the United States.

The reference to the perpetrator of the crime as a national of the United States was adopted at the request of the executive branch. A letter from the Department of Defense

explained that this "jurisdictional change would hopefully never be required to be used. However, were a U.S. service member the perpetrator of a war crime, such general federal jurisdiction would be necessary to ensure that a former service member could be prosecuted. *See Toth v. Quarles*, 350 U.S. 11 (1955) (no UCMJ jurisdiction over former member of a military service). . . ." *See* H.Rep. 104–698 (1996) at 13.

The executive branch had also urged that the act be expanded in two key respects not adopted in 1996. First, it urged that the act should provide jurisdiction if the perpetrator were later found in the United States, even where the crime in question had been committed abroad and neither the perpetrator nor the victim were U.S. nationals. *See* H.Rep. 104–698 at 14–15. In testimony before the Subcommittee on Immigration and Claims, Committee on the Judiciary, House of Representatives, June 12, 1996, Principal Deputy Legal Adviser Michael J. Matheson explained that this change would ensure the ability of the United States to fulfill its treaty obligations. He also noted that "[t]his follows a pattern adopted in the U.S. Criminal Code for offenses implicating other international obligations, such as piracy, attacks on internationally-protected persons, and attacks against international civil aviation." *War Crimes Act of 1995: Hearing on H.R. 2587 Before the House Subcommittee on Immigration and Claims, Committee on the Judiciary,104th Cong. (1996)*. The proposal was not enacted.

Second, the executive branch urged a wider reach of the statute to include war crimes other than those meeting the definition of "grave breaches." *See* H.Rep. 104–698 at 14–15. This proposal was adopted in an amendment in 1997. Pub. L. No. 105–118, 111 Stat. 2436 Title V, § 583 (1997). As amended, 18 U.S.C. § 2441, provided penalties for "war crimes," and defined that term to include conduct:

> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

No hearings were held in connection with the 1997 amendment; however, excerpts from Mr. Matheson's 1996 testimony on this issue were included in the 1997 House report, H.R. Rep. 105–204 at 3 (1997). Excerpts below from Mr. Matheson's 1996 prepared statement address the need for the legislation, including the executive branch proposals both for the broader range of war crimes adopted in 1997 and for expanded jurisdiction. The full text is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

The United States has played a leading role in international efforts to bring to justice those who have committed war crimes and other violations of international humanitarian law. In his remarks on October 15, 1995, commemorating the 50th anniversary of the Nuremberg Tribunals, President Clinton declared: "We have an obligation to carry forward the lessons of Nuremberg." The President stressed the need to "put into practice the principle that those who violated universal human rights must be called to account for those actions." This is one of the reasons why the United States has so strongly supported the establishment and the work of the United Nations War Crimes Tribunal for the former

Yugoslavia and for Rwanda. As President Clinton said with regard to persons indicted by those Tribunals:

Those accused of war crimes, crimes against humanity and genocide must be brought to justice. They must be tried and, if found guilty, they must be held accountable.

The Congress acted in support of this objective earlier this year by its adoption of Section 1342 of the National Defense Authorization Act, Fiscal Year 1996, which authorized the surrender to the War Crimes Tribunals of persons found in the United States who had been indicted or convicted for offenses within the jurisdiction of those Tribunals.

Although the United States led the effort to create the War Crimes Tribunals for the former Yugoslavia and for Rwanda, we do not believe that the prosecution of war crimes can be left to international tribunals alone. The mandate of these tribunals is limited to particular conflicts, and as a practical matter these tribunals will not have the ability to deal with most offenders even in those cases. More fundamentally, international law imposes an obligation on individual states to take various measures to prevent and punish the commission of war crimes.

Making such acts criminal under domestic law is essential to deterring them. When such acts do occur, prosecuting those who commit them is essential in helping to prevent their recurrence. If we are to ensure that those who commit war crimes are brought to justice, we must rely first and foremost on the domestic criminal laws and practice of individual states.

Indeed, international law expressly requires states to enact penal legislation, where necessary, to provide for the punishment of those who commit certain war crimes. Parties to the Geneva Conventions of August 12, 1949, relating to the laws of warfare ("the 1949 Geneva Conventions") are required to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" defined in those Conventions. Grave breaches include, among other things, acts such as willful killing, torture or inhuman treatment, and willfully causing great suffering or serious injury to body or health, when committed against sick or wounded combatants, prisoners of war, or civilians.

At the time of the submission of the 1949 Geneva Conventions to the Senate for advice and consent, the Executive Branch advised that implementing legislation was not required, since offenders could be prosecuted under federal and state penal statutes (in the case of crimes within United States jurisdiction) or the Uniform Code of Military Justice (with respect to crimes committed abroad). However, over the years, U.S. courts have handed down a series of decisions which cast doubt on the constitutionality of the exercise by military tribunals of criminal jurisdiction over the acts abroad of various categories of persons who are not in active military service.

It is therefore very useful, in our view, to establish clear jurisdiction in U.S. courts to try any persons for such offenses if they come within U.S. jurisdiction. Furthermore, since 1949 the United States has accepted certain specialized rules of international humanitarian law which may not have an equivalent in existing U.S. criminal statutes.

* * * *

. . . [T]he Administration supports expanding the types of violations of international humanitarian law to be addressed by H.R. 2587. We suggest that the provision cover not only grave breaches of the 1949 Geneva Conventions, but a more general category of "war crimes" that would be defined to include certain violations of the laws of war in addition to grave breaches.

Specifically, we believe H.R. 2587 should make it a crime under U.S. law to commit violations of the rules specified in Common Article 3 and Additional Protocol II to the 1949 Geneva Conventions that apply during non-international armed conflict, that is, civil wars and other internal conflicts. As the grim experience in Rwanda reminds us, some of the most horrible war crimes occur in internal armed conflicts, as to which the grave breach provisions of the 1949 Geneva Conventions may not be applicable.

For example, Common Article 3 of the Geneva Convention prohibits murder, cruel treatment, and torture of persons, such as civilians or captured or wounded combatants, taking no active part in hostilities during a non-international armed conflict. As

evidence of the importance of the protections of international law in non-international armed conflicts, the United States has taken the position that the Statute of the International Criminal Tribunal for the Former Yugoslavia, which gives the Tribunal jurisdiction over "persons violating the laws or customs of war," includes violations of Common Article 3 and the additional protocols to the Geneva Conventions. We believe that such violations should similarly be treated as war crimes for purposes of U.S. law, and thus should be covered by an expanded H.R. 2587.

Further, H.R. 2587 should be expanded to cover violations of Articles 23, 25, 27, and 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, of October 18, 1907, applicable to international armed conflict. The 1907 Hague Convention is an important source of international humanitarian law, and it served as an important basis of law for the Nuremberg Tribunal.

Article 23 of the Convention lists a series of acts prohibited in war, including, among other things, using poison weapons, killing individuals who have laid down their arms and surrendered, and employing arms calculated to cause unnecessary suffering. Article 25 prohibits the bombardment of undefended towns, villages, dwellings, or buildings. Article 27 requires forces to take steps to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. Article 28 prohibits pillage. Provisions such as these have provided the basis for Article 3 of the Statute of International Criminal Tribunal for the former Yugoslavia, which gives the Tribunal jurisdiction over "persons violating the laws or customs of war."

The Administration believes such violations should also be treated as war crimes in H.R. 2587. Finally, the United States has recently participated in the successful negotiation of an amendment to Protocol II (on land mines) to the Convention on Conventional Weapons, to which the United States is a Party. The amended Protocol, which will soon be submitted to the Senate for its advice and consent, will require the imposition of penal sanctions against persons who, in relation to armed conflict and contrary to the

provisions of the Protocol, willfully kill or cause serious injury to civilians.*

[Criminalizing such offenses] . . . would ensure, for example, that deliberate, indiscriminate use of anti-personnel mines to harm civilians would constitute an offense under U.S. law. This objective is entirely consistent with Congressional sentiments and Administration policy on ending the humanitarian crisis posed by these weapons.

Expanding U.S. criminal jurisdiction over war crimes will serve not only the purpose of ensuring that the United States is able to comply fully with its obligations under international law, but will also serve as a diplomatic tool in urging other countries to do the same. Currently the U.S. Government's leverage in calling on other governments to enforce the laws of armed conflict is restricted because of the limitations I have noted concerning our own domestic enforcement jurisdiction. H.R. 2587, if amended in the manner we propose, would remedy this defect concerning U.S., enforcement of the laws of armed conflict, particularly with respect to persons who commit such crimes outside the United States but who enter U.S. territory. With this bill, if modified as we suggest, we will set the right example and use it to persuade other governments to abide by and enforce the laws of armed conflict.

* * * *

b. Overview of global issues

On December 17, 1999, David J. Scheffer, Ambassador-at-Large for War Crimes Issues, addressed the Union of American Hebrew Congregations, Orlando, Florida, on "Milosovic, Pinochet, and Us: Responding to Crimes Against Humanity." Excerpts below from the speech address crimes against humanity in a number of contexts. See C. below for discussion of the International Tribunal for Rwanda and

* Editors' note: The amended protocol entered into force for the United States on November 24, 1999; *see* Chapter 18.A.7.b.

Yugoslavia and the International Criminal Court, references to which have been excluded from these excerpts.

The full text is available at *www.state.gov/www/policy_remarks/1999/991217_scheffer_orlando.html.*

---

* * * *

The first crimes against humanity were prosecuted on an international scale at the Nuremberg trials more than 50 years ago. The Genocide Convention was 50 years old last year, and the Geneva Conventions of 1949 celebrated their 50th anniversary this year. And yet today, on the eve of the new millennium when the technological, economic, and artistic triumph of mankind brings new meaning to civilization, the mega-crimes of genocide, crimes against humanity, and significant war crimes still occur. Notwithstanding the end of the Cold War, the last decade has been extraordinary in the wave of atrocities that have engulfed innocent civilian populations. While we must never forget the unparalleled magnitude of the killings during the Holocaust, we must also recognize that on our watch, during our stewardship of civilized society, horrendous mass killings and other serious violations of international humanitarian law are occurring at an astonishing pace across the globe.

* * * *

Today I will share with you some of what we know about events in Chechnya, East Timor, and elsewhere. I will also update you on efforts to bring Milosevic and Pinochet to justice, the recent conclusion of another case from World War II, ongoing efforts to set up a permanent international criminal court to address war crimes, and the atrocities prevention work of the Administration.

Chechnya

The ongoing conflict in Chechnya is very much of concern to all of us who want to see an end to the fighting now going on there. The United States does not question Russia's right to fight terrorism or insurgencies on its soil. However, President Clinton spoke on December 8 and on other occasions of the critical importance of both sides to the conflict respecting the lives and

property of civilians. Many other governments in Europe and elsewhere have expressed similar concerns in recent weeks. We have noted that the Russian Government appears to be responding to some of these concerns. Still, current reports from the Grozny theater have not put to rest the serious concerns of the international community about what is happening to civilians in Chechnya.

There have been accusations that Russian forces have intentionally targeted civilians. We call on the Russian Government to conduct a full and impartial investigation of these allegations. We certainly abhor any intentional targeting of civilians. Article 3 of the Fourth Geneva Convention prohibits violence against noncombatants, Article 13 of Additional Protocol II to the Geneva Conventions states that civilians shall not be intentionally attacked, and the OSCE Code of Conduct states that due care must be taken to avoid injury to civilians or their property. Additionally, the customary law of internal armed conflict prohibits the intentional targeting of civilians.

The human cost to date of a military solution in Chechnya has been high, and recent reports of the fighting for the Chechen capital of Grozny and nearby towns have shown that the fighting is fierce. That is why we continue to urge a political solution and why Secretary Albright is meeting with Russian Foreign Minister Ivanov today in Europe.

Nazi War Crimes

The Office of War Crimes Issues facilitates in other countries, where possible, the prosecution of former Nazis accused of serious crimes. Earlier this year, for example, with the assistance of the U.S. Government, the last known surviving concentration camp commander from World War II, Dinko Sakic, was convicted in a court in Zagreb, Croatia. Sakic was given the maximum sentence under Croatian law for war crimes, 20 years in prison. As Sakic is 76, this is effectively a life sentence. His case is currently on appeal to the Croatian Supreme Court.

The Sakic trial is important because it is the first World War II war crimes trial in Eastern Europe. It would not have come about without the work of organizations such as B'nai B'rith and the Simon Wiesenthal Institute. The United States Government and the Government of Israel played an important role in encouraging

the governments involved to give this case the highest priority for investigation and prosecution. We provided many documents from the National Archives in Washington to assist the prosecutor's efforts to build a strong case. . . .

* * * *

While the Office of War Crimes Issues pursues justice against individual perpetrators from the Nazi era, the U.S. Government is also closely engaged on the question of monetary compensation for lost assets and slave labor during the Holocaust. This has been a difficult effort, but one on which Treasury Deputy Secretary Stu Eizenstat, formerly an Under Secretary in the State Department, has labored tirelessly for many years. The recent settlement announced in the slave labor cases, and which should be signed today in Berlin, is enormously significant for the victims of Nazi barbarism, and it is precedent-setting.

* * * *

Pinochet

Let me turn to another part of the world—the pending case against former Chilean dictator Augusto Pinochet.

As you may recall, Pinochet ruled Chile from the early 1970s to the late 1980s. Pinochet left power in 1990 after losing a 1988 referendum on his continuation in office. He became a Senator-for-Life, which affords him immunity under Chile's 1978 Amnesty law. Since 1978, Chilean courts have limited the application of the 1978 law. A number of Pinochet's subordinates are now facing human rights trials in Chile. There are additional obstacles to prosecution in Chile of Pinochet, including his Senatorial immunity, but human rights groups have commented favorably on progress toward accountability in Chile.

When Pinochet traveled to England in September 1998 to seek medical treatment, a court in Spain sought his extradition. The original basis for the extradition request was a Spanish law asserting universal jurisdiction to try certain kinds of cases, irrespective of where they occurred and without regard to the nationality of the victim. Subsequent decisions by the British courts have limited extraditable charges to torture and conspiracy to

torture committed after December 1998. The case has raised a number of important and controversial legal issues because of Pinochet's status as a former head of state and the Spanish court's assertion of jurisdiction over crimes committed in Chile. At present, an October 8 Bow Street Magistrate's ruling that Pinochet is extraditable to Spain is under appeal to Britain's High Court. A decision on that appeal is expected in late March. The U.K. has also responded to a Chilean request that Pinochet be released on humanitarian grounds by offering an independent medical assessment of his condition. That assessment has yet to take place.

The United States has long recognized the importance of accountability and justice, as well as the choices made by countries like Chile to achieve reconciliation in making the transition to democracy. The United States condemned the abuses of the Pinochet Government when it was in power. The extradition of Pinochet to Spain is a matter that we believe can best be solved by the courts of the United Kingdom and by the Governments of Chile, the United Kingdom, and Spain. One thing that the United States Government can do and is doing is to declassify and release all the documents we can, subject to the protection of intelligence sources and methods, regarding political violence and human rights abuses of the Pinochet era. The United States has declassified and released thousands of documents, and thousands more will be released in June.

East Timor

In East Timor civilians paid only a few months ago for their vote to reject autonomy within Indonesia in favor of full independence. The international community was able to use diplomacy to help bring an end to the violence. As widespread violence and intimidation on the part of "pro-autonomy" militias raged, the international community made clear to Jakarta that it was prepared to step in.

If the militias had had their way, the results of the referendum would not have been put into effect and those responsible for atrocities in East Timor would have enjoyed impunity in perpetuity. In the end, the Government of Indonesia, to its credit, ultimately allowed the will of the East Timorese people to prevail. In addition, Jakarta allowed a multinational force to re-establish order in East

Timor and handed over power to the United Nations transitional authority.

A number of efforts to piece together what exactly happened in Timor are currently underway. We do know that some 230,000 people were forced to flee their homes, often at gunpoint. As a result of a well-orchestrated, scorched-earth campaign, approximately 80% of the buildings in Dili, the East Timor capital, were burned. We do not yet know how many people were killed or raped in this orgy of violence, but credible reports paint a very grim picture that merits full investigation.

With strong U.S. support, reports of atrocities are being investigated both by a UN-appointed commission and by an Indonesian Commission of Inquiry. We want to see those responsible held accountable. We cannot let go unchallenged the policy —as enunciated last week by the civilian Defense Minister—of exempting Indonesia's top generals from prosecution for murders, torture, rapes, and other atrocities committed by their troops. "We can't go up into the high ranks," Defense Minister Juwono had said, "as they were just carrying out state policy." The implications of this statement are extremely troubling and are in direct contradiction to the law and principles set down more than 50 years ago in Nuremberg. Fortunately, with the weight of public opinion, Indonesian President Abdurraham Wahid reversed the policy, stating that he would allow prosecution of Indonesia's ranking generals if evidence links them to the violence that ravaged East Timor this fall.

* * * *

Atrocities Prevention

Let me say a word now about prevention of atrocities, a major function of my office. Preventing atrocities and ensuring commitment to humanitarian law requires commitment from many nations. Last year, President Clinton launched an atrocities prevention mechanism that includes the establishment of the Atrocities Prevention Inter-Agency Working Group, which I have the privilege to lead, as a focal point within the U.S. Government for identifying and coordinating policy responses to atrocities. The group focuses on those parts of the world where an outbreak of atrocities is

imminent, or where its occurrence requires immediate attention to deter further killing. Recently, we examined both Burundi and Angola as countries where the worst can occur at any moment. We are extremely pleased that Nelson Mandela has just agreed to mediate peace talks between rival groups in Burundi. Ambassador Richard Holbrooke just returned from Angola, where he stressed the need for more preventive actions, including stronger backing for the UN sanctions regime on the rebel group UNITA now so ably coordinated by Canada's permanent representative to the United Nations.

We have also worked with other governments, international organizations, and non-governmental organizations to cooperate on the prevention, amelioration, and prosecution of those responsible for atrocities worldwide. At a conference held at the Holocaust Museum in October, the United States and other participants representing various governmental and non-governmental entities put forth a statement affirming such principles. Some of the key assertions made in this Statement of Principles include:

- The desire to increase respect for and observance of the rights of all persons to live without fear of arbitrary or extrajudicial killing, torture, mutilation, and other serious physical abuse.
- The desire to take all feasible measures to enhance international cooperation and coordinated efforts in the struggle against mass acts of murder, wanton violence, torture, rape as a weapon of war, and other gender-based violence against civilian populations. The deliberate targeting of civilians, especially children, needs special attention.
- The need for intensified efforts to identify patterns of atrocities quickly in order to facilitate prompt responses via the creation of an informal atrocities prevention and response network that will focus on the policy linkages among human rights concerns, atrocities, international law enforcement, and international institutions. Such a network will identify emerging trends and potential responses based on information sharing and will help develop coordinated

policy options that will be raised to appropriate governmental and institutional levels.

* * * *

Diamond Trade

One area that deserves further attention, for example, is how illicit trade fuels conflict. Trade in illicit diamonds, for example, has been known to help finance several conflicts in Africa. All too often, massive civilian carnage has been associated with those conflicts. Consider for a moment the thousands of maimed civilians in Sierra Leone, who have paid for that conflict with their limbs. If we are serious about wanting to prevent atrocities, we need to be willing take on difficult issues such as the linkage between illicit diamond trading and atrocities. We need to consider, specifically, how to devise a new regime to distinguish between diamonds that are "clean" and those that are "bloodied." We are not likely to find any easy answers, but the U.S. Government is committed to working with producing and consuming countries, as well as the diamond industry, toward this end. We owe it to the victims and survivors of bloody conflict to do so.

* * * *

c. Bosnia

As noted in Chapter 17.A.1., violence in the former Yugoslavia in the 1990s became Europe's bloodiest conflict since World War II. On December 16, 1992, Secretary of State Lawrence S. Eagleburger addressed the second meeting of the International Conference on the Former Yugoslavia, in Geneva. The address emphasized the U.S. view that "it is time for the international community to begin identifying individuals who may have to answer for having committed crimes against humanity." In addition to delineating war crimes and crimes against humanity that had been committed, Secretary Eagleburger named individuals who the United States believed were responsible for the commission of the crimes and specified that "[l]eaders such as Slobodan Milosevic, . . .

Radovan Karadzic, . . . and General Ratho Mladic . . . must eventually explain whether and how they sought to ensure, as they must under international law, that their forces complied with international law."

The full text of Secretary Eagleburger's prepared remarks, excerpted below, is available at 3 Dep't St. Dispatch No. 52 at 923 (Dec. 28, 1992), *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

---

* * * *

Just under 4 months ago, an important milestone was reached with the convening of the London International Conference on the former Yugoslavia. Commitments were made both by the parties to the Yugoslav conflict and by the international community itself—commitments to ensure unimpeded delivery of humanitarian aid; to lift the barbaric siege of cities; to halt all military flights over Bosnia-Herzegovina; to group all heavy weapons under UN monitoring; to open up and shut down all detention camps; to tighten sanctions against the aggressor; and to prevent the conflict's spread to neighboring regions and countries.

Some of those commitments have been kept, particularly in the area of sanctions monitoring, and in efforts to prevent a further widening of the war. Most importantly, London established a negotiating mechanism centered here in Geneva, which has brought the international community and the various ex-Yugoslav parties together on an ongoing basis, and which, thanks to the efforts of Cyrus Vance and Lord Owen, remains a viable forum for an eventual settlement of the war.

But let us be clear: We find ourselves today in Geneva because most of the commitments made in London have not been kept, and because the situation inside the former Yugoslavia has become increasingly desperate. Thus, we meet to discuss how the international community will respond in order to force compliance with the London agreements, and thereby accelerate an end to the war.

It is clear in reviewing the record since London that the promises broken have been largely Serbian promises broken. It is the Serbs who continue to besiege the cities of Bosnia; Serb heavy

weapons which continue to pound the civilian populations in those cities; the Bosnian Serb air forces which continue to fly in defiance of the London agreements; and Serbs who impede the delivery of humanitarian assistance and continue the odious practice of "ethnic cleansing." It is now clear, in short, that Mr. Milosevic and Mr. Karadzic have systematically flouted agreements to which they had solemnly, and yet cynically, given their assent. Today we must, at a minimum, commit ourselves anew to the London agreements by:

— Redoubling our assistance efforts and continuing to press for the opening of routes for aid convoys, so that widespread starvation can be avoided this winter;
— Strengthening our efforts to prevent the war's spillover, particularly in Kosovo, which we will not tolerate; and
— Tightening and better enforcing sanctions, the surest means of forcing an early end to the war.

But we must also do more. It is clear that the international community must begin now to think about moving beyond the London agreements and contemplate more aggressive measures. That, for example, is why my government is now recommending that the UN Security Council authorize enforcement of the no-fly zone in Bosnia, and why we are also willing to have the Council re-examine the arms embargo as it applies to the Government of Bosnia-Herzegovina. Finally, my government also believes it is time for the international community to begin identifying individuals who may have to answer for having committed crimes against humanity. We have, on the one hand, a moral and historical obligation not to stand back a second time in this century while a people faces obliteration. But we have also, I believe, a political obligation to the people of Serbia to signal clearly the risk they currently run of sharing the inevitable fate of those who practice ethnic cleansing in their name.

The fact of the matter is that we know that crimes against humanity have occurred, and we know when and where they occurred. We know, moreover, which forces committed those crimes, and under whose command they operated. And we know,

finally, who the political leaders are to whom those military commanders were—and still are—responsible.

Let me begin with the crimes themselves, the facts of which are indisputable:

— The siege of Sarajevo, ongoing since April, with scores of innocent civilians killed nearly every day by artillery shelling;
— The continuing blockade of humanitarian assistance, which is producing thousands upon thousands of unseen innocent victims;
— The destruction of Vukovar in the fall of 1991, and the forced expulsion of the majority of its population;
— The terrorizing of Banja Luka's 30,000 Muslims, which has included bombings, beatings, and killings;
— The forcible imprisonment, inhumane mistreatment, and willful killing of civilians at detention camps, including Banja Luka/Manjaca, Brcko/Luka, Krajina/Prnjavor, Omarska, Prijedor/Keraterm, and Trnopolje/Kozarac;
— The August 21 massacre of more than 200 Muslim men and boys by Bosnian Serb police in the Vlasica Mountains near Varjanta;
— The May-June murders of between 2,000 and 3,000 Muslim men, women, and children by Serb irregular forces at a brick factory and a pig farm near Brcko;
— The June mass execution of about 100 Muslim men at Brod; and
— The May 18 mass killing of at least 56 Muslim family members by Serb militiamen in Grbavci, near Zvornik.

We know that Bosnian Serbs have not alone been responsible for the massacres and crimes against humanity which have taken place. For example, in late October Croatian fighters killed or wounded up to 300 Muslims in Prozor, and between September 24–26, Muslims from Kamenica killed more than 60 Serb civilians and soldiers.

We can do more than enumerate crimes; we can also identify individuals who committed them. For example:

— Borislay Herak is a Bosnian Serb who has confessed to killing over 230 civilians; and
— "Adil and Arif" are two members of a Croatian para-military force which in August attacked a convoy of buses carrying more than 100 Serbian women and children, killing over half of them.

We also know the names of leaders who directly supervised persons accused of war crimes, and who may have ordered those crimes. These include:

— Zeljko Raznjatovic, whose para-military forces, the "tigers," have been linked to brutal ethnic cleansing in Zvornik, Srebrenica, Bratunac, and Grobnica; and who were also linked to the mass murders of up to 3,000 civilians near Brcko;
— Vollslay Seselj, whose "White Eagles" force has been linked to atrocities in a number of Bosnian cities, including the infamous incident at Brcko;
— Drago Prcac, commander of the Omarska Detention Camp, where mass murder and torture occurred; and
— Adem Delic, the camp commander at Celebici where at least 15 Serbs were beaten to death in August.

I want to make it clear that, in naming names, I am presenting the views of my government alone. The information I have cited has been provided to the UN War Crimes Commission, whose decision it will be to prosecute or not. Second, I am not prejudging any trial proceedings that may occur; they must be impartial and conducted in accordance with due process. Third, the above listing of names is tentative and will be expanded as we compile further information.

Finally, there is another category of fact which is beyond dispute—namely, the fact of political and command responsibility for the crimes against humanity which I have described. Leaders such as Slobodan Milosevic, the President of Serbia, Radovan Karadzic, the self-declared President of the Serbian Bosnian Republic, and General Ratho Mladic, commander of Bosnian Serb

military forces, must eventually explain whether and how they sought to ensure, as they must under international law, that their forces complied with international law. They ought, if charged, to have the opportunity of defending themselves by demonstrating whether and how they took responsible action to prevent and punish the atrocities I have described which were undertaken by their subordinates.

I have taken the step today of identifying individuals suspected of war crimes and crimes against humanity for the same reason that my government has decided to seek UN authorization for enforcing the no-fly zone in Bosnia and why we are now willing to examine the question of lifting the arms embargo as it applies to Bosnia-Herzegovina. It is because we have concluded that the deliberate flaunting of Security Council resolutions and the London agreements by Serb authorities is not only producing an intolerable and deteriorating situation inside the former Yugoslavia, it is also beginning to threaten the framework of stability in the new Europe.

It is clear that the reckless leaders of Serbia, and of the Serbs inside Bosnia, have somehow convinced themselves that the international community will not stand up to them now, and will be forced eventually to recognize the fruits of their aggression and the results of ethnic cleansing. Tragically, it also appears that they have convinced the people of Serbia to follow them to the front lines of what they proclaim to be an historic struggle against Islam on behalf of the Christian West.

It is time to disabuse them of these most dangerous illusions. The solidarity of the civilized and democratic nations of the West lies with the innocent and brutalized Muslim people of Bosnia. Thus, we must make it unmistakably clear that we will settle for nothing less than the restoration of the independent state of Bosnia-Herzegovina with its territory undivided and intact, the return of all refugees to their homes and villages, and, indeed, a day of reckoning for those found guilty of crimes against humanity.

It will undoubtedly take some time before all these goals are realized, but then there is time, too, though not much, for the people of Serbia to step back from the edge of the abyss. There is

time, still, to release all prisoners; to lift the siege of cities; to permit humanitarian aid to reach the needy; and to negotiate for peace and for a settlement guaranteeing the rights of all minorities in the independent states of the former Yugoslavia.

But in waiting for the people of Serbia, if not their leaders, to come to their senses, we must make them understand that their country will remain alone, friendless, and condemned to economic ruin and exclusion from the family of civilized nations for as long as they pursue the suicidal dream of a Greater Serbia. They need, especially, to understand that a second Nuremberg awaits the practitioners of ethnic cleansing, and that the judgment, and opprobrium, of history awaits the people in whose name their crimes were committed.

On December 18, 1992, the UN General Assembly adopted a resolution on the situation in Bosnia-Herzegovina containing a preambular paragraph referring to "the abhorrent policy of 'ethnic cleansing,' which is a form of genocide." U.N. Doc. A/RES/47/121 (1992). While not necessarily agreeing with the preambular reference at that time, the United States voted in favor of the resolution.

On May 18, 1993, Secretary of State Warren Christopher stated in testimony before the House Foreign Affairs Committee:

> Some of the acts that have been committed by various parties in Bosnia, principally by the Serbians, could constitute genocide under the 1948 convention if their purpose was to destroy the religious or ethnic group in whole or in part. That seems to me to be a standard that may well have been reached in some of the aspects of Bosnia. Certainly some of the conduct there is tantamount to genocide.

Foreign Assistance Legislation for FY94: Hearing Before the House Comm. On Foreign Affairs, 103 Cong. 88–122, 226–232 (1993) (statement by Warren M. Christopher, Secretary of State).

d. Rwanda

In May 1994 officials in the U.S. Department of State concluded that acts of genocide had occurred in Rwanda. In a memorandum to the Secretary of State, dated May 21, 1994, the analysis was set forth as follows. The full text of this previously classified memorandum is available at *www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/rw052194.pdf.*

---

* * * *

DISCUSSION

As defined in the 1948 Genocide Convention, the crime of "genocide" occurs when certain acts are committed against members of a national, ethnic, racial or religious group with the intent of destroying that group in whole or in part. Among the relevant acts are killing, causing serious bodily or mental harm and deliberately inflicting conditions of life calculated to bring about physical destruction of the group. In addition, conspiracy, direct and public incitement and attempts to commit genocide, as well as complicity in genocide, are offenses under the Convention.

. . . [The Office of the Legal Adviser] believes . . . that there is a strong basis to conclude that some of the killings and other listed acts carried out against Tutsis have been committed with the intent of destroying the Tutsi ethnic group in whole or in part. Moreover, there is evidence that some persons in Rwanda have incited genocide or have been complicit in genocide, which would also constitute offenses under the Convention.

A USG statement that acts of genocide have occurred would not have any particular legal consequences. Under the Convention, the prosecution of persons charged with genocide is the responsibility of the competent courts in the state where the acts took place or an international penal tribunal (none has yet been established); the U.S. has no criminal jurisdiction over acts of genocide occurring within Rwanda unless they are committed by U.S. citizens or they fall under another criminal provision of U.S.

law (such as those relating to acts of terrorism for which there is a basis for U.S. jurisdiction).

Although lacking in legal consequences, a clear statement that the USG believes that acts of genocide have occurred could increase pressure for USG activism in response to the crisis in Rwanda. We believe, however, that we should send a clear signal that the United States believes that acts of genocide have occurred in Rwanda. If we do not seize the opportunity presented by fora such as the UNHRC to use the genocide label to condemn events in Rwanda, our credibility will be undermined with human rights groups and the general public, who may question how much evidence we can legitimately require before coming to a policy conclusion.

* * * *

On February 22, 1995, Assistant Secretary of State for Human Rights John Shattuck testified before the House of Representatives Subcommittee on Africa, Committee on International Relations. Excerpts below provide views on the situation in Rwanda and also in Burundi.

The full text of that testimony is available at *http://dosfan.lib.uic.edu/ERC/democracy/releases_statements/950222.html*.

---

* * * *

. . . The genocidal slaughter in Rwanda is among the greatest human rights catastrophes of our time in both speed and scale. I have traveled twice to Rwanda since the onslaught of the killings in April 1994. I cannot adequately describe some of the things I have seen. From this horror, we are trying to wrest some measure of justice and hope for the future. In particular, we fought hard and successfully for the creation of the UN War Crimes Tribunal for Rwanda. We have contributed personnel and over $1 million in funds to the Tribunal, and were instrumental in helping the UN field human rights monitors in Rwanda, contributing three quarters of a million dollars to this major effort to stabilize the country so that refugees can return, and we are contributing development

aid for the rebuilding of the economic and social structures. The establishment of criminal responsibility for genocide is crucial if we are to differentiate victims from aggressors, foster societal reconciliation and overcome the cynical argument that ethnic conflicts cannot be resolved.

The Rwanda genocide was the result of years of mounting interethnic hostility and conflict; it is the cause of the flood of refugees, the depopulation of the country and the continuing instability, which threatens to spread to neighboring countries. In order to address this crisis, all aspects of a human rights response must be present and well integrated.

How is that to be done? First, through the Tribunal. Second, through the deployment of UN monitors whose work and presence will promote stability. Third, we must coordinate the UN peacekeeping operation in Rwanda with humanitarian relief and human rights monitoring and enforcement activities. Fourth, through the UN we must assist the Rwandan government to build national institutions of justice and democracy.

We must also work to prevent a human rights disaster in Burundi akin to that of Rwanda. Here, we are actively supporting efforts to prevent ethnic bloodshed and promote national reconciliation. We will provide $5 million in FY-95 development aid focused on grants to promote dialogue, reconciliation and human rights; we will look to other funds to support the UN's comprehensive plan for human rights advisory services and the OAU monitoring force. We are also pressing for accountability for those responsible for the attempted coup and murder of President Ndayade in October 1993 and the ethnic violence that followed. I have traveled twice to Burundi to investigate and encourage efforts at accountability and reconciliation.

I have discussed Rwanda and Burundi at some length because they are indicative of the new, creative efforts in preventive diplomacy and preemptive conflict resolution that we must develop to manage the post-Cold War human rights challenges that arise along the fault lines within societies and between countries. Many of the old familiar diplomatic and military tools have proven to be of limited utility in addressing these challenges. We are joining our efforts with other governments and nongovernmental

organizations to begin to establish mechanisms that will meet these challenges.

* * * *

e. Iraq

On October 27, 1999, Ambassador Scheffer addressed the Carnegie Endowment for International Peace in Washington, D.C. on "The Continuing Criminality of Saddam Hussein's Regime." Excerpts below from his prepared text provide an overview of war crimes, crimes against humanity, and possible genocide committed by Saddam Hussein since the 1980s, efforts undertaken to gather evidence, and possible fora for bringing him to justice. On December 13, 2003, U.S. military forces took Saddam Hussein into custody. As this volume was going to press, he was being held by Iraqi officials with the intention of bringing him to trial before the Iraq Special Tribunal on various war crimes and other charges.

The full text of Ambassador Scheffer's prepared remarks is available at *www.state.gov/www/policy_remarks/1999/991027_scheffer_iraq.html. See also* Ambassador Scheffer's remarks to the Middle East Institute and the Iraq foundation, September 18, 2000, "The Case for Justice in Iraq," available at *www.state.gov/www/policy_remarks/2000/000918_scheffer_iraq.html.*

---

* * * *

Looking back to 1990 and 1991, before the days of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, it was clear to many international lawyers in those days that Iraqi president Saddam Hussein deserved investigation and prosecution as an international war criminal. His violations of international humanitarian law were considerable even at that time. Yet Saddam Hussein and his colleagues in power—men such as his sons Qusay and Uday, and Ali Hassan al-Majid, the infamous "Chemical Ali"—have not been stigmatized and ostracized by the

international community as have been equally infamous men such as Slobodan Milosevic, Radovan Karadzic, Ratko Mladic, Jean Kambanda, and Théoneste Bagasora. Saddam Hussein and his henchmen are still viewed by some governments as legitimate tolerable leaders of a country somehow under siege by the international community. They are viewed as men with whom people want someday to do business, to open up channels of trade, and even to forget and forgive. In reality, these are thugs who terrorize what was once, and could again become, a great nation. The United States Government is determined to see this clique of Iraqi criminals stripped of their power and, if possible, brought to justice. They should benefit from no contracts, no trade, no initiatives that would bestow any legitimacy on their criminal enterprise in Baghdad. They should be isolated, cut off, and brought before the gates of justice. That would be far more generous and humane than what they have offered hundreds of thousands of their victims.

* * * *

Saddam's Crimes

In Iraq today, atrocities are being carried out by Saddam's army against the inhabitants of the southern marshes with a ferocity that is as widespread, albeit over a longer period of time, as that waged by Milosevic's goons against the Kosovar Albanians. The Iraqi regime's destruction of the environment in the south, making it uninhabitable by the people who live there, is part of that overall campaign. And Saddam's internal war against his political opponents is of a character that begs for description as crimes against humanity. The criminal enterprise is undeniable and glares at anyone who cares to look closely at Iraq today. We intend to keep exposing it for what it is and to work towards the day when the key people in Saddam's regime, who are actually responsible for it, are put behind bars.

I should therefore describe the scope and magnitude of the Iraqi regime's international crimes and who within the leadership clique we think merits investigation.

We have identified nine major criminal episodes under Saddam Hussein's rule in Iraq. Three of the nine episodes continue to this

day and, indeed, one of them is accelerating at an alarming rate. These episodes are:

1. In the 1980's, crimes against humanity and possibly genocide in the "Anfal" campaign against the Iraqi Kurds, including the notorious use of poison gas in Halabja in 1988, which killed an estimated 5,000 people in a single attack.
2. In the 1980's, crimes against humanity and war crimes for use of poison gas against Iran, as well as other war crimes against Iran and the Iranian people.
3. In 1990–91, crimes against humanity and war crimes against Kuwait, its people, and its environment during and following the illegal invasion and occupation of that country.
4. 1991, war crimes against Coalition forces during the Gulf War.
5. During the 1990's, possible crimes against humanity and war crimes for illegal human experimentation.
6. Since the 1980's, possible crimes against humanity for killings, ostensibly against political opponents, within Iraq.
7. Since 1991, crimes against humanity and possibly genocide against the Iraqi Kurds in northern Iraq.
8. Since 1991, crimes against humanity and possibly genocide against the peoples of the southern Iraqi marshes.
9. Crimes against humanity and war crimes for possible killings of Iranian prisoners of war.

Like Slobodan Milosevic, Saddam Hussein did not commit these crimes on his own. . . .

* * * *

The non-governmental group INDICT has come up with a list of 12 people it believes should be indicted by an international war crimes tribunal. In addition to Saddam Hussein, his two sons, and Ali Hassan al-Majid, INDICT's list includes Barzan al-Tikriti, former head of Iraqi Intelligence; Taha Yasin Ramadan, Vice President of Iraq; Watban al-Tikriti, former Minister of the Interior;

Sabawi al-Tikriti, former head of Intelligence and the General Security Organization; Izzat Ibrahim al-Douri, vice chairman of the Revolutionary Command Council and former Head of the Revolutionary Court; Muhammad Hamza al-Zubaydi, Deputy Prime Minister of Iraq; Tariq Aziz, Deputy Prime Minister of Iraq; and Aziz Salih Noman, Governor of Kuwait during the Iraqi occupation.

Need for International Investigation and Prosecution

* * * *

Since some governments are contemplating broader relationships with Baghdad, and since some well-intentioned people seem to believe that our support for sanctions against the Iraqi regime somehow raises questions about our own conduct towards the people of Iraq, we must understand the character and magnitude of Saddam Hussein's criminal enterprise. The Iraqi regime's violations of international humanitarian law have been going on for many years and are, in fact, on-going. This is a man and a regime who have brutally and systematically committed war crimes and crimes against humanity for years, are committing them now and will continue committing them until the international community finally says enough.

I am going to explain in some detail what we are doing to corner Saddam Hussein and his regime within the rule of law. Our primary objective is to see Saddam Hussein and the leadership of the Iraqi regime indicted and prosecuted by an international criminal tribunal. There remains a critical need for such ad hoc international criminal tribunals at the end of the 20th century. The permanent international criminal court envisaged by the Rome Treaty of 1998 will have only prospective jurisdiction when it is established, and that will not happen unless 60 governments ratify the Rome Treaty. Given that four governments have ratified the Rome Treaty to date, one can expect that several years will elapse before such a permanent court can be used, and then only for crimes committed after its establishment. Moreover because of the way the ICC's jurisdiction was set out in article 12 of the Rome statute, Saddam Hussein will be

immune from the ICC so long as he only kills Iraqis. That is unacceptable to us, and should be unacceptable to other civilized nations of the world.

For several years, the United States has quietly pursued with member States of the Security Council and with interested governments in the region the goal of an international criminal tribunal that would be established by the UN Security Council. I have personally led this effort since 1997, and I have visited with many governments to seek out their views. We are realistic about where we stand and the prospects for accomplishing our objective. Quiet diplomacy has told us that many governments agree with the principle that something should be done to bring Saddam Hussein and other very high officials to justice. Interestingly, many governments seem to think that the effort will be blocked in the Council by countries willing to defend Saddam Hussein publicly. Given how infamous his crimes have been, this will be an interesting test to see who will defend a regime that has committed both international and internal atrocities that are as horrendous as they are illegal.

* * * *

. . . [W]e strongly believe even at this stage that the Security Council would be fully justified in establishing an ad hoc international criminal tribunal without the predicate of a Commission of Experts. We say this because a major effort, strongly supported by the U.S Government and other governments and non-governmental organizations, has already been working to gather relevant information about the Iraqi regime so as to be able to make it available to an international prosecutor as soon as one is appointed with jurisdiction over Saddam Hussein and his top assistants.

* * * *

Considerable Evidence of Iraqi War Crimes Exists

For its part, the United States Government will continue to gather and organize a large amount of incriminating information about the Iraqi regime stretching back to the 1980's. The documents we have been working on include:

- First is the archive of 5.5 million pages of captured Iraqi documents taken out of northern Iraq by Human Rights Watch and the U.S. Government. We have transcribed these onto 176 CD-ROM's and I am pleased to announce that the U.S. Government is handing over a set to the Iraq Foundation. These detail in the most minute way the day-to-day nature of the crimes committed by Saddam Hussein's intelligence services against the peoples of northern Iraq.
- Second is an archive of Iraqi documents—over four million pages—captured during the Gulf War in 1991 from Iraqi forces in Kuwait and southern Iraq. These also detail the nature of Iraqi crimes against the Kuwaiti people. I should note in this context the excellent work already done by Kuwaiti prosecutors, the Center for Research and Studies on Kuwait and others there in documenting Saddam Hussein's crimes against the Kuwaiti people.
- Third, the U.S. Government is working to preserve videotapes shot by U.S. cameramen after the Gulf War that have been stored in U.S. Government archives. These will provide important visual evidence of Saddam's crimes in Kuwait, in particular.
- Fourth, the U.S. Government in 1991 and 1992 compiled an archive of classified documents relating to Iraqi war crimes in the Gulf War. While we do not intend to make all of these documents public, we have worked closely with past commissions of experts and tribunals to allow them access to classified material in accordance with U.S. laws that protect sources and methods. We would be willing to do the same for a commission or tribunal looking into the crimes of Saddam Hussein and his henchmen.
- Fifth, the U.S. Government has compiled imagery and other evidence of Saddam's campaign against the people of southern Iraq, particularly the culture of those who live in the southern marshes. Some of this has already been declassified, and I will be showing you some of that in the next few minutes.

Funding and Congressional Support

Seeing Saddam Hussein indicted for his crimes is a goal that the Administration and the Congress all share. In 1997, the House of Representatives voted in favor of such a resolution by a vote of 396–2; in the Senate a similar resolution passed 97–0. Last year Congress expressed its desire to see an international criminal tribunal established to indict Saddam Hussein when it adopted the Iraq Liberation Act.*

3. Narcotrafficking

a. Counternarcotics assistance related to certain aerial interdiction programs

(1) Suspension of certain assistance

The United States has for a number of years provided assistance to foreign countries to support their counternarcotics programs. *See* 22 U.S.C. § 2291. In Peru and Colombia the assistance included providing flight-tracking information and other forms of technical assistance for the purpose of enabling these countries to locate and intercept aircraft suspected of engaging in illegal drug trafficking. Due to concerns that the two countries were engaging in in-flight destruction of civil aircraft as part of their counternarcotics programs, the Office of Legal Counsel, U.S. Department of Justice, issued an opinion on July 14, 1994, concluding that continued provision of certain assistance to these two countries that could be used in carrying out such "shootdowns" could be found to be a violation of the U.S. Aircraft Sabotage Act. The assistance was suspended.

---

* Editors' Note: Section 2 of the Iraq Liberation Act, Pub. L. No. 105–338 (1998), set forth findings which, among other things, enumerated crimes committed by Saddam Hussein. In § 6 Congress "urge[d] the President to call upon the United Nations to establish an international criminal tribunal for the purpose of indicting, prosecuting, and imprisoning Saddam Hussein and other Iraqi officials who are responsible for crimes against humanity, genocide, and other criminal violations of international law."

While concluding that the specific statutory provision in question, 18 U.S.C. § 32(b)(2), was applicable to U.S. officials, the opinion also stated that its conclusions "should not be taken to mean that other domestic criminal statutes will necessarily apply to USG personnel acting officially."

The full text of the opinion, excerpted below, is available at *www.usdoj.gov/olc/shootdow.htm*. Footnotes have been omitted.

---

* * * *

[W]e understand that the government of Peru has used weapons against aircraft suspected of transporting drugs and that the government of Colombia announced its intention to destroy in-flight civil aircraft suspected of involvement in drug trafficking. The possibility that these governments might use the information or other assistance furnished by the United States to shoot down civil aircraft raises the question of the extent to which the United States and its governmental personnel may lawfully continue to provide assistance to such programs.

* * * *

I. International law forms an indispensable backdrop for understanding section 32(b)(2). A primary source of international law regarding international civil aviation is the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (the Chicago Convention). The Chicago Convention is administered by the International Civil Aviation Organization (ICAO).

Article 3(d) of the Chicago Convention declares that "[t]he contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft." Parties have interpreted the due regard standard quite strictly, and have argued that this provision proscribes the use of weapons by states against civil aircraft in flight. For example, the United States invoked this provision during the international controversy over the Korean Air Lines Flight 007 (KAL 007) incident. While acknowledging that Article 1 of

the Chicago Convention recognized the customary rule that "every State has complete and exclusive sovereignty over the airspace above its territory," the United States argued that the Soviet Union had violated both Article 3(d) and customary international legal norms in shooting down KAL 007. The Administrator of the Federal Aviation Authority stated to the ICAO Council that:

> The ICAO countries have agreed that they will "have due regard for the safety of navigation of civil aircraft" when issuing regulations for their military aircraft. It is self-evident that intercepts of civil aircraft by military aircraft must be governed by this paramount concern.
>
> The international community has rejected deadly assault on a civil airliner by a military aircraft in time of peace as totally unacceptable. It violates not only the basic principles set forth in the [Chicago] convention but also the fundamental norms of international law. . . .

In the wake of KAL 007, the ICAO Assembly unanimously adopted an amendment to the Chicago Convention to make more explicit the prohibitions of Article 3(d). This amendment, Article 3 *bis*, reads in part as follows:

> (a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

Article 3 *bis* should be understood to preclude states from shooting down civil aircraft suspected of drug trafficking, and the only recognized exception to this rule is self-defense from attack. We understand that the United States has not yet ratified Article 3 *bis*. There is, however, support for the view that the principle it announced is declaratory of customary international law.

In addition to the Chicago Convention, the United States has ratified the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation [Sabotage], Sept. 23, 1971, 24 U.S.T. 567, T.I.A.S. 7570 (the Montréal Convention). Article 1 of the latter Convention specifies certain substantive offenses against civil aircraft: in particular, Article 1,1(b) states that "[a]ny person commits an offence if he unlawfully and intentionally . . . destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight." Article 1,2 makes it an offense to attempt to commit a previously enumerated offense, or to be an accomplice of an offender. Further, Article 10 requires states "in accordance with international and national law," to "endeavour to take all practicable measures for the purpose of preventing" substantive offenses.

. . . The United States implemented the Convention in 1984 by enacting the Aircraft Sabotage Act, Pub. L. No. 98–473, tit. II, ch. XX, pt. B, §§ 2011–2015, 98 Stat. 1837, 2187 (1984). Congress specifically stated that legislation's purpose was "to implement fully the [Montréal] Convention . . . and to expand the protection accorded to aircraft and related facilities." *Id*., § 2012(3); *see also* S. Rep. No. 619, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3682. The criminal prohibition now codified at 18 U.S.C. § 32(b)(2) was enacted as part of that legislation.

II. We turn to the question of criminal liability under domestic law. At least two criminal statutes are relevant to this inquiry. The first is 18 U.S.C. § 32(b)(2), which implements Article 1,1(b) of the Montréal Convention, and prohibits the destruction of civil aircraft. The second is 18 U.S.C. § 2(a), which codifies the principle of aiding and abetting liability.

A. 18 U.S.C. § 32(b)(2) was enacted in 1984, one year after the destruction of KAL 007. The statute makes it a crime "willfully" to "destroy[] a civil aircraft registered in a country other than the United States while such aircraft is in service or cause[] damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight." The text, structure and legislative history of the statute establish that

it applies to the actions of the Peruvian and Columbian officials at issue here.

* * * *

Section 32(b)(2) was intended to apply to governmental actors (here, the military and police forces of Colombia and Peru) as well as to private persons and groups. When Congress adopted section 32(b)(2) in 1984, it had been a crime for nearly thirty years under section 32(a)(1) for anyone willfully to "set[] fire to, damage[], destroy[], disable[], or wreck[] any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." 18 U.S.C. § 32(a)(1). This Department has sought, under section 32(a), to prosecute state actors whom it believes to have sponsored terrorist acts (specifically, the bombing of Pan American Flight 103 at the behest of Libya). Because of the obvious linguistic and structural similarities between sections 32(a)(1) and 32(b)(2), we read those sections to have the same coverage in this regard, *i.e.*, to apply to governmental and non-governmental actors alike.

The legislative history of the Aircraft Sabotage Act confirms that Congress intended section 32(b)(2) to reach governmental actions. . . .

* * * *

Because section 32(b)(2) applies generally to foreign governments, it must apply to shootdowns of foreign-registered civil aircraft by law enforcement officers or military personnel of the governments of Colombia and Peru. The statute contains no exemption for shootdowns in pursuance of foreign law enforcement activity; nor does it exempt shootdowns of aircraft suspected of carrying contraband. USG personnel who aid and abet violations of section 32(b)(2) by the Colombian or Peruvian governments are thus themselves exposed to criminal liability by virtue of 18 U.S.C. § 2(a), *see* Part II B below.

Our conclusion that section 32(b)(2) applies to governmental action should not be understood to mean that other domestic criminal statutes apply to USG personnel acting officially. Our Office's precedents establish the need for careful examination of each individual statute. For example, we have opined that USG

officials acting within the course and scope of their duties were not subject to section 5 of the Neutrality Act, 18 U.S.C. § 960. *See Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984) (*Neutrality Act Opinion*). . . .

* * * *

III. United States aid to Colombia and Peru might also implicate USG personnel in those governments' shootdown policies on a conspiracy rationale. *See* 18 U.S.C. § 371. . . .

* * * *

IV. This case is characterized by a combination of factors: it involves a criminal statute that explicitly has extraterritorial reach, that is applicable to foreign government military and police personnel, and that defines a very serious offense. Moreover, our Government is fully engaged in furnishing direct and substantial assistance that is not otherwise available to the foreign nations involved, and at least some of the USG personnel who provide that assistance have actual knowledge that it is likely to be used in committing violations.

Given this combination of factors, we conclude that, in the absence of reliable assurances . . . USG agencies and personnel may not provide information (whether "real-time" or other) or other USG assistance (including training and equipment) to Colombia or Peru in circumstances in which there is a reasonably foreseeable possibility that such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking.

* * * *

V. Our conclusions here must not be exaggerated. We have been asked a specific question about particular forms of USG assistance to the Colombian and Peruvian aerial interdiction programs. The application of the legal standard described here to any other USG programs—including other programs designed to benefit Colombia or Peru—will require careful, fact-sensitive analysis. We see no need to modify USG programs whose connection to those governments' shootdown policies is remote and attenuated, and (as noted above) we perceive no implications for USG assistance

to any other foreign country unless another government adopts a policy of shooting down civil aircraft.

Other limitations on our conclusions should be noted. In certain circumstances, USG personnel may employ deadly force against civil aircraft without subjecting themselves to liability under section 32(b)(2). "The act is a criminal statute, and therefore must be construed strictly, 'lest those be brought within its reach who are not clearly included.' " Although these circumstances are extremely limited, they may in fact arise.

Specifically, we believe that the section would not apply to the actions of United States military forces acting on behalf of the United States during a state of hostilities. . . . We do not think that section 32(b)(2) should be construed to have the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict. . . . Thus, we do not think the statute, as written, should apply to such incidents as the downing on July 3, 1988 of Iran Air Flight 655 by the United States Navy cruiser *Vincennes*.

Furthermore, even in cases in which the laws of armed conflict are inapplicable, we believe that a USG officer or employee may use deadly force against civil aircraft without violating section 32(b)(2) if he or she reasonably believes that the aircraft poses a threat of serious physical harm to the officer or employee or to another person. A situation of this kind could arise, for example, if an aircraft suspected of narcotics trafficking began firing on, or attempted to ram, a law enforcement aircraft that was tracking it. Assuming that such aggressive actions posed a direct and immediate threat to the lives of USG personnel or of others aboard the tracking aircraft, and that no reasonably safe alternative would dispel that threat, we believe that the use of such force would not constitute a violation of section 32(b)(2).

(2) Legislation

On October 5, 1994, President William J. Clinton signed into law the National Defense Authorization Act for Fiscal year

1995, which included legislation designed to address the legal issues highlighted in the OLC opinion, discussed above. Pub. L. No. 103–337, div. A, title X, § 1012, 108 Stat. 2663, 2837 (1994). The provision, codified as 22 U.S.C. §§ 2291–94, is set forth below in full.

Official immunity for authorized employees and agents of United States and foreign countries engaged in interdiction of aircraft used in illicit drug trafficking

(a) Employees and agents of foreign countries

Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of a foreign country (including members of the armed forces of that country) to interdict or attempt to interdict an aircraft in that country's territory or airspace if—

(1) that aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and
(2) the President of the United States, before the interdiction occurs, has determined with respect to that country that—
    (A) interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and
    (B) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force directed against the aircraft.

(b) Employees and agents of United States

Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of the United States (including members of the Armed Forces of the United States) to provide assistance for the interdiction actions of foreign countries authorized under subsection (a) of this section. The provision of

such assistance shall not give rise to any civil action seeking money damages or any other form of relief against the United States or its employees or agents (including members of the Armed Forces of the United States).

(c) Definitions

For purposes of this section:

(1) The terms "interdict" and "interdiction", with respect to an aircraft, mean to damage, render inoperative, or destroy the aircraft.

(2) The term "illicit drug trafficking" means illicit trafficking in narcotic drugs, psychotropic substances, and other controlled substances, as such activities are described by any international narcotics control agreement to which the United States is a signatory, or by the domestic law of the country in whose territory or airspace the interdiction is occurring.

(3) The term "assistance" includes operational, training, intelligence, logistical, technical, and administrative assistance.

(3) Presidential Determinations

On December 1, 1994, President William J. Clinton issued Presidential Determination No. 95–7, as required under subsection (a)(2) of the statute to resume drug interdiction assistance to the Government of Colombia. 59 Fed. Reg. 64,835 (Dec. 15, 1994). On December 8, the President issued the statutorily required determination for Peru in Determination No. 95–9, 59 Fed. Reg. 65,231 (Dec. 19, 1994). The determination for Colombia is set forth below.

---

* * * *

Resumption of U.S. Drug Interdiction Assistance to the Government of Colombia

Memorandum for the Secretary of State [and] the Secretary of Defense

Pursuant to the authority vested in me by section 1012 of the National Defense Authorization Act for Fiscal Year 1995, Public Law 103–337, I hereby determine with respect to Colombia that: (a) interdiction of aircraft reasonably suspected to be primarily engaged in illicit rug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (b) that country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft.

* * * *

b. National emergency concerning significant narcotics traffickers

On October 21, 1995, President William J. Clinton issued Executive Order No. 12,978, Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers, 60 Fed. Reg. 54,579 (Oct. 24, 1995), acting under the authority of the Constitution and U.S. law, including the International Emergency Economic Powers Act (50 U.S.C. §§ 1701 et seq.) ("IEEPA"), the National Emergencies Act (50 U.S.C. §§ 1601 et seq.), and general authorization to delegate executive functions (3 U.S.C. § 301). In the executive order, effective October 22, 1995, the President found that "the actions of significant foreign narcotics traffickers centered in Colombia, and the unparalleled violence, corruption, and harm that they cause in the United States and abroad, constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," and declared a national emergency to deal with that threat.

Sanctions established by Executive Order 12978, and imposed on the four principal figures in the Cali cartel designated in its annex are set forth below. A notice of the blocking action issued by OFAC, effective October 23,

1995, added designations of over 30 entities and more than 40 individuals. 60 Fed. Reg. 54,582 (Oct. 24, 1995). The comprehensive designation lists are periodically updated in the Federal Register. *See also* 90 Am. J. Int'l L. 79, 87 (1996).

---

* * * *

SECTION 1. Except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) and in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date, I hereby order blocked all property and interests in property that are or hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, of:
(a) the foreign persons listed in the Annex to this order;
(b) foreign persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State:

(i) to play a significant role in international narcotics trafficking centered in Colombia; or
(ii) materially to assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to this order; and

(c) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated in or pursuant to this order.

SEC. 2. Further, except to the extent provided in section 203(b) of IEEPA and in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date, I hereby prohibit the following:
(a) any transaction or dealing by United States persons or within the United States in property or interests in property of the persons designated in or pursuant to this order;

(b) any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order.

SEC. 3. For the purposes of this order:

* * * *

(e) the term "narcotics trafficking" means any activity undertaken illicitly to cultivate, produce, manufacture, distribute, sell, finance or transport, or otherwise assist, abet, conspire, or collude with others in illicit activities relating to, narcotic drugs, including, but not limited to, cocaine.

* * * *

President Clinton transmitted the executive order to Congress in a message dated October 21, 1995, that explained the purpose of the sanctions, as set forth in excerpts below. 31 WEEKLY COMP. PRES. DOC. 1914 (Oct. 30, 1995).

---

* * * *

Narcotics production has grown substantially in recent years. Potential cocaine production—a majority of which is bound for the United States—is approximately 850 metric tons per year. Narcotics traffickers centered in Colombia have exercised control over more than 80 percent of the cocaine entering the United States.

Narcotics trafficking centered in Colombia undermines dramatically the health and well-being of United States citizens as well as the domestic economy. Such trafficking also harms trade and commercial relations between our countries. The penetration of legitimate sectors of the Colombian economy by the so-called Cali cartel has frequently permitted it to corrupt various institutions of Colombian government and society and to disrupt Colombian commerce and economic development.

The economic impact and corrupting financial influence of such narcotics trafficking is not limited to Colombia but affects commerce and finance in the United States and beyond. United

States law enforcement authorities estimate that the traffickers are responsible for the repatriation of $ 4.7 to $ 7 billion in illicit drug profits from the United States to Colombia annually, some of which is invested in ostensibly legitimate businesses. Financial resources of that magnitude, which have been illicitly generated and injected into the legitimate channels of international commerce, threaten the integrity of the domestic and international financial systems on which the economies of many nations now rely.

* * * *

The measures I am taking are designed to deny these traffickers the benefit of any assets subject to the jurisdiction of the United States and to prevent United States persons from engaging in any commercial dealings with them, their front companies, and their agents. These measures demonstrate firmly and decisively the commitment of the United States to end the scourge that such traffickers have wrought upon society in the United States and beyond. The magnitude and dimension of the current problem warrant utilizing all available tools to wrest the destructive hold that these traffickers have on society and governments.

c. Foreign Narcotics Kingpin Designation Act

On December 3, 1999, President William J. Clinton signed into law the Foreign Narcotics Kingpin Designation Act, Title VIII, Intelligence Authorization Act, Fiscal Year 2000, Pub. L. No. 106–120, 113 Stat. 1606 (1999), 21 U.S.C. §§ 1901–1908, 8 U.S.C. § 1182. As indicated in § 802 of the act, it was modeled on the effective sanctions program already in place against Colombian drug cartels, *supra*. Section 804 required the President to submit both a classified and an unclassified report annually to Congress. The unclassified report would, among other things, publicly identify the "foreign persons that the President determines are appropriate for sanctions" and detail his intent to impose sanctions. Section 805 of the act blocked assets and prohibited transactions with "significant foreign narcotics traffickers." That term was

defined in § 808 to mean "any foreign person that plays a significant role in international narcotics trafficking, that the President has determined to be appropriate for sanctions pursuant to this title, and that the President has publicly identified" in the report required under § 804. President Clinton's statement on signing the bill into law follows. 35 WEEKLY COMP. PRES. DOC. 2512 (Dec. 3, 1999). *See also Digest 2001* at 143–145.

This Act contains a provision, known as the "Foreign Narcotics Kingpin Designation Act," that establishes a global program targeting the activities of significant foreign narcotics traffickers and their organizations. The new Act provides a statutory framework for the President to institute sanctions against foreign drug kingpins when such sanctions are appropriate, with the objective of denying their businesses and agents access to the U.S. financial system and to the benefits of trade and transactions involving U.S. businesses and individuals. Working with other nations, I intend to use the tools in this provision to combat the national security threat posed to the United States by international drug trafficking.

No nation alone can effectively counter these supra-national criminal organizations. The United States must continue to cooperate with, assist, and encourage other nations to join in coordinated efforts against these organizations. Consequently, as kingpin designations are made under this law, we look forward to working with appropriate host government authorities to pursue additional measures against those designated.

d. Prohibition on assistance to drug traffickers

In 1995 the Department of State issued a proposed rule to implement § 487 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291f. 60 Fed. Reg. 7737 (Feb. 9, 1995). The new regulations were published as a final rule at 63 Fed. Reg. 36,571 (July 7, 1998), 22 CFR Part 140. As the Federal Register explained,

> [s]ection 487(a) directs the President to take all reasonable steps to ensure that assistance provided under the Foreign Assistance Act or the Arms Export Control Act is not provided to or through any individual or entity that the President knows or has reason to believe has been convicted of a violation of, or a conspiracy to violate, any law or regulation of the United States, a State or the District of Columbia, or a foreign country relating to narcotic or psychotropic drugs or other controlled substances; or is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assistor, abettor, conspirator, or colluder with others in the illicit trafficking of any such substance. This rule establishes a single government-wide enforcement mechanism for Section 487.

The 1998 Federal Register notice explained the purpose and structure of the regulation as set forth below.

---

* * * *

. . . The responsibilities of the President under Section 487 have been delegated to the Secretary of State (E.O. 12163). The Secretary of State is issuing these regulations and has delegated the responsibility for their implementation to the Assistant Secretary for International Narcotics and Law Enforcement Affairs . . .

The General Subpart (Subpart A) provides a statement of the regulations' purpose (§ 140.1), based upon the language of Section 487 of the Foreign Assistance Act; identifies the authorities for issuance of the regulations (§ 140.2); and defines key terms used in the regulations (§ 140.3). The broad coverage of the regulations is reflected in the definitions of drug trafficking (§ 140.3(e)), money laundering (§ 140.3(f)), and narcotics offenses (§ 140.3(g)), which are intended to be comprehensive. As noted in the definition of drug trafficking, it encompasses drug-related money laundering. . . .

Two of the key terms defined in the regulations are "covered country" (§ 140.3(d)) and "covered assistance" (§ 140.3(c)). The term "covered country" corresponds to those countries listed on

the "majors list," i.e., the list of major illicit drug producing countries and major drug-transit countries, as determined annually by the President and transmitted to the appropriate Congressional committees as required by section 490(h) of the FAA.

* * * *

The term "Country Narcotics Coordinator" is defined in section 140.3(b). . . . [W]e note that the CNC is a key position often held by the Deputy Chief of Mission at a U.S. diplomatic post. In the event that another person were assigned to exercise these functions, that person would necessarily have equally appropriate clearances to handle sensitive law enforcement information.

The Applicability Subpart (Subpart B) explains the scope of the regulations. Their applicability is keyed primarily to "covered individuals and entities" that receive or provide direct or first-tier "covered assistance" and are located or providing assistance within a "covered country." . . .

The regulations are also applicable where a government agency providing covered assistance within a covered country has specifically designated a recipient beyond the first tier (see §§ 140.4(a), 140.7(b)). Additionally, they apply to individuals who receive a scholarship, fellowship, or participant training (unless the assistance is provided through a multilateral institution or international organization and the recipient has not been designated by the agency providing assistance). . . .

The factual circumstances that give rise to application of the regulations are highly varied and may, on occasion, have potentially serious or sensitive foreign relations, national security, or law enforcement consequences. In rare circumstances, such potential consequences may require that, in fulfilling the statutory requirements of Section 487, the procedures set forth in the regulations be expanded, modified, utilized in a different manner or not utilized. This necessary flexibility is provided in the initial clause of § 140.4. In response to comments by one agency raising concerns about possible disclosure of law enforcement investigatory information, however, that section has been amended to provide that §§ 140.13 and 140.14 will apply in all cases.

The Enforcement Subpart (Subpart C) contains an overview (§ 140.5), which outlines the Subpart's scope. The applicable determination procedures, criteria to be applied in deciding whether to withhold assistance or take other measures, and procedures concerning violations identified subsequent to the obligation of funds are set forth in the Enforcement Subpart. The applicability of these procedures varies depending on the nature of the proposed recipient. . . .

The determination procedures set forth in the regulations are applied by the Country Narcotics Coordinator (as defined in § 140.3(b)), who is responsible in the first instance for reviewing available information to determine whether a proposed assistance recipient is to be granted or denied assistance or whether other measures are to be taken to structure the provision of the assistance in such a way as to meet the requirements of Section 487 of the Foreign Assistance Act (§ 140.6(a)). . . .

Section 140.6(a)(6) further provides that it is the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs (rather than the Country Narcotics Coordinator), in consultation with appropriate bureaus and agencies, who ordinarily will make any decision to withhold assistance or take other measures based on information or allegations that a key individual who is a senior government official of a foreign government has been convicted of a narcotics offense or has been engaged in drug trafficking. Personal involvement at or above the Assistant Secretary of State level is appropriate in such a case because it involves inherently sensitive foreign policy issues. . . . [A] new subsection (b)(3)(v) has been added to make clear that measures other than denial of assistance may be appropriate in certain cases where a negative determination is made as to one or more key individuals.

* * * *

4. Illicit Manufacturing of and Trafficking in Firearms

On June 9, 1998, President William J. Clinton transmitted the Inter-American Convention Against the Illicit Manufacturing

of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials, signed at Washington, D.C. on November 11, 1997, for the Senate's advice and consent to ratification. S. Treaty Doc. No. 105–49 (June 9, 1998). Excerpts below from the transmittal letter and the accompanying report of the Department of State submitting the treaty to the President for transmittal, also included in S. Treaty Doc. No. 105–49, address basic aspects of the convention. As this volume was going to press, the Senate Foreign Relations Committee had not scheduled hearings on the treaty.

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (the "Convention"), adopted at the Special Session of the General Assembly of the Organization of American States (OAS) at Washington on November 13, 1997. The Convention was signed by the United States and 28 other OAS Member States on November 14, 1997, at the OAS Headquarters in Washington. So far, 31 States have signed the Convention and one (Belize) has ratified it. In addition, for the information of the Senate, I transmit the report of the Department of State with respect to the Convention.

The Convention is the first multilateral treaty of its kind in the world. The provisions of the Convention are explained in the accompanying report of the Department of State. The Convention should be an effective tool to assist in the hemispheric effort to combat the illicit manufacturing and trafficking in firearms, ammunition, explosives, and other related materials, and could also enhance the law enforcement efforts of the States Parties in other areas, given the links that often exist between those offenses and organized criminal activity, such as drug trafficking and terrorism.

The Convention provides for a broad range of cooperation, including extradition, mutual legal assistance, technical assistance, and exchanges of information, experiences, and training, in relation to the offenses covered under the treaty. The Convention also

imposes on the Parties an obligation to criminalize the offenses set forth in the treaty if they have not already done so. The Convention will not require implementing legislation for the United States.

This treaty would advance important U.S. Government interests, and would enhance hemispheric security by obstructing the illicit flow of weapons to criminals such as terrorists and drug traffickers. In addition, ratification of this Convention by the United States would be consistent with, and give impetus to, the active work being done by the United States Government on this subject in other fora, such as the United Nations, the P-8 Group, and the OAS Inter-American Drug Abuse Control Commission (CICAD).

* * * *

LETTER OF SUBMITTAL

* * * *

The Convention will not require implementing legislation for the United States. As further discussed below, the existing body of federal laws in the United States is adequate to satisfy the Convention's provisions regarding requirements for legislation, and the other provisions contained in the Convention are self-executing and will not require new legislation.

The Convention includes a Preamble, thirty articles and an Annex. The Preamble makes clear that the Convention is intended to address the problem of transnational trafficking in firearms, and is not meant to regulate the internal firearms trade of the States Parties. The Preamble expressly recognizes, for example, that the Convention "does not commit States Parties to enact legislation or regulations pertaining to firearms ownership, possession or trade of a wholly domestic character. . . ." Furthermore, the Preamble reflects the recognition that States have developed different cultural and historical uses for firearms, and "that the purpose of enhancing international cooperation to eradicate illicit transnational trafficking in firearms is not intended to discourage or diminish lawful leisure or recreational activities such as travel or tourism for sport shooting, hunting, and other forms of lawful ownership and use recognized by the States Parties."

Article 1 ("Definitions") sets forth definitions of a number of terms used in the Convention.

* * * *

As with the definitions of "firearms," the definitions of "ammunition" and "explosives" contained in relevant United States laws are not identical in all respects to the Convention's definition of such terms. However, the definitions in U.S. law are broad enough to enable the U.S. to comply with the obligations imposed therein. Similarly, although there is no definition of the term "other related materials" as such in U.S. law, items covered under the Convention's definition are subject to regulation under relevant U.S. statutes. For example, all components and parts for firearms are regulated under the Arms Export Control Act, 22 U.S.C. Sec. 2778. The implementing regulations also make it clear that certain accessory items, such as riflescopes, silencers, and flash suppressors, are subject to the import controls of the Act. See 27 C.F.R. Part 47.

The definition of "controlled delivery" was drawn by the negotiators largely from the definition of that term in the United Nations Convention Against the Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, done at Vienna on December 20, 1988. The term is defined as "the technique of allowing illicit or suspect consignments of firearms, ammunition, explosives, and other related materials to pass out of, through, or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offenses referred to in Article IV of the Convention."

* * * *

Article IV ("Legislative Measures") directs States Parties that have not yet done so to adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials. The Departments of Treasury and Justice have concluded that the obligation to criminalize the acts of illicit manufacturing and trafficking

mentioned in Article IV of the Convention can be fully satisfied under various existing federal laws. The Gun Control Act of 1968, 18 U.S.C. Sec. 921 et seq., the National Firearms Act, 26 U.S.C. Sec. 5801 et seq., the Arms Export Control Act, 22 U.S.C. Sec. 2778 et seq. and other federal statutes, e.g., Title 18 U.S.C. Chapter 40, establish criminal penalties for the acts covered under Article IV of the Convention. Accordingly, the United States would not be required to enact any additional legislation to comply with this provision of the Convention.

Article IV also states that, subject to the respective constitutional principles and basic concepts of the legal systems of the States Parties, the criminal offenses established pursuant to the foregoing paragraph must include participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counseling the commission of such offenses. Although with respect to some of these acts U.S. law uses a different terminology than the Convention, existing U.S. laws provide for criminal penalties for such acts. Therefore, this provision will not require additional U.S. legislation.

* * * *

5. Corruption

a. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

On May 1, 1998, President William J. Clinton transmitted the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to the Senate for advice and consent to ratification. S. Treaty Doc. No. 105–43 (1993); S. Exec. Rpt. 105–19 (1998). The Senate provided advice and consent to ratification on July 31, 1998, 146 CON. REC. S9668 (July 31, 1998), with certain conditions, and the convention entered into force February 15, 1999.

The President's letter of transmittal explained the impetus for the convention from the U.S. perspective as follows:

> Since the enactment in 1977 of the Foreign Corrupt Practices Act (FCPA), the United States has been alone in specifically criminalizing the business-related bribery of foreign public officials. United States corporations have contended that this has put them at a significant disadvantage in competing for international contracts with respect to foreign competitors who are not subject to such laws. Consistent with the sense of the Congress, as expressed in the Omnibus Trade and Competitiveness Act of 1988, encouraging negotiation of an agreement within the OECD governing the type of behavior that is prohibited under the FCPA, the United States has worked assiduously within the OECD to persuade other countries to adopt similar legislation. Those efforts have resulted in this Convention that, once in force, will require that the Parties enact laws to criminalize the bribery of foreign public officials to obtain or retain business or other improper advantage in the conduct of international business.

Excerpts below from the April 9, 1998, report of the Department of State submitting the convention to the President and accompanying the transmittal describe the convention and note issues on which the United States had particular comments. The full report is included in S. Treaty Doc. No. 105–43.

THE PRESIDENT: I have the honor to submit to you, with a view to transmittal to the Senate for its advice and consent to ratification, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention was adopted on November 21, 1997 by a conference held in Paris under the auspices of the Organization for Economic Cooperation and Development (OECD). It was signed in Paris on December 17, 1997 on behalf of 33 countries, including the United States: 28

of the 29 OECD Member States (all except Australia) and five non-OECD Members who are participants in the OECD's Working Group on Bribery in International Business Transactions.

* * * *

I transmit also, for the information of the Senate, interpretive Commentaries on the Convention that were adopted by the negotiating conference in conjunction with the Convention. Although not submitted for the advice and consent of the Senate, the Commentaries are relevant to the Senate's consideration of the Convention.

* * * *

Article 1(1) of the Convention requires each Party to establish bribery of a foreign public official as a criminal offense under its laws. Such bribery is defined as the intentional offer, promise, or giving of any undue pecuniary or other advantage by any person, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, to induce that official to act or to refrain from acting in relation to the performance of official duties in order to obtain or retain business or other improper advantage in the conduct of international business. Such bribery is further defined in Article 1(2) to include complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official. Attempt and conspiracy to bribe a foreign public official must also be criminalized by each Party to the same extent that attempt and conspiracy to bribe a public official of such Party are criminal offenses. This language is generally consistent with U.S. law. However, to comply fully with the Convention, which covers bribes by "any person," the United States will have to expand the scope of the FCPA to encompass bribes paid by foreign persons who are not affiliated with issuers that have securities registered under the Exchange Act.

"Foreign public official" is defined by Article 1(4) as any person holding a legislative, administrative, or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public

international organization. . . . Paragraph 17 of the Commentaries notes that "public international organization" includes any international organization formed by states, governments, or other public international organizations, including a regional economic integration organization such as the European Community. The FCPA does not cover bribery of officials of "public international organizations." To conform with the Convention, the FCPA will have to be amended to encompass bribery of such officials.

The Convention does not apply to bribes to foreign political parties or party officials *per se*, although it would cover, by its terms, business-related bribes to foreign public officials made through political parties or party officials, as well as bribes directed by corrupt foreign public officials to political parties or party officials. Paragraph 16 of the Commentaries notes that persons that hold *de facto* public authority, such as political-party officials in single-party states, may be considered to be foreign public officials under the legal principles of some countries. The United States has urged that bribes paid to foreign political parties and party officials be covered under the Convention, as they are under the FCPA, and such coverage will be a topic of future negotiations within the OECD Working Group on Bribery.

* * * *

Article 4(1) requires that each Party take necessary measures to establish its jurisdiction over bribery of a foreign public official when such offense is committed in whole or in part in its territory. Paragraph 25 of the Commentaries states that the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the act of bribery is not required. . . . Parties are required, under Article 4(4), to review whether their current bases for jurisdiction are effective with regard to bribery of foreign public officials and, if not, to take remedial steps. Current U.S. law governing foreign bribery contains a territorial element and is generally limited to bribery by U.S. persons and foreign persons affiliated with issuers that have securities registered under the Exchange Act. To implement fully the Convention, the United States will have to expand the FCPA to encompass acts within its territory by other foreign persons. The United States also proposes

to assert jurisdiction over the acts of U.S. persons outside the United States.

Article 9(1) requires that each Party, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offenses within the scope of the Convention, as well as for the purpose of non-criminal proceedings within the scope of the Convention brought by a Party against a legal person. Pursuant to Article 9(2), where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality is deemed to exist if the offense for which the assistance is sought is within the scope of the Convention. Article 9(3) states that a Party may not, on the ground of bank secrecy, decline to render mutual legal assistance for criminal matters within the scope of the Convention. This provision is particularly important, because U.S. prosecutions have sometimes been frustrated by difficulty in obtaining foreign evidence because of lack of dual criminality.

Article 10(1) provides that bribery of a foreign public official shall be deemed to be included as an extraditable offense under the laws of the Parties and the extradition treaties between them. Under Article 10(2), a Party that receives a request for extradition regarding bribery of a foreign public official from another Party with which it has no extradition treaty may consider the Convention to be the legal basis for such extradition. Each Party must, pursuant to Article 10(3), ensure that it can either extradite or prosecute its nationals for bribery of a foreign public official. If a Party declines to extradite a person for bribery of a foreign public official solely on the ground that the person is its national, that Party is required to submit the case to its competent authorities for the purpose of prosecution. Article 10(4) states that extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offense for which extradition is sought is within the scope of Article 1 of the Convention.

* * * *

The Convention is largely consistent with existing U.S. law. However, as set forth above, certain amendments to the FCPA are proposed in order to conform with and to implement the Convention. Proposed legislation is being prepared and is expected to be submitted to the Congress at an early date.

* * * *

The one understanding included in the resolution of ratification related to extradition provisions in Article 10, described above:

> Extradition.—The United States shall not consider this Convention as the legal basis for extradition to any country with which the United States has no bilateral extradition treaty in force. In such cases where the United States does have a bilateral extradition treaty in force, that treaty shall serve as the legal basis for extradition for offenses covered under this Convention.

b. Inter-American Convention Against Corruption

On April 1, 1998, President William J. Clinton transmitted the Inter-American Convention Against Corruption to the Senate for advice and consent to ratification. S. Treaty Doc. No. 105–39 (1996); S. Exec. Rpt. No. 106–15 (2000). The Senate gave advice and consent to ratification on July 27, 2000 (146 CONG. REC. S7809 (July 27, 2000)), and the convention entered into force for the United States on October 29, 2000. *See also* 92 Am. J. Int'l L. 491 (1998); *Digest 2000* at 231–38.

The President's letter of transmittal explained, as with the OECD convention discussed in 5.a., *supra*, that the obligation to criminalize the bribery of foreign government officials "was included in the Convention at the behest of the United States negotiating delegation. In recent years, the United States Government has sought in a number of multilateral fora to persuade other governments to adopt legislation akin to the U.S. Foreign Corrupt Practices Act."

Excerpts below from the March 24, 1998, report of Acting Secretary of State Strobe Talbott, also included in S. Treaty Doc. No. 105–39, describe the convention and set forth proposed understandings on which ratification should be conditioned. The resolution of ratification included, among other things, these or substantially similar understandings and added understandings (1) on extradition identical to that attached to the OECD convention discussed in 5.a., *supra*, and (2) on assistance to the International Criminal Court identical to that attached to mutual legal assistance treaties, set forth in C.2.e. below.

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 Inter-American Convention Against Corruption ("the Convention"), adopted and opened for signature at the Specialized Conference on Corruption of the Organization of American States (OAS) in Caracas, Venezuela, on March 29, 1996. The Convention was signed by the United States on June 27, 1996, at the twenty-seventh regular session of the General Assembly of the OAS meeting in Panama City, Panama. I recommend that the Convention be transmitted to the Senate for its advice and consent to ratification.

* * * *

The Convention is the first instrument of its kind in the world to be adopted. It establishes a treaty-based regime of obligations among the OAS member states to combat corruption, including various forms of cooperation analogous to those that exist pursuant to a number of multilateral law enforcement treaties to which the United States is a party. The Convention will enhance the United States' ability to cooperate with, and receive assistance from, other countries in the hemisphere in connection with efforts to prevent, investigate, and prosecute acts of corruption. The Convention will not require implementing legislation for the United States. As further discussed below, the existing bodies of laws and regulations in the United States will be adequate to satisfy the Convention's provisions regarding requirements for legislation, and the other

provisions contained in the Convention are self-executing and will not require additional implementing legislation.

The Convention consists of a preamble and twenty-eight articles. Article 1 ("Definitions") defines the following terms: "public function," "public official," "government official," "public servant" and "property." With respect to the definitions of the first four of the terms listed above, it was agreed by the negotiators that the term "at any level of its hierarchy", which is contained in such definitions, was intended to clarify the "vertical" scope of application of the Convention; i.e., that the Convention would cover officials ranging from those at the very top of the government bureaucracy, such as Cabinet-level officials, to those at the lowest levels, such as clerks. The phrase was included at the behest of certain delegations who expressed concern that some of the corruption laws that exist in their countries do not reach officials at the very top levels of government, or, alternatively, those at the lowest levels.

However, the negotiators expressly discussed and understood that the phrase "at any level of its hierarchy" was not intended in this Convention to define the scope of application of the Convention with respect to constituent units of federal states, nor was the Convention as a whole intended to impose obligations with respect to the conduct of state or local officials. To emphasize this point, upon conclusion of the negotiations at the final session of the specialized conference in Caracas, the head of the U.S. negotiating team read the following statement into the record:

> The U.S. would like to reaffirm for the record the statement made earlier by the President of the Working Group for the article on definitions that the conclusions of the Working Group reflect the fact that countries with federal systems of government may not be able to bind their states and municipalities to the obligations under the Convention.

This statement was seconded at the conference by the delegation from Canada and from other States with federal systems. To confirm our understanding on this point, I recommend that the

following understanding to Article I be included in the United States instrument of ratification:

> The Government of the United States of America understands that the phrase "at any level of its hierarchy" in the first and second subparagraphs of Article 1 refers, in the case of the United States, to all levels of the hierarchy of the federal government of the United States, and that the Convention does not impose obligations with respect to the conduct of officials other than federal officials.

* * * *

Article VII ("Domestic Law") requires that the States Parties, to the extent they have not yet done so, adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the acts of corruption described in Article VI, as well as to facilitate cooperation among themselves pursuant to the Convention.

At various times during the negotiations, the U.S. delegation described the extensive network of laws already in place in the U.S. that address the various acts of corruption covered under the Convention. Based on the discussions held at the negotiating sessions, the U.S. negotiators do not believe that it is the expectation of any of the other negotiating delegations that the United States would be required to enact any laws beyond those that it already has in place. Indeed, the opinion was voiced that one of the objectives of the Convention is to have the rest of the nations of the hemisphere develop a body of laws on corruption comparable to that which exists in the United States.

There is, however, no single federal anti-corruption law in the United States that uses exactly the terms used in this Convention. Moreover, the network of United States anti-corruption laws is extensive, but not every federal employee is subject to criminal prosecution for every act that could conceivably fall within the definition of the "acts of corruption" in the Convention. In particular, there is no general "attempt" statute in U.S. federal criminal law, although federal statutes make "attempts" criminal in connection with specific crimes. The practical effect of this,

however, is debatable. The "acts of corruption" described in Article VI(1)(a) and (b) are defined in such a way as effectively to embrace the acts constituting an attempt within the crime since it is the mere solicitation, acceptance, offering or granting of a bribe which is a crime, without any consummation of an act of bribery or even an agreement to bribe. The literal terms of subparagraph (c), on the other hand, would embrace a situation in which an individual took some preparatory action unknown to anyone, with the "purpose" of profiting illicitly at some future point. Under U.S. law, this would not be criminalized as such, although the conduct in question in a given case might well be prosecutable in the context of some other crime. It should also be noted, with respect to subparagraph (e), that the reference to "instigator" is not intended to require the United States to create a new crime of association denominated "instigation," but rather was included in the Convention merely as an illustrative form of the types of "participation" that the provision intends to cover. Although the U.S. legal system does not recognize the offense of "instigation" as such, it does contemplate equivalent but differently denominated offenses, such as aiding or abetting.

Despite the above, the existing network of laws in place in the United States can reasonably be deemed to satisfy the obligations imposed under the Convention with respect to the enactment of legislation. During the negotiations, the U.S. delegation provided considerable information to other delegations on the nature and content of U.S. law, and it was the understanding of all delegations that Article VII would not be understood to require new legislation in the U.S. substituting the broad wording of Article VI for specific U.S. laws currently in place.

In light of the foregoing, I recommend that the following understanding to Article VII be included in the United States instrument of ratification:

> Article VII of the Convention sets forth an obligation to adopt legislative measures to establish as criminal offenses the acts of corruption described in Article VI(1). There is an extensive network of laws already in place in the United States that criminalize a wide range of corrupt acts.

> Although United States laws may not in all cases be defined in terms or elements identical to those used in the Convention, it is the understanding of the United States, with the caveat set forth below, that the kinds of official corruption which are intended under the Convention to be criminalized would in fact be criminal offenses under U.S. law. Accordingly, the United States does not intend to enact new legislation to implement Article VII of the Convention.
>
> There is no general "attempt" statute in U.S. federal criminal law. Nevertheless, federal statutes make "attempts" criminal in connection with specific crimes. This is of particular relevance with respect to Article VI(1)(c), which by its literal terms would embrace a single preparatory act done with the requisite "purpose" of profiting illicitly at some future time, even though the course of conduct is neither pursued, nor in any sense consummated. The United States will not criminalize such conduct per se, although we would expect significant acts of corruption in this regard to be generally subject to prosecution in the context of one or more other crimes.

Article VIII ("Transnational Bribery") obligates the States Parties, subject to their Constitutions and the fundamental principles of their legal system, to prohibit and punish the offering or granting of a bribe, directly or indirectly, by its nationals, residents, and businesses domiciled there, to a government official of another State in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions. This Article was included at the behest of the United States, and was intended to obligate the States Parties to have in place legislation similar to the U.S. Foreign Corrupt Practices Act (FCPA).

There are small differences, however, between the wording of Article VIII and that of the FCPA, and a literal reading of Article VIII could suggest that the U.S. would need to revise its laws in some respects to comply with the obligations imposed in the Article. For example, the FCPA specifically excepts from coverage "facilitating payments," i.e., small gratuities sometimes paid to

foreign government officials to secure or expedite performance of routine government action. See Title 15, United States Code, Sections 78dd–1(b) and 78dd–2(b). Article VIII, however, contains no such exception. Also, the FCPA applies only to payments made to obtain or retain business, while Article VIII requires criminalization of all payments made "in connection with any economic or commercial transaction," an arguably larger universe. Since Article VIII was included at the behest of the U.S. in order to require other OAS states to enact laws similar to the FCPA, none of the negotiating delegations expected that the U.S. itself would enact new legislation to comply with Article VIII.

In order to be clear on the scope of the U.S. commitment under Article VIII, I recommend that the following understanding be included in the United States instrument of ratification:

> With respect to Article VIII, the Government of the United States of America notes that current United States law provides criminal sanctions for transnational bribery. It is the understanding of the Government of the United States of America that no additional legislation is needed for the United States to comply with the obligation imposed in Article VIII.

Article IX ("Illicit Enrichment") is structurally analogous to Article VIII, and was included at the insistence of a number of the Latin American nations. The Article refers to the offense known as "illicit enrichment," which is defined as a significant increase in the assets of a government official that such official cannot reasonably explain in relation to his lawful earnings during the performance of his functions. Like Article VIII, compliance with the obligations imposed under this Article is subject to each State's Constitution and fundamental legal principles.

Although there is no offense of "illicit enrichment" as such in U.S. law, there are a number of laws and regulations in the United States that penalize the same substantive conduct which this article is intended to reach and which is proscribed by the "illicit enrichment" laws that exist in some nations. However, in an illicit enrichment statute of the sort contemplated by the statute, the

defendant must bear the burden of establishing the legitimate origin of the assets in question. The Article therefore by its terms calls for States Parties to make the described conduct criminal without requiring an affirmative showing by the State of wrongdoing on the part of the defendant. Since under the U.S. legal system the State must in all cases affirmatively prove that an individual has engaged in wrongdoing before it can impose criminal sanctions on such person, compliance with the literal terms of Article IX would impose on the United States an obligation that would be inconsistent with its Constitution and the fundamental principles of its legal system.

Accordingly, the explicit exception contained in Article IX, which renders compliance with the obligation therein subject to each State's "Constitution and the fundamental principles of its legal system," is applicable to the United States.

This interpretation is consistent with that which was voiced by the U.S. delegation during the negotiations, and which was understood by the other delegations. The negotiators discussed Article IX in detail, and understood that the Article would not require the United States to enact new legislation. To emphasize this point, at the final session of negotiations, the head of the U.S. negotiating delegation read the following statement for the record:

> I stress that we remain perfectly happy to offer assistance and cooperation to those OAS states that have enacted illicit enrichment legislation. However, we do wish to reiterate . . . that we may be unable to adopt such legislation ourselves for constitutional reasons. In addition, we may be obliged to take a reservation to this article because our legislature may not wish to adopt such legislation for reasons unrelated to constitutional law or "fundamental principles," such as the fact that we deal with this issue fully through other laws already in force.

The other delegations accepted this statement, and no objections or dissenting views were voiced.

In order to leave no doubt about the scope of the U.S. commitment under Article IX, I recommend that the following

understanding regarding Article IX be included in the United States instrument of ratification:

> Article IX obligates the States Parties, subject to the Constitution and fundamental legal principles of their respective legal systems, to establish as an offense the act of "illicit enrichment," as defined in the Article. With respect to this Article, the Government of the United States of America believes that the establishment of such an offense would be inconsistent with the United States Constitution and the fundamental principles of the United States legal system. The United States therefore understands that Article IX does not require the United States to establish a new criminal offense of illicit enrichment. However, the United States intends to provide assistance pursuant to the Convention in accordance with this Article, to the extent permitted by its domestic law.

* * * *

6. Criminal Procedure in U.S. Courts: Limitation on Availability of Fifth Amendment Privilege

In *United States v. Balsys*, 524 U.S. 666 (1998), the U.S. Supreme Court resolved a conflict between the U.S. circuit courts over whether the Fifth Amendment privilege against self-incrimination could be invoked based on fear of prosecution by a foreign government rather than by the United States or a state of the United States. *Compare United States v. Balsys*, 119 F.3d 122 (2d Cir. 1997) (resident alien ordered to testify at a deposition for lying on his immigrant and visa registration about his involvement as a Nazi criminal could invoke the privilege against self-incrimination based on fear of prosecution by foreign countries) *with United States v. Gecas*, 120 F.3d 1419 (11th Cir. 1997) (en banc) (resident alien subpoenaed by OSI to testify about his possible involvement in Nazi persecution could not invoke privilege based on fear of prosecution abroad).

In *Balsys*, the Office of Special Investigations of the Criminal Division, U.S. Department of Justice ("OSI") sought testimony from Aloyzas Balsys, a resident alien, native of Lithuania, concerning his wartime activities between 1940 and 1944 and his immigration to the United States in 1961. OSI was investigating whether, contrary to his representations on his visa application, Balsys had participated in Nazi persecution during World War II. As explained in the Court's opinion, "[s]uch activity would subject him to deportation for persecuting persons because of their race, religion, national origin, or political opinion under [8 U.S.C.] §§ 1182(a)(3)(E) and 1251(a)(4)(D), as well as for lying on his visa application under §§ 1182(a)(6)(C)(i) and 1251(a)(1)(A)." *Balsys*, 524 U.S. at 670. Balsys invoked his Fifth Amendment privilege against compelled self-incrimination contending that answering questions concerning his wartime activities and immigration could subject him to criminal prosecution by Lithuania, Israel and Germany.

The Court concluded that fear of criminal prosecution by a foreign government could not provide the basis for invocation of the Fifth Amendment privilege against self-incrimination. In so holding, however, the Court confirmed that "resident aliens such as Balsys are considered 'persons' for purposes of the Fifth Amendment and are entitled to the same protections under the [Self-Incrimination] Clause as citizens." It also found the privilege unavailable for fear of deportation because deportation is not a criminal prosecution. The Supreme Court examined and rejected the argument that "cooperative internationalism" in fighting crime warranted a broader reading of the protection, as excerpted below.

---

* * * *

The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5. Resident aliens such as Balsys are considered "persons" for purposes of the Fifth

Amendment and are entitled to the same protections under the Clause as citizens. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596, 73 S.Ct. 472, 477, 97 L.Ed. 576 (1953). The parties do not dispute that the Government seeks to "compel" testimony from Balsys that would make him "a witness against himself." The question is whether there is a risk that Balsys's testimony will be used in a proceeding that is a "criminal case."

* * * *

. . . Balsys[] argu[es] that application of the privilege in situations like his would promote the purpose of preventing government overreaching, which on anyone's view lies at the core of the Clause's purposes. This argument begins with the premise that "cooperative internationalism" creates new incentives for the Government to facilitate foreign criminal prosecutions. Because crime, like legitimate trade, is increasingly international, a corresponding degree of international cooperation is coming to characterize the enterprise of criminal prosecution. (fn. omitted). The mission of the OSI as shown in this case exemplifies the international cooperation that is said to undermine the legitimacy of treating separate governmental authorities as separate for purposes of liberty protection in domestic courts. Because the Government now has a significant interest in seeing individuals convicted abroad for their crimes, it is subject to the same incentive to overreach that has required application of the privilege in the domestic context. Balsys says that this argument is nothing more than the reasoning of the *Murphy* [*v. Waterfront Comm'n of N.Y. Harbor,* 378 U.S. 52 (1964)] Court when it justified its recognition of a fear of state prosecution by looking to the significance of " 'cooperative federalism,' " the teamwork of state and national officials to fight interstate crime. 378 U.S., at 55–56, 84 S.Ct., at 1596–1597.

. . . For the *Murphy* majority, "cooperative federalism" was not important standing alone, but simply because it underscored the significance of the Court's holding that after *Malloy* it would be unjustifiably formalistic for a federal court to ignore fear of state prosecution when ruling on a privilege claim. Thus, the Court described the "whipsaw" effect that the decision in *Malloy* [*v.*

Hogan, 378 U.S. 1 (1964)] would have created if fear of state prosecution were not cognizable in a federal proceeding:

> "[The] policies and purposes [of the privilege] are defeated when a witness can be whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination is applicable to each. This has become especially true in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity." 378 U.S., at 55–56, 84 S.Ct., at 1597 (citation and internal quotation marks omitted).

Since in this case there is no analog of *Malloy*, imposing the Fifth Amendment beyond the National Government, there is no premise in *Murphy* for appealing to "cooperative internationalism" by analogy to "cooperative federalism."[16] . . .

But even if *Murphy* were authority for considering "cooperative federalism" and "cooperative internationalism" as reasons supporting expansion of the scope of the privilege, any extension would depend ultimately on an analysis of the likely costs and benefits of extending the privilege as Balsys requests. . . .

* * * *

[16] There is indeed nothing comparable to the Fifth Amendment privilege in any supranational prohibition against compelled self-incrimination derived from any source, the privilege being "at best an emerging principle of international law." See Amann, A Whipsaw Cuts Both Ways, 45 UCLA L.Rev. 1201, 1259 (1998) (hereinafter Amann). In the course of discussing the Eleventh Circuit case raising the same issue as this one, Amann suggests nonetheless that the whipsaw rationale has particular salience on these facts because along with the United States, Lithuania and Israel are signatories to the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200, which recognizes something akin to the privilege. See Amann 1233, n. 206. The significance of being bound by the Covenant, however, is limited by its provision that the privilege is derogable and accordingly may be infringed if public emergency necessitates. *Id.,* at 1259, n. 354. In any event, Balsys has made no claim under the Covenant, and its current enforceability in the courts of the signatories is an issue that is not before us.

V. This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood. If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign." The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence gatherer and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself.

Whether such an argument should be sustained may be left at the least for another day, since its premises do not fit this case. It is true that Balsys has shown that the United States has assumed an interest in foreign prosecution, as demonstrated by OSI's mandate[18] and American treaty agreements[19] requiring the

---

[18] According to Order No. 851–79, reprinted in App. 15–17, the OSI shall "[m]aintain liaison with foreign prosecution, investigation and intelligence offices; [u]se appropriate Government agency resources and personnel for investigations, guidance, information, and analysis; and [d]irect and coordinate the investigation, prosecution, and any other legal actions instituted in these cases with the Immigration and Naturalization Service, the Federal Bureau of Investigation, the United States Attorneys Offices, and other relevant Federal agencies."

[19] The United States and Lithuania have entered into an agreement that provides that the two governments "agree to cooperate in prosecution of persons who are alleged to have committed war crimes . . . agree to provide mutual legal assistance concerning the prosecution of persons suspected of having committed war crimes . . . will assist each other in the location of witnesses believed to possess relevant information about criminal actions

Government to give to Lithuania and Israel any evidence provided by Balsys. But this interest does not rise to the level of cooperative prosecution. There is no system of complementary substantive offenses at issue here, and the mere support of one nation for the prosecutorial efforts of another does not transform the prosecution of the one into the prosecution of the other. Cf. *Bartkus v. Illinois*, 359 U.S. 121, 122–124, 79 S.Ct. 676, 677–679, 3 L.Ed.2d 684 (1959) (rejecting double jeopardy claim where federal officials turned over all evidence they had gathered in connection with federal prosecution of defendant for use in subsequent state prosecution of defendant). In this case there is no basis for concluding that the privilege will lose its meaning without a rule precluding compelled testimony when there is a real and substantial risk that such testimony will be used in a criminal prosecution abroad.

7. Code of Crimes Against the Peace and Security of Mankind

The International Law Commission adopted the text of the Draft Code of Crimes Against the Peace and Security of Mankind at its forty-eighth session, in 1996. *See* Report of the 48th session, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996); *see also* Yearbook of the International

---

. . . during World War II, and agree to intermediate and endeavor to make these witnesses available for the purpose of giving testimony in accordance with the laws of the Republic of Lithuania to authorized representatives of the United States Department of Justice." Memorandum of Understanding Between the United States Department of Justice and the Office of the Procurator General of the Republic of Lithuania Concerning Cooperation in the Pursuit of War Criminals, Aug. 3, 1992, reprinted in App. in No. 96–6144 (CA2), p. 396.

The District Court found that though it had not been made aware of a treaty between the U.S. and Israel requiring disclosure of information related to war crimes, OSI had shared such information in the past and that it would be consistent with OSI's mandate from the Attorney General for OSI to do so again. 918 F. Supp. 588, 596 (EDNY 1996).

Law Commission, 1996, vol. II(2). On November 5, 1996, John R. Crook, Assistant Legal Adviser, Office of United Nations Affairs, Office of the Legal Adviser, commented on the draft code before the Sixth Committee, as excerpted below.

The full text of Mr. Crook's comments is available at *www.state.gov/s/l/c8183.htm*. For a discussion of U.S. comments on an earlier draft, submitted December 9, 1991, *see* 87 Am. J. Int'l L. 595, 607 (1993).

---

* * * *

Our debate begins this morning with the Draft Code of Crimes Against the Peace and Security of Mankind. The General Assembly first requested this work in November of 1947, forty-nine years ago. For twenty-seven of those years, work on the Code lay dormant while the international community wrestled with the problem of defining aggression. The project has been marked by years of controversy and difficulty, reflecting the difficulty and importance of the matters involved.

After all these years, a completed Code is at last before us for consideration. The articles and the accompanying commentaries are rich and detailed, reflecting much work by the Commission and the Special Rapporteurs. This text will require careful study and reflection. . . .

. . . I would like to offer a few general comments and observations.

First, we are pleased that the Commission decided to limit the scope of the draft Code to a core group of serious offenses generally recognized by the international community as involving matters of special gravity. Last year, we joined many other delegations in questioning the inclusion of international terrorism, illicit traffic in narcotic drugs, and "environmental crimes" within the scope of the draft code. The Commission wisely and correctly decided to omit these matters from its final text.

We further appreciate the clarifications of the mental states required for commission of crimes and the definitions of key

terms or concepts that are set forth in the commentaries. It may be worth considering whether in some cases it would be more appropriate to have certain aspects of the crimes defined with greater specificity in the articles themselves.

Turning to the article on aggression, we have in the past noted our concerns over the previous definition of the offense of aggression. In its earlier work, the Commission drew from General Assembly Resolution 3314, and from Article 2(4) of the Charter in seeking to define aggression. We did not think that these provided an adequate basis for drafting a criminal law definition, nor did they properly reflect the historical roots of the crime of waging aggressive war in the aftermath of World War II.

In its current text, the Commission appropriately recognized that the draft Code was concerned with the conduct of individuals, not States. It consequently focused on the individual conduct that would be punishable. The Commission sought to ground itself on the Nuremberg precedent when it identified active participation in or ordering the planning, preparation, initiation or waging of aggression committed by a State.

We appreciate the analysis that led the Commission to this result in its desire to complete the Code. The concept of aggression is a difficult one to define; the historical precedents do not offer clear guides. That is why in the context of the negotiations on the international criminal court, we have urged that aggression not be included within the jurisdiction of the proposed new court at this stage. In Article 16, the ILC undertook a serious and considered effort that deserves further reflection.

As to the text on crimes against humanity, which we believe is generally fine, there are some areas that warrant further study. For example, we are interested in further examining the Commission's requirement that an enumerated act be "instigated or directed by a government, any organization, or group," which was included to exclude the situation where an individual commits an inhumane act while acting on his own initiative. It needs to be considered whether this formulation is not overly broad or vague.

Additionally, we have some questions with respect to particular enumerated acts. For example, the Code would deem as a crime against humanity the practice of enforced or involuntary disappearance. While enforced disappearance is a loathsome practice, we are not sure that it appropriately constitutes a matter for universal and international criminal jurisdiction. At the least, these terms could be defined more precisely so that it is clear they encompass recognized criminal conduct.

Next, my government appreciates the Commission's inclusion in the draft Code of crimes against UN and associated personnel. The article provides that certain actions, when committed intentionally and in a systematic manner or on a large scale, against UN and associated personnel constitute crimes against the peace and security of mankind. . . . It may be that certain of the key terms in this article could be defined more precisely in the article itself.

Finally, regarding the Code's proposed descriptions of covered war crimes, the Commission sought to draw a line between those war crimes which are to be left to national jurisdiction and those which are of such consequence as to constitute crimes against the peace and security of mankind. We want to consider further whether the formulation suggested for making the distinction is adequate to the task.

Also, the Code appears to draw in several instances on provisions of Additional Protocols I and II to the 1949 Geneva Conventions. Neither these instruments, nor the concepts drawn from them in this connection, are universally accepted. With the guide of some of the commentary, we want to examine closely the extent to which the provisions in this article are based on conventional or accepted customary law. For example, we have doubts that the provision on damage to the natural environment merits inclusion in the draft Code.

. . . [W]e believe the most appropriate course at this time would be for this Committee and the General Assembly to transmit the Code to governments for their complete assessment and comment. Once these comments are received and collected, we can determine at that time what further steps might be appropriate.

C. INTERNATIONAL CRIMINAL TRIBUNALS

1. Ad Hoc Tribunals and Related Issues

a. Establishment of ad hoc tribunals and U.S. participation

(1) Security Council resolutions

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia ("International Criminal Tribunal for the Former Yugoslavia" or "ICTY") and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States ("International Criminal Tribunal for Rwanda" or "ICTR") were established in 1993 and 1994, respectively, as subsidiary but independent bodies of the Security Council.

On May 25, 1993, the UN Security Council, acting under Chapter VII of the UN Charter and with the active support of the United States, established the ICTY, headquartered in The Hague. U.N. Doc. S/RES/827 (1993). Resolution 827 established the tribunal "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace." The Statute of the ICTY is annexed to Resolution 827. The United States had submitted its views supporting the creation of such an international tribunal in a letter dated April 5, 1993, with a proposed draft charter. U.N. Doc. S/25575 (1993), *reprinted in* 32 I.L.M. 1203 (1993); *see also* 87 Am. J.Int'l L. 435 (1993).

On November 8, 1994, the UN Security Council, also acting under Chapter VII of the UN Charter and with the

active support of the United States, adopted Resolution 955, establishing the ICTR. U.N. Doc. S/RES/955 (1994) *reprinted in* 33 I.L.M. 1598, 1601 (1994). The ICTR was established "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994." The Statute of the ICTR is annexed to Resolution 955. The courtrooms and registry for the ICTR were established in Arusha, Tanzania, while the investigative and prosecutorial offices were located in Kigali, Rwanda.

Both tribunals were given jurisdiction over genocide, war crimes, and crimes against humanity. As established, the ICTY and the ICTR shared the same appeals chamber and the same Chief Prosecutor. (*See Digest 2003* at 219–21 for creation of a new position of Prosecutor for the ICTR and addressing completion of the work of the tribunals. U.N. Doc. S/RES/1503(2003).)

The Security Council resolutions establishing each of the tribunals contained identical language deciding that

> all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under [Article 29 of the ICTY statute and Article 28 of the ICTR statute].

Among other things, the referenced articles in the relevant statutes required states to comply with orders for "the surrender or the transfer of the accused" to the tribunal.

(2) Executive agreements

On October 5, 1994, the United States signed an executive agreement with the ICTY governing the surrender of persons sought by the tribunal, which entered into force February 14, 1996. TIAS No. 12570. On January 24, 1995, the United States signed a similar executive agreement with the ICTR, which also entered into force February 14, 1996. TIAS No. 12601, *see* 1995 U.S.T. LEXIS 125. Under the agreements the United States "agree[d] to surrender to the Tribunal . . . persons . . . found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal."

(3) Implementing legislation

In 1995 President William J. Clinton signed into law legislation to implement the two agreements. *See* Pub. L. No. 104–106, div. A, title XIII, Sec. 1342, 110 Stat. 486 (1996), 18 U.S.C. § 3181 note. Section 1342(a) provided, with certain exceptions, that:

> provisions of chapter 209 of title 18, United States Code [18 U.S.C. § 3181 et seq.], relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of persons, including United States citizens, to—
>
> (A) The International Tribunal for Yugoslavia, pursuant to the Agreement Between the United States and the International Tribunal for Yugoslavia; and
>
> (B) The International Tribunal for Rwanda, pursuant to the Agreement Between the United States and the International Tribunal for Rwanda.

See C.1.d.(1) below for challenges in U.S. courts to the use of the executive agreement and implementing legislation to surrender a person to the ICTR. For additional discussion of congressional-executive agreements, *see* Chapter 4.A.2.

(4) Sanctions on countries providing sanctuary to indicted war criminals

Section 570 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, Fiscal Year 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105–277, 112 Stat. 2681–195 (Oct. 21, 1998), imposed restrictions on assistance for a "country, entity, or canton . . . whose competent authorities have failed, as determined by the Secretary of State, to take necessary and significant steps to apprehend and transfer to the [ICTY ("Tribunal")] all persons who have been publicly indicted by the Tribunal." The earliest version of the section appeared as § 570 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105–118, 111 Stat. 2386, 2429 (1997), and was repeated thereafter.

On November 30, 1998, Secretary of State Madeleine Albright "determine[d] that Serbia and the Republika Srpska Entity of Bosnia and Herzegovina have failed to take [such] necessary and significant steps." 63 Fed. Reg. 68,496 (Dec. 11, 1998). On April 12, 1999, Acting Secretary of State Strobe Talbott issued a waiver, as authorized under § 570, "authorizing a U.S. vote in favor of a World Bank credit to Bosnia, including the Republika Sprska," which would otherwise have been prohibited. 64 Fed. Reg. 19,398 (April 20, 1999). A memorandum of justification accompanying the determination explained that "the World Bank is fully aware of the need to avoid a situation where its funds could benefit persons publicly indicted for war crimes, or municipalities responsible for harboring such persons."

b. Witness and victim protection

On January 28, 1998, David J. Scheffer, U.S. Ambassador at Large for War Crimes Issues, addressed an audience at Fordham University School of Law on the challenges of

witness and victim protection in international criminal courts, particularly in crimes involving sexual violence.

The full text of the address, excerpted below, is available at *www.state.gov/www/policy_remarks/1998/980128_scheffer_icc.html.*

---

* * * *

The testimony of witnesses, for the prosecution or for the defense, is vital for the international tribunals, particularly since so much of the evidence is dependent on witness testimony rather than on incriminating or exculpatory documents. This is especially true of crimes of sexual violence.

Are crimes of rape and other serious sexual assault violations of international humanitarian law? The answer is yes, whether one is examining the crime of genocide, crimes against humanity, or war crimes. While there has been and will be debate over precisely how to define crimes of sexual assault within the context of international humanitarian law, the United States will continue to exercise its leadership to ensure that these serious crimes are fully incorporated in the work of the ad hoc tribunals and in the jurisdiction of the permanent international criminal court.

* * * *

Some of the witness protection issues for victims of sexual violence are essentially the same as for victims of other crimes. We might look at this problem in three stages:

First, what needs to be done before a witness actually testifies? The tactics are important. For example, it is important for the criminal tribunal to have unmarked cars to travel to meet witnesses. Safe houses, particularly in Bosnia, are essential. Investigators should arrange to meet witnesses in places where it will not be apparent to neighbors that they are cooperating—a requirement in both Bosnia and Rwanda. Also, the timing of the interview is important. Interviews might be arranged when the witness could just be going into town, or going to the market, or on a personal errand. . . .

An important factor that has to be considered in any decision to provide protection is whether the witness in fact is known to be a witness beyond the secrecy of the tribunal. We need to recognize that until a witness' identity is exposed, the tribunals may not need to provide the level of protection that will be required later in the process.

Second, witness protection during the testimony phase is critical. At this juncture the Victims and Witnesses Units of both ad hoc tribunals are important. They must be adequately staffed and well coordinated with the investigators in the Office of the Prosecutor. Investigators are the first line of contact and frequently work more closely with witnesses than does the Victim and Witness Unit of the tribunal. The Victims and Witnesses Unit arranges safe transportation of witnesses from home to the tribunal including accompaniment of secure or vulnerable witnesses where necessary. It liaises with states for exit and entry permits, travel documents, safe conduct agreements and visas. It liaises with host governments for protection, safe accommodation and transportation for witnesses during trials. The Unit liaises with states for pre- and post-trial protection and support services. And it liaises with states for temporary and permanent relocation of witnesses.

Rule 96 of the Rules of Procedure and Evidence of the Yugoslav and Rwanda Tribunals recognizes the importance of limiting the defense of consent in challenging victim testimony in connection with cases of sexual assault which fall within the jurisdiction of the tribunals. The United States Government understands the critical importance of this rule and we believe its tenets should be reflected in the rules of the permanent international criminal court.

There are a lot of witnesses required for the cases being litigated by the two ad hoc tribunals, and the same can surely be expected for the permanent international criminal court. The Yugoslav Tribunal used 200 witnesses in 1997 and expects to use at least 340 in 1998. The Rwanda Tribunal used 109 witnesses in 1997 and expects around 330 this year. In 1997 the number of witnesses with additional protective measures totaled 49 for the Yugoslav Tribunal and 51 for the Rwanda Tribunal. In 1998 those numbers are expected to jump to 98 and 257, respectively. The number of

relocation requests at the Yugoslav Tribunal in 1997 was one and four more are expected this year. At the Rwanda Tribunal, the number of relocation requests in 1997 was five and is expected to increase to 20 such requests this year. Witnesses with additional support needs numbered 40 last year and should increase to 80 this year at the Yugoslav Tribunal, and numbered 31 last year and should increase to 33 this year at the Rwanda Tribunal. The Rwanda Tribunal had two safe houses last year and will need three in 1998.

In the past, the Victims and Witnesses Units of both Tribunals have relied to an inordinate degree on voluntary contributions to support the critical work of protection. The consequence has been insufficient protection for witnesses and thus degraded capabilities to prosecute and defend indictees, meaning that the conduct of fair trials can be jeopardized. The funding for protection of witnesses must be strengthened. . . .

The third stage of witness protection occurs after testimony is delivered. Perhaps the most significant issue is whether local police will be supportive and protect the witnesses afterwards. Where local police may be hostile, it is important to keep the fact of a witness' testimony secret. That is particularly difficult in the highest-profile cases. Also, states need to take up witness protection as a national issue, both for international and national trials. This is possible in places like Rwanda. Interestingly, some witnesses who testify anonymously will be willing to talk publicly afterwards. It is in this third stage of witness protection where progress is particularly lacking. That is why, for example, in Bosnia the United States is so focused on full implementation of the Dayton Peace Accords, including proper training, screening, and upgrading of local police forces so that they can responsibly begin to assume some of these duties.

* * * *

In the U.N. talks to establish a permanent international criminal court, the United States recognizes how important it will be for the permanent court to understand the significance of witness protection issues. As in national criminal prosecutions, effective witness protection on a state's territory normally would require

state consent and the cooperation of local police. Lack of witness protection can be an effective brake on the ability of the ICC prosecutor to prosecute, and it would be exceedingly difficult to overcome a state's non-consent or unwillingness to properly protect witnesses on its territory.

We look forward to further negotiations on relevant articles of the draft statute for the ICC which pertain to witness protection. The United States believes that the Victims and Witnesses Unit of the ICC should be located within the Office of the Prosecutor. We reach this position having observed the performance of the Victims and Witnesses Units of the ad hoc tribunals, where they are located in the Registry. It has not worked to our satisfaction. Witness protection is not a bureaucratic function; it is very serious business that directly involves the Prosecutor, who needs the trust of witnesses and who has a very direct stake in protecting them. Our federal court system places witness protection under the authority of the Department of Justice, not the Administrator of the U.S. Courts.

* * * *

c. International Criminal Tribunal for Yugoslavia

On July 17, 1995, the United States filed its Submission Concerning Certain Arguments Made by Counsel for the Accused in the Case of *Prosecutor v. Tadic*, Case No. IT–94–1-T. The United States offered its views on arguments "which bear specifically on its special interest and knowledge as a Permanent Member of the U.N. Security Council and its substantial involvement in the adoption of the Statute of the Tribunal . . . particularly with respect to the validity of the action of the Security Council in creating the Tribunal and the interpretation of the jurisdictional provisions of the Statute." The United States took no position on the guilt or innocence of the accused. The Appeals Chamber of the ICTY held that the Security Council did have authority to create the ad hoc tribunal to prosecute persons accused of genocide, war crimes, and crimes against humanity, and

that international norms concerning fair trial and due process were fully satisfied by the tribunal's statute and rules.

Excerpts below from the U.S. submission address the validity of the Security Council's decisions establishing the ICTY (with most footnotes deleted). The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

* * * *

a. *Existence of a threat to the peace*. Counsel for the Accused argues that the situation in the former Yugoslavia does not constitute a threat to international peace and that there is therefore no basis for action by the Security Council under Chapter VII of the Charter. We disagree. In the case of the former Yugoslavia, the Council has repeatedly (and usually by unanimous vote) determined that the situation constituted a threat to international peace and security,[7] a judgment supported by the Secretary-General and the General Assembly. We believe that no reasonable observer could deny this conclusion.

Armed conflict has occurred and continues to this day among the States of the former Yugoslavia, with heavy military and civilian

[7] S.C. Res. 713, Forty-Sixth Year, 3009th mtg. at preamb. para. 4–5 and op. para. 6, U.N. Doc. S/RES/713 (1991) (unanimous vote); S .C. Res. 721, Forty-Ninth Year, 3018th mtg. at preamb. para. 4, U.N. Doc. S/RES/721 (1991) (unanimous vote); S.C. Res. 743, Forty-Seventh Year, 3055th mtg. at preamb. para. 5, U.N. Doc. S/RES/743 (1992) (unanimous vote); S.C. Res. 770 (1992), Forty-Seventh Year, 3106th mtg. at preamb. para. 5, U.N. Doc. S/RES/770 (1992) (12–0,with 3 abstentions); S.C. Res. 807, Forty-Eighth Year, 3174th mtg. at preamb. para. 5, U.N. Doc. S/RES/807 (1993) (unanimous vote); S.C. Res. 808, Forty-Eighth Year, 3175th mtg. at preamb. para. 7, U.N. Doc. S/RES/808 (1993) (unanimous vote); S.C. Res. 815, Forty-Eighth year, 3189th mtg. at preamb. para. 5, U.N. Doc. S/RES/815 (1993) (unanimous vote); S.C. Res. 827, Forty-Eighth year, 3217th mtg. at preamb. para. 4, U.N. Doc. S/RES/827 (1993) (unanimous vote); S.C. Res. 900, Forty-Ninth year, 3344th mtg. at preamb. para. 15, U.N. Doc. S/RES/900 (1994) (unanimous vote); S.C. Res. 913, Forty-Ninth year, 3367th mtg. at preamb. para. 14, U.N. Doc. S/RES/914 (1994) (unanimous vote).

casualties. Armed units have operated across national borders and States have commanded and provided material support for military operations against their neighbors on many occasions. Large flows of refugees have moved across national borders, trade among the States of the region has been severely disrupted, and neighboring States have been forced to take concerted measures to curb the spread of the conflict to their territories. The fighting has necessitated intervention by the international community in the form of tens of thousands of troops and other personnel of the nations which contribute to or support the U.N. peacekeeping operations in the region. On the whole, only a small handful of other situations in the entire world since World War II have posed as serious a threat to international peace and security as the situation in the former Yugoslavia. Accordingly, the Council has acted well within its Chapter VII authority in determining that there exists a threat to international peace and security.

Counsel for the Accused argues that the Council's authority under Chapter VII is limited to international armed conflicts. This misreads the Charter. Article 41 refers to "threats to international peace and security," not to international armed conflicts. As indicated below, we believe that the conflict in the former Yugoslavia has been, and continues to be, of an international character. Even if this were not the case, the Council may exercise its Chapter VII authority whenever it determines that there is a threat to international peace and security, whether or not caused by an international armed conflict.

Article 39 of the Charter is in no way limited to international armed conflicts and the Council has invoked the authority of Chapter VII on many occasions when no international armed conflict had occurred. Recent examples include the situations in Rwanda, Haiti, and Somalia, and there are many earlier examples. The Council can accordingly properly determine that an internal armed conflict (or a situation involving no armed conflict) threatens international peace and security for the purpose of Article 39, whether because of the risk of outside intervention or the spread of the conflict to other States, the impact on neighboring States of massive refugee flows or severe economic disruption, or the risk of political destabilization of the region.

b. *Authority under Chapter VII to create a tribunal.*

Counsel for the Accused argues that the creation of a tribunal to try offenses under international humanitarian law is not within the authority of the Security Council under Chapter VII. We disagree.

Article 41 of the Charter provides that the Council "may decide what measures not involving the use of armed force are to be employed to give effect to its decisions" and then gives an exemplary list of actions which the Council may call upon States to take. This list is not an exclusive enumeration of the measures the Council may take and nothing in Chapter VII limits the Council's choice of means. Accordingly, the decision as to what measures are to be taken is given exclusively to the Council and is not subject to judicial review.

In fact, the Council has resorted to a wide variety of actions under Chapter VII which are not specifically enumerated in the illustrative list in Article 41. This includes, for example, the creation of zones in which overflights are prohibited, the creation of "safe areas"[16] and humanitarian corridors,[17] the granting of compensation to the victims of armed attack,[18] the delimitation of disputed borders,[19] and the prohibition of the acquisition or possession of weapons of mass destruction by a particular State.[20]

---

[16] S.C. Res. 824 (1993), Forty-Eighth Year, 3208nd mtg. at op. para. 3, U.N. Doc. S/RES/824 (1992) (designating cities as safe areas); S.C. Res. 819 (1993), Forty-Eighth Year, 3199th mtg. at op. para. 1, U.N. Doc. S/RES/819 (1992) (designating Srebrenica as a safe area).

[17] S.C. Res. 918, Forty-Ninth Year, 3377th mtg. at para 3, U.N. Doc. S/RES/918 (1994).

[18] S.C. Res. 687, U.N. SCOR, Forty-Fifth Year, 2981st mtg. at op. paras. 16, 18, U.N. Doc. S/RES/687 (1991) (reaffirming Iraq's liability for actions against victims and setting up compensation fund).

[19] S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. paras. 3, U.N. Doc. S/RES/687 (1991) (eventually establishing the U.N. Iraq/Kuwait Boundary Demarcation Commission).

[20] S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. paras. 3, U.N. Doc. S/RES/687 (1991) (recommending the establishment of a special commission to deal with the elimination, under international supervision, of Iraq's weapon's of mass destruction).

* * * *

Further, Article 29 of the Charter provides that the Council "may establish such subsidiary organs as it deems necessary for the performance of its functions." There is no limitation on the character of such organs, and in fact the Council has created a wide variety of bodies under this authority. They include, for example, observer teams and peacekeeping forces, investigation commissions, commissions charged with enforcement of restrictions on weapons and military activities, commissions charged with demarcation of boundaries, and committees charged with interpreting and administering sanctions regimes. In at least two recent cases, the Council has created subsidiary organs with judicial or quasi-judicial functions: the U.N. Compensation Commission, which decides on the compensation to be given to particular victims of the Gulf War;[26] and the International Tribunal for Rwanda, which has functions closely related to those of the International Tribunal for the Former Yugoslavia.[27]

The establishment of the International Tribunal was particularly appropriate in response to the situation in the former Yugoslavia. In Resolution 771, the Council expressly acted under Chapter VII in demanding that all parties to the conflict in the former Yugoslavia cease all breaches of international humanitarian law, reflecting the Council's determination that such violations

---

[26] S.C. Res. 687, U.N. SCOR, Forty-Fifth Year, 2981st mtg. at op. paras. 16, 18, U.N. Doc. S/RES/687 (1991) (reaffirming Iraq's liability for actions against victims and setting up compensation fund); S.C. Res. 692, U.N. SCOR, Forty-Sixth Year, 2987th mtg. at op. paras. 3, U.N. Doc. S/RES/692 (1991) (establishing the United Nations Compensation Commission); Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991), U.N. SCOR, Forty-Sixth Year at para 20, U.N. Doc. S/22559 (1993)("[t]he Commission is not a court or an arbitral tribunal. . . . it is a political organ that performs an essentially fact-finding function of examining and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved").

[27] S.C. Res. 955, U.N. SCOR, Forty-Ninth Year, 3453rd mtg. at op. para. 1 and Annex, U.N. Doc. S/RES/955 (1994)(establishing an international tribunal for the purpose of prosecuting persons responsible for genocide and other violations of international humanitarian law in Rwanda).

constitute threats to international peace and security.[28] Such violations pose an ongoing obstacle to peace in the region as they provide motivation for revenge and fuel for those who would foment hatred among groups. Accordingly, an effort to establish the culpability of individuals responsible for atrocities and to deter future violations is a suitable and important step in removing the threat to international peace and security posed by the conflict.

Hence, the Council specifically decided in Resolution 827 that:

> . . . in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an-international tribunal and the prosecution of persons responsible for serious violations of international law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace. . . .

and that:

> . . . the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed. . . .[29]

In our view, these decisions are clearly within the purview of the Council under Chapter VII. In creating the Tribunal, the Council was acting to deal with a specific urgent situation presenting a serious threat to the peace. It was not creating new standards for international humanitarian law, nor was it creating a permanent institution to deal with situations other than the former Yugoslavia.

---

[28] S.C. Res. 771, U.N. SCOR, Forty-Seventh Year, 3106th mtg. at op. paras. 3, 5, U.N. Doc. S/RES/771 (1992).

[29] S.C. Res. 827 (1993), Fifty-First year, 3217th mtg. at preamb. paras. 6, 7, U.N. Doc. S/RES/827 (1993).

* * * *

Counsel for the Accused argues that the creation of the Tribunal will obstruct rather than assist in the peace process and suggests instead that amnesty for those indicted would be more conducive to peace. This is, however, a judgment of policy and politics that is given by the U.N. Charter to the Security Council, and there is no basis for a judicial body to question that judgment.

In any event, we disagree with the conclusion offered by Counsel for the Accused. . . . Nor is it the case that the authority of the General Assembly has been infringed by the creation of the Tribunal.

The Assembly does not have the Council's Chapter VII authority to deal with threats to the peace or to obligate Member States to comply with Tribunal decisions. But even if the Assembly had all the necessary authority, this would not preclude the Council from exercising its own powers under Chapter VII. In fact, Article 12 of the Charter requires that the Assembly defer to the Council when the latter is exercising its Chapter VII authority in a particular situation.

Furthermore, Resolution 827 provides an ample role for the Assembly in the creation and operation of the Tribunal, including the election of its judges and the approval of its funding. . . . [T]he Assembly has in fact expressed its full support for the Tribunal, has elected its judges and has acted to provide financial support for its operations.[31]

In the case of violations of humanitarian law, the Council has now created ad hoc tribunals in the cases of Rwanda and the former Yugoslavia, and we trust the Council will consider similar action

---

[31] G.A. Res. 49/10, U.N. GAOR, 48th Session, 51st mtg at op. para. 27, U.N. Doc. A/RES/49/10 (1994) (welcoming the fact that delays which had hampered the work of the Tribunal had been removed); G.A. Res. 48/153, U.N. GAOR, 47th Session, 85th mtg. at preamb. para. 5 and op. para. 8, U.N. Doc. A/RES/48/153 (1993) (welcoming the convening of the Tribunal and the naming of its Chief Prosecutor); G.A. Res. 49/471, U.N. GAOR, Forty-Ninth Session, 95th-mtg., U.N. Doc. A/RES/49/471 (1994) (committing additional funds to the Tribunal); G.A. Res. 47/235, U.N. GAOR, 47th Session, 110th mtg., Item No. 155 at op. para. 2, U.N. Doc. A/RES/47/235 (1993); G.A. Res. 48/251, U.N. GAOR, 48th Session, 93rd mtg., Item no. 159 at preamb. 3 and op. para. 2–12, U.N. Doc. A/RES/48/251 (1994).

in any future instances of massive violations. It is unconvincing to suggest, as does Counsel for the Accused, that the Council's failure to take similar action with respect to conflicts of past decades in Korea, Vietnam, Algeria, Cambodia and the Belgian Congo somehow estops it from acting now. Such a concept would condemn the international community to refrain from actions necessary to maintain the peace because such actions had not been taken in the past. It would effectively prevent the international community from developing and advancing the system of international law.

c. *Independence of the Tribunal.*

Counsel for the Accused argues that the creation by the Security Council of the Tribunal necessarily impairs the independence of its judicial functions. We disagree. All judicial bodies are created by political acts; their degree of independence depends on the mandate and rules that govern their operations.

The independence of the Tribunal is prescribed by the mandate given to it by the Council in Resolution 827 and the Statute adopted thereby. Articles 12 and 13 of the Statute call for independent and impartial judges, and the oath of office prescribed by Tribunal rules [Rule 14A] requires an affirmation of impartiality. Article 16 provides that the Prosecutor will act independently and "shall not seek or receive instructions from any Government or from any other source." Articles 20 and 21 call for fair trial proceedings and require that the accused be presumed innocent until proved guilty. Article 25 provides a right of appeal against any miscarriage of justice. There is no basis for any allegation that the Tribunal is not independent or that it is subject to influence by the Council in the conduct of its judicial functions.

d. *Sovereignty of States.*

Counsel for the Accused argues that the creation of the Tribunal by the Security Council is inconsistent with the sovereignty of States under the Charter. We disagree.

The Tribunal was created pursuant to a treaty—the U.N. Charter to which all the relevant States are party. This acceptance of the Charter system was an exercise of the sovereignty of Member States and not an infringement upon it. Article 2(7) of the Charter,

which states that the U.N. is not authorized to intervene in matters "which are essentially within the domestic jurisdiction of any state", specifically provides that "this principle shall not prejudice the application of enforcement measures under Chapter VII." As explained above, the Council used this authority to take the measures it deemed necessary to restore and maintain the peace in the former Yugoslavia. Accordingly, that exercise was not an infringement on the sovereignty of any State.

Similarly, we disagree with the assertion by Counsel for the Accused that the creation of the Tribunal improperly gives the Council authority over individuals accused of offenses within the Tribunal's jurisdiction. The relevant law and precedents for the offenses in question here—genocide, war crimes and crimes against humanity—clearly contemplate international as well as national action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all States, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals. Moreover, criminal responsibility for these acts was a part of the law of the former Yugoslavia at the time the offenses were committed. The Council has simply created a new international mechanism for the trial of crimes that were already the subject of international responsiblity.

Moreover, many actions of the Council under Chapter VII directly affect individuals. For example, private individuals are precluded from various dealings with sanctioned countries, and the nationals of sanctioned countries are placed under significant financial and other restrictions. Private individuals are the subject of proceedings under the operations of the U.N. Compensation Commission. Persons who attack or obstruct peacekeeping and enforcement forces authorized by the Council are subject to detention or, if necessary, the use of deadly force.[35] The fact that

---

[35] S.C. Res. 865, U.N. SCOR, Forty-Eighth Year, 3280th mtg. at op. para. 3, U.N. Doc. S/RES/865 (1993) (reaffirming that those who commit attacks on UNOSOM II personnel will be held individually responsible for the acts); S.C. Res. 837, U.N. SCOR, Forty-Eighth Year, 3229th mtg. at op. para. 5, U.N. Doc. S/RES/837 (1993) (affirming UN ability to prosecute those individuals who engage in armed attacks against UNOSOM II).

individuals are affected by Council action in no way invalidates such action.

The Tribunal operates against individuals in the normal way that other international regimes do—that is, through the actions of national and local authorities. The Tribunal acquires custody over individuals by requesting that such authorities defer to the competence of the Tribunal and deliver persons against whom arrest warrants have been issued. During trial, the authorities of the host State detain the accused.

Upon conviction, sentences of imprisonment are carried out by authorities of States which have agreed to serve this function.

e. *Involvement in humanitarian law.*

Counsel for the Accused argues that it is improper for the Security Council to become involved in humanitarian law. We disagree. All organs of the U.N. are obligated to support and comply with international law in their operations. In the case of the Security Council, the furtherance of international humanitarian law is essential to the accomplishment of one its core functions—the maintenance of international peace and security under Chapter VII.

The Council has often determined that adherence to humanitarian law was an important element in the restoration of peace in particular situations. In fact, it may determine that one of the most serious obstacles to the restoration of peace is the commission of atrocities, which can inflame mutual passions and engender a cycle of violence and reprisal. Accordingly, the Council has frequently called for observance of humanitarian law obligations and has taken steps to encourage observance or to redress the victims of violations. For example, in the case of the invasion of Kuwait, the Council called frequently for compliance with various humanitarian law norms, and later took decisive action to terminate such violations and to provide compensation for the victims. In the case of the various conflicts in the Middle East, the Council has frequently addressed humanitarian law issues and called upon States to comply with humanitarian law obligations. In the case of Rwanda, the Council likewise demanded compliance with such obligations and took various actions—including the creation of a tribunal to try offenders—to deal with

violations. Contrary to the suggestion of Counsel for the Accused, the International Committee of the Red Cross has not criticized the creation of the Yugoslav Tribunal, but has supported this action.[40] Moreover, the Council has not attempted to create new humanitarian law or to interfere with the way in which such law is developed. The law to be applied by the Tribunal is well established by conventional and customary law,[41] and affirmed by the General Assembly.[42] Accordingly, the Council's involvement in the enforcement of settled humanitarian law in the case of the former Yugoslavia in response to a threat to international peace and security in the former Yugoslavia is fully consistent with the Council's mandate.

d. International Criminal Tribunal for Rwanda

(1) Surrender of Elizaphan Ntakirutimana by the United States

On June 20, 1996, and September 7, 1996, the ICTR confirmed two indictments against Elizaphan Ntakirutimana and others. Ntakirutimana, a Hutu, served as President of the

---

[40] Letter dated 8 April 1994 from Cornelia Sommaruga, President of the International Commission of the Red Cross, Addressed to Antonio Cassese, President of the International Tribunal (supporting the establishment of the Tribunal). . . .

[41] See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, Forty-Ninth Year at paras. 29, 34, and 35, U.N. Doc. S/25704 (1993).

[42] See, e.g., G.A. Res. 95, U.N. GAOR, 1st Session, U.N. Doc. A/RES/95 (1946) (affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal); G.A. Res. 2444, U.N. GAOR, 23rd Session, U.N. Doc. A/RES/2444 (1968) (recognizing the necessity of applying basic humanitarian principles in all armed conflicts and affirming certain principles to be observed in armed conflict); G.A. Res. 2712, U.N. GAOR, 25th Session, U.N. Doc. A/RES/2712 (1970) (calling upon states to try and punish persons who have committed war crimes and crimes against humanity); G.A. Res. 260, U.N. GAOR, 3rd Session, U.N. Doc. A/RES/260 (1948) (approving and proposing for signature the Convention on the Prevention and Punishment of the Crime of Genocide).

Seventh Day Adventist Church of Rwanda during the relevant period. The indictments charged genocide, complicity in genocide, conspiracy, and other crimes, including murder of civilians, extermination of civilians, and inhuman acts, all in violation of the Statute of the ICTR.

At the time of the indictments, Ntakirutimana was living in Laredo, Texas, and the ICTR requested that the United States surrender him to the ICTR pursuant to the U.S.-ICTR Agreement, *see* a.(2) above. A magistrate judge denied the U.S. Government's first request for surrender, holding that Public Law 104–106, authorizing surrender to the ICTR, was unconstitutional because extradition required a treaty; alternatively, probable cause had not been established. *In re Surrender of Ntakirutimana*, 988 F. Supp. 1038 (S.D. Tex. 1997). In response to a second request for surrender filed by the United States, the district court judge certified Ntakirutimana's surrender, finding the statute to be constitutional and all other requirements met. *In re Surrender of Ntakirutimana*, 1998 U.S. Dist. LEXIS 22173, No. CIV. A. L-98-43 (S.D. Tex. Aug. 5, 1998). The district court denied Ntakirutimana's petition for a writ of *habeas corpus*, and the U.S. Court of Appeals for the Fifth Circuit affirmed. *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999), *cert denied,* 528 U.S. 1135 (2000). Secretary of State Madeleine K. Albright signed the warrant to surrender Ntakirutimana at the beginning of March 2000.

Excerpts below from the Fifth Circuit opinion provide the basis for its conclusion that the surrender of Ntakirutimana to the ICTR was constitutional (most footnotes omitted). The Fifth Circuit also found that evidence was sufficient to establish probable cause. The court found Ntakirutimana's arguments challenging the authority of the Security Council to establish the ICTR and maintaining that the ICTR was incapable of protecting his rights, to be beyond the scope of *habeas corpus* review. *See also Digest 2000* at 203–16 providing excerpts from the U.S. brief in opposition to the writ of certiorari and d.(2) below concerning the establishment of the ICTR.

* * * *

Rwanda has been the source of ongoing ethnic conflict between members of the majority Hutus and minority Tutsis. In April 1994, President Juvenal Habyarimana of Rwanda, a Hutu, was killed when his aircraft crashed due to an artillery attack. The crash triggered a wave of violence by the Hutus against the Tutsis, which resulted in the deaths of between 500,000 and one-million persons. Tutsi rebels triumphed over the Hutus, and the Tutsi-dominated government then requested the U.N. to create an international war crimes tribunal. An investigation by the U.N. established that the mass exterminations of the Tutsis—motivated by ethnic hatred—had been planned for months. . . .

. . . In 1996, Congress enacted Public Law 104–106 to implement the [U.S.-ICTR] Agreement. . . . Among the statutory provisions made applicable is 18 U.S.C. § 3184. This section authorizes a judicial officer to hold a hearing to consider a request for surrender. If the judicial officer finds the evidence sufficient to sustain the charges under the treaty or convention, then the officer certifies to the Secretary of State that the individual may be surrendered. *See also* 18 U.S.C. § 3186 (conferring final authority on the Secretary of State to order a fugitive's surrender where a judicial officer has ruled that the requirements for extradition have been met).

* * * *

III. Ntakirutimana alleges that Article II of the Constitution of the United States requires that an extradition occur pursuant to a treaty. It is unconstitutional, he claims, to extradite him to the ICTR pursuant to a statute in the absence of a treaty. Accordingly, he claims it is unconstitutional to extradite him on the basis of the Agreement and Pub. Law 104–106 (the "Congressional-Executive Agreement"). The district court concluded that it is constitutional to surrender Ntakirutimana in the absence of an "extradition treaty," because a statute authorized extradition. We review this legal issue *de novo*. *See United States v. Luna,* 165 F.3d 316, 319 (5th Cir. 1999), *cert. denied,* 526 U.S. 1126, 119 S. Ct. 1783,

143 L. Ed. 2d 811 (1999) (reviewing constitutionality of extradition statute *de novo*).

To determine whether a treaty is required to extradite Ntakirutimana, we turn to the text of the Constitution. Ntakirutimana contends that Article II, Section 2, Clause 2 of the Constitution requires a treaty to extradite. This Clause, which enumerates the President's foreign relations power, provides in part 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 he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls. . . ." U.S. CONST. art. II, § 2, cl. 2. This provision does not refer either to extradition or to the necessity of a treaty to extradite. The Supreme Court has explained, however, that the power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers." *Terlinden v. Ames,* 184 U.S. 270, 289, 22 S. Ct. 484, 492, 46 L. Ed. 534 (1902) (citation omitted).

Yet, the Court has found that the Executive's power to surrender fugitives is not unlimited. In *Valentine v. United States,* 299 U.S. 5, 57 S. Ct. 100, 81 L. Ed. 5 (1936), the Supreme Court considered whether an exception clause[11] in the United States' extradition treaty with France implicitly granted to the Executive the discretionary power to surrender citizens. The Court first stated that the power to provide for extradition is a national power that "is not confided to the Executive in the absence of

[11] The exception clause provided, 'Neither of the contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.' *Valentine,* 299 U.S. at 7, 57 S. Ct. at 102 (citations omitted). Historically, "where treaties have provided for the extradition of persons without exception, the United States has always construed its obligation as embracing its citizens." *Id.* (citation omitted). Exception clauses excuse a government from surrendering its own citizens. [Editors' note: Subsequently, in 1990, 18 U.S.C. § 3196 was enacted, providing that citizens of the United States may be extradited even 'if the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country,' if other requirements for extradition are met.]

treaty or legislative provision." *Id. at 8, 57 S. Ct. at 102*. The Court explained:

> [The power to extradite] rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that the statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Id. at 9, 57 S. Ct. at 102.

* * * *

Valentine indicates that a court should look to whether a treaty *or statute* grants executive discretion to extradite. Hence, *Valentine* supports the constitutionality of using the Congressional-Executive Agreement to extradite Ntakirutimana. Ntakirutimana attempts to distinguish *Valentine* on the ground that the case dealt with a *treaty* between France and the United States. Yet, *Valentine* indicates that a statute suffices to confer authority on the President to surrender a fugitive. *See id.* Ntakirutimana suggests also that *Valentine* expressly challenged the power of Congress, independent of treaty, to provide for extradition. *Valentine,* however, did not place a limit on Congress's power to provide for extradition. *See id.* at 9, 57 S. Ct. at 102 ("Whatever may be the power of the Congress to provide for extradition independent of treaty . . ."). Thus, although some authorization by law is necessary for the Executive to extradite, neither the Constitution's text nor *Valentine* require that the authorization come in the form of a treaty.

* * * *

. . . Ntakirutimana does not cite to any provision in the Constitution or any aspect of its history that requires a treaty to

extradite. Ntakirutimana's argument, which is not specific to extradition, is premised on the assumption that a treaty is required for an international agreement. To the contrary, "the Constitution, while expounding procedural requirements for treaties alone, apparently contemplates alternate modes of international agreements." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 4–5, at 228–29 (2d ed. 1988) (explaining that Article 1, § 10 of the Constitution refers to other international devices that may be used by the federal government). "The Supreme Court has recognized that of necessity the President may enter into certain binding agreements with foreign nations not strictly congruent with the formalities required by the Constitution's Treaty Clause." *United States v. Walczak,* 783 F.2d 852, 855 (9th Cir. 1986) (citations omitted) (executive agreement). More specifically, the Supreme Court has repeatedly stated that a treaty or statute may confer the power to extradite. *See, e.g., Valentine,* 299 U.S. at 18, 57 S. Ct. at 106; *Grin v. Shine,* 187 U.S. 181, 191, 23 S. Ct. 98, 102, 47 L. Ed. 130 (1902) ("Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient." (citation omitted)); *Terlinden*, 184 U.S. at 289, 22 S. Ct. at 492 ("In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision." (citation omitted)).

Ntakirutimana next argues that historical practice establishes that a treaty is required to extradite. According to Ntakirutimana, the United States has never surrendered a person except pursuant to an Article II treaty, and the only involuntary transfers without an extradition treaty have been to "a foreign country or territory 'occupied by or under the control of the United States.'" *Valentine*, 299 U.S. at 9, 57 S. Ct. at 102. This argument fails for numerous reasons. First, *Valentine* did not suggest that this "historical practice" limited Congress's power. *See id.* at 9, 57 S. Ct. at 102–03. Second, the Supreme Court's statements that a statute may confer the power to extradite also reflect a historical understanding of the Constitution. *See, e.g., id.* at 18, 57 S. Ct. at 106; *Grin,* 187 U.S. at 191, 23 S. Ct. at 102; *Terlinden*, 184 U.S. at 289, 22 S. Ct.

at 492. Even if Congress has rarely exercised the power to extradite by statute, a historical understanding exists nonetheless that it may do so. Third, in some instances in which a fugitive would not have been extraditable under a treaty, a fugitive has been extradited pursuant to a statute that "filled the gap" in the treaty. *See, e.g., Hilario v. United States*, 854 F. Supp. 165 (E.D.N.Y. 1994) (upholding extradition pursuant to a post-*Valentine* statute that granted executive discretion to extradite). Thus, we are unconvinced that the President's practice of usually submitting a negotiated treaty to the Senate reflects a historical understanding that a treaty is required to extradite.

* * * *

(2) Authority of the Security Council to establish the ICTR

On April 4, 1997, a declaration by Michael J. Matheson, Acting Legal Adviser, U.S. Department of State, was filed in the U.S. District Court for the Southern District of Texas responding to issues concerning the ICTR raised by Ntakirutimana in the extradition proceedings. A number of the same issues had already been addressed by the U.S. brief in *Tadic* and resolved as to the ICTY by the appellate chamber serving both the ICTY and the ITCR. Excerpts provided below from the declaration address only additional matters specifically related to the ICTR, or raised in the extradition proceedings, including the obligation of the members of the United Nations to comply with Security Council resolutions, and the Report of the Office of Internal Oversight Services on the audit and investigation of the ICTR. (Most footnotes omitted)

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

---

1. I am the Acting Legal Adviser in the Department of State. I have held this position since June 1996, have been Deputy Legal Adviser since 1983, and have been employed by the Department of State as an attorney since 1972. The Office of the Legal Adviser

is responsible for providing legal advice to the Secretary of State, including matters relating to the International Criminal Tribunal for Rwanda (the Tribunal). During the course of these responsibilities, I have become familiar with the law relating to the Tribunal and the United Nations. I was personally involved in the establishment of the Tribunal and in the drafting of its Statute. The following is based on my personal knowledge and information available to me as part of my official duties.

2. Authority under Chapter VII of the Charter of the United Nations to create a tribunal. The establishment of the Tribunal to try offenses under international humanitarian law is within the authority of the Security Council under Chapter VII of the United Nations Charter.

* * * *

The establishment of the Tribunal was particularly appropriate in response to the situation in Rwanda. In creating the Tribunal, the Council was acting to deal with a specific urgent situation presenting a serious threat to the peace. An effort to establish the culpability of individuals responsible for genocide and other serious violations of international humanitarian law—and to deter future violations of international humanitarian law—is a suitable and important step in removing the threat to international peace and security posed by the conflict.

Furthermore, it is essential to the establishment and maintenance of a lasting peace that there be some impartial mechanism to bring to justice those responsible for the atrocities committed during the conflict. Thus, providing for the surrender and trial of those accused of atrocities raises important foreign policy issues.

Moreover, it is not the case that the authority of the General Assembly has been infringed by the creation of the Tribunal. The Assembly does not have the Council's Chapter VII authority to deal with threats to the peace or to obligate Member States to comply with Tribunal decisions. But even if the Assembly had all the necessary authority, this would not preclude the Council from exercising its own powers under Chapter VII. In fact, Article 12 of the Charter requires that the Assembly defer to the Council when

the latter is exercising its Chapter VII authority in a particular situation.

The Assembly has in fact expressed its full support for the Tribunal, has elected its judges and has acted to provide financial support for its operations.[14]

* * * *

Moreover, the Tribunal is not otherwise in violation of international law. The establishment of the Tribunal is not inconsistent with the International Covenant on Civil and Political Rights (ICCPR) 6 International Legal Materials 368 (1967), 999 TINTS 171 and the Universal Declaration of Human Rights (UDHR), G.A. Res. 271 A, U.N. Doc. A/819 (1948). Indeed, the Statute and the Rules of Procedure and Evidence of the Tribunal of 29 June 1995, ITR/3/Rev4, provide full due process for the accused that are fully consistent with the ICCPR and the UDHR.

These various issues have been considered and resolved with respect to the International Criminal Tribunal for the Former Yugoslavia by the Appeals Chamber of that Tribunal (which, under the Statute for the Rwanda Tribunal, also has jurisdiction over appeals from the Trial Chambers of the Rwanda Tribunal).

Furthermore the UDHR is not a treaty and thus bestows no rights on litigants in U.S. courts. While the ICCPR is a treaty, to which the United States is party, a declaration filed with its instrument of ratification clearly conveyed the U.S. intention that it not be self-executing and as a result confers no rights directly on U.S. litigants which can form the basis for relief in U.S. courts, 31 International Legal Materials 648 (1992).

3. *Members of the United Nations have an obligation to comply with Security Council Resolutions*. The duty of Members of the United Nations to comply with resolutions of the Security Council is made expressly clear in the U.N. Charter. For example, under

---

[14] GA. Res. 51/215, U.N. GAOR, 51st Session, 89th mtg at op. para. 2, U.N. Doc. A/RES/51/215 (1996) (appropriating funds to the Tribunal); G.A. Res. 213, U.N. GAOR, 50th Session, 100th mtg at op. para. 1, U.N. Doc, A/RES/50/213 (1995) (appropriating funds to the Tribunal).

Article 24(1) of the Charter, Members "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." Pursuant to Article 25, Members "agree to accept and carry out the decisions of the Security Council in accordance with" the Charter. Article 103 provides, further, that "[i]n the event of a conflict between the obligations of the Members . . . and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Security Council Resolution 955 of November 8, 1994, which created the Tribunal, was a valid exercise of the Council's authority under Chapter VII of the Charter. It decided that "all States shall cooperate fully with the International Tribunal and its organs . . . and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute. . . ." Article 28 of the Statute, which was adopted by the Council in Resolution 955, provides that "States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to . . . the arrest or detention of persons" and "the surrender or the transfer of the accused to the International Tribunal for Rwanda." Accordingly, the United States has an obligation under the Charter to comply with the order of the Tribunal to surrender the accused to the Tribunal.

4. *Report of the Office of Internal Oversight Services on the audit and investigation of the International Criminal Tribunal for Rwanda* (fn. omitted). In response to a request by the United Nations General Assembly [Resolution 213C (1996)], the Office of Internal Oversight Services conducted an audit and investigation of the Tribunal. The report stated that the judicial independence of the Tribunal is unquestioned. The integrity of the judges and the fairness of trials have not been questioned in the report. Moreover, there is nothing in the report which indicates that the accused would not be able to retain adequate counsel, or otherwise put forward a vigorous defense, under rules which provide due

process. Indeed, none of the shortcomings cited in the report bear on the validity of the charges against the accused. However, mismanagement was found and recommendations were made to address the shortcomings identified. The Secretary General has moved promptly to institute necessary changes. The Registrar and the Deputy Prosecutor have been removed from their positions. A new Registrar has been hired. An active search is underway for a Deputy Prosecutor. Attention is being given to witness protection. The other areas where shortcomings were reported, particularly those of a management and administrative nature, are being addressed.

5. *The alleged conduct of the accused was a criminal offense at the time and place it occurred.* . . . Therefore, it cannot be argued that the accused is being prosecuted for conduct that was not criminal at the time and place it occurred, or that the accused could not reasonably have foreseen that he could be liable to prosecution for murder, genocide and other serious violations of international humanitarian law.

* * * *

e. Forum for Iraq

See B.2.e *supra*, discussing possible fora for bringing Saddam Hussein to justice.

f. Cambodia

In testimony before the Senate Foreign Relations Committee, Subcommittee on Asia and the Pacific, June 10, 1998, Assistant Secretary for East Asian and Pacific Affairs Stanley O. Roth provided an update on the situation in Cambodia. Mr. Roth's testimony focused on the prospects in Cambodia for free, fair and credible elections following the seizure of power by Hun Sen in 1997. In concluding, Mr. Roth turned to the issue of bringing Khmer Rouge leaders to justice, as excerpted below. The United States worked with the

United Nations and Cambodia to draft legislation to establish Extraordinary Chambers, which would have both international and domestic participation. On October 4, 2004, the legislation was ratified by the Cambodian government. *See also Digest 2002* at 148.

The full text of the testimony is available at *www.state.gov/www/policy_remarks/1998/980610_roth_cambodia.html.*

---

* * * *

I know our primary purpose today was to review the prospects for Cambodia's elections, but I would be remiss if I did not reiterate our policy on justice and accountability for those senior Khmer Rouge leaders responsible for genocide against the Cambodian people, and other serious violations of humanitarian law. Despite the death of Pol Pot in April, we believe strongly that those surviving senior Khmer Rouge leaders responsible for such crimes from 1975–1979 should be held accountable. We have discussed this issue with many governments over the last year, and have made it clear we are prepared to support—and work to implement—any of a variety of options, should these senior Khmer Rouge leaders become accessible to the international community. Our preferred option is to establish an international tribunal similar to the ones established for the former Yugoslavia and Rwanda. We have circulated a draft resolution with United Nations Security Council members that would accomplish this task.

* * * *

2. International Criminal Court

a. Preparatory work for the establishment of an international criminal court.

On May 13, 1993, the United States submitted comments to the Secretary-General on the Report of the International Law Commission's Working Group on the Question of an International Criminal Jurisdiction, in accordance with

Resolution 47/33 of the UN General Assembly, dated November 25, 1992. U.N. Doc. A/RES/47/33 (1992). *See* 87 Am. J. Int'l L. 595, 604 (1993). An ILC draft statute for the International Criminal Court was submitted to the United Nations General Assembly in 1994. U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994). On February 17, 1995, the General Assembly established the Ad Hoc Committee on the Establishment of the International Criminal Court to consider major substantive issues arising from the ILC's draft Statute. G.A. Res. 49/53, U.N. Doc. A/RES/49/53 (1994).

Following consideration of a report by the ad hoc committee, on December 11, 1995, the General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court to prepare a draft for submission to a future diplomatic conference. G.A. Res. 50/46, U.N. Doc. A/RES/50/46 (1995). The preparatory committee met from 1996 to 1998.

Since 1994 the UN Sixth Committee (Legal) had regularly included an agenda item on the establishment of an International Criminal Court, and produced a resolution for adoption by the General Assembly. In the Sixth Committee debate, many states, including the United States, presented their views on the then current issues. In a November 1, 1995, statement, Deputy Legal Adviser Jamison S. Borek, U.S. Department of State, described recent efforts, provided the U.S. views on these efforts, and made suggestions for future work on this topic. *See* U.N. Doc. A/C.6/50/SR.27 (1995).

The full text of Ms. Borek's statement is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

I would like to touch upon where we have been, where we are, and where we are going. Where we have been is the beginning of an important debate on the substance of establishing a new institution, one which would have a far-reaching impact on world

society, and thus one which requires considerable care in its construction and a broad consensus for success.

In 1993, the International Law Commission presented the Sixth Committee with a draft statute that allowed us to proceed beyond the largely academic debate of the prior decades, and focused attention on the details of establishing a court.

Based on comments by Member States here in the Sixth Committee, the Commission revised and further improved its draft, presented it to us, and challenged us to take the next steps. As a result, a year ago, we met to consider those further steps. Many States believed that the time was ripe for convening a diplomatic conference to seek agreement on a final text of the statute for a court. The United States and other States believed that there were still many uncertainties with the draft and requested the Sixth Committee to establish instead an Ad Hoc Committee to allow governments to review and assess the issues involved.

The Ad Hoc Committee met for four weeks in two sessions this past year. Delegations came prepared to provide detailed perspectives on the issues presented. The United States provided extensive comments, both in writing and during the Committee sessions. We did so both in comments submitted to the Secretary-General, and in non-papers made available to those participating in the work of the Committee.

In the view of my delegation, the work has resulted in significant progress. . . .

As the report of the Committee states, "further work on the establishment of an international criminal court has to be done." We embrace the challenge and look forward to a year of intensive work to improve upon the ILC draft statute, including thorough discussions of key issues and the drafting of some revised texts.

All of us have undertaken this task not only in the shadows of history, but also among and in response to the atrocities of our own time. The United States Government's support to the two UN war crimes tribunals has been second to none. Recognizing the challenge before us, President Clinton recently said that "nations all around the world who value freedom and tolerance [should] establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious

violations of humanitarian law." Such a permanent international court, in the President's words, "would be the ultimate tribute to the people who did such important work at Nuremburg. . . ." We now need to focus our next steps on what is critically needed to address violations of international humanitarian law and what is pragmatically achievable in a reasonable period of time. . . .

There are many critical issues that need to be explored in greater depth and, we hope, resolved. If we approach the court from an academically pure perspective, without regard for political realities and what States are willing to participate in and fund, we will have wasted our time. The United States has consistently cautioned against unrealistic propositions that would create a court that would be ineffective. Those who wish to accelerate the work of the court need to avoid futile proposals and press for the achievable.

We believe the discussions in the Ad Hoc Committee showed a growing consensus to restrict the jurisdiction of the court to genocide, crimes against humanity and war crimes. We also heard many governments attracted to the proposition that crimes under the Torture Convention and the Convention on the Safety of United Nations and Associated Personnel be incorporated in an appropriate manner into the court's jurisdiction, and we share that attraction. We do not believe that there is enough support to sustain aggression, drug crimes, terrorism crimes, or violations of the Apartheid Convention within the court's jurisdiction. The crimes of terrorism and drug crimes also present particular problems of investigation and prosecution which the court would inevitably be ill-equipped to address. These are crimes committed as part of the ongoing activity of international criminal organizations. The investigation of these crimes requires major police and technical resources which the court will not have. The prosecution of these crimes, moreover, does not occur in isolation, but rather as part of an overall investigative and prosecutorial strategy, in which the choice of who to prosecute and when and how is calculated in order to end the workings of the organization as a whole and to reach the key figures at the top. These cases are thus essentially tied to national investigations and would require a fundamentally different regime, which at best would significantly complicate the design and workings of the court.

We also view the inclusion of the crime of aggression as highly problematic on numerous grounds. This is fundamentally a crime of States, as to which the Security Council would have to play a central role. It thus presents all the risks of politicization in a serious form. It is, moreover, a crime which is still very ill defined. The Nuremburg Tribunal did not have to confront this problem, as it was dealing, after the fact, with a clear and specific case. In the abstract, however, it is not at all universally established what fits even within the limited concept of "waging a war of aggression." What are the possible defenses or mitigating factors in connection with such a charge? What if it concerns disputed territory? Where there is a conflict which is settled by reference to the International Court of Justice, for example, does the losing party automatically become guilty of an aggressive war? What about controversial concepts such as humanitarian intervention or a war of liberation? Including the crime of aggression would require clear, universally-accepted answers to these questions. In short, Mr. Chairman, we join those who support focusing, in the first instance, on the core crimes of international humanitarian law for which there is universal support.

The proposal, endorsed by some governments but never proposed by the International Law Commission, that the court have "inherent jurisdiction" over violations of humanitarian law (other than possibly the crime of genocide) is ill-conceived in our view and will not achieve the broad support necessary for a viable court. We have provided our views on this on a number of occasions, and will continue to do so.

The question of consent deserves further consideration, as the current focus on territoriality will often yield unfair and illogical results. As it stands, moreover, the nationals of a State could be subject to investigation and prosecution when the State itself is not even party to the court. As many have noted, it is also important to elaborate further the principle of complementarity. We believe that bona fide national investigations and prosecutions will always be preferable, where possible, for many reasons. We believe that, for a permanent court which will face many possible and unknown cases, national jurisdiction should enjoy a presumption of regularity. It is not appropriate simply to mirror the

War Crimes Tribunal provisions, as these were designed with specific situations in mind, in which one could fairly prejudge the incapacity of national institutions when the statutes were designed. It requires no subtle judgment when institutions are wholly destroyed or incapable of functioning due to armed conflict. It is a much more difficult, intrusive and subtle judgment to say that a functioning national system is not bona fide.

There is an important role for the Security Council to play in the work of the court. We have heard the role of the Security Council criticized as unduly tainting the independence of a judicial body. Ironically, allowing a State unfettered discretion to launch cases against another State, regardless of whether the resulting international prosecution would be necessary or effective, has even greater potential for political misuse. Under the current draft, the initiation of cases would be subject to whatever political agenda a particular State may have, rather than a collective decision by the Council that in fact would be less likely to reflect a political bias than that of an individual State. In any event, the reality of the hard core categories of crimes is that they are in almost all cases relevant to the matters of which the Security Council is likely to be seized, and which are part of the Council's mandate under the Charter of the United Nations to maintain and restore international peace and security. A primary purpose in establishing a permanent international criminal court is to avoid the necessity of the Security Council establishing ad hoc tribunals to deal with crimes arising under international humanitarian law. The statute should recognize the authority of the Security Council to refer situations to the court, and to do so in a way, as the delegation of Canada suggested on Monday, that will ensure that all States must cooperate with the court. At the same time, however, it would be for the prosecutor and the court—not the Security Council—to decide which specific cases should be initiated and against whom. As others have noted, the court must be an independent judicial institution, without interference from political bodies. The role of the Security Council thus can be defined so that it in no way undermines the judicial independence of the court, its judges and its prosecutor, but rather strengthens the court in addressing the important cases that would be part of its mandate.

Beyond questions of subject matter jurisdiction, many other issues need to be resolved, including the structure, organization and financing of the court, its primacy in relation to bona fide State jurisdiction, and the rules of evidence and procedure under which it would function. While the UN ad hoc tribunals provide a point of departure, the creation of a permanent institution of more general jurisdiction raises many problems which the drafters of the tribunal statutes did not have to resolve.

It is important to continue work in the same spirit and approach as the Ad Hoc Committee. In particular, we must ensure that all critical issues are carefully reviewed. It is essential not to set unrealistic deadlines for this work. Further deliberation is needed to ensure thoughtful review of the remaining issues and to garner the kind of widespread support needed for a truly effective and global court.

* * * *

In our prior interventions, we have touched on the many issues that will need to be reviewed. We must ensure that the due process rights of defendants are protected. We must ensure that legitimate efforts of local authorities to investigate and prosecute crimes are not harmed, while at the same time providing the court with sufficient authority so that it can act effectively where it has jurisdiction. . . . [W]e must not rush a decision that could, as a result of haste, allow us to wind up with a court that is ineffective and not widely endorsed.

In sum, my delegation is ready to move forward with attempts to establish a permanent international criminal court. We are mindful of the difficulties inherent in establishing a new institution of such complexity, but we stand ready to make a diligent effort, in every hope of a successful conclusion.

An address by David J. Scheffer, U.S. Ambassador at Large for War Crimes Issues, at the Peace Palace, The Hague, the Netherlands on September 19, 1997, entitled "The Future of International Criminal Justice" discussed the state of negotiations at that time. Excerpts below describe the U.S. position on the independence of the court and the U.S.

proposal for a requirement of Security Council or State Party referral of "situations" to the Prosecutor for further investigation as to charges against specific individuals.

The full text of the address can be found at *www.state.gov/www/global/narcotics_law/970919_scheffer.html.*

---

* * * *

As we approach the 21st century, individuals—of whatever rank in society—who participate in serious and widespread international crimes of genocide, crimes against humanity, or war crimes must no longer act with impunity. Throughout history the "enemy" has been the belligerent nation or rebel army threatening international peace and security. But the other reality is that war criminals and genocidaire are the common enemies of all civilized peoples. They must come to learn that while they may run, they cannot escape the long reach of international law that finally shows some promise of being enforced. There is no doubt that the Yugoslav and Rwanda Tribunals have been critical first steps. But in the 21st Century we will need a permanent court that both deters such heinous crimes globally and stands prepared to investigate and prosecute their perpetrators.

As the head of the U.S. delegation to those talks, I can confirm that the precedents being established in The Hague and in Arusha inform the discussions and stimulate much deliberation. There is no question that the momentum of the UN talks is driven in significant part by the example of the ad hoc tribunals and the need to ensure that a similar institution of justice will be available in the future.

* * * *

It is appropriate that in this historic chamber I discuss the issue that particularly vexes the UN talks, namely the independence of the ICC. There have been those governments which argue that the independence of the Court is assured only if the Prosecutor has unfettered authority to initiate cases, without any role for the Security Council or the consent of interested states. There are other governments which insist on

the consent of a range of states before any case can be prosecuted before the ICC.

The United States has proposed an alternative procedure that we believe best ensures both the independence of the ICC and the practical use of the Court to prosecute crimes of genocide, humanity, and war. In our view, no case should be initiated by the Prosecutor unless the over-all situation pertaining to that case has been referred to the Prosecutor. But once there has been a referral, the Prosecutor has discretion to investigate and prosecute an individual case.

Therefore, under the U.S. proposal neither a State Party nor the Security Council would lodge a complaint against a single individual with the Prosecutor. The Prosecutor, and the Prosecutor alone, would determine whom to investigate and whom to seek indictments against. He or she would have the expertise and capabilities—more so than a State Party or the Security Council—to conduct investigations and make the critical determinations of which individuals should be held criminally responsible for commission of the core crimes of genocide, crimes against humanity, and war crimes.

The targeting of an individual for criminal responsibility is serious business that should be as far removed from political considerations as possible; only a highly qualified and respected Prosecutor should be entrusted with that duty for the ICC if it is not being undertaken at the national level. In this respect, the independence of the Prosecutor would be qualified only in terms of other important provisions of the Statute. The United States has reserved its position on the consent of any States to the prosecution of a case pending further review of negotiations in other key issues, including the role of the Security Council and the strength of the complementarity regime, or deferral to national jurisdiction.

We believe that the Security Council and State Parties to the statute of the ICC should be empowered to refer overall situations to the Prosecutor where there has been apparent commission of one or more of the core crimes in the Court's jurisdiction. The referral would request the Prosecutor to investigate the situation for the purpose of determining whether one or more specific

persons should be charged with commission of such crime. We have emphasized that the State Party should have to refer a situation or matter; the State Party would not lodge a complaint against one or more named individuals as contemplated by most other governments and by the International Law Commission in its draft statute. This procedure would mirror the referral procedure for the Security Council which is acceptable to a wide range of governments.

However, if the situation referred by the State Party to the ICC concerns a dispute or situation pertaining to international peace and security or an act of aggression which is being dealt with by the Security Council, then the Security Council should approve that referral of the entire situation to the ICC. In our view, the UN Charter responsibilities of the Security Council for the maintenance and restoration of international peace and security permit no alternative to that procedure.

Therefore, our proposal would require that no prosecution may be commenced before the ICC arising from a dispute or situation pertaining to international peace and security or an act of aggression which is being dealt with by the Security Council without the prior consent of the Security Council that such dispute or situation can be adjudicated, for purposes of individual criminal responsibility, by the ICC.

The referral power of the Security Council should be established so that the Council can bring to the ICC's attention situations that span the scope of the Council's responsibilities under the Charter, including both enforcement actions and peaceful actions relating to disputes the continuance of which would likely endanger the maintenance of international peace and security. We are, after all, striving to establish a court that will serve as a deterrent for the commission of core crimes as well as the judge of them. If peace can be served, and further core crimes deterred, with the rendering of justice by the ICC without the Security Council taking the extraordinary step of using its enforcement powers under Chapter VII of the Charter, then we believe that is a worthy procedure to incorporate in the statute of the Court.

If the Security Council were to act under Chapter VII in its referral of a situation to the ICC, then it could choose to direct the

Court to exercise mandatory powers similar to those currently employed by the International Criminal Tribunals for the former Yugoslavia and for Rwanda. Whether or not the Council acts under Chapter VII, it could choose to refer a situation for action by the Court under whatever rules are finally established for complementarity and state consent. But governments need to keep in mind the Council's potential for a mandatory referral under Chapter VII authority as further progress is made in drafting the procedural rules of the Court, and then make whatever adjustments may be necessary.

The United States views the combination of the State Party referral procedure and the Security Council referral procedure as providing the ICC with a potentially wider and more significant range of cases to prosecute.

The Security Council is indeed a political institution, but then so too are governments. The argument we often hear that reference to the Security Council invites political influence into the work of the ICC continues to ignore the fact that any State Party lodging a complaint against a single individual also invites political influence into the work of the Court. Our proposal seeks to minimize political considerations in deciding which individuals to bring to the bar of justice. The U.S. proposal seeks to maximize the opportunities for both State Parties and the Security Council to bring whole-scale atrocities and war crimes to the doorstep of the Prosecutor and invite him or her to bring the perpetrators of those crimes to justice.

The United States recently proposed that the Security Council be expanded up to 20 or 21 Member States so that new permanent members could be added, including nations from the developing world. When the Security Council reform process concludes, we expect that the representation of a much wider cross-section of the global society will have been accomplished. Any decision that the Security Council makes with respect to the referral of a situation to the ICC thus will reflect the considered judgment of that larger and more representative group of nations. The Security Council is a principal, but not static, organ of the United Nations. The reform process reflects the interest of Member States in making sure the Security Council remains an effective and representative institution.

The grim reality of our effort to establish an international criminal court is that it is required to hold accountable the perpetrators of atrocities that presumably will occur in the future, since the ICC will have only prospective jurisdiction. This presumption is the darker vision of the next century. Our common hope must be that the establishment of a permanent court will defeat that presumption through the power of deterrence. Working with other governments, the United States will spare no effort to create a fair and effective permanent international criminal court as soon as possible to realize that hope.

This brings me to my final and most important point for you to consider today. There remains a widening and immediate gap in international criminal justice, between the two ad hoc International Tribunals established by the Security Council and the proposed ICC which will likely have only prospective jurisdiction. With increasing frequency, the Security Council is posed with the question of accountability for real-time and serious violations of international humanitarian law. "Tribunal fatigue" by Council Members and the still distant creation of a permanent court have combined to create a gap for mechanisms of accountability for massive crimes which have been committed in our times.

We must urgently fill this gap in our judicial institutions. The problem is complex, the solution illusive, and the political will of governments largely untested. But this is a challenge we must confront, today. The victims of too many atrocities and war crimes which have gone untended deserve our best efforts.

On October 23, 1997, Ambassador Bill Richardson, U.S. Permanent Representative to the United Nations, made a statement before the Sixth Committee (Legal) of the 52nd General Assembly regarding the agenda item "Establishment of an International Criminal Court." UNGAOR 6th Comm., 52nd Sess., Agenda Item 150, at 5–7, U.N. Doc. A/C.6/52 SR.13 (1998). The statement, building on Ambassador Scheffer's remarks, *supra*, provided U.S. views on the then upcoming diplomatic conference to adopt a statute for a permanent international criminal court.

The full text of Ambassador Richardson's statement is available at *www.state.gov/s/l/c8183.htm*.

I am pleased to address the Sixth Committee on a subject of great importance to the United States and the international community. In this connection, I would like to recall today the remarks of the President of the United States to the General Assembly almost exactly a month ago. Speaking before the General Assembly on September 22, he said:

> To punish those responsible for crimes against humanity and to promote justice so that peace endures, we must maintain our strong support for the United Nations' war crime tribunals and truth commissions. And before the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law.

This reflects, of course, the fundamental position of support for a fair, efficient and effective court which we have expressed before, but with a particular emphasis on the timing which we now envision based on the road we see before us and developments and progress which have already occurred.

* * * *

The [court's] basic rules and procedures must necessarily include the fundamentals of the criminal law procedures of the court. Certainly we cannot expect to agree on, nor do we need to elaborate, every single rule. At the same time, however, we cannot leave the court as it stands now, totally formless and uncertain, torn between civil and common law. The fundamental outlines of procedure, including the important subject of defendants' rights, must be clear before any State is asked or expected to sign on to the court.

We must also finish the very considerable work that has already been done on general principles of criminal law. Further, we must clarify and elaborate the rules on the cooperation of States with the Tribunal, the powers of the Tribunal to compel and enforce

cooperation, and the powers of the Tribunal to investigate on its own. Experience with the International Criminal Tribunals for the Former Yugoslavia and Rwanda, for example, demonstrates that effective rules in this area are a sine qua non for the future of an international criminal court.

It is neither prudent nor wise to leave such supposed "details" unresolved, as there may be surprising controversy and difference of opinion, and a total absence of shared assumptions, about even very simple, albeit essential, procedures and rules.

We must also still reach a common designation and better definition of crimes. It is in our view important that jurisdiction be confined initially to the truly "hard core" crimes of genocide, war crimes and crimes against humanity. These crimes and the court's jurisdiction should, moreover, be further and more precisely defined so as to focus clearly on those well-established crimes of serious international concern.

* * * *

. . . . Another important area which remains to be resolved is that of the structure and administration of the Court, including the question of oversight and funding. As has also been shown by experience with the ad hoc tribunals, there are potential pitfalls in these areas as well, which can make the difference between the success and failure of a permanent court.

Based on our consideration of the question over the past years, we have come to the conclusion that the Court should not be a direct part of, or administratively dependent on, the United Nations. Obviously, a linkage with the Security Council is essential, because of the Security Council's central role in the maintenance of international peace and security and its mandatory and enforcement powers. At the same time, however, the court needs to function independently—not only from the Security Council, but even more critically from the vast bureaucracy, structure and unrelated operations of the United Nations.

* * * *

At the same time, the court will need some mechanisms of oversight by States parties. These would not be the large and

relatively cumbersome mechanisms of the United Nations, nor should they be in any way intrusive of the independent functioning of the court.

Such a mechanism can be important, however, to ensure a necessary measure of oversight and accountability, especially as concerns fiscal matters, to guard against irreconcilable issues arising between the different and, to varying degrees, independent components of the Court, and to provide a mechanism for the approval of necessary adjustments which might be made from time to time, for example, in the rules of procedure.

In addition, as a corollary of the above and also as an independent matter, we believe that it is essential for there to be a treaty-based funding scheme. While it is reasonable for the United Nations to make a very significant contribution when a situation or matter is referred by the Security Council, it is not acceptable to expect the United Nations to bear the entire cost of the Court.

To do so risks dooming the ICC to a permanently underfunded status, on the one hand, while also jeopardizing the overall necessary budgetary constraints of the United Nations. There should not be a trade-off between U.N. programs and prosecutorial priorities, nor should the other operations of the United Nations wax and wane depending on the incidence of serious international crime. Moreover, independence from United Nations mechanisms entails fiscal independence as well.

These are only some of the more important issues which lie ahead of us. It is important to bring our best efforts, wisest judgment, and maximum flexibility to bear to see that they are resolved as quickly as possible in a way that best promotes the future authority, integrity, and effectiveness of the court.

* * * *

On March 31, 1998, in remarks to the Washington College of Law, American University in Washington, D.C., Ambassador Scheffer addressed the issue of U.S. policy on international criminal tribunals. His remarks included a discussion of a recent U.S. proposal for strengthening complementarity—deferral to national systems—and the need for the court to avoid undermining efforts of countries

such as the United States that "shoulder the burden of international security."

The full text of Ambassador Scheffer's address, excerpted below, can be found at *www.state.gov/www/policy_remarks/1998/980331_scheffer_tribs.html.*

---

* * * *

The Clinton Administration believes that a core purpose of an international criminal court must be to advance a simple norm: countries should bring to justice those who commit genocide, crimes against humanity, and war crimes, or turn suspects over to someone who will, such as an impartial and effective international court.

Our long-term vision is the prevention of heinous crimes through effective national law enforcement buttressed by the deterrence of an international court. The permanent court must ensure that national legal systems with the will and ability to prosecute persons who commit these crimes are permitted to do so, while guaranteeing that perpetrators of these crimes acting in countries without competent, functioning legal systems nonetheless will be held accountable.

In that spirit, the U.S. delegation introduced a proposal last week that would strengthen the principle of "complementarity" that requires deferral to capable national judicial systems. The U.S. proposal states that when a matter (that is, a situation in which crimes within the jurisdiction of the court may have been committed) has been referred to the Court, a State may step forward and commit itself to investigating its own citizens or others within its jurisdiction who may be suspects for commission of crimes in that matter. If the Prosecutor defers to that State, then there should be a certain period of time to allow the State to take the lead, following which the Prosecutor can challenge the State's performance if it proves lacking.

On the other hand, right at the outset the Prosecutor may decide that the requesting State's legal system has collapsed or is unavailable, or it is unable or unwilling to genuinely investigate and prosecute the suspects. Under those circumstances, the Prosecutor may seek the views of the Court to uphold or deny the

decision to override State jurisdiction. The issue could be appealed to the Appeals Chamber, where a super-majority number of the Appeals judges would need to approve the Prosecutor's decision to launch investigations. We anticipate that expedited procedures for the judges' actions could be formulated in the Rules of the Court.

This proposal is extremely important to the United States Government. In our view, it takes account of our interest in protecting against unwarranted prosecutions of our nationals, as well as nationals of other responsible members of the international community, while ensuring the prosecution of those who should be brought before an international tribunal. Our proposal also seeks to honor a fundamental tenet of the principle of complementarity, namely, that at the outset of a referral of an overall matter, a State can seize the opportunity to enforce the law itself provided it is capable and willing to do so. Other governments are examining this proposal closely and the non-governmental community is beginning to comment on it.

Because of its responsibilities for international peace and security, the U.N. Security Council must have an important role in the permanent court's work. The jurisdiction of the court will involve many conflicts that are properly being addressed by the Security Council. The court cannot be used to undermine the Council's critical work. Governments need to agree on how to preserve this vital role for the Council while pursuing justice.

The Security Council also should be able to refer armed conflicts or atrocities to the court for investigation and direct all countries to cooperate with the court if necessary. The Council may need to assist the court with the enforcement of its orders.

Many governments and non-governmental organizations seek a prosecutor who can self-initiate investigations and seek indictments against anyone anywhere. Justice Arbour has spoken eloquently in support of this proposition. However, we believe there must be reasonable limits on the prosecutor's scope of action and reasonable procedures which will activate the prosecutor's powerful duties.

We have proposed that first a State Party to the treaty or the Security Council must refer an overall matter to the court. Then,

provided the crimes are sufficiently grave, the prosecutor would be free to investigate the situation and prosecute alleged perpetrators. This would mirror the Yugoslav and Rwanda Tribunals and ensure that the prosecutor has the necessary backing to get the job done. If neither any State Party nor the Security Council believes that a situation should be referred to the Court, that speaks powerfully against the need or wisdom of court involvement.

At this session of the Preparatory Committee the U.S. delegation has been particularly concerned about complications in negotiating the fundamental stages of the criminal process. . . . We, along with a number of other delegations, believe it is imperative to develop a straightforward, simplified procedure that can stand as a common vision for delegations from a variety of jurisdictions and legal traditions. . . .

For example, there needs to be a single method for arrest of a person based upon an independent judicial determination of probable cause. In lieu of two or three different concepts in the negotiations about how one confirms or formalizes charges, there needs to be a form of preliminary hearing that satisfies civil and common law jurisdictions alike. Between those two stages, procedures for arrest and surrender by national authorities needs to be controlled by provisions of the statute which require much higher levels of agreement. While such issues may not be the grist of public debate, they are the gut of the Court's statute and negotiators' most time consuming endeavor. The outcome of this proposal remains open, but the reaction so far has been very encouraging.

What hard realities—beyond theory—must we all consider in connection with the negotiations for a permanent international criminal court? First, the permanent court must not handcuff governments that take risks to promote peace and security and undertake humanitarian missions. It should not be a political forum in which to challenge legitimate actions of responsible governments by targeting their military personnel for criminal investigation and prosecution. Human rights groups advocating speedy military interventions to save human lives should be most sensitive to this reality. Otherwise, ironically, a permanent court would undermine efforts to confront the worst assaults on humankind.

Many countries shoulder the burden of international security. The U.S. military, in particular, is called upon to carry out mandates of the Security Council, to help defend our allies and friends, to achieve humanitarian objectives, to combat international terrorism, to rescue Americans and others in danger, to prevent the proliferation or use of weapons of mass destruction, and to defend our national security from a wide range of threats. Other governments participate in our military alliances or in U.N. or other multinational peacekeeping operations. Our armed forces are deployed globally and need to be able to fulfill their legitimate responsibilities without unjustified exposure to criminal legal proceedings.

* * * *

b. Rome Conference for the Adoption of the Statute of the International Criminal Court.

In its 52nd session, the UN General Assembly adopted a resolution to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, subsequently held in Rome from June 15 to July 17, 1998. G.A. Res. 52/160, U.N. Doc. A/RES/52/160 (1998).

In remarks at Rome, July 15, 1998, Ambassador Scheffer commented on the status of ongoing negotiations on the establishment of the International Criminal Court. After reiterating the long standing U.S. support for creating an appropriate court, Ambassador Scheffer concluded:

> The world desperately needs this mechanism for international justice, but it must be a community, not a club. It will need the cooperation of governments to operate effectively, and it will not achieve its objectives by ignoring the legitimate concerns of many governments. The United States and other countries have critical responsibilities around the world that are crucial to the protection of civilian populations. A scheme that ignores

> these responsibilities is not going to serve the vital interest of the court. . . . There is still time to achieve our common vision for international justice.
>
> The full text of his remarks is available at *www.state.gov/www/policy_remarks/1998/980715_scheffer_icc.html*.
>
> On July 17, 1998, the Conference adopted the Statute of the International Criminal Court ("Rome Treaty") by a vote of 120–7, with twenty-one abstentions. The United States voted no. The United States explained its negative vote as set forth below. The full record of the explanations of vote can be found at *www.un.org/icc/index.htm*.

The United States does not accept the concept of jurisdiction in the Statute and its application over non-States parties. . . . Any attempt to elaborate a definition of the crime of aggression must take into account the fact that most of the time it was not an individual act, instead wars of aggression existed. The Statute must also recognize the role of the Security Council in determining that aggression has been committed. No State party can derogate from the power of the Security Council under the United Nations Charter, which has the responsibility for the maintenance of international peace and security.

The United States will not support resolution "e" in the final act. Including crimes of terrorism and drug crimes under the Court will not help the fight against those crimes. The problem is not one of prosecution but of investigation, and the Court will not be well equipped to do that.

c. U.S. views on adoption of the Rome Treaty

On July 23, 1998, Ambassador Scheffer testified on behalf of the Department of State before the Senate Foreign Relations Committee. S. Hrg. Doc. No. 105–724 (1998). His testimony, excerpted below, reported on both the objectives achieved and the continuing concerns of the United States in the

treaty adopted at the recently completed UN Diplomatic Conference on the Establishment of a permanent International Criminal Court.

His testimony, excerpted below, can be found at *www.state.gov/www/policy_remarks/1998/980723_scheffer_icc.html*.

---

* * * *

Among the objectives we achieved in the statute of the court were the following:

— An improved regime of complementarity (meaning deferral to national jurisdictions) that provides significant protection, although not as much as we had sought.
— A role preserved for the UN Security Council, including the affirmation of the Security Council's power to intervene to halt the court's work.
— Sovereign protection of national security information that might be sought by the court.
— Broad recognition of national judicial procedures as a predicate for cooperation with the court.
— Coverage of internal conflicts, which comprise the vast majority of armed conflicts today.
— Important due process protections for defendants and suspects.
— Viable definitions of war crimes and crimes against humanity, including the incorporation in the statute of elements of offenses. We are not entirely satisfied with how the elements have been incorporated in the treaty, but at least they will be a required part of the court's work. We also were not willing to accept the wording proposed for a war crime covering the transfer of population into occupied territory.
— Recognition of gender issues.
— Acceptable provisions based on command responsibility and superior orders.
— Rigorous qualifications for judges.

— Acceptance of the basic principle of state party funding.
— An Assembly of States Parties to oversee the management of the court.
— Reasonable amendment procedures.
— A sufficient number of ratifying states before the treaty can enter into force, namely 60 governments have to ratify the treaty.

The U.S. delegation also sought to achieve other objectives in Rome that in our view are critical. I regret to report that certain of these objectives were not achieved and therefore we could not support the draft that emerged on July 17th.

First, while we successfully defeated initiatives to empower the court with universal jurisdiction, a form of jurisdiction over non-party states was adopted by the conference despite our strenuous objections. In particular, the treaty specifies that, as a precondition to the jurisdiction of the court over a crime, either the state of territory where the crime was committed or the state of nationality of the perpetrator of the crime must be a party to the treaty or have granted its voluntary consent to the jurisdiction of the court. We sought an amendment to the text that would have required both of these countries to be party to the treaty or, at a minimum, would have required that only the consent of the state of nationality of the perpetrator be obtained before the court could exercise jurisdiction. We asked for a vote on our proposal, but a motion to take no action was overwhelmingly carried by the vote of participating governments in the conference.

We are left with consequences that do not serve the cause of international justice. Since most atrocities are committed internally and most internal conflicts are between warring parties of the same nationality, the worst offenders of international humanitarian law can choose never to join the treaty and be fully insulated from its reach absent a Security Council referral. Yet multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by

the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.

Mr. Chairman, the U.S. delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies. But serious risks remain because of the document's provisions on jurisdiction.

Our position is clear: Official actions of a non-party state should not be subject to the court's jurisdiction if that country does not join the treaty, except by means of Security Council action under the UN Charter. Otherwise, the ratification procedure would be meaningless for governments. In fact, under such a theory, two governments could join together to create a criminal court and purport to extend its jurisdiction over everyone, everywhere in the world. There will necessarily be cases where the international court cannot and should not have jurisdiction unless the Security Council decides otherwise. The United States has long supported the right of the Security Council to refer situations to the court with mandatory effect, meaning that any rogue state could not deny the court's jurisdiction under any circumstances. We believe this is the only way, under international law and the UN Charter, to impose the court's jurisdiction on a non-party state. In fact, the treaty reaffirms this Security Council referral power. Again, the governments that collectively adopt this treaty accept that this power would be available to assert jurisdiction over rogue states.

Second, as a matter of policy, the United States took the position in these negotiations that states should have the opportunity to assess the effectiveness and impartiality of the court before considering whether to accept its jurisdiction. At the same time, we recognized the ideal of broad ICC jurisdiction. Thus, we were prepared to accept a treaty regime in which any state party would need to accept the automatic jurisdiction of the court

over the crime of genocide, as had been recommended by the International Law Commission in 1994. We sought to facilitate U.S. participation in the treaty by proposing a 10-year transitional period following entry into force of the treaty and during which any state party could "opt-out" of the court's jurisdiction over crimes against humanity or war crimes. We were prepared to accept an arrangement whereby at the end of the 10-year period, there would be three options—to accept the automatic jurisdiction of the court over all of the core crimes, to cease to be a party, or to seek an amendment to the treaty extending its "opt-out" protection. We believe such a transition period is important for our government to evaluate the performance of the court and to attract a broad range of governments to join the treaty in its early years. While we achieved the agreement of the Permanent Members of the Security Council for this arrangement as well as appropriate protection for non-party states, other governments were not prepared to accept our proposal. In the end, an opt-out provision of seven years for war crimes only was adopted.

Unfortunately, because of the extraordinary way the court's jurisdiction was framed at the last moment, a country willing to commit war crimes could join the treaty and "opt out" of war crimes jurisdiction for seven years while a non-party state could deploy its soldiers abroad and be vulnerable to assertions of jurisdiction.

Further, under the amendment procedures states parties to the treaty can avoid jurisdiction over acts committed by their nationals or on their territory for any new or amended crimes. This is protection we successfully sought. But as the jurisdiction provision is now framed, it purports to extend jurisdiction over non-party states for the same new or amended crimes.

The treaty also creates a proprio motu—or self-initiating prosecutor—who, on his or her own authority with the consent of two judges, can initiate investigations and prosecutions without referral to the court of a situation either by a government that is party to the treaty or by the Security Council. We opposed this proposal, as we are concerned that it will encourage overwhelming the court with complaints and risk diversion of its resources, as

well as embroil the court in controversy, political decision-making, and confusion.

In addition, we are disappointed with the treatment of the crime of aggression. We and others had long argued that such a crime had not been defined under customary international law for purposes of individual criminal responsibility. We also insisted, as did the International Law Commission in 1994, that there had to be a direct linkage between a prior Security Council decision that a state had committed aggression and the conduct of an individual of that state. The statute of the court now includes a crime of aggression, but leaves it to be defined by a subsequent amendment to be adopted seven years after entry into force. There is no guarantee that the vital linkage with a prior decision by the Security Council will be required by the definition that emerges, if in fact a broadly acceptable definition can be achieved. We will do all we can to ensure that such linkage survives.

We also joined with many other countries during the years of negotiation to oppose the inclusion of crimes of terrorism and drug crimes in the jurisdiction of the court on the grounds that this could undermine more effective national efforts. We had largely prevailed with this point of view only to discover on the last day of the conference that the Bureau's final text suddenly stipulated, in an annexed resolution that would be adopted by the conference, that crimes of terrorism and drug crimes should be included within the jurisdiction of the court, subject only to the question of defining the relevant crimes at a review conference in the future. This last-minute insertion in the text greatly concerned us and we opposed the resolution with a public explanation. We said that while we had an open mind about future consideration of crimes of terrorism and drug crimes, we did not believe that including them will assist in the fight against these two evil crimes. To the contrary, conferring jurisdiction on the court could undermine essential national and transnational efforts, and actually hamper the effective fight against these crimes. The problem, we said, was not prosecution, but rather investigation. These crimes require an ongoing law enforcement effort against criminal organizations and patterns of crime, with police and intelligence resources. The court will not be equipped effectively to investigate and prosecute these types of crimes.

Finally, we were confronted on July 17th with a provision stipulating that no reservations to the treaty would be allowed. We had long argued against such a prohibition and many countries had joined us in that concern. We believed that at a minimum there were certain provisions of the treaty, particularly in the field of state cooperation with the court, where domestic constitutional requirements and national judicial procedures might require a reasonable opportunity for reservations that did not defeat the intent or purpose of the treaty.

Mr. Chairman, the Administration hopes that in the years ahead other governments will recognize the benefits of potential American participation in the Rome treaty and correct the flawed provisions in the treaty.

In the meantime, the challenge of international justice remains. The United States will continue as a leader in supporting the common duty of all law-abiding governments to bring to justice those who commit heinous crimes in our own time and in the future. The hard reality is that the international court will have no jurisdiction over crimes committed prior to its actual operation. So more ad hoc judicial mechanisms will need to be considered. We trust our friends and allies will show as much resolve to pursue the challenges of today as they have to create the future international court.

d. Subsequent U.S. policy on the Rome Treaty

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, pursuant to Resolution F of the Final Act of the Rome Conference, established the Preparatory Commission for the International Criminal Court with a mandate to prepare proposals for the arrangements that would be needed for the operation of the court. U.N. Doc. A/CONF.183/10 (1998); *see www.un.org/law/icc/statute/finalfra.htm*. Resolution F stipulated that the Secretary-General of the United Nations should convene the Preparatory Commission as early as possible, at a date to be decided by the General Assembly.

Furthermore, the resolution stipulated that the Commission would prepare draft texts of specified documents including a relationship agreement between the court and the UN, an agreement on privileges and immunities, and the financial regulations and rules of the court. It provided that the texts of the rules of procedure and evidence and the elements of crimes should be finalized by June 30, 2000. In addition the Commission was entrusted with preparing proposals for a provision on crimes of aggression to be included in the statute in accordance with its provisions. The Preparatory Commission was open to representatives of all States that had signed the final action and other States that had been invited to participate in the Conference, thus including the United States.

Ambassador Scheffer headed the U.S. delegation to the three sessions of the Preparatory Commission held in 1999. In a February 23, 1999, address entitled "Deterrence of War Crimes in the 21st Century" at the Twelfth Annual U.S. Pacific Command, International Military Operations and Law Conference held in Honolulu, Hawaii, Ambassador Scheffer summarized U.S. objectives for the Preparatory Commission meetings, and outlined the U.S. involvement as of that date.

The full text of Ambassador's Scheffer's remarks can be found at *www.state.gov/www/policy_remarks/1999/990223_scheffer_hawaii.html*.

---

* * * *

The United States has had and will continue to have a compelling interest in the establishment of a permanent international criminal court (ICC). Such an international court, so long contemplated and so relevant in a world burdened with mass murderers, can both deter and punish those who might escape justice in national courts. As head of the U.S. delegation to the ICC talks since mid-1997, I can confirm that the United States has had an abiding interest in what kind of court the ICC would be in order to operate efficiently, effectively and appropriately within a global system that also requires our constant vigilance to protect international

peace and security. Our refusal to support the final draft of the treaty in Rome last summer was grounded in law and in the reality of our international system.

On December 8, 1998, we joined consensus in the UN General Assembly to adopt a resolution creating the Preparatory Commission on the ICC. . . . The United States has taken the lead in the elements discussions. This summer the PrepCom will afford an opportunity for concerns we and others have had about the effectiveness and acceptance of the Court to be addressed. This is an important opportunity to correct the Treaty. We believe the problems in the treaty which prevent us from signing it can be solved, and that it is in the interest of all governments to address those problems now so that we can all be active partners in the ICC. There is far more to lose in the effectiveness of the ICC if the United States is not a treaty partner than there is to gain from its current dubious regime of jurisdiction. As I said at the United Nations last October, we do not pretend to know all the answers. We hope some creative thinking can be generated in the months ahead.

At the Rome conference last summer, the U.S. delegation worked with other delegations, many of whose governments are sitting in this room today, to achieve important objectives. One major objective was a strong complementarity regime, namely, deferral to national jurisdiction. A key purpose of the international criminal court should be to promote observance and enforcement of international humanitarian law by domestic legal systems. Therefore, we were pleased to see the adoption of Article 18 (preliminary rulings regarding admissibility), which is drawn originally from an American proposal, and its companion Articles 17 and 19. We considered it only logical that, when an investigation of an overall situation is initiated, relevant and capable national governments be given an opportunity under reasonable guidelines that respect the authority of the court to take the lead in investigating their own nationals or others within their jurisdiction.

Our negotiators struggled, successfully, to preserve appropriate sovereign decision-making in connection with obligations to cooperate with the court. Some delegates were tempted to require unqualified cooperation by states parties with all court orders,

notwithstanding national judicial procedures that would be involved in any event. Such obligations of unqualified cooperation were unrealistic and would have raised serious constitutional issues not only in the United States but in many other jurisdictions. Part 9 of the statute represents hard-fought battles in this respect. The requirement that the actions of states parties be taken "in accordance with national procedural law" or similar language is pragmatic and legally essential for the successful operation of the court.

The U.S. experience with the Yugoslav Tribunal has shown that some sensitive information collected by a government could be made available as lead evidence to the prosecutor, provided that detailed procedures were strictly followed. We applied years of experience with the Yugoslav Tribunal to the challenge of similar cooperation with a permanent court. It was not easy. Some delegations argued that the court should have the final determination on the release of all national security information requested from a government. Our view prevailed in Article 72: a national government must have the right of final refusal if the request pertains to its national security. In the case of a government's refusal, the court may seek a remedy from the Assembly of States Parties or the Security Council.

The United States helped lead the successful effort to ensure that the ICC's jurisdiction over crimes against humanity included acts in internal armed conflicts and acts in the absence of armed conflict. We also argued successfully that there had to be a reasonably high threshold for such crimes.

U.S. lawyers insisted that definitions of war crimes be drawn from customary international law and that they respect the requirements of military objectives during combat and of requisite intent. We had long sought a high threshold for the court's jurisdiction over war crimes, since individual soldiers often commit isolated war crimes that by themselves should not automatically trigger the massive machinery of the ICC. We believe the definition arrived at serves our purposes well: "The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes." A major achievement of Article 8 of the treaty

is its application to war crimes committed during internal armed conflicts. In order to widen acceptance of the application of the statute to war crimes committed during internal armed conflicts, the United States helped broker language that excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.

One of the more difficult, but essential, issues to negotiate was the coverage of crimes against women, in particular either as a crime against humanity or as a war crime. The U.S. delegation worked hard to include explicit reference to crimes relating to sexual assault in the text of the statute. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of significant magnitude were included as crimes. As I mentioned earlier, our emphasis on the elements of crimes resulted in Article 9 of the treaty, which requires their preparation—a task that governments are now undertaking in New York. We also were instrumental in creating acceptable definitions of command responsibility and the defense of superior orders.

These accomplishments and others in the Rome Treaty are significant. But the U.S. delegation was not prepared at any time during the Rome Conference to accept a treaty text that represented a political compromise on fundamental issues of international criminal law and international peace and security. We could not negotiate as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible. We could not bargain away unique security requirements or our need to uphold basic principles of international law even if some of our closest allies reached their own level of satisfaction with the final treaty text. The United States made compromises throughout the Rome process, but we always emphasized that the issue of jurisdiction had to be resolved satisfactorily or else the entire treaty and the integrity of the court would be imperiled.

The theory of universal jurisdiction for genocide, crimes against humanity and war crimes seized the imagination of many delegates negotiating the ICC treaty. They appeared to believe that the ICC should be empowered to do what some national governments have done unilaterally, namely, to enact laws that empower their courts

to prosecute any individuals, including non-nationals, who commit one or more of these crimes. Some governments have enacted such laws, which theoretically, but rarely in practice, make their courts arenas for international prosecutions. Of course, the catch for any national government seeking to exercise universal jurisdiction is to exercise personal jurisdiction over the suspect. Without custody, or the prospect of it through an extradition proceeding, a national court's claim of universal jurisdiction necessarily and rightly is limited.

The ICC is designed as a treaty-based court with the unique power to prosecute and sentence individuals, but also to impose obligations of cooperation upon the contracting states. A fundamental principle of international treaty law is that only states that are party to a treaty should be bound by its terms. Yet Article 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of a non-party state. Under Article 12, the ICC may exercise such jurisdiction over anyone anywhere in the world, even in the absence of a referral by the Security Council, if either the state of the territory where the crime was committed or the state of nationality of the accused consents. Ironically, the treaty exposes non-parties in ways that parties are not exposed. Why is the United States so concerned about the status of non-party states under the ICC treaty? Why not, as many have suggested, simply sign and ratify the treaty and thus eliminate the problem of nonparty status? First, fundamental principles of treaty law still matter and we are loath to ignore them with respect to any state's obligations vis-a-vis a treaty regime. While certain conduct is prohibited under customary international law and might be the object of universal jurisdiction by a national court, the establishment of, and a state's participation in, an international criminal court are not derived from custom but, rather, from the requirements of treaty law.

Second, even if the Clinton Administration were in a position to sign the treaty, U.S. ratification could take many years and stretch beyond the date of entry into force of the treaty. Thus, the United States could have non-party status under the ICC treaty for a significant period of time. The crimes within the court's

jurisdiction also go beyond those arguably covered by universal jurisdiction, and court decisions or future amendments could effectively create "new" and unacceptable crimes. Moreover, the ability to withdraw from the treaty, should the court develop in unacceptable ways, would be negated as an effective protection.

Equally troubling are the implications of Article 12 for the future willingness of the United States and other governments to take significant risks to intervene in foreign lands in order to save human lives or to restore international or regional peace and security. The illogical consequence imposed by Article 12, particularly for nonparties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions, which up to this point have been mostly shielded from politically motivated charges. In Rome the U.S. delegation offered various proposals to break the back of the jurisdiction problem. The other permanent members of the Security Council joined us in a compromise formula during the last week of the Rome conference. One of our proposals was to exempt from the court's jurisdiction conduct that arises from the official actions of a nonparty state acknowledged as such by that nonparty. This would require a nonparty state to acknowledge responsibility for an atrocity in order to be exempted, an unlikely occurrence for those who usually commit genocide or other serious violations of international humanitarian law. Regrettably, our proposed amendments to Article 12 were rejected on the premise that the proposed take it or leave it draft of the treaty was so fragile that, if any part were reopened, the conference would fall apart.

The final text of the treaty includes the crime of aggression, albeit undefined until a Review Conference seven years after entry into force of the treaty when only the states parties to the treaty at that time determine the meaning of aggression. This political concession to the most persistent advocates of a crime of aggression without a consensus definition and without the linkage to a prior Security Council determination that an act of aggression has occurred, should concern all of us. The Preparatory Commission

is addressing the issue, however, and we hope it will proceed responsibly in the years ahead. If handled poorly, this issue alone could fatally compromise the ICC's future credibility.

* * * *

e. Understandings to treaties concerning cooperation with the ICC

In granting advice and consent to ratification to extradition and mutual legal assistance treaties pending before the Senate in 1998, the Senate attached understandings related to cooperation with the International Criminal Court.

The resolution of ratification, prohibiting resurrender to the International Criminal Court so long as the United States was not a party to the Rome Treaty, was attached to each extradition treaty then pending. For example, the understanding attached to the extradition treaty with Luxembourg provided:

> (a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:
>
> PROHIBITION ON EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT.—The United States understands that the protections contained in Article 17 concerning the Rule of Specialty would preclude the resurrender of any person from the United States to the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the United States consents to such resurrender; and the United States shall not consent to the transfer of any person extradited to Luxembourg by the United States to the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing that Court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

144 CONG. REC. S12,991 (daily ed. Oct. 21, 1998).

On the same day, the Senate attached the following understanding, limiting provision of assistance, to the resolutions of ratification on pending mutual legal assistance treaties to the ICC:

> UNDERSTANDING. The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:
>
> PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT. The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

144 CONG. REC. S12,986 (daily ed. Oct. 21, 1998).

Cross-references

Anti-Terrorism and Effective Death Penalty Act of 1996, **Chapter 1.C.2.c.**
Deportation in law enforcement context, **Chapter 1.C.2.m.(2).**
Parental kidnapping as crime, **Chapter 2.B.1.b.**
Prisoner transfer issues, **Chapter 2.C.**
Changes to text of Rome Statute establishing ICC, **Chapter 4.B.5.(1).**
Protection of confidential communications with foreign government in extradition case, **Chapter 5.A.4.**
Implementation of Torture Convention in extradition cases, **Chapter 6.F.2.a., b.(1) & c.**
UN Security Council Resolution re Libya's support for terrorism, **Chapter 7.B.4.**

CHAPTER 4

Treaty Affairs

A. CAPACITY TO MAKE

1. Treaties Generally

Two articles by Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, were published in 1999 and 2000 on various issues related to international agreements entered into by the United States. "National Treaty Law and Practice: United States" contained a survey of issues related to treaties and executive agreements, including a discussion of executive authorization and internal approval procedures, legislative approval, reservations, consultations with the legislature and the public, legal bases for agreements not formally approved by the legislature, publication and transmittal requirements, incorporation into national law, legally binding decisions of international organizations, implementing multilateral conventions, termination, and depositary problems. *National Treaty Law and Practice, Vol. II: Austria, Chile, Colombia, Japan, Netherlands, United States*, Studies in Transnational Legal Policies No. 30, American Society of International Law, 1999 (Monroe Leigh et al. eds.).

"Participation in Treaty Regimes: Putting the Constitutional and Legal Issues in Historical Perspective" described the underpinnings of the treaty power in the U.S. Constitution and its historical development as reflected in U.S. practice and court decisions. It also included a discussion of challenges to the exercise of the treaty power and review of three

decisions of U.S. courts in which treaties or language included in treaties have been found to be defective. *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty*, Transnational Publishers (Thomas M. Franck, ed., 2000).

2. Executive Agreements

a. Trade agreements executed as congressional-executive agreements: The Uruguay Round Agreements

On July 29, 1994, Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice ("OLC"), concluded in a memorandum to Ambassador Michael Kantor, U.S. Trade Representative, that the Uruguay Round Agreements did not require ratification by the Senate as a treaty, but could constitutionally be executed by the President and approved and implemented by act of Congress. Such agreements are referred to as congressional-executive agreements. The Uruguay Round of Multilateral Trade Negotiations, which, among other things, established the World Trade Organization, is discussed in Chapter 11.B.2.a.

Professor Laurence H. Tribe disagreed with this conclusion. A further OLC memorandum, dated November 22, 1994, replied to "two later papers by Professor Laurence H. Tribe, and his testimony before the Senate Committee on Commerce, Science, and Transportation, that have disputed our conclusion on that subject." Memorandum to Ambassador Michael Kantor, United States Trade Representative, from Walter Dellinger, Assistant Attorney General, OLC, re: Whether Uruguay Round Agreements Required Ratification as a Treaty. As explained in the November memorandum, OLC concluded that the Uruguay Round Agreements could constitutionally be adopted by the passage of implementing legislation by both the House and the Senate, signed by the President.

The full text of the November memorandum, excerpted below (most footnotes omitted) is available at *www.usdoj.gov/olc/gatt.htm*.

* * * *

I. The Treaty Clause

Professor Tribe argues that there exists, for constitutional purposes, "a discrete subset of international agreements properly categorized as treaties."* Professor Tribe "readily admit[s]," however, "that the Constitution itself provides little guidance about the content of this category." He also concedes that "[t]he Supreme Court has never addressed directly the constitutionality of using the congressional-executive agreement to deal with matters that fall within the Constitution's 'treaty' category." Nor does he attempt "to construct any sort of general test for determining whether any given agreement should be considered a treaty." Despite that, Professor Tribe insists that "the Uruguay Round warrants the high level of deliberation and consensus that the formal requirements of the Treaty Clause guarantee."

Like Professor Tribe, we find that neither the text of the Constitution, nor the materials surrounding its drafting and ratification, nor subsequent Supreme Court case law interpreting it, provide clear-cut tests for deciding when an international agreement must be regarded as a "treaty" in the constitutional sense, and submitted to the Senate for its "Advice and Consent" under the Treaty Clause, U.S. Const. art. II, § 2, cl. 2. In such circumstances,

* Editors' note: Professor Tribe's views referenced in the memorandum are set forth in a letter to the President from Professor Laurence H. Tribe (September 12, 1994); Memorandum to Walter Dellinger, Abner J. Mikva, George J. Mitchell and Robert Dole, from Laurence H. Tribe, re: *The Constitutional Requirement of Submitting the Uruguay Round as a Treaty* (October 5, 1994); *The World Trade Organization and the Treaty Clause: The Constitutional Requirement of Submitting the Uruguay Round of GATT as a Treaty*, Prepared Statement of Laurence H. Tribe Before the Senate Committee on Commerce, Science, and Transportation (October 18, 1994).

a significant guide to the interpretation of the Constitution's requirements is the practical construction placed on it by the Executive and Legislative Branches acting together. *See, e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 689–90 (1929) ("[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character. Compare . . . *State v. South Norwalk*, 77 Conn. 257, 264 [(1904)], in which the court said that a practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.' "); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature."). Indeed, the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions that involve foreign relations. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *see also* Harold H. Koh, *The National Security Constitution* 70–71 (1990) (historical precedent serves as "quasi-constitutional custom" in foreign affairs); Griffin B. Bell & H. Miles Foy, *The President, the Congress, and the Panama Canal: An Essay on the Powers of the Executive and Legislative Branches in the Field of Foreign Affairs*, 16 Ga. J. Int'l & Comp. L. 607, 640–41 (1986); Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. Chi. L. Rev. 463, 478 (1976).

Such practical construction has long established . . . that "there are many classes of agreements with foreign countries which are not required to be formulated as treaties" for constitutional purposes.[9] Most pertinently here, practice under the Constitution

[9] Validity of Commercial Aviation Agreements, 40 Op. Att'y Gen. 451, 452 (1946) (Clark, A.G.); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); Tribe GATT Memorandum at 2–3.

has established that the United States can assume major international trade obligations such as those found in the Uruguay Round Agreements when they are negotiated by the President and approved and implemented by Act of Congress pursuant to procedures such as those set forth in 19 U.S.C. §§ 2902 & 2903.[10] In following these procedures, Congress acts under its broad Foreign Commerce Clause powers,[11] and the President acts pursuant to his constitutional responsibility for conducting the Nation's foreign affairs.[12] The use of these procedures, in which both political branches deploy sweeping constitutional powers, fully satisfies the Constitution's requirements; the Treaty Clause's provision for concurrence by two-thirds of the Senators present is not constitutionally mandatory for international agreements of this kind.[13]

---

[10] For a survey of the various statutory régimes relating to international trade agreements in the period from 1930 onwards, *see* Harold H. Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. Int'l L. & Pol. 1191, 1192–1208 (1986). On Congressional-Executive agreements generally, *see* Kenneth C. Randall, *The Treaty Power*, 51 Ohio St. L.J. 1089, 1093–96 (1990).

[11] *See* U.S. Const. art. I, § 8, cl. 3; *Barclays Bank PLC v. Franchise Tax Bd. of California*, 114 S. Ct. 2268, 2285 (1994); *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 59 (1974). The Treaty Clause should not be interpreted to curtail Congress's power under the Foreign Commerce Clause. *See Downes v. Bidwell*, 182 U.S. 244, 313 (1901) (White, J., joined by Shiras and McKenna, JJ., concurring); *id.* at 370 (Fuller, C.J., joined by Harlan, Brewer and Peckham, JJ., dissenting).

[12] *See, e.g.*, *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.' ") (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705–06 n.18 (1976) ("the conduct of [foreign policy] is committed primarily to the Executive Branch"); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (President is "the constitutional representative of the United States in its dealings with foreign nations.").

[13] Although we insist on the variety of legal instruments by which the United States may make agreements with foreign nations, we do not dispute Professor Tribe's view that some such agreements may have to be ratified as treaties. . . . Whatever may be true of other international agreements such as the United Nations Charter, *see* Tribe GATT Memorandum at 8, our contention is only that trade agreements such as the Uruguay Round Agreements do not require ratification as "treaties."

* * * *

One recurring kind of dispute over the Treaty Clause has been whether international agreements could be given effect by Executive action alone, or whether they required submission to the Senate for its concurrence. *See, e.g.*, 2 *Messages and Papers of the Presidents* 33 (James D. Richardson ed., 1896) (President Monroe's message to the Senate of April 6, 1818, expressing uncertainty whether the Executive alone could make an international agreement for the naval disarmament of the Great Lakes, or whether Senate advice and consent was required.) A second type of recurring dispute, more pertinent here, centered on the respective powers of the Senate and the House of Representatives in such areas as the regulation of foreign trade, where different clauses of the Constitution assign responsibilities either to one House alone or to both Houses together. As Secretary of State Dulles explained in testimony before the Senate Judiciary Committee in 1953, there is an undefined, and probably undefinable, borderline between international agreements which require two-thirds Senate concurrence, but no House concurrence, as in the case of treaties, and agreements which should have the majority concurrence of both Chambers of Congress. . . . This is an area to be dealt with by friendly cooperation between the three departments of Government which are involved, rather than by attempts at constitutional definition, which are futile, or by the absorption, by one branch of Government, of responsibilities which are presently and properly shared. *Treaties and Executive Agreements, Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st Sess. 828 (1953).

Intra-branch disputes over the Treaty Clause can be traced as far back as 1796, when Representative Albert Gallatin argued that the "[t]reaty-making power . . . may be considered as clashing" with Congress's "authority of regulating trade," and that "[a] difference of opinion may exist as to the proper construction of the several articles of the Constitution, so as to reconcile those apparently contradictory provisions." 5 Annals of Cong. 437 (1796); *see also id.* at 466–74 (arguing that Foreign Commerce Clause limits Treaty Clause); Note, *United States Participation in the General Agreement on Tariffs and Trade*, 61 Colum. L. Rev. 505, 511 (1961); *contrast* Tribe Letter at 3 (Treaty Clause limits Foreign Commerce Clause).

Again, in 1844, the Senate Foreign Relations Committee, under Senator Rufus Choate, presented a report on the Prussian and Germanic Confederation Treaty, in which the Committee urged rejection of the treaty because "the legislature is the department of government by which commerce should be regulated and laws of revenue be passed. The Constitution, in terms, communicates the power to regulate commerce and to impose duties to that department. It communicates it, in terms, to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgement or participation, to Congress." *Compilation of Reports of the Senate Committee on Foreign Relations, 1789–1901*, S. Doc. No. 231, 56th Cong., 2d Sess., pt. 8, at 36 (1901).

From time to time, the House of Representatives has also insisted that a treaty be made dependent on the consent of both Houses of Congress. This has occurred when, for example, the House's power over appropriations has been at issue, as in the Gadsden purchase treaty of 1853 and the Alaskan purchase treaty of 1867. In 1880, the House asserted that the negotiation of a commercial treaty that fixed duties on foreign imports would be an unconstitutional invasion of its prerogatives over the origination of revenues; in 1883, it demanded, in connection with a proposed commercial treaty with Mexico, to have a voice in treaties affecting revenue.

In 1898, the United States annexed Hawaii by joint resolution, Joint Res. 55, 30 Stat. 750 (1898), even though the Senate had previously rejected an annexation treaty, and even though opponents of the measure argued strenuously both in Congress and in the press that such an annexation could be accomplished only by treaty, and not by a simple legislative act.[23]

---

[23] *See* Memorandum for Abraham D. Sofaer, Legal Adviser, Department of State, from Douglas W. Kmiec, Acting Ass't Att'y General, Office of Legal Counsel, re: *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 12 Op. O.L.C. 301, 320–21 (1988) (preliminary print).

More recently, the court in *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.) (per curiam), *cert. denied*, 436 U.S. 907 (1978), rejected the claim by members of the House of Representatives that the treaty power could not be used to transfer the Panama Canal to Panama. The plaintiffs relied on the Constitution's Property Clause, U.S. Const. art. IV, § 3, cl. 2, which commits to "[t]he Congress" the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The court answered this claim by pointing out that

> [t]he grant of authority to Congress under the property clause states that "The Congress shall have Power . . . ," not that only the Congress shall have power, or that the Congress shall have exclusive power. In this respect the property clause is parallel to Article I, § 8, which also states that "The Congress shall have Power . . ." Many of the powers thereafter enumerated in § 8, involve matters that were at the time the Constitution was adopted, and that are at the present time, also commonly the subject of treaties. The most prominent example of this is the regulation of commerce with foreign nations, Art. [I], § 8, cl. 3, and appellants do not go so far as to contend that the treaty process is not a constitutionally allowable means for regulating foreign commerce. It thus seems to us that, on its face, the property clause is intended not to restrict the scope of the treaty clause, but, rather, is intended to permit Congress to accomplish through legislation what may concurrently be accomplished through other means provided in the Constitution.

580 F.2d at 1057–58. As the court noted, the Constitution on its face permits foreign commerce to be regulated either through the Treaty Clause or through the Foreign Commerce Clause. Nothing in the language of the Constitution privileges the Treaty Clause as the "sole" or "exclusive" means of regulating such activity. In actual practice, Congress and the President, understanding that nothing in the Constitution constrained them to choose one

procedure rather than the other, have followed different procedures on different occasions.

In general, these inter- and intra-branch disputes over the scope of the Treaty Clause have been resolved through the political process, occasionally with marked departures from prior practices. *See Goldwater v. Carter*, 444 U.S. 996, 1004 n.1 (1979) (Rehnquist, J., concurring in judgment); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 Law & Contemp. Probs. 293, 305–08 (Autumn 1993). For example, after the House of Representatives objected to the concentration of power over Indian affairs in the hands of the Senate through the Treaty Clause, Congress in 1871 enacted a rider to an Indian appropriation bill declaring that no fresh treaties were to be made with the Indian nations. 16 Stat. 544, 566 (1871). Although the United States had been making Indian treaties for almost a century before that enactment, *see United States v. Kagama*, 118 U.S. 375, 382 (1886), after 1871 "the federal government continued to make agreements with Indian tribes, many similar to treaties, that were approved by both Senate and House," but "the House's action sounded the death knell for treaty making." Felix S. Cohen, *Handbook of Federal Indian Law* 107 & n.370 (1982 ed.). The policy of the 1871 enactment remains in effect. *See* 25 U.S.C. § 71. . . .

The existence of such recurring disputes over the scope and meaning of the Treaty Clause undermines any dogmatic claim that a major trade agreement such as the Uruguay Round Agreements, which stands at the intersection of the foreign affairs, revenue raising and commerce powers, *must* be ratified as a treaty and *cannot* be implemented by the action of both Houses of Congress. The distinctions between the Federal government's treaty power and the other constitutional powers in play are simply too fluid and dynamic to dictate the conclusion that one method must be followed to the complete exclusion of the other. Here, if anywhere, is an area where the sound judgment of the political branches, acting in concert and accommodating the interests and prerogatives of one another, should be respected. It is simply mistaken to suggest that this established practice of mutual

adjustment and cooperation on a constitutional question of inherent uncertainty reflects mere "political convenience rather than constitutional commitment." [as suggested by Professor Tribe]. None of the three political branches involved in working out the procedure for Congressional-Executive agreements has abdicated its constitutional responsibility; none has endangered the basic, structural provisions of Articles I and II.

Finally, Professor Tribe's newly-crafted account of the treaty power entails that the Federal Government may diminish State sovereignty by employing the Treaty Clause to ratify an international agreement, but not by using any other constitutional procedure for giving such an agreement effect. . . . On this view, the Federal Government is not constitutionally prohibited from curtailing State sovereignty to a certain degree, but it may not accomplish such a curtailment by the ordinary Article I process of legislation. We find that conclusion odd and unconvincing. If the Federal Government may not trespass on State sovereignty beyond certain limits, then the attempt to do so by making a treaty would not remove the constitutional infirmity: it is by now well-established that treaties may not violate basic constitutional ordinances, including the principles of federalism. *See, e.g.*, *Reid v. Covert*, 354 U.S. 1 (1957) . . . On the other hand, if it *does* lie within the Federal Government's power to curtail State sovereignty under an international agreement, we see no reason why the Government may not invoke Article I procedures for giving effect to that agreement. In short, if the Uruguay Round Agreements unduly invade State sovereignty, ratification as a treaty will not save them from unconstitutionality; if they are not an undue invasion, they can be given effect by Act of Congress.

II. The Uruguay Round Agreements and Presidential Power

In considering Professor Tribe's critique of the Uruguay Round Agreements—which focuses on the asserted impairment that the agreement causes to State sovereignty—it should be borne in mind that judicial decisions have treated GATT as effectively a "Treat[y]," and hence "supreme Law," within the meaning of the Supremacy

Clause, U.S. Const., art. VI, § 2, and have held provisions of State law to be superseded by the GATT when in conflict with it. It is also important to remember that the existing GATT arrangements include dispute resolution procedures, which often involve referring disputes to panels of individuals, who act in an individual and not a governmental capacity. Professor Tribe does not contend that the existing version of GATT or the dispute resolution procedures that have developed under it are unconstitutional as applied to the Federal or State governments of this country; rather, he alleges that "[t]he Uruguay Round's establishment of the World Trade Organization [the WTO] and its dispute resolution mechanisms represents a [constitutionally] significant departure from prior versions of GATT." Specifically, Professor Tribe objects that if the WTO's dispute settlement body (or an Appellate Body on appeal) were "to find a United States law 'GATT-illegal,' the United States would be bound by that decision unless it could persuade the *entire GATT membership* by consensus to overturn the adverse decision. . . . Unlike other WTO decisions under the Uruguay Round, dispute panel decisions, or Appellate Body decisions in the instance of an appealed case, would be final, unless every WTO Member nation agrees to reject the panel or Appellate Body's recommendation. . . . This 'reverse consensus' requirement is a 180-degree turnaround from prior GATT practice; it means that individual nations, including the United States, no longer maintain a de facto veto over GATT dispute panel decisions. This turnaround . . . is alone sufficient to distinguish the Uruguay Round's potential effects on state sovereignty from the effects of all previous GATT agreements."

Under existing GATT practice, "the Contracting Parties, acting jointly as a whole, have jurisdiction over the final disposition of the dispute procedure."[34] Although decisions on adoption of panel reports have always been made by consensus, the existing GATT permits a vote on these matters. Thus, while the United States, in practice, can exercise a "veto" over any adverse panel decision,

[34] John H. Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 1967 Proc. Am. Soc'y Int'l L. at 149.

this could be changed under existing GATT rules. The Uruguay Round Agreements would alter this procedure by making the panel's or Appellate Body's report final unless the WTO States "decide[] by consensus not to adopt the [panel or] Appellate Body report" within a set period.[35]

. . . Under the *current* version of GATT, the States could equally well be said to be "in the hands of the Executive," for the simple reason that the President, as the sole constitutional actor who may represent the United States abroad, alone speaks for the United States in the GATT organization. Thus, the *President*, through his delegate, possesses the "veto" over the outcome of a dispute resolution under existing GATT practice, *and may refuse to exercise it*. In other words, State laws may, even under the current version of GATT, be finally determined to be "GATT-illegal" unless the Executive Branch takes affirmative action to prevent that result.

Moreover, it is misleading to suggest that the WTO procedures of the Uruguay Round Agreements place State law "at the mercy of the Executive Branch and the Trade Representative." . . . even if the Executive Branch decides to bring an action against a State for the purpose of having a State law declared invalid for inconsistency with the Uruguay Round Agreements, the implementing legislation explicitly precludes the WTO panel's (or Appellate Body's) report from being considered "binding or otherwise accorded deference" by the court that hears the case. *See* S. 2467, § 102(b)(2)(B)(i). Thus, the State law cannot be declared invalid by the Executive Branch acting unilaterally, even if the Executive is armed with a WTO report that has found the State law GATT-illegal; rather, the independent action of another branch of the government—the courts—is required.[40]

---

[35] Agreement Establishing The World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 17.14, 33 I.L.M. 9, 124 (1994). We note that voting is precluded under the new procedures.

* * * *

[40] Professor Tribe acknowledges that the detailed scheme of the implementing legislation, which is designed to make recourse to the courts unlikely, "offers a noteworthy protection to states." Tribe Prepared Statement

Furthermore, given the breadth of the joint authority of Congress and the President in the field of foreign relations, it would be the truly extraordinary case indeed in which Presidential action in that area, when supported by an Act of Congress, could amount to an unconstitutional invasion of State sovereignty. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635 (Jackson, J., concurring) (Presidential power in such cases is "at its maximum"). The Supreme Court has held that even *unilateral* Executive action, relying on the President's inherent constitutional powers alone, may constitute a "treaty" for purposes of the Supremacy Clause, and hence supersede contrary State law. Thus, in *United States v. Belmont*, 301 U.S. 324, 331–32 (1937), the Court upheld a unilateral Executive agreement in the face of contrary State law, declaring that

> complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines

---

at 22. The implementing legislation would set up a Federal-State consultation process to keep the States informed of Uruguay Round Agreements matters that would affect them. The States are to be notified by the United States Trade Representative of actions by foreign WTO members that might draw their laws into the WTO dispute resolution process, consulted regarding the matter, and involved in the development of this country's position if the matter is taken up in the dispute resolution process. Should the WTO find a State law to be GATT-illegal, the Trade Representative must consult with the State concerned in an effort to develop a mutually agreed response. *See* S. 2467, § 102(b)(1). In short, the States are to be continuously and closely involved with the Executive in any matter that may involve a challenge to State law under the Uruguay Round Agreements.

The implementing legislation provides other important protections to State law. No plaintiffs other than the Executive Branch may challenge a State law for inconsistency with the Uruguay Round Agreements, and in any action it brings, the Executive bears the burden of proof. Before bringing any such action, moreover, the Executive Branch must report to, and consult with, congressional committees in both Houses. *See* S. 2467, § 102(b)(2). Here again, as in the WTO phase of any challenge to State law, the political branches must take account of the State's views.

> disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate.

In *United States v. Pink*, 315 U.S. 203, 233 (1942), the Court, again upholding a unilateral Executive agreement over State law, reaffirmed that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees." Again, in *Zschernig v. Miller*, 389 U.S. 429, 432, 434 (1968), the Court struck down a State probate statute requiring an inquiry into "the type of governments that obtain in particular foreign nations" as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." And in *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941), the Court stated that the field of international relations is "the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *See also United States v. California*, 332 U.S. 19, 35 (1947) ("peace and world commerce are the paramount responsibilities of the nation, rather than an individual state"); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) ("[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (the Federal Government "has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."); *Holmes v. Jennison*, 39 U.S. (14 Pet.) at 570 (plurality op.) ("[a]ll the powers which relate to our foreign intercourse are confided to the general government"); *cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964) (problems posed by "act of state" doctrine implicate foreign relations and thus "are uniquely federal in nature"); *Goldwater v.*

Carter, 444 U.S. at 1005, n.2 (Rehnquist, J., concurring in the judgment) (State courts may not "trench upon exclusively federal questions of foreign policy").

Accordingly, we cannot agree that the powers assigned to the President by the Uruguay Round Agreements and their implementing legislation would be unconstitutional (unless the agreement were ratified as a treaty) because they might be exercised in a manner that persuaded the courts to rule that State laws were superseded. Against the massive powers of Congress and the President, acting together, to control the Nation's foreign policy and commerce, the claims of State sovereignty have little force.[42]

III. The World Trade Organization

. . . The proposed arrangements for the WTO do *not* represent an invasion of State sovereignty that can be cured only if the Uruguay Round Agreements are ratified as a treaty; rather, the Uruguay Round Agreements are similar in kind to earlier, Congressionally-approved trade pacts, including NAFTA and the Tokyo Round Codes, that were not, and that did not have to be, ratified as treaties.

* * * *

[42] In the context of domestic legislation that assertedly threatens to impair State sovereignty, the Court has held that "States must find their protection . . . through the national political process." *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). If that is the case when Congress acts under the Interstate Commerce Clause, the States' procedural rights in the national legislature can hardly be more extensive when the *Foreign* Commerce Clause is the source of Congress's authority. *See, e.g.*, *Bethlehem Steel Corp. v. Board of Com'rs of Dep't of Water & Power*, 80 Cal. Rptr. at 803, 804 ("[t]he California Buy American Act, in effectively placing an embargo on foreign products, amounts to a usurpation by this state of the power of the federal government to conduct foreign trade policy. . . . Only the federal government can fix the rules of fair competition when such competition is on an international basis. Foreign trade is properly a subject of national concern, not state regulation. . . . A state law may not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' ") (quoting *Hines v. Davidowitz*, 312 U.S. at 67).

Neither the WTO, nor any dispute settlement panels, will have the authority to enter injunctions or impose monetary sanctions against member countries. Nor will they be able to order any member country that has a federal system to change its component governments' laws. While a WTO dispute settlement may opine on whether a law is inconsistent with a member's obligations under the Uruguay Round Agreements, it is up to the parties to decide how to resolve the situation. The complaining country may suspend reciprocal trade concessions if alternative forms of settlement—*e.g.*, compensation in the form of additional trade concessions, or a change in the defending country's domestic law—are not made. The suspension of trade concessions by a complaining country is likely to mean a temporary increase in the tariffs it imposes on the defending country's goods. No suspension of trade concessions can exceed the amount of the trade injury. Because our foreign trading partners would be able to increase tariffs on American goods even more easily in the absence of a trade agreement, it is hard to see how the attempt in the Uruguay Round Agreements to resolve trade disputes between member countries and to prevent the unilateral imposition of retaliatory tariffs could amount to an unconstitutional invasion of State or local sovereignty.

* * * *

Conclusion

We remain persuaded that, in deciding not to submit the Uruguay Round Agreements to the Senate for the concurrence of two-thirds of the Senators present, the President is acting in a wholly proper and constitutional manner. Like other recent trade agreements, including NAFTA, the United States-Canada Free Trade Agreement, the United States-Israel Free Trade Agreement and the Tokyo Round Agreement, the Uruguay Round Agreements may constitutionally be executed by the President and approved and implemented by Act of Congress.

b. Status of AIT-TECRO agreement

On October 9, 1998, the United States filed its Reply in Support of Motion to Dismiss for Lack of Jurisdiction in

Defense Procurement Division, Taipei Economic and Cultural Representative Office in the United States v. United States, No. 97–292C (Ct. Claims 1998). In this case, the Taipei Economic and Cultural Representative Office in the United States ("TECRO"), which is the non-governmental entity authorized to conduct unofficial relations with the United States on behalf of the people on Taiwan, sued the United States seeking refunds of the harbor maintenance tax ("HMT") imposed under 26 U.S.C. § 4461 as applied to its exports from the United States by sea. Its complaint alleged that imposition of the HMT was unconstitutional under Article 1, § 9, clause 5 (the "export clause") of the U.S. Constitution and the Due Process Clause of the Fifth Amendment. It also claimed exemption from taxation conferred by an agreement between plaintiff and the American Institute on Taiwan ("AIT"), the non-governmental entity authorized to conduct unofficial relations with the people on Taiwan on behalf of the United States. Agreement on Privileges, Exemptions and Immunities Between The American Institute In Taiwan And The Coordination Council For North American Affairs, Oct. 2, 1980.

In its October 1998 brief, the United States argued that the U.S. Federal Court of Claims lacked jurisdiction over the exemption claim because the United States had not waived its sovereign immunity. The United States argued that the claim "gr[ew] out of" a congressionally-authorized agreement properly considered a treaty within the meaning of 28 U.S.C. § 1502, which enumerates exceptions to statutory U.S. waiver of sovereign immunity in certain circumstances. This conclusion was consistent with "the general rule and practice among nations that treaty disputes between governments are not justiciable in domestic courts." On October 30, 1998, the complaint was dismissed in an unpublished order.

The full text of the brief, excerpted below (footnotes omitted), is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Unofficial relations between the United States and the people on Taiwan are conducted through the American Institute in Taiwan, on behalf of the United States, and plaintiff, the Taipei Economic and Cultural Representative Office, on behalf of the people on Taiwan. Those entities are parties to an Agreement on Privileges, Exemptions and Immunities. In count three of the complaint, plaintiff challenges the Harbor Maintenance Tax as a violation of an alleged exemption from taxation contained in the Agreement.

The Tucker Act's waiver of sovereign immunity is limited by 28 U.S.C. § 1502, which divests this Court of jurisdiction to entertain a claim growing out of a treaty. Plaintiff's count three, a request for money damages based upon an alleged breach of a congressionally-authorized agreement, is such a claim, and should be dismissed for lack of jurisdiction.

Like its predecessor, the United States Court of Claims, the United States Court of Federal Claims is a court of limited jurisdiction. *Dynalectron Corp. v. United States*, 4 Cl. Ct. 424, 428, *aff'd*, 758 F.2d 665 (Fed. Cir. 1984). Absent congressional consent to entertain a claim against the United States, this Court lacks authority to grant relief. *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

A waiver of sovereign immunity, and thus consent to be sued, must be expressed unequivocally and may not be implied. *Library of Congress v. Shaw*, 478 U.S. 310 (1986); *United States v. King*, 395 U.S. 1, 4 (1969). As the United States Court of Appeals for the Federal Circuit has stated, "[i]n construing a statute waiving the sovereign immunity of the United States, great care must be taken not to expand liability beyond that which was explicitly consented to by Congress." *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1387 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983).

Section 1502 of Title 28, United States Code, limits the waiver of sovereign immunity contained in the Tucker Act. Section 1502 states:

> Except as otherwise provided by Act of Congress, the United States Court of Federal Claims shall not have jurisdiction of any claim against the United States growing

> out of or dependent upon any treaty entered into with foreign nations.

Plaintiff's count three satisfies both requirements of the statute, placing it beyond this Court's jurisdiction. In that count, plaintiff cites an agreement properly considered a "treaty entered into with [a] foreign nation[]" within the meaning of the statute; plaintiff's claim "grows out of" that agreement.

The word "treaty" generally has a broader meaning than just those documents that satisfy the treaty clause of the Constitution. 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 v. Rossi*, 456 U.S. 25, 29 (1982). *See also B. Altman & Co. v. United States*, 224 U.S. 583 (1912) (construing the word "treaty" in a statute to "include international agreements concluded by the President under congressional authorization").

The Court of Claims also has equated "international executive agreements with treaties for purposes of Section 1502." *Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976). Thus, in Hughes, a Memorandum of Understanding between the United States and the United Kingdom "neither proclaimed by the President, ratified by the Senate, nor submitted for ratification, as required for treaty status pursuant to Article II, Section 2 of the Constitution," was nonetheless considered to be a "treaty" for purposes of section 1502. 534 F.2d at 903 n.17; *See also Yassin v. United States*, 76 F. Supp. 509, 516 (Ct. Cl. 1948); *Great Western Ins. Co. v. United States*, 112 U.S. 193 (1884). The *Hughes* Court explained:

> [T]he reason for this equation is that the fundamental separation-of-powers policy underlying [section] 1502, i.e., to avoid undue judicial interference (e.g., by construction of particular treaty terms and provisions) with the Executive Branch's conduct of foreign relations, is equally applicable to both forms of international compact.

534 F.2d at 903 n.17.

Interference with the conduct of foreign relations is similarly implicated here. Although the agreement cited in the complaint is not a "treaty" ratified by Congress, it does facilitate the conduct of unofficial foreign relations with the people on Taiwan, as explained below.

After the United States established diplomatic relations with the People's Republic of China in 1979, and ended relations with the Republic of China (Taiwan), Congress enacted the Taiwan Relations Act (TRA). The TRA was enacted "to promote the foreign policy of the United States" and "to help maintain peace, security, and stability in the Western Pacific." 22 U.S.C. § 3301(a). The Act declared that "the policy of the United States" was "to preserve and promote extensive, close and friendly . . . relations between the people of the United States and the people on Taiwan." 22 U.S.C. S 3301(b). Congress sought 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." 22 U.S.C. § 3301(a)(2).

Under the Act, unofficial relations are conducted on behalf of the United States by a nonprofit corporation called the American Institute in Taiwan (AIT), and by a counterpart organization on behalf of the people on Taiwan. 22 U.S.C. § 3305(a); 3309(a). That Taiwan instrumentality is plaintiff, the Taipei Economic and Cultural Representative Office (TECRO), formerly known as the Coordination Council for North American Affairs (CCNAA). Exec. Order No. 13014, 61 Fed. Reg. 42,963 (1996); Exec. Order No. 12143, 44 Fed. Reg. 37,191 (1979).

The TRA makes plain that "[t]he absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan. . . . " 22 U.S.C. § 3303(a). The TRA expressly states that "[f]or all purposes, including actions in any court of the United States, the Congress approves the continuation of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan" before January 1, 1979, unless and until terminated in accordance with law. *Id.* § 3303(c). The TRA further provides that, "[w]henever

the President or any agency of the United States is authorized or required by or pursuant to the laws of the United States to enter into, perform, enforce, or have in force an agreement . . . relative to Taiwan, such agreement . . . shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the Institute." Id. § 3305(b). Finally, the TRA requires the Secretary of State to transmit to Congress the text of any agreement to which the Institute is a party (unless such public disclosure would prejudice national security interests). *Id.* § 3311(a). Pursuant to the Taiwan Relations Act, AIT has entered into at least 87 agreements with TECRO since 1979. See 61 Fed. Reg. 33,948 (1996) (listing AIT-TECRO agreements as of July 1, 1996); *see also Treaties in Force* 315–316 (January 1, 1997) (listing pre-1979 U.S.-Taiwan agreements currently in force); *New York Chinese TV Programs Inc. v. U.E. Enterprises, Inc.*, 954 F.2d 847, 849–52 (2d Cir. 1992) (holding that the Treaty of Friendship, Commerce and Navigation that the Republic of China signed with the United States in 1946 remains in force).

The TRA expressly authorizes the President to extend to "the Taiwan instrumentality and its appropriate personnel, such privileges and immunities . . . as may be necessary to the effective performance of their functions" upon the granting of comparable privileges and immunities to AIT and its personnel by Taiwan. 22 U.S.C. S 3309(c). The status of AIT and TECRO and their privileges and immunities are spelled out in the 1980 Agreement on Privileges, Exemptions and Immunities Between the American Institute in Taiwan and the Coordination Council for North American Affairs. 61 Fed. Reg. 33, 950 (1996) ("AIT-TECRO Agreement"). See Taiwan v. United States District Court, 128 F.3d at 714. Under section 3309(c) and the provisions of the TRA regarding the execution and implementation of agreements between AIT and TECRO, the AIT-TECRO Agreement must be considered a "treaty" for purposes of the Tucker Act.

Additional provisions of the TRA also mandate this conclusion. Section 4 of the TRA, 22 U.S.C. § 3303, states:

> (a) The absence of diplomatic relations or recognition shall not affect the application of the laws of the United

> States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.
>
> (b) The application of subsection (a) of this section shall include, but shall not be limited to, the following:
>
> (1) Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

Under section 3303 (b)(1), when a law of the United States refers to "nations," that term "shall include . . . Taiwan." Section 1502 of the Tucker Act refers to a treaty entered into "with foreign nations." Thus, under the TRA, the AIT-TECRO Agreement, expressly authorized by Congress and governing the status of the counterpart organizations through which unofficial relations are conducted, must be considered a "treaty entered into with foreign nations" under the Tucker Act. Indeed, this is how the law would have treated any such agreement with Taiwan prior to 1979, and, thus, how the law "shall apply with respect to Taiwan" and the AIT-TECRO Agreement today. *See, e.g., Dupont Circle Citizens Association v. BZA*, 530 A.2d 1163 (1987) (holding that main office of TECRO in the United States should be treated as a foreign government chancery for the purpose of laws governing the location, replacement, and expansion of foreign government chanceries in the District of Columbia).

In sum, the AIT-TECRO Agreement is a congressionally-authorized agreement, promulgated under a statute promoting the foreign policy of the United States to promote peace and stability in the Pacific region. The Agreement, therefore, should be treated like a treaty for purposes of section 1502.

Plaintiff's third cause of action "grows out of" the AIT-TECRO Agreement and, therefore, satisfies the second requirement of section 1502. . . .

Declining to exercise jurisdiction over count three would comport with the general rule and practice among nations that treaty disputes between governments are not justiciable in domestic

courts. Over 100 years ago, in the Head Money Cases, the Supreme court ruled:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

112 U.S. 580, 598 (1884).

When a claim is brought by a foreign government against the United States alleging a treaty violation, principles of non-justiciability and sovereign immunity intersect, and the very conduct of foreign relations may be affected. To guard against unwarranted interference, then, a foreign government generally may not bring suit in our domestic courts against the United States to enforce rights allegedly conferred upon that foreign government in an international agreement.

From its earliest days, the Supreme Court has regarded as nonjusticiable claims that the United States has not acted in accordance with a treaty's obligations to a foreign nation, holding: "that the power to determine these matters ha[s] not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws." *Whitney v. Robertson*, 124 U.S. 190, 194–95 (1888).

To rule otherwise would implicate the features of a non-justiciable political question described in *Baker v. Carr*, 369 U.S. 186 (1962). . . .

Not all cases involving foreign relations raise political questions. Nonetheless, the Supreme Court has recognized that decisions concerning foreign relations are inherently political in nature: "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." *Baker v. Carr*, 369 U.S. at 211.

* * * *

c. Modification of treaty obligations by congressional-executive agreement

On November 25, 1996, Christopher Schroeder, Acting Assistant Attorney General, OLC, issued a Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Counsel re: Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations under an Existing Treaty. Mr. Kreczko had requested an opinion regarding whether Congress can authorize the President to enter into an executive agreement that substantially modifies the obligations which the United States would otherwise have under a pre-existing treaty, or whether such modifications could only be effected with the advice and consent of the Senate, pursuant to the treaty-making power, U.S. Const. art. II, § 2, cl.2. Based on analysis of applicable international and constitutional law, OLC concluded that it lay within the power of Congress to authorize the President, through an executive agreement, substantially to modify the United States' international obligations under an arms control (or other political-military treaty); Senate advice and consent was not required. Excerpts from the OLC memorandum follow.

The full text of the memorandum is available at *www.usdoj.gov/olc/treaty.top.htm*.

---

* * * *

I. At the outset, it is essential to recognize the dual nature of treaties, as instruments of both domestic and international law. As the Supreme Court has said,

> [a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties of it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.

Head Money Cases, 112 U.S. 580, 598 (1884).

A "treaty," therefore, has two aspects: insofar as it is self-executing, it prescribes a rule of domestic or municipal law and, as a compact or contract between nations, it gives rise to binding obligations in international law.

II. Under the Supremacy Clause of the Constitution, treaties, like Acts of Congress, are made "supreme Law," U.S. Const. art. VI, cl. 2; *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272–73 (1909). Accordingly, "treaty provisions, which are self-executing in the sense that they require no additional legislation to make them effective, are equivalent to and of like obligation with an act of Congress." Further, insofar as a treaty incorporates a rule of domestic law, the Supreme Court has long held that it may be modified or repealed by a later Act of Congress. *See Head Money Cases*, 112 U.S. at 599. . . .

Accordingly, it lies within the power of Congress to modify the substantive obligations that a treaty imposes upon the United States, or to authorize the President to modify those obligations, insofar as those treaty obligations are binding as a matter of domestic or municipal law. The advice and consent of the Senate are not necessary to achieve that outcome.

III. A. The unilateral modification or repeal of a provision of a treaty by Act of Congress, although effective as a matter of

domestic law, will not generally relieve the United States of the international legal obligations that it may have under that provision. *See Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934) . . .

B. As with contracts of other kinds, however, the parties to a treaty may agree to modify the obligations to which the treaty gives rise. It is "a general principle of [international] law recognized by civilized nations" that "[a]ny legal position, or system of legal relationships, can be brought to an end by the consent of all persons having legal rights and interests which might be affected by their termination." *International Status of South-West Africa*, 1950 I.C.J. 128, 167 (July 11) (Separate Opinion of Judge Read). As a general rule of international law, therefore, "[a] treaty may be amended by agreement between the parties." Vienna Convention on the Law of Treaties, art. 39, *reprinted in* Ian Brownlie (ed.), *Basic Documents in International Law* 404. . . .

* * * *

The only remaining question, therefore, is whether, as a matter of *constitutional* law, the President has the power to modify, by means of an executive agreement authorized by Act of Congress, the international legal obligations that the United States has under a treaty, or whether the only constitutional method by which the President may achieve that end is through the advice and consent of the Senate. . . .

IV. A. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) . . . We believe that the inherent powers of the President over foreign affairs, coupled with whatever powers Congress can and does delegate to him in this area, are constitutionally sufficient to enable the President to make an executive agreement that substantially modifies the international legal obligations of the United States under a prior treaty.

The Constitution makes the President the Nation's "guiding organ in the conduct of our foreign affairs. . . . He . . . was entrusted

with . . . vast powers in relation to the outside world. . . ." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). Pursuant to his inherent powers, the President has made executive agreements with other countries, not submitted to the Senate for its advice and consent or to Congress for its approval, including agreements that regulated the use of military forces. Congress too—as distinct from the Senate under its treaty-making power—has some power to vary the international legal obligations of the United States. So, for example, in *Weinberger v. Rossi*, 456 U.S. at 32, the Supreme Court implied that Congress, if it expressed its intent with sufficient clarity, could effect the abrogation of the United States' international obligations, as set forth in international agreements for the hiring of local nationals at the United States' overseas military bases. It can reasonably be maintained that, if Congress may effect the *abrogation* of international obligations, it has some power to authorize the President to *modify* them.

B. The practice of the two branches discloses many examples of binding agreements that Presidents have made with foreign States, relying on the inherent authority of the Executive, as affirmed and amplified by Congress. . . . Over the years, Congress has authorized or sanctioned additional agreements concerning a wide variety of subjects including, *inter alia*, the protection of intellectual property rights, acquisition of territory, national participation in various international organizations, foreign trade, foreign military assistance, foreign economic assistance, atomic energy cooperation, and international fishery rights. S. Rpt. 53 at 52–53.

The constitutionality of such "congressional-executive agreements" is firmly established. *Accord* S. Rpt. 53 at 58. The Supreme Court long ago rejected arguments that such agreements constitute an invalid delegation of power to the President or the House of Representatives, or an improper invasion of the Senate's treaty-making power. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 410–11 (1928). . . .

C. Of particular relevance here, the practice of the political branches underscores that the President has the authority to make Congressional-Executive agreements with our treaty partners that substantially modify the United States' rights or obligations under those treaties.

Congress has enacted legislation in the political-military field that permits the modification of the United States' international obligations through a Congressional-Executive Agreement as an alternative to the treaty-making process [citing the Arms Control and Disarmament Act of 1961, as amended] codified in relevant part at 22 U.S.C. § 2573(b). . . .

Further, in a 1990 study, the Congressional Research Service identified three Congressional-Executive Agreements since 1970 of a political-military nature; each of them could arguably have been adopted as a treaty instead. . . .

Congress has also ratified, by legislation, Executive acts that substantially modified pre-existing treaty (or other international) obligations. . . .

In light of these judicial and historical precedents, we conclude that Congress may authorize the President, through an executive agreement, substantially to modify the United States' international obligations under an arms control (or other political-military) treaty.

d. Executive agreements providing for waiver of subrogated claims of federal agencies and for waiver of states' claims against a foreign government

In a memorandum of June 7, 1995, OLC responded to a request for an opinion concerning whether the National Aeronautics and Space Administration ("NASA") could enter into executive agreements under which it agreed to waive subrogated claims on behalf of other federal agencies. *Memorandum for Conrad K. Harper, Legal Adviser, Department of State, from Teresa Wynn Roseborough, Deputy Assistant Attorney General, OLC, re: Waiver of Claims for Damages Arising out of Cooperative Space Activity*. The memorandum concluded that NASA had no express statutory authority to waive subrogated claims on behalf of other federal agencies and that "Congress' broad grant to NASA of discretion to enter into agreements" on such terms as it deems appropriate "does not extend to agreements with foreign governments." Neither did NASA have implied statutory authority to do so. However,

as explained in the excerpts from the memorandum set forth below, the President could enter into an executive agreement under which subrogated claims against a foreign government were waived in exchange for a reciprocal waiver from the foreign government, and he could delegate that authority to an agency head. The President's authority to enter into an executive agreement could bind the fifty states and the District of Columbia to a waiver of state claims.

Most footnotes have been omitted from the excerpts below. The full text is available at *www.usdoj.gov/olc/opinion_003.htm.*

* * * *

IV. President's Constitutional Authority

We have concluded that the President may enter into international agreements providing for the waiver of subrogated claims of federal agencies in return for a reciprocal waiver from the other State. This conclusion, however, is subject to the following challenges and limitations.

The President's authority to enter into international agreements containing such a waiver derives principally from his constitutional authority to conduct foreign affairs. The Constitution has long been interpreted to grant the President plenary authority to represent the interests of the United States in dealings with foreign States, subject only to limits specifically set forth in the Constitution or to such statutory limitations that the Constitution permits Congress to impose by exercise of its enumerated powers.[19] As

[19] Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Legal Authority for Recent Covert Arms Transfers to Iran* (Dec. 17, 1986); Letter for the Hon. David L. Boren, from John R. Bolton, Assistant Attorney General, Office of Legislative Affairs (Nov. 13, 1987). *See generally United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936) (Power of the President as "the sole organ of the federal government in the field of international relations . . . does not require as a basis for its exercise an act of Congress.") . . .

part of this authority, the President may enter into "sole" executive agreements—international agreements based on the President's own constitutional powers.[20]

Although the President's authority to enter into sole executive agreements is well established, the precise limitations that may exist on the proper scope of those agreements is far from settled. As one commentator has noted, "constitutional issues and controversies have swirled about executive agreements concluded by the President wholly on his own authority. . . . Periodically, Senators (in particular) have objected to some agreements, and the Bricker Amendment sought to curtail or regulate them, but the power to make them remains as vast and its constitutional foundations and limits as uncertain as ever."[21]

The leading cases on sole executive agreements support—though not unequivocally—the President's authority to enter into agreements disposing of government claims. In *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), the Court upheld the validity of the Litvinov Assignment, by which, through exchange of diplomatic correspondence, the Soviet Union assigned to the United States its claims against U.S. nationals. The Litvinov Assignment was part of an overall settlement of claims between the Soviet Union, the United States, and their nationals, undertaken to clear the way for United States recognition of the Soviet government.

The *Belmont* and *Pink* opinions establish the President's broad authority to enter into sole executive agreements that deal with international claims. However, the Litvinov Assignment was executed pursuant to the President's recognition of the Soviet Union, and the opinions rely in part on that fact. Accordingly, it could be argued that they support only the limited proposition that the President may enter into sole executive agreements that

---

[20] *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); Restatement (Third) of The Foreign Relations Law of the United States § 303(4) (1987) ("Restatement") . . .

[21] Henkin, *Foreign Affairs and the Constitution* at 177 (footnotes omitted). . . .

accompany the exercise of his core power to recognize foreign governments. We reject this narrow reading. The opinions impose no such restriction, but rather, find authority for the Assignment in the President's authority as "sole organ" of the federal government in the field of international relations.[22] Even so, *Belmont* and *Pink* are not dispositive because, although the Litvinov Assignment anticipated an overall settlement of claims between the two governments, the Assignment itself appears only to have involved the assignment of Soviet claims to the United States—not the release by the United States of its claims.

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court upheld the President's authority to suspend individuals' claims pursuant to an executive order that, among other things, established the U.S.-Iran Claims Tribunal. In addition to relying upon the "general tenor" of the International Emergency Economic Powers Act, the Hostage Act, and the International Claims Settlement Act[23] (which the Court found implicitly to authorize the challenged executive action), the Court emphasized the U.S. government's longstanding practice of exercising its sovereign authority to settle claims of its nationals against foreign governments and noted that those settlements frequently occur through executive agreements.

If the President has authority to dispose of claims of individuals in furtherance of U.S. foreign policy objectives, it would seem reasonable to conclude that he must have authority to waive claims of federal agencies. *Dames & Moore*, however, did not so squarely raise separation of power concerns. Here, arguably, the President would be encroaching on Congress' control over the federal fisc by declining to recover monies otherwise subject to claim by the United States. Although this argument is not without force, we

---

[22] *See* State Department Legal Adviser's Reply to Senate Office of Legislative Counsel Memorandum on Certain Middle East Agreements (Oct. 6, 1975) *reprinted in* 1 *United States Foreign Relations Law: Documents and Sources* 295 (Michael J. Glennon & Thomas M. Franck eds., 1980) (rejecting the argument that *Belmont* and *Pink* should be narrowly interpreted as only authorizing agreements pursuant to recognition of foreign states). . . .

[23] 50 U.S.C. § 170; 22 U.S.C. § 1732; 22 U.S.C. §§ 1621–1645, respectively.

are not persuaded by it in its current context, and we conclude that there would be no impermissible encroachment upon congressional authority. First, this is not an instance of the executive branch bestowing a unilateral gift. The waivers are mutual. The United States is getting what it gives. More important, the President's action must be considered against the backdrop of the statutes governing NASA and its operations. By enacting the insurance-indemnification scheme, Congress expressed its intent to commit very substantial resources to support NASA's activities. In contrast to the indemnification system of the Commercial Space Launch Act, which caps the government's indemnification at a certain amount, Congress granted NASA unlimited indemnification authority. In addition, Congress endorsed a program of international cooperation, placed NASA under the foreign policy guidance of the President, and granted the President the authority to enter into international agreements to promote international cooperation. Congress has at least implicitly approved of the long-standing practice of NASA and other federal agencies who are using NASA's services waiving their own claims for damages, which likely represents the greatest risk of financial exposure to the United States.

Taken together, we believe that this statutory framework supports the conclusion that the President would not encroach upon congressional authority by entering into a mutual waiver of claims with a foreign State. Moreover, waiving claims for damages coincides with two other sources of Presidential power: the President's prosecutorial discretion and his authority as chief administrator of the executive branch. Conceptually a waiver operates similarly to a decision not to pursue a certain class of claims—an executive decision that is generally within the prerogative of the President.

We further conclude that the President may delegate this authority to an appropriate agency head. The President is generally authorized under 3 U.S.C. § 301 to delegate to heads of executive agencies "any function vested in the President by law." This Office has interpreted section 301 as conferring a very broad grant of delegation authority. However, the legislative history indicates that section 301 was intended only to authorize the delegation of functions vested in the President by *statute*.

The scope and source of the President's authority to delegate responsibility conferred upon him by the Constitution is less clear. We have recognized that the President possesses "inherent" authority to delegate, and that this is not restricted to delegation of duties conferred by statute. In *Myers v. United States*, 272 U.S. 52, 117 (1926), the Court declared the general principle sustaining the delegation by the President of the exercise of his executive authority:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.

We have endorsed the statement of the exception to this general rule expressed by one commentator that:

> Where . . . from the nature of the case, or by express constitutional or statutory declaration, the personal, individual judgment of the President is required to be exercised, the duty may not be transferred by the President to anyone else.[32]

Thus, this Office has concluded that the President may not delegate his authority to undertake specific functions that are expressly vested in him by the Constitution, such as to grant a pardon, or to transmit and proclaim the ratification of a treaty.[33] And we have suggested that there may be greater limits on his delegation authority in the area of foreign affairs. For instance, we have advised that it would be "safer" to conclude that the President may not delegate his authority to terminate international trade agreements, and to carry out certain duties relating to military assistance, defense programs, and foreign aid. This limitation is

---

[32] Memorandum *re: President's Authority to Delegate Functions* (Jan. 24, 1980) (quoting Willoughby, *Constitution*, Vol. I, p. 1160).

[33] Memorandum *re: Delegation of Presidential Functions*, Office of Legal Counsel (Sept. 1, 1955).

based on the view that these were "basic decisions relating to international relations and involve[d] far-reaching policy considerations."[34] The waivers at issue here, in contrast, do not implicate, at least in their individual application, far-reaching policy considerations. The President would exercise his individual judgment that mutual, government-wide waivers under these particular circumstances are in the public interest; he would delegate merely the application of that judgment to particular agreements. Accordingly, we conclude that the President may delegate his authority to enter into mutual waivers of claims for damages that arise pursuant to cooperative space activity.

V. Authority to Waive States' Claims

You have also asked us to advise whether the federal government could bind the fifty states and the District of Columbia to a waiver of state claims. NASA correctly notes that under the terms of its agreements, it does not purport to waive states' claims. However, when federal states enter into international agreements, they are generally viewed as binding their constituent units as well as the central government. Moreover, absent an express agreement to the contrary, the central government generally is responsible for the failure of the constituent units to fulfill their legal obligations.[36]

---

[34] *Id.* at 16.

* * * *

[36] Ivan Bernier, *International Legal Aspects of Federalism* 88 (1973) (As a matter of international law, "there can be no doubt that a federal state is responsible for the conduct of its member states."). According to the Restatement, federal states sometimes have sought special provisions in international agreements to take account of restrictions upon the power of the central government to deal with certain matters by international agreement. "Some proposed 'federal-state clauses' would permit a federal state to leave implementation to its constituent units, incurring no violation of international obligation if implementation fails. Even without a special provision, a federal state may leave implementation of its international obligations to its constituent units, but the central government remains responsible if the obligation is not fulfilled." Restatement § 302, reporters' note 4. . . .

It is a fundamental principle of our constitutional law that our foreign affairs are governed by the federal government and that the state governments may not interfere.[37] Moreover, sole executive agreements that purport to create legal obligations, like statutes and treaties, are "the supreme Law of the Land" for purposes of the Supremacy Clause, art. VI, cl. 2, and thus bind the states.[38] Accordingly, it would seem that there would be no question but that the federal government could, in pursuance of its foreign policy objectives, prohibit states from bringing certain claims against foreign countries. Yet, as Professor Henkin notes, despite many such "light, flat statements" that U.S. foreign relations are strictly national, they "are not in fact wholly insulated from the States."[39] Not surprisingly, the scope of state authority in this regard is not well defined.

The Supreme Court has upheld limitations imposed on the states by the federal government in matters concerning foreign affairs. In both *Belmont* and *Pink*, the Court held that the Litvinov Assignment—a sole executive agreement—would prevail over any inconsistent state policy. In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court held that Oregon inheritance law that required probate courts to inquire into the type of government in particular

---

[37] *See e.g.*, *Belmont*, 301 U.S. at 331 ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear." (citations omitted)). . . .

[38] Restatement § 1, reporters' note 5 ("There are no clear cases, but principle would support the view that the federal government can preempt and exclude the States not only by statute but by treaty or other international agreement, and even by executive acts that are within the President's constitutional authority."); Restatement § 115, reporters' note 5 ("A sole executive agreement made by the President on his own constitutional authority is the law of the land and supreme to State law."); Memorandum for Conrad Harper, Legal Adviser, Department of State from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Enforceability of Penalty-Related Assurances Provided to Foreign Nations in Connection with Extradition Requests* (Nov. 18, 1993) (noting that sole executive agreements, valid under the President's own constitutional powers, preempt inconsistent state laws).

[39] Henkin, *Foreign Affairs and the Constitution* at 228.

foreign countries before permitting citizens of those countries to inherit property from Oregon residents was an invalid intrusion into the field of foreign affairs. *See also Missouri v. Holland*, 252 U.S. 416 (1920) (upholding, against state's tenth amendment challenge, federal statute that executed a treaty protecting migratory birds).

We are aware of no cases upholding state challenges to federal international agreements on the ground of impermissible interference with state sovereignty.[41] There is, however, dicta suggesting hypothetical constitutional limitations on the federal government's ability to enter into international agreements that override state law. *See Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty power] extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."); *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 486 (1984) ("[I]t is questionable whether the Federal Government could guarantee a New York forum by treaty without violating constitutional principles of federalism and separation of powers.").

It could perhaps be argued that the states' right at issue here—the ability to bring claims to recover monies due the state—is a core state prerogative and more like the hypothetical examples of impermissible encroachments on the states than, for instance, the state policy against giving effect to confiscations of assets situated in the state and the inheritance laws at issue in *Belmont*, *Pink*, and *Zschernig*. However, this seems strained as compared to the

[41] It is generally accepted that the Tenth Amendment does not apply to impose limits on the subject matter of international agreements. *Missouri v. Holland*, 252 U.S. at 434 (federal treaty power is not checked by any "invisible radiation from the general terms of the Tenth Amendment"); *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) ("To the extent that the United States can validly make treaties, the people and the States have delegated their power[s] to the National Government and the Tenth Amendment is no barrier."); Restatement § 302 cmt. d ("[T]he Tenth Amendment . . . does not limit the power to make treaties or other agreements.").

federal government's undisputed authority to maintain friendly relations with foreign governments, which, arguably, could be compromised by suits filed by states. We believe the weight of authority supports the President's power to waive states' claims against a foreign government.

e. Non-publication of certain international agreements

On February 16, 1996, the Department of State issued a final rule amending Title 22, Code of Federal Regulations, Part 181, to provide that certain international agreements other than treaties will not be published in United States Treaties and Other International Agreements or in the Treaties and Other International Acts Series. Coordination and Reporting of International Agreements: Determination Not To Publish Certain Agreements, 61 Fed. Reg. 7070 (Feb. 26, 1996). As provided in the regulations, the purpose of Part 181 is to implement the provision of 1 U.S.C. §§ 112a and 112b, known as the Case-Zablocki Act, Pub. L. No. 92-403, 86 Stat. 619 (1972), on the reporting to Congress, coordination with the Secretary of State and publication of international agreements. 22 C.F.R. § 181.1 (1996). Part 181 was amended in 1996 by adding a new Section, 22 C.F.R. § 181.8 (1996), set forth below, listing the categories of international agreements that would not be published.

Sec. 181.8 Publication.

(a) The following categories of international agreements will not be published in United States Treaties and Other International Agreements:
  (1) Bilateral agreements for the rescheduling of inter-governmental debt payments;
  (2) Bilateral textile agreements concerning the importation of products containing specified textile fibers done under the Agricultural Act of 1956, as amended;

(3) Bilateral agreements between postal administrations governing technical arrangements;
(4) Bilateral agreements that apply to specified military exercises;
(5) Bilateral military personnel exchange agreements;
(6) Bilateral judicial assistance agreements that apply only to specified civil or criminal investigations or prosecutions;
(7) Bilateral mapping agreements;
(8) Tariff and other schedules under the General Agreement on Tariffs and Trade and under the Agreement of the World Trade Organization;
(9) Agreements that have been given a national security classification pursuant to Executive Order No. 12958 or its successors; and

(b) Agreements on the subjects listed in paragraphs (a) (1) through (9) of this section that had not been published as of February 26, 1996.

(c) Any international agreements in the possession of the Department of State, other than those in paragraph (a) (9) of this section, but not published will be made available upon request by the Department of State.

The reasons for the amendment were set forth in the notice of proposed rule. 60 Fed. Reg. 54,319 (Oct. 23, 1995), excerpted below. *See also* 90 Am. J. Int'l L. 265 (1996).

---

* * * *

Until 1994, the Case-Zablocki Act, 1 U.S.C. Sec. 112a, directed the Department of State to publish in United States Treaties and Other International Agreements "all treaties to which the United States is a party * * * and all international agreements other than treaties to which the United States is a party." See 1 U.S.C. Sec. 112a. Due to resource constraints, the Department of State has been unable to publish agreements promptly. The Department's experience, however, has been that public requests have been received for very few of the unpublished agreements. In many

instances the agreements that have not been published are printed by private publishers. In other cases, agreements may not be of interest to the public because they address narrow, technical subjects. In view of these considerations, Congress enacted Public Law 102–236 in 1994, to amend the Case-Zablocki Act by authorizing the Secretary of State to "determine that publication of certain categories of agreements is not required if the following criteria are met:

(1) Such agreements are not treaties which have been brought into force for the United States after having received Senate advice and consent pursuant to section 2(2) of Article II of the Constitution of the United States;

(2) The public interest in such agreements is insufficient to justify their publication, because (A) as of the date of enactment of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, the agreements are no longer in force; (B) the agreements do not create private rights or duties, or establish standards intended to govern government action in the treatment of private individuals; (C) in view of the limited or specialized nature of the public interest in such agreements, such interest can adequately be satisfied by an alternative means; or (D) the public disclosure of the text of the agreement would, in the opinion of the President, be prejudicial to the national security of the United States; and

(3) Copies of such agreements (other than those in paragraph (2)(D)), including certified copies where necessary for litigation or other purposes, will be made available by the Department of State upon request."

. . . Non-publication of the [specified] categories of agreements will substantially eliminate the existing publication backlog, thus permitting future agreements to be published in a more timely manner. Moreover, in selecting the following categories, the Department has focussed on a few areas that have a large volume of agreements that do not appear to be of general public interest or are frequently revised and readily available from private sources. . . .

* * * *

Agreements in the [specified] categories (except classified agreements) will continue to be listed in the Department of State's annual publication Treaties in Force.

Finally, it should be noted that United States agencies frequently enter into contracts and similar arrangements with other governments that the Department of State does not consider to constitute international agreements under the criteria established in the Department's regulations at 22 CFR 181.2. These include, for example, nonbinding political commitments. They also include such arrangements as bilateral agreements extending grants of $25 million or less by the Agency for International Development to foreign governments and P.L. 480 agreements under which the United States sells food commodities to foreign governments. The Department of State does not publish such arrangements, as it considers them not to be international agreements within the meaning of the Case Act.

3. International Documents of a Non-Legally Binding Character

A Congressional inquiry requested the views of the Department of State concerning the practice of signing documents such as the Trilateral Statement concluded at Moscow on January 14, 1994, by President William J. Clinton, Russian Federation President Boris Yeltsin, and Ukraine President Leonid M. Kravchuk, and the status of such documents under both United States and international law and practice. Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, prepared the following memorandum, "International Documents of a Non-Legally Binding Character," dated March 18, 1994, which was used as a basis for the response to the request. *See also* 88 Am. J. Int'l L. 515 (1994).

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

It has long been recognized in international practice that governments may agree on joint statements of policy or intention that do not establish legal obligations. In recent decades, this has become

a common means of announcing the results of diplomatic exchanges, stating common positions on policy issues, recording their intended course of action on matters of mutual concern, or making political commitments to one another.

These documents are sometimes referred to as non-binding agreements, gentlemen's agreements, joint statements or declarations. The title of the document is not determinative as to whether it establishes legal obligations, but rather the intent of the parties, as reflected in the language and context of the document, the circumstances of its conclusion, and the explanations given by the parties.

Two of the better known older twentieth-century examples involving the United States are the Lansing-Ishii exchange of notes of November 2, 1917, on Japanese immigration to the United States (often described as a "Gentlemen's Agreement"), which both countries considered not to be legally binding, and the Joint Declaration made on August 14, 1941, by President Franklin Roosevelt and Prime Minister Churchill, a document more commonly known as the Atlantic Charter.

The existence of a large number of such non-binding documents led the International Law Commission, when developing the Vienna Convention on the Law of Treaties, to consider whether or not such documents should be included within its definition of "treaty". The Commission decided against their inclusion by incorporating in its definition the requirement that an international agreement must be "governed by international law" in order to be a treaty. That this was the Commission's intention is confirmed by the legislative history of the article. See Report of the International Law Commission to the General Assembly (1959 2 *Y. B. Int'l Law Comm.* 96–97 (1959)).

The leading article on this subject is Munch, "Non-Binding Agreements", 29 *Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht* 1 (1969)—an article that appeared six months before the adoption of the Convention (and that is footnoted in Professor Oscar Schachter's editorial, "The Twilight Existence of Nonbinding International Agreements", 71 *Am. J. Int'l L.* (1977), pp. 296–297). Munch summarizes the Commission's discussion on this issue and sets out a comprehensive collection of non-binding

documents of which the Commission had taken note. In light of the evidence adduced by the Commission documenting this practice, the Conference on the Law of Treaties held in Vienna in May 1969 refused to adopt an amendment that would have led to the application of the Convention's rules to non-binding documents.

In 1965, the American Law Institute adopted the *Restatement (Second), Foreign Relations Law of the United States*. The subject of non-binding documents was discussed in Comments f and g of Section 115. The former, subtitled "Intention to create legal relationships", read:

> A question may arise as to whether statements or declarations of heads of state or government, foreign ministers, or other officials engaged in the conduct of foreign relations create international legal agreements as distinguished from statements of policy or political objectives. In order to create an international agreement as defined in . . . this Section, the statement of the parties must express more than a present intention or a personal or political commitment. . . .

The distinction between an agreement that results in a binding commitment under international law and one that does not is not always clear, and there are no absolute tests for determining whether an agreement constitutes a binding commitment. . . . American Law Institute, *Restatement of the Law (Second), Foreign Relations Law of the United States* (1965), p. 365.

Comment g, "Gentlemen's agreement", stated:

> Two or more states may enter into an understanding which is clearly intended to affect their relations with each other but not to be binding legally. Such an understanding, sometimes called a "gentlemen's agreement," is not an international agreement as defined in this Section.

Ibid., p. 366.

Following the adoption of the Case-Zablocki Act, Pub. L. 92-403, approved August 22, 1972, 86 Stat. 619, 1 U.S.C. 112b,

which required the Secretary of State to transmit to the Congress the text of "any international agreement . . . other than a treaty, to which the United States is a party" within a specified time, the question arose as to what documents should be reported. In order to permit a uniform determination of that question, the Act was amended by the Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. 95-426, approved October 7, 1978, 92 Stat. 963, to provide that the President, acting through the Secretary of State, should promulgate such rules and regulations as might be necessary to carry out the Act.

Pursuant to that authority, the Department of State issued regulations on the reporting of international agreements on July 13, 1981. The regulations established general criteria to be applied in deciding whether a document constituted an international agreement for the purposes of the Act. Each of four specified criteria had to be met in order for a document to be reportable. The first criterion is the most relevant to the subject of this memorandum.

(1) *Identity and intention of the parties.*—A party to an international agreement must be a state, a state agency, or an intergovernmental organization. The parties must intend their undertaking to be legally binding, and not merely of political or personal effect. Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements. . . . In addition, the parties must intend their undertaking to be governed by international law, although this intent need not be manifested by a third-party dispute settlement mechanism or any express reference to international law. 22 CFR, Pt. 181, § 181.2 (Apr. 1, 1993), p. 597.

The intention of the parties standard referred to above was also used by the International Court of Justice in the only instance in which a party to a case sought to establish the Court's jurisdiction on the basis of a document that was not legally binding. In the *Aegean Sea Continental Shelf* case (Greece v. Turkey), Greece alleged that the Court had jurisdiction on the basis of a joint communique issued at Brussels on May 21, 1975, following an exchange of views between the Prime Ministers of Greece and Turkey. Language to the effect that they had decided that the

problems dividing the two countries, including the Aegean Sea continental shelf, should be resolved by the Court at The Hague was not regarded by the Court as sufficient to establish jurisdiction. *Aegean Sea Continental Shelf*, Judgment, 1978 I.C.J. Reports 3, at 44.

Documents of a non-legally binding character were concluded between the time of the original enactment of the Case-Zablocki Act in 1972 and its amendment in 1977 and 1978. A notable example was the Final Act of the Conference on Security and Cooperation in Europe signed at Helsinki on August 1, 1975, by President Ford and other national leaders. Clearly, the intention of the parties was that this was a politically binding, not a legally binding, document. Later that year, on October 7, 1975, Secretary of State Kissinger, accompanied by the Legal Adviser of the Department, Monroe Leigh, testified before the Senate Foreign Relations Committee on memoranda of agreement between the Governments of Israel and the United States. He observed that not all of the provisions in documents containing U.S. commitments submitted to the Committee amounted to binding undertakings. He noted that they included:

> . . . [A]ssurances by the United States of our political intentions. These are often statements typical of diplomatic exchange: in some instances they are merely formal re-affirmations of existing American policy. Other provisions refer to contingencies which may never arise and are related, sometimes explicitly, to present circumstances subject to rapid change.

The fact that many provisions are not by any standard international commitments does not mean, of course, that the United States is morally or politically free to act as if they did not exist. On the contrary, they are important statements of diplomatic policy and they engage the good faith of the United States so long as the circumstances that gave rise to them continue. But they are not binding commitments of the United States. *Early Warning System in Sinai: Hearings before the Sen. Comm. on For. Rel.*, 94th Cong., 1st sess. (1975), pp. 206, 211.

[Other] documents of a non-binding character include the Bonn Declaration of 1978 and the Shanghai Communique of [1972]. The former was a multilateral document; the latter, a bilateral one. The Department replied to a request from the Chairman of the Senate Foreign Relations Committee to explain the legal significance of the Bonn Declaration as follows:

> While the Declaration issued in Bonn is an important political commitment, it is not an international agreement within the meaning of United States law or international law since the parties did not evidence an intent to be legally bound. There is no indication of intention to depart from the established international practice of concluding non-binding communiques at the conclusion of a summit meeting. Accordingly, while we expect that the Bonn Summit participants will comply with the accord, it is not a legally binding commitment.

Asst. Secty. of State Douglas J. Bennet, Jr., to Senator John J. Sparkman, letter dated Aug. 14, 1978, to be found at Dept. of State File No. P78 0130-0487, and at the 1978 *Digest*, p. 799.

The Department has consistently taken a similar position with respect to the Shanghai Communique, which addressed, *inter alia*, the question of U.S. arms sales to Taiwan. For example, in his testimony before the House Committee on Foreign Affairs on August 18, 1982, Assistant Secretary of State John M. Holdridge said:

> We should keep in mind that what we have here is not a treaty or agreement but a statement of future U.S. policy. We intend to implement this policy, in accordance with our understanding of it. . . . I can further assure you that, having participated closely in the negotiations, I am confident that the Chinese are fully cognizant of that understanding. 82 Dept. of State Bulletin, No. 2067, Oct. 1982, pp. 19, 21.

A recent study prepared for the Senate Foreign Relations Committee by the Congressional Research Service of the Library

of Congress stated that non-binding documents existed in many forms, including declarations of intent, joint communiques, joint statements (as well as final acts of conferences), and informal arrangements. It noted that even with respect to documents that are legally non-binding, the parties affected may to some degree expect adherence.

The study referred to a statement by the Department of State of the difference between a legally binding obligation and a political obligation in describing "certain declarations, intended to be politically rather than legally binding, exchanged in connection with the START Treaty," as follows:

> An undertaking or commitment that is understood to be legally binding carries with it both the obligation of each Party to comply with the undertaking and the right of each Party to enforce the obligation under international law. A "political" undertaking is not governed by international law and there are no applicable rules pertaining to compliance, modification, or withdrawal. Until and unless a Party extricates itself from its "political" undertaking, which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a party contravenes a political commitment, it will be subject to an appropriate political response.

Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, S. Comm. Print 103–53, 103d Cong., 1st sess. (1993), pp. 34–35 [Ftn. 73. Treaty with the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms (the START Treaty), S. Treaty Doc. 102–20, 102d Cong., 1st sess. (1991), p. 1086 (the quotation is from the Article-by-Article Analysis of START Documents, Declarations and Statements Associated with the Treaty, p. 352)].

* * * *

4. Role of Hong Kong

On May 3, 1997, President William J. Clinton transmitted to the Senate for its advice and consent to ratification the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders, signed at Hong Kong on December 20, 1996 ("Agreement"). S. Treaty Doc. No. 105-3 (1997). As described in the transmittal letter, the Agreement was intended "to enhance cooperation between the law enforcement communities of the United States and Hong Kong, and provide a framework and basic protections for extraditions after the reversion of Hong Kong to the sovereignty of the People's Republic of China ("PRC") on July 1, 1997." The accompanying report of the Department of State dated February 4, 1997, submitting the treaty to the President, also included in S. Treaty Doc. No. 105-3, explained that the Agreement would be considered a treaty for purposes of U.S. law:

> Although entitled an "Agreement" to reflect Hong Kong's unique juridical status, for purposes of U.S. law, the instrument will be considered to be a treaty, and therefore I am submitting it to you for transmittal to the Senate for advice and consent to ratification. In that regard, I note that Hong Kong is entering into the Agreement with the authorization of "the sovereign government which is responsible for its foreign affairs." At present, that is the United Kingdom. However, the PRC has also approved the Agreement and authorized its continuation in force after July 1, 1997 through approval of the Sino-British Joint Liaison Group. . . .

A diplomatic note of January 24, 1997, to the Department of State from the British Embassy in Washington, D.C., explaining the process for negotiation of this and other bilateral treaties with Hong Kong was included in the report of the Senate Foreign Relations Committee recommending

that the Senate give its advice and consent to ratification. S. Exec. Rep. No. 105-2 (1997). Excerpts from the note are set forth below.

---

* * * *

Her Britannic Majesty's Embassy present their compliments to the United States Department of State and have the honour to inform the United States Department of State of the arrangements agreed between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China relating to the application to Hong Kong after 30 June 1997 of bilateral agreements and, in particular, to extradition arrangements between the United States and the Hong Kong Special Administrative Region of the PRC (HKSAR).

The Status of the Sino-British Joint Declaration on the Question of Hong Kong

The Sino-British Joint Declaration on the Question of Hong Kong, signed on 19 December 1984, is an international treaty, registered at the United Nations, under which the United Kingdom undertakes to restore sovereignty over Hong Kong to China with effect from 1 July 1997 and the Chinese Government sets out the basic policies that it undertakes to implement regarding Hong Kong, including that the HKSAR shall have a high degree of autonomy except in the fields of foreign affairs and defence. The HKSAR will be vested with executive, legislative and independent judicial power, including that of final adjudication. . . .

The Authority of the Sino-British Joint Liaison Group

The British and Chinese Governments agreed in the Joint Declaration to establish a Joint Liaison Group to discuss the effective implementation of the Joint Declaration as well as matters relating to the smooth transfer of government at midnight, on 30 June 1997. . . .

General principles relating to the continued application of existing bilateral agreements to HKSAR

During the Joint Declaration negotiations, Britain and China agreed that, in line with the high degree of autonomy to be enjoyed by the HKSAR in the areas described in para 3 above, the HKSAR could have its own network of agreements with third countries, separate from China, in these areas. . . .

* * * *

The process the two governments agreed in the Joint Liaison Group enables the Hong Kong Government to negotiate the agreements it needs and allows these agreements to continue in effect after the handover without any further action or checking by China, since the entire process will have been scrutinised and agreed by the Chinese Government through the Joint Liaison Group.

The basic steps in the process carried out through exchanges in the Joint Liaison Group are:

— a Model Agreement, eg a model Surrender of Fugitive Offenders Agreement, is negotiated and agreed;
— on behalf of the Hong Kong Government, the British Government asks the Chinese Government to approve a list of negotiating partners;
— once the Chinese Government approves the proposed partners, the British Foreign Secretary signs a formal entrustment authorising the Hong Kong Government to negotiate on its own behalf with those partners on the basis of the Model Agreement;
— once the Hong Kong Government and an approved partner reach agreement, they initial the text. The British Government pass the initialled text to the Chinese Government through the Joint Liaison Group for approval.

The Chinese Government may seek clarification if the initialed text departs significantly from the Model Agreement. Further negotiations between the Hong Kong Government and the approved

partner may be necessary. Once the Chinese Government has approved the initialed text, the Hong Kong Government and the approved partner can sign the agreement.

An agreement so concluded and brought into force before the handover will remain in effect after the handover, notwithstanding that China may itself separately have concluded a bilateral agreement in the same area with the same approved partner.

* * * *

The HK/US Agreement for the Surrender of Fugitive Offenders

In line with the process described above, the Joint Liaison Group has agreed a Model Surrender of Fugitive Offenders Agreement and the Chinese Government has approved a number of negotiating partners, including the United States, with which the Hong Kong Government has, under entrustment by the British Foreign Secretary, concluded new agreements for the surrender of fugitive offenders to replace the existing agreements extended to Hong Kong by the United Kingdom, and to continue in force after the handover.

In the case of the HK/US Surrender of Fugitive Offenders agreement, the Chinese Government approved the text of the agreement during the thirty-seventh plenary meeting of the Joint Liaison Group, held in Peking from 17 to 19 September 1996.

. . . The HK/US Agreement for the Surrender of Fugitive Offenders was duly signed in Hong Kong on 20 December 1996 by the United States Consul-General in Hong Kong and the Hong Kong Secretary for Security. The British Senior Representative to the Joint Liaison Group and a Chinese Representative to the Joint Liaison Group were present at the signing ceremony.

Her Britannic Majesty's Embassy wishes to draw to the attention of the United States Department of State a statement issued by the Chinese Ministry of Foreign Affairs spokesman on 21 January, at Annex C. The British Government endorses the Chinese Government's statement that the Hong Kong-US Surrender of Fugitive Offenders Agreement shall remain valid after 30 June 1997.

* * * *

S. Exec. Rep. No. 105–2 also included written responses to questions posed by members of the Senate Foreign Relations Committee. Jamison S. Borek, Deputy Legal Adviser, Department of State, answered a question from Senator Helms concerning the status of the treaty and its implementation, indicating, among other things, that the United States had received confirmation of PRC support of the treaty:

> We believe that the treaty can be successfully implemented because it is the Hong Kong government and not the PRC which has the power and authority to fulfill its obligations under the treaty.
>
> We expect that the PRC will respect this Agreement; indeed, it has provided us with a diplomatic note expressly confirming its support of the treaty. Furthermore, the relationship between the PRC and Hong Kong in this area is spelled out in the Joint Declaration and Basic Law, and we expect the PRC to honor its commitments under both.

Two other agreements with Hong Kong were likewise treaties for purposes of U.S. law: (1) The Agreement Between the Government of the United States of America and the Government of Hong Kong on Mutual Legal Assistance in Criminal Matters, with Annex, (S. Treaty Doc. No. 105–6 (1997); *see* Chapter 3.A.3.) and (2) the Agreement Between the Government of the United States and the Government of Hong Kong for the Transfer of Sentenced Persons (S. Treaty Doc. No. 105–7 (1997); *see* Chapter 2.C.2.)

See also Digest 2000 at 190–203; 91 Am. J. Int'l L. 93 (1997).

5. Regional Economic Integration Organizations

The interest of regional economic integration organizations ("REIOs"), such as the European Union ("EU"), in becoming parties to treaties or members of international organizations raises legal issues in which the United States is engaged. Several issues arising during the 1990s are discussed below.

a. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

On April 25, 1994, President William J. Clinton transmitted the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted at Rome by the Conference of the UN Food and Agriculture Organization ("FAO"), November 24, 1993, to the Senate for advice and consent to acceptance. S. Treaty Doc. No. 103–24 (1994). Pursuant to Article XI, the Agreement would enter into force upon the receipt by the Director-General of FAO of the twenty-fifth instrument of acceptance. The Senate provided advice and consent to acceptance on October 7, 1994, 140 CONG. REC. D1221 (1997). The United States deposited its instrument of acceptance on December 19, 1995.

As provided in Article X, the Agreement is "open to acceptance by any Member or Associate Member of FAO, and to any non-member State that is a member of the United Nations, or of the specialized agencies of the United Nations or of the International Atomic Energy Agency." The report of the Secretary of State to the President submitting the treaty to the President for transmittal to the Senate, also included in S. Treaty Doc. No. 103–24, explained that pursuant to Article X the EU could become a party to the treaty:

> . . . The EU, which is a Member of FAO and which participated actively in the negotiations leading to the Agreement, is eligible to become party to the Agreement, subject to certain requirements set forth in Article X(4) relating to the division of competence between the EU and its Member States.

Article X(4) addressed issues of allocation of responsibility between a REIO and its member states, providing:

> When a regional economic integration organization becomes a Party to this Agreement, such regional economic integration organization shall, in accordance with the

provision of Article II.7 of the FAO Constitution, as appropriate, notify such modifications or clarifications to its declaration of competence submitted under Article II.5 of the FAO Constitution as may be necessary in light of its acceptance of this Agreement. Any Party to this Agreement may, at any time, request a regional economic integration organization that is a Party to this Agreement to provide information as to which, as between the regional economic integration organization and its Member States, is responsible for the implementation of any particular matter covered by this Agreement. The regional economic integration organization shall provide this information within a reasonable time.

b. Madrid Protocol

On July 19, 1996, Joanna R. Shelton, Deputy Assistant Secretary of State for Trade Policy and Programs, testified before the House Committee on the Judiciary, Subcommittee on Intellectual Property and Judicial Administration, on the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("Madrid Protocol"). Ms. Shelton's testimony noted the benefits that could be derived from the Madrid Protocol; because of issues concerning treatment of REIOs, however, she stated that "we continue to believe that it is not in the best interests of the United States to become party to the Protocol as it now stands. The problem rests not with the substance of its provisions—but rather the way in which the Madrid Protocol is currently structured."

Following further negotiations, the Council of the European Union provided an approved Statement of Intent to address U.S. objections in a letter dated February 2, 2000. As a result, on September 5, 2000, the President transmitted the Madrid Protocol to the Senate for advice and consent to accession. S. Treaty Doc. No. 106–41 (2000). The United States became a party to the Madrid Protocol on November

2, 2003. In giving advice and consent to ratification, however, the Senate required the President to notify the Senate of "any nonconsensus vote . . . in which the total number of votes cast by the European Community and its member states exceeded the number of member states of the European Community." 148 CONG. REC. S10640 (Oct. 17, 2002). *See Digest 2000* at 297–308*; Digest 2003* at 702–04.

Excerpts below from Ms. Shelton's testimony explain the U.S. concerns with the protocol as drafted. The full text of the prepared testimony is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Our concerns about the Madrid Protocol center on provisions concerning so-called "intergovernmental organizations." As explained below, these provisions would give unfair advantages to the member states of such organizations, which would undermine U.S. interests with respect to the Madrid Protocol and other aspects of international intellectual property protection, as well as our overall treaty practices.

By way of background, international agreements are traditionally concluded among states. Although the European Union (EU) is not a state, its member states have transferred to it some of their powers to conclude and implement international agreements. In the drafting of treaties and the operation of international organizations, the United States has looked for ways to accommodate European integration. As European integration proceeds and develops, however, the United States must be careful that those accommodations do not put the United States at a disadvantage.

. . . [W]e do not object to states forming Regional Economic Integration Organizations (REIOs), such as the EU, nor have we ever concluded that participation by REIOs in international agreements is objectionable. Indeed, the United States generally has supported participation by REIOs, including the EU, in multilateral fora. Furthermore, we recognize that REIOs can be effective instruments for fostering economic integration and well-being. Nevertheless, their participation in international agreements must be carefully monitored.

* * * *

Our principal objections to the Madrid Protocol are:

(1) that it allows an "intergovernmental organization" to have an additional vote separate and independent from its member states;
(2) that it allows an "intergovernmental organization" to be counted independently toward the number of entities required to bring the protocol into force despite the fact that its member states also may be counted;
(3) that it grants voting rights to "intergovernmental organizations" without requiring an unambiguous declaration of competence; and
(4) that it grants rights to "intergovernmental organizations."

EU Voting

From the debate over competence emerged the EU contention that "shared competency" required the EU to have its own vote separate and independent from that of its member states.

The issue of competent authority is inextricably linked to the issue of voting. . . . [T]he U.S. has long opposed granting a vote to REIOs separate and independent from their member states, and our policy is not to become party to agreements where concurrent voting by REIOs and their member states is allowed. In these cases, the U.S. has viewed such voting as an unwarranted expansion of rights under the agreement which may well work to the detriment of U.S. interests. If its member states were to cede competent authority to the EU on the substance of the Madrid Protocol, we would have no problem with the EU voting the position of the fifteen member states of the European Communities. However, we cannot accept a situation where an assertion of "shared competency" would suggest that the EU is entitled to a separate sixteenth vote exclusive of and in addition to those of its member states.

* * * *

Counting REIO Ratification Toward Bringing the Treaty into Force

A corollary of the EU voting issue is the provision of the Madrid Protocol that would permit a REIO and its member states to be

counted separately toward bringing the Protocol into force. We have opposed this provision of the Protocol for the same reasons we have objected to concurrent voting by a REIO and its member states—that such a provision represents an unwarranted expansion of the powers of REIOs and their member states which has no basis in international law. Consequently, we cannot agree to any provision that would allow a REIO as well as its member states to count toward bringing an agreement into force.

Declaration of Competence

Another objection to the current text of the Madrid Protocol is the absence of a requirement for an unambiguous declaration of the allocation of competence as between the intergovernmental organization and its member states.

As party to an agreement, the United States has a legal and practical need to know which party has responsibility for implementing the particular obligations of an agreement. Consequently, before entering into an agreement, we regularly have requested from REIOs and their member states a clear statement as to allocation of competence.

The issue of competent authority arose in the Madrid Protocol when the EU and its member states were unwilling to provide a definitive statement as to where responsibility for the implementation of the Protocol resided. Rather, the EU and its member states attempted to introduce a new concept they characterized as "shared competence." Under this arrangement, the EU and its member states claimed to each have full, separate and independent responsibility for substantive trademark matters under the Madrid Protocol. This proposal, heretofore unknown in international law and practice, served to introduce uncertainty into the administration of the Madrid Protocol that we believe could work to the disadvantage of the United States.

Lack of Definition of Intergovernmental Organization

When states have transferred competence to negotiate and implement treaties to a supranational body, that body may be an appropriate treaty partner. On the other hand, a looser grouping of states—for example, one that is largely a political compact—

would lack the legal and practical ability to honor commitments it made in a treaty. For this reason, when treaties permit supranational bodies to become parties, they typically define such bodies with precision. For example, the Vienna Convention for the Protection of the Ozone Layer defines those categories of organizations eligible to participate as organizations constituted by sovereign states, having competence in matters covered by the agreement, and having been duly authorized to become party to the agreement. The Madrid Protocol, however, contains no safeguards to address our concerns about "non-states."

USG Engagement on EU Voting

Because we are not party to the underlying treaty, the Madrid Agreement Concerning the International Registration of Marks, our role in negotiating the Protocol was limited. We nevertheless made known our views on EU voting to the World Intellectual Property Organization (WIPO) and to EU member states.

Since the Protocol was concluded, we have actively engaged the EU and WIPO member states on the issue of EU voting. Through a series of demarches to foreign governments, we have explained our views and solicited their support for our position. Our view has garnered significant support among the countries of East Asia and Latin America, so much so that voting provisions were dropped from the recently-concluded Trademark Law Treaty in order to avoid granting the EU an extra vote. In addition, the issue has been shelved in the negotiations for the Hague Agreement Concerning the International Deposit of Industrial Designs.

* * * *

B. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION AND TERMINATION

1. Provisional Application

From time to time, the United States provisionally applies the terms of a treaty pending its entry into force. For example, the United States agreed with Mexico and with Russia to

recognize provisional boundaries set forth in an exchange of notes in each case accompanying a treaty on maritime boundaries. *See* discussion in Chapter 12.A.3.a. and 13.A.4.a.(9), respectively.

In some cases, a treaty may expressly provide for provisional application. For example, Article 7 of the 1994 Agreement Relating to Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea ("1994 Agreement") provided that, until the 1994 Agreement entered into force, it would be applied provisionally from November 16, 1994, by (1) States which consented to the adoption of the 1994 Agreement (i.e., by voting in favor of the resolution by which the UNGA adopted the 1994 Agreement) unless such State indicated otherwise; (2) States which signed the 1994 Agreement, again unless such State indicated otherwise; (3) other States (i.e., those not UN members) which consented to provisional application through notification to the Depositary; and (4) States which acceded to the 1994 Agreement. Those States that applied the 1994 Agreement provisionally were required to do so "in accordance with their national or internal laws and regulations." The 1994 Agreement entered into force on July 28, 1996.

In transmitting the 1994 Agreement to the Senate for advice and consent to ratification, the United States stated that, at the time of its signature on July 29, 1994, the United States indicated that it intended to apply the agreement provisionally pending ratification. *See* further discussion in Chapter 12.A.1.

2. Applicability of Treaties to Taiwan

a. 1946 FCN treaty applicable to Taiwan

On January 24, 1992, the U.S. Court of Appeals for the Second Circuit affirmed a lower court ruling that certain Taiwanese television programs were eligible for copyright protection under U.S. law. *New York Chinese TV Programs, Inc. v. U.E.*

Enters., Inc., 954 F.2d 847 (2d Cir. 1992), *cert. denied*, 506 U.S. 827 (1992). Plaintiff New York Chinese TV had been granted the exclusive license to distribute in New York and New Jersey video cassette copies of certain television programs from Taiwan for which American copyrights had been obtained. Defendants in the case had attempted to sell the same programs in the same states. New York Chinese TV sued, claiming, among other things, that defendants' reproduction and sale of the videotapes violated plaintiff's rights under the Copyright Act of 1978, 17 U.S.C. §§ 101–110. The United States filed a Statement of Interest in support of plaintiff's position on September 26, 1988. The district court ruled for plaintiff, endorsing the views expressed in the Statement of Interest. 1989 U.S.Dist. LEXIS 2760 (S.D.N.Y. Mar. 8, 1989). *See I Cumulative Digest 1981–1988* at 256–59.

On appeal in October 1991, the United States filed a brief as *amicus curiae*. The U.S. brief reiterated its position that the 1946 Treaty of Friendship, Commerce and Navigation ("FCN treaty") between the United States and the then Republic of China ("ROC") continued in force pursuant to the terms of the Taiwan Relations Act, 22 U.S.C. §§ 3301–3316 ("TRA"). As a result, Article IX of the FCN Treaty satisfied the language in the Copyright Act extending copyright protection to "a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party." 17 U.S.C. § 104(b)(1). As a matter of domestic law, the U.S. argued, the TRA "has continued copyright protection for Taiwanese nationals under section 104(b) [of the Copyright Act] after January 1, 1979. . . . Congress, for domestic purposes, has simply extended the effectiveness of a piece of domestic legislation (section 104(b)(1)) by another piece of domestic legislation (the TRA)."

The U.S. brief also refuted defendants' Constitution-based arguments. The United States argued that the TRA did not constitute an "amendment" of the FCN Treaty and that, even if it were an "amendment," there was no constitutional impediment to taking such action through a

"legislative-executive agreement" rather than a "treaty" entered into with the advice and consent of the Senate under Article II of the Constitution.

The Second Circuit opinion providing the legal context of the issue and confirming copyright protection is excerpted below (footnotes omitted).

The full text of the U.S. amicus brief is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Recognition of the PRC . . . necessitated derecognition of the ROC. Accordingly, on December 30, 1978, then-President Jimmy Carter signed a memorandum "recognizing the government of the People's Republic of China as the sole legal government of China and . . . terminating diplomatic relations with the Republic of China." President's Memorandum for All Departments and Agencies: Relations With the People on Taiwan, *reprinted in* 1979 U.S. Code Cong. & Admin. News 75 (hereinafter *President's Memorandum*).

The *President's Memorandum* acknowledged that, despite its termination of diplomatic relations with Taiwan, the United States still wished to maintain "commercial, cultural, and other relations with the people of Taiwan without official government representation and without diplomatic relations." *Id.* As part of this policy, the *President's Memorandum* directed that

> Existing international agreements and arrangements in force between the United States and Taiwan shall continue in force and shall be performed and enforced by departments and agencies beginning January 1, 1979, in accordance with their terms and, as appropriate, through that instrumentality.

Id.

Since 1979, the Executive Branch has consistently used the *President's Memorandum's* mandate as a basis for continuing to honor the FCN Treaty. The State Department annually publishes *Treaties in Force*, listing all treaties that are honored by the United

States. Significantly, each edition of *Treaties in Force* published since the United States derecognized Taiwan in 1979 includes the FCN Treaty as a valid and enforceable treaty.

Derecognition of Taiwan prodded Congress to ensure that Taiwan's status as a major United States trading partner remained unscathed. Accordingly, Congress passed the Taiwan Relations Act ("TRA") codified at 22 U.S.C. § 3301, *et seq.*, "to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan" and to "declare that peace and stability in the area are in the political, security, and economic interests of the United States." 22 U.S.C. § 3301(b)(1), (2).

The substantive provisions of the TRA are analogous to the *President's Memorandum*. Like the *President's Memorandum*, the TRA states that the

> absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan . . . in the [same] manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.

22 U.S.C. § 3303(a). More specifically, the TRA mandates

> the continuation in force of all treaties and other international agreements . . . entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

Id. § 3303(c).

* * * *

1. *The "Treaty" Requirement of Section 104(b)(1)*

As noted previously, Section 104(b)(1) [of the Copyright Act] permits the granting of copyright protection to works authored by citizens of a foreign nation if that nation is a party to a copyright

treaty with the United States. Defendants argue that the United States and Taiwan no longer have such a treaty. This conclusion rests on two premises. First, defendants contend that the FCN Treaty lapsed in 1979 when the United States derecognized Taiwan. Second, defendants assert that the TRA cannot resurrect the obligations imposed by the FCN Treaty because that would require a new treaty, and the TRA is not a treaty.

To be sure, the TRA is not a "treaty." A "treaty" is a contract between nations. . . . The TRA is solely a domestic statute. . . .

The difficulty with the defendants' argument lies in their root premise that the FCN Treaty lapsed upon derecognition of Taiwan. It is well settled that "on the question whether a treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance." *Terlinden v. Ames*, 184 U.S. 270, 285, 46 L. Ed. 534, 22 S. Ct. 484 (1902). Moreover, the judiciary should refrain from determining whether a treaty has lapsed, and instead should defer to the wishes of the elected branches of government. *See Whitney v. Robertson*, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888). In this case, both Congress and the Executive Branch have, with rare clarity, determined that the United States must continue to honor the FCN Treaty, despite official diplomatic derecognition of Taiwan.

The TRA requires the United States to honor all previous treaties and international agreements with Taiwan. Among these obligations is the FCN Treaty, which was explicitly noted by the House of Representatives in its report on the TRA. H.R. Rep. No. 26, 96th Cong., 1st Sess. 10–11 (1979). Thus, we find that Congress indisputably intended that the FCN Treaty remain a valid and enforceable treaty.

Similarly, the Executive Branch has not wavered from honoring the FCN Treaty. Each edition of the State Department pamphlet *Treaties in Force* published between 1979 and the present date lists the FCN Treaty as a valid treaty. Moreover, we have not located any proclamation from either the President or any Executive Agency renouncing the United States' obligations under the FCN Treaty.

Because both Congress and the Executive Branch agree that the FCN treaty is to continue in effect, and because of the deference

we owe to the political branches of the government in treaty matters, we hold that the FCN treaty remains a valid and enforceable treaty.

* * * *

We do not quarrel with defendants' assertion that a significant amendment to a treaty must follow the mandate of the Treaty Clause, and therefore must be proposed by the President, and be ratified following the advice and consent of the Senate. We find, however, that the TRA has not amended the FCN Treaty in such fashion as to implicate the Treaty Clause.

The TRA simply inserted a new name in the FCN Treaty to replace the derecognized "Republic of China," and to recognize the realities of a changed political landscape. . . .

* * * *

A change in the name of a party to a treaty is not an "amendment" to that treaty. *Cf. Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679 (9th Cir. 1983) (treaty between the United States and Denmark applied to Iceland after Iceland had declared its independence from Denmark). Rather, a treaty is "amended" only if the obligations imposed by that treaty change. The TRA certainly has not changed any of the substantive requirements of the FCN Treaty.

Finally, we are mindful of the strong commercial relationship ties between the United States and Taiwan. Indeed, Taiwan's trade with the United States has increased nearly four-fold since 1979. This trade would surely go elsewhere if the FCN, the bedrock of the U.S.-Taiwanese commercial relationship, were to crumble suddenly. Taiwan, moreover, has unfailingly relied upon the FCN Treaty to provide protection of its own copyright laws to works authored by American citizens. Taiwan would have little reason to honor the FCN Treaty if the United States were to turn its back on the Treaty. Thus, our holding encourages the United States to provide copyright protection to works authored by Taiwanese citizens, and insures that Americans will receive copyright protection of their works in Taiwan.

* * * *

b. Taiwan not bound by Warsaw Convention never adhered to by ROC

Mingtai Fire & Marine Insurance Co., Ltd. ("Mingtai") insured a package that was lost during shipment from Taiwan to San Jose, California. Mingtai alleged that the package contained computer chips worth over $83,000 and brought suit against United Parcel Service and United Parcel Service International, Inc. (collectively "UPS"), the carrier of the package, in the U.S. District Court for the Northern District of California. Mingtai argued that the loss was covered under the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"), Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 49 U.S.C. § 40105 note. UPS took the position that the Warsaw Convention did not apply to Taiwan and that its air carrier liability was thus limited to the $100 released value provided by the air waybill. The district court agreed with the UPS position, finding that Taiwan, which is not a party to the Warsaw Convention, was not bound by the People's Republic of China's ("PRC's") adherence to the Convention. *Mingtai Fire & Marine Ins. Co. v. UPS,* 1997 U.S. Dist. LEXIS 23535 (N.D. Cal. Dec. 10, 1997).

Mingtai appealed to the U.S. Court of Appeals for the Ninth Circuit. Excerpts below from the brief for the United States as *amicus curiae* filed in the court of appeals described the interest of the United States in the case and its view that the case had been decided correctly by the district court because the Republic of China ("ROC") had never adhered to the treaty.

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

---

* * * *

The question presented on this appeal is whether the adherence to an international agreement by the People's Republic of China ("PRC") binds Taiwan. The United States has a very strong interest in ensuring that it does not. The United States has not recognized

in the PRC a power to bind Taiwan to the PRC's international commitments. To the contrary, through executive orders and legislation, the President and Congress have ensured that the United States may maintain separate relations with the authorities on Taiwan.

The United States submits this amicus brief to make clear that plaintiff's position, if accepted, would create significant foreign policy problems for the United States. As this Court has recognized, the views of the executive branch on matters of foreign policy are entitled to great weight. . . .

* * * *

. . . At the core of the [Warsaw] Convention is a series of provisions governing the nature and scope of a carrier's liability for three categories of harms—personal injury, damaged or lost goods or baggage, and damage due to delay—that occur in the course of international air travel.

The Warsaw Convention applies if the place of departure and the place of destination are situated . . . within the territories of two parties to the Convention. . . . *See* Warsaw convention, Article 1.

. . . The United States adhered to the Convention in 1934. *See* T.S. No. 896, 49 Stat. 3000 (1934). The Republic of China ["R.O.C."] never adhered to the Convention. *See* Goldhirsch, The Warsaw Convention Annotated: A Legal Handbook App. 9 (1988).

The People's Republic of China adhered to the Convention in 1958. *See* Shawcross & Beaumont, Air Law App. 17 (1997). In adhering to the Convention, the PRC made a declaration purporting to extend the Convention to Taiwan. *See id*. at App. 21 n. 8 (declaration stating that the Convention "will of course apply to the entire Chinese territory including Taiwan"). In response to the PRC's declaration, the United States informed the Polish government—the depository for the Warsaw Convention —that, since [at that time] the United States recognized "the Government of the Republic of China as the only legal Government of China and does not recognize the so-called 'People's Republic of China', it regards this action as being without legal effect." . . . The authorities on Taiwan have consistently maintained that the

R.O.C. never adhered to the Convention and that Taiwan is therefore not bound by its terms.

* * * *

The court of appeals affirmed the district court's decision. *Mingtai Fire & Marine Insurance Co, Ltd. v. UPS*, 177 F.3d 1142 (9th Cir. 1999), *cert. denied*, 528 U.S. 951 (1999). Excerpts below from the court's decision explain its conclusion that "the Warsaw Convention does not apply to the lost air cargo in this case and the district court properly upheld the limitation of liability in the air waybill." (footnotes deleted).

---

* * * *

[The provisions of the TRA] strongly imply that, despite the absence of official relations, the United States continues to deal separately with Taiwan. With the passage of the Act, the United States not only continued in force its treaties with Taiwan that antedated derecognition; it also gave no indication that existing or future agreements with the newly recognized China would be binding upon Taiwan.

The State Department's publication *Treaties in Force* makes explicit what is implicit in the Act. *Treaties in Force* contains sections listing bilateral treaties with various countries. *See* U.S. Dep't of State, *Treaties in Force* iii–iv (1997). There are separate sections listing the bilateral treaties between (1) the United States and "China" and (2) the United States and "China (Taiwan)". *See id.* . . .

More specific to the question presented here, "China" is listed as a signatory to the Warsaw Convention, while "China (Taiwan)" is not. *See id.* at 329–30. This listing of "China" does not appear to encompass Taiwan, because . . . where both China and Taiwan are signatories to a treaty, *Treaties in Force* so indicates. . . .

We need not, however, merely rely upon the implications of the Act and the statements in and structure of *Treaties in Force*. Instead, we have the benefit of the Executive's express position on the issue presented. In an amicus brief and at oral argument, the United States made plain its position that China's adherence to

the Convention does not bind Taiwan. In *Taiwan v. United States District Court*, we were similarly presented with a question concerning Taiwan's status, regarding which the United States filed a brief as amicus curiae. *See* 128 F.3d at 718. We noted that the United States' position was "entitled to substantial deference in light of the 'primacy of the Executive in the conduct of foreign relations' and the Executive Branch's lead role in foreign policy," and thus held in accordance with that position. *Id.* (quoting *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767, 32 L. Ed. 2d 466, 92 S. Ct. 1808 (1972)). Similarly here, the United States' position is entitled to deference.

While Mingtai argues that the district court violated separation of powers by rejecting its position, it instead would be an intrusion into the political sphere for this court to rule in Mingtai's favor and effectively to hold, contrary to every indication of executive and legislative intent, that Taiwan has tacitly been recognized by the United States as a party to any treaty signed by China. We will not do so. We caution, however, that we do not independently determine the status of Taiwan; instead, we merely recognize and defer to the political departments' position that Taiwan is not bound by China's adherence to the Warsaw Convention.

* * * *

3. Treaty Interpretation

a. Relationship between treaty and domestic law

On January 12, 1999, the Supreme Court held that a "recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' . . . if not allowed under the [Warsaw] Convention, is not available at all." *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999). In so doing, it reversed a decision by the U.S. Court of Appeals for the Second Circuit, 122 F.3d 99 (1997), and resolved a split among the circuits on the interpretation of the Warsaw Convention on this issue.

In the case presented, the plaintiff sought tort damages from El Al Israel Airlines in New York state court because she had been subjected to "an intrusive security search" before boarding an El Al flight to Tel Aviv. As explained in excerpts from the Court's decision set forth below, Article 17 of the Warsaw Convention limits carrier liability for personal injury damages to "bodily injury" from an "accident . . . sustained . . . in the course of any of the operations of embarking or disembarking," as those terms are used in the convention. The intrusive security search did not fit either of these terms, and thus the question presented was whether a passenger who suffered personal injury within the scope of the Warsaw Convention, but who could not meet the conditions set forth in Article 17 for establishing that a carrier was liable under the convention itself, could nonetheless seek relief under the law of a state of the United States.

The U.S. filed an amicus brief arguing that the Warsaw Convention language should be interpreted to mean that any personal injury action brought by a passenger against a carrier for events arising in international air travel must be subject to the conditions and limits of the convention in Article 17. *See www.usdoj.gov/osg/briefs/1998/3mer/1ami/97-0475.ami.mer.supp.html.* Excerpts from the opinion of the Supreme Court adopting this view are set forth below. (footnotes ommited.)

---

* * * *

At the outset, we highlight key provisions of the treaty we are interpreting. Chapter I of the Warsaw Convention, entitled "SCOPE—DEFINITIONS," declares in Article 1(1) that the "Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire." 49 Stat. 3014. Chapter III, entitled "LIABILITY OF THE CARRIER," defines in Articles 17, 18, and 19 the three kinds of liability for which the Convention provides. Article 17 establishes the conditions of liability for personal injury to passengers:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018.

. . . Article 24, referring back to Article[] 17 . . . instructs:

* * * *

> "(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." *Id.*, at 3020.

* * * *

We accept it as given that El Al's search of Tseng was not an "accident" within the meaning of Article 17, for the parties do not place that Court of Appeals conclusion at issue. . . . We also accept, again only for purposes of this decision, that El Al's actions did not constitute "wilful misconduct"; accordingly, we confront no issue under Article 25 of the Convention. . . . The parties do not dispute that the episode-in-suit occurred in international transportation in the course of embarking.

Our inquiry begins with the text of Article 24, which prescribes the exclusivity of the Convention's provisions for air carrier liability. "It is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399. "Because a treaty ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux preparatoires*) and the postratification understanding of the contracting parties." *Zicherman*, 516 U.S. at 226.

Article 24 provides that "cases covered by article 17"—or in the governing French text, "les cas prevus a l'article 17"—may

"only be brought subject to the conditions and limits set out in the Convention." 49 Stat. 3020. That prescription is not a model of the clear drafter's art. We recognize that the words lend themselves to divergent interpretation.

In Tseng's view, and in the view of the Court of Appeals, "les cas prevus a l'article 17" means those cases in which a passenger could actually maintain a claim for relief under Article 17. So read, Article 24 would permit any passenger whose personal injury suit did not satisfy the liability conditions of Article 17 to pursue the claim under local law.

In El Al's view, on the other hand, and in the view of the United States as *amicus curiae*, "les cas prevus a l'article 17" refers generically to all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking, and simply distinguishes that class of cases (Article 17 cases) from cases involving damaged luggage or goods, or delay (which Articles 18 and 19 address). So read, Article 24 would preclude a passenger from asserting any air transit personal injury claims under local law, including claims that failed to satisfy Article 17's liability conditions, notably, because the injury did not result from an "accident," see *Saks*, 470 U.S. at 405, or because the "accident" did not result in physical injury or physical manifestation of injury, see *Floyd*, 499 U.S. at 552.

Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184–185, 72 L. Ed. 2d 765, 102 S. Ct. 2374 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). We conclude that the Government's construction of Article 24 is most faithful to the Convention's text, purpose, and overall structure.

A. The cardinal purpose of the Warsaw Convention, we have observed, is to "achieve uniformity of rules governing claims arising from international air transportation." *Floyd*, 499 U.S. at 552; see *Zicherman*, 516 U.S. at 230. The Convention signatories, in the treaty's preamble, specifically "recognized the advantage of

regulating in a uniform manner the conditions of . . . the liability of the carrier." 49 Stat. 3014. To provide the desired uniformity, Chapter III of the Convention sets out an array of liability rules which, the treaty declares, "apply to all international transportation of persons, baggage, or goods performed by aircraft." *Ibid.* . . .

* * * *

A complementary purpose of the Convention is to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability. Before the Warsaw accord, injured passengers could file suits for damages, subject only to the limitations of the forum's laws, including the forum's choice of law regime. This exposure inhibited the growth of the then-fledgling international airline industry. . . .

* * * *

The drafting history of Article 17 is consistent with our understanding of the preemptive effect of the Convention. The preliminary draft of the Convention submitted to the conference at Warsaw made air carriers liable "in the case of death, wounding, or any other bodily injury suffered by a traveler." Minutes 264; see *Saks*, 470 U.S. at 401. In the later draft that prescribed what is now Article 17, airline liability was narrowed to encompass only bodily injury caused by an "accident." See Minutes 205. It is improbable that, at the same time the drafters narrowed the conditions of air carrier liability in Article 17, they intended, in Article 24, to permit passengers to skirt those conditions by pursuing claims under local law.

* * * *

Decisions of the courts of other Convention signatories corroborate our understanding of the Convention's preemptive effect. In *Sidhu*, the British House of Lords considered and decided the very question we now face concerning the Convention's exclusivity when a passenger alleges psychological damages, but no physical injury, resulting from an occurrence that is not an "accident" under Article 17. See 1 All E.R. at 201, 207. Reviewing

the text, structure, and drafting history of the Convention, the Lords concluded that the Convention was designed to "ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action." *Ibid.* Courts of other nations bound by the Convention have also recognized the treaty's encompassing preemptive effect. The "opinions of our sister signatories," we have observed, are "entitled to considerable weight." *Saks*, 470 U.S. at 404 (internal quotation marks omitted). The text, drafting history, and underlying purpose of the Convention, in sum, counsel us to adhere to a view of the treaty's exclusivity shared by our treaty partners.

* * * *

For the reasons stated, we hold that the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention. . . .

b. Relationship between treaty and subsequent customary international law

By letter dated July 1, 1991, John O. McGinnis, Deputy Assistant Attorney General of the U.S. Department of Justice, Office of Legal Counsel ("OLC"), informed Deputy Legal Adviser Alan J. Kreczko that the Department of Justice would defer to the Department of State's view that the 1958 Convention on the Territorial Sea and the Contiguous Zone ("1958 Convention") did not prevent the United States from extending its contiguous zone to twenty-four nautical miles by Presidential proclamation.

As noted in the OLC letter, the 1958 Convention provides that the nation's contiguous zone "may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is asserted." A memorandum prepared by

David Small, Assistant Legal Adviser for Oceans, International Environmental and Scientific Issues, U.S. Department of State, dated April 5, 1989, and forwarded to OLC by Legal Adviser Abraham D. Sofaer on April 24, 1989, explained that a consensus had emerged since 1958 that a twenty-four mile contiguous zone was permissible under international law. On September 2, 1999, President William J. Clinton issued Proclamation 7219, extending the U.S. contiguous zone to 24 nautical miles. 35 WEEKLY COMP. PRES. DOC. 1684 (Sept. 2, 1999); 64 Fed. Reg. 48,701 (Sept. 8, 1999). *See* Chapter 12.A.2.

The full text of the State Department memorandum, excerpted below, is available at *www.state.gov/s/l/c8183c/htm.*

---

* * * *

Summary

Under international law, a treaty rule may lose its effect if the parties accept an inconsistent customary norm and do not intend the treaty to constitute a special regime among themselves. The process has safeguards and allows written international law to be developed without creating unrealistic rigidity. Though various concerns prevented express codification of this principle in the Vienna Convention on the Law of Treaties, it has ample support. The 1958 Convention parties have accepted a norm permitting 24 nautical mile contiguous zones and are not applying Article 24(2) as a special regime. It no longer binds the U.S. internationally.

The Constitution does not generally constrain the President under a treaty where the treaty does not constrain the U.S. internationally. There were no Executive Branch representations to the Senate at the time of ratification that Article 24(2) was part of a special regime. Accordingly, Article 24(2) does not constitutionally bar Presidential proclamation of a 24 nautical mile contiguous zone.

The 24 nautical mile rule is not controversial and involves no vested rights. Congressional consultations indicated no substantive concern with it. The record of similar action by other parties to the 1958 Convention indicates that no other party will object.

I. International law

A. Supersession of the 12 nautical mile limit

The 24 nautical mile contiguous zone provision of the 1982 UN Convention on the Law of the Sea (LOS) (Article 33) was non-controversial in the LOS negotiations. The United States has accepted the 24 nautical mile contiguous zone rule as customary international law. *See, e.g.*, Statement by the President, March 10, 1983, 19 Weekly Comp. Pres. Docs. 383 (recognizing the rights of coastal states as reflected in the 1982 LOS Convention); *see also* Restatement (3d), Foreign Relations Law of the United States, § 511(b), comment(k), and Introductory Note to Part V (1988). Thirty-six states now have contiguous zones greater than 12 nautical miles.

Moreover, the parties to the 1958 Convention, in fact, accept the supersession of the 12 nautical mile rule of Article 24(2) among themselves: eleven parties have extended their zones beyond 12 miles; our recent survey of those parties turned up no reports of protests (except for a U.S. protest before we accepted the extended limits). To date, we have found no indication that any state party to the 1958 Convention is in the position of a "persistent objector" to the 24 nautical mile contiguous zone rule. A Dutch official recently expressed the prevailing international attitude: "[The Netherlands] has never objected to any country extending its contiguous zone beyond twelve miles; it assesses an extension of the contiguous zone equal to the territorial sea as consequential to the extension of the territorial sea." (The Hague 0100, 5 January 1989.)

The contiguous zone case has a direct analogue in 1958 High Seas Convention and the 200 nautical mile exclusive economic (or fishing) zone. Such zones are recognized in the 1982 LOS Convention and are now claimed by one hundred and two states. Thirty-four of them, the U.S. included, remain party to the 1958 High Seas Convention, which is inconsistent with such zones, inter alia, in providing for freedom of fishing for all states (Article 2) in all parts of the sea beyond the territorial sea (Article 1). We surveyed these states party: their experience too was acquiescence, not protest, since the mid-1970's. After the President's 1983

proclamation of our 200 mile EEZ, the United States received some objections to picking out a portion of the 1982 LOS "package deal", but these were not legal protests.

B. Theoretical bases for the supersession

These cases are not treated by the states party to the 1958 conventions or generally understood by international law authorities as involving treaty breach, at least by the states which acted after the initial few extensions. A variety of theories, some overlapping, support this legal result.

1. Emergence of a new inconsistent customary rule modifying the operation of a prior treaty

Article 68(c) of the 1964 ILC draft articles on the law of treaties stated that "the operation of a treaty may be modified by subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties." 2 *ILC Yearbook* 198 (1964); adopted unanimously, 1 *ILC Yearbook* 318 (1964). The government comments on this draft article and the comments of the ILC members on this and its predecessor (Article 73 of the Third Report on the Law of Treaties, 2 *ILC Yearbook* 53 (1964)) evidence acceptance of the rule as existing customary law, although there were some questions raised about the appropriateness of including it in the convention and some sentiment that it was more appropriately conceived of as a rule of interpretation than application or modification. See Annex: Summary of Consideration of Draft Law of Treaty Articles on Informal Modification, attached to this memorandum. The United States found the formulation "literally accurate and in keeping with the long recognized principle that treaties are to be applied in the context of international law and in accordance with the evolution of that law." Citing difficulties its codification might lead to, the U.S. suggested leaving the principle "to be applied under the norms of international law in general . . ." 2 *ILC Yearbook* 358 (1966), quoted in Annex, 3–4. The ILC later dropped Article 68(c) because "the question would in any given case depend to a large extent on the intentions of the parties" and the relation between customary and treaty norms was too complex, *id*. at 236;

at the same time, the ILC broadened the interpretation article to encompass subsequent changes in law. *Id.* at 222, Annex, 5–6.

The principle is generally accepted. *Case Concerning Delimitation of the Continental Shelf*, (U.K./France), *infra.* 10; Restatement, 5102, Comment j; 1 Rousseau, *Droit International-Public* 344 (1970); Reuter, *Introduction au Droit des Traités* 117–118 (2nd ed. 1985); Schachter, *General Course in Public International Law* 178 Receuil des Cours 98 (1982); Thirlway, *International Customary Law and Codification* 130–142 (1972); Morelli, *Observations on Treaty Termination*, 1 Annuaire de l'Inst. de Droit Int'l 296–29 (1967); Giraud, *Modification et terminaison des traités collectifs,* Annuaire 49, 54–59 (1961); R. Pinto, *La Prescription en Droit International*, 87 Receuil 431–432 (1955); Villager, *Customary International Law and Treaties* 207–234 (1985). The instances in which certain provisions of the 1958 LOS conventions have been displaced by new inconsistent customary rules are cited as prime examples of this principle in operation. Restatement, 5102, Comment j; Schachter, at 98; Villager, at 213.

One explanation of the principle is that the treaty and customary law rule are essentially equal sources and that the latter will control in the case of incompatibility. Such a principle would be highly questionable if it operated without regard to the possible intent of the parties that a treaty provision remain binding among themselves. See, U.K. comment on article 68(c), 2 *ILC Yearbook* 345 (1966), and Sixth Report on the Law of Treaties, *id.* at 90. However, as the ILC made clear in dropping article 168(c) and encompassing subsequent law changes in the interpretation articles, the principle's application depends largely on the parties' intent. This is reflected in the Restatement formulation: "A new rule of customary law will supersede inconsistent obligations created by earlier agreement if the parties so intend and the intention is clearly manifested." Restatement, § 102, Comment j.

2. Properly interpreting a law-stating treaty as not originally intended to maintain a special regime

The result may also be explained as a matter of treaty interpretation, not modification, "taking into account" the customary

factors: the treaty's object and purpose, subsequent practice in its application which establishes the agreement of the parties regarding its interpretation and any relevant rules of international law applicable in the relations between them. Vienna Convention, Article 31(3)(a), (b) and (c).

The purpose of parties in concluding a treaty may be to establish and maintain a special arrangement among themselves, for example a regional code of conduct. The emergence of a new inconsistent general rule of customary law, applicable in the relations of the regional arrangement parties with non-parties, would not supercede the regional code in the relations of the parties *inter se*, unless the new rule were a peremptory norm of international law. Vienna Convention, Article 64.

The general purpose of law-stating treaties, however, is to render accessible, clarify, crystallize or develop general international law. Such treaty rules are drafted as general rule statements, e.g., "the contiguous zone shall not exceed twelve miles." They do not commit parties to persistent objection to emerging change: it is implicit that a treaty rule may became obsolete; the parties may accept an inconsistent norm, making the original object and purpose in stating the treaty rule impossible to achieve. To consider the parties bound *inter se* in those circumstances would artificially convert the treaty rule to a special regime, absent reason to believe the parties intended it. Vamvoukos, *Termination of Treaties in International Law* 214 (1985) ("... even in a case where recourse to objective tests cannot justify an application of the rebus doctrine, one may reach the conclusion, by interpreting the treaty, that the changes are of such a nature that the continuation of the treaty would be incompatible with the original intention of the parties"). In the case of the 1958 law of the sea conventions, the parties' practice evidences agreement that the obsolete provisions were not intended as a special regime in these circumstances.

While this might appear to strain the line between interpreting a treaty and modifying its effects, it is consonant with the LOS process since the 1950's and is precisely the kind of interpretive possibility contemplated during the drafting of Vienna Article 31(3) and left open by its wording. . . .

3. Subsequent practice establishing tacit consent of all the parties to modify the treaty's effect

The distinction between new inconsistent custom changing a treaty's interpretation and modifying its effect is of little practical significance, especially for states which accept the broader principle, reflected in Article 68(b) of the 1964 ILC draft articles, that, even in cases where changed customary law is not involved, the effect of a treaty may be modified by "subsequent practice of the parties in the application of the treaty establishing their agreement to" the modification. 2 *ILC Yearbook* 198 (1964). That article, renumbered 38, was unfortunately worded and was deleted at the Vienna diplomatic conference. Some governments voiced constitutional concern about informal treaty amendment and some doubted its status as customary law. However, most governments commenting on the issue, including the U.S., accepted as custom that a treaty's effect may be modified by such practice. Annex p. 7.

* * * *

Omission of Article 38 from the Vienna Convention is, in any event, not conclusive. The Convention's preamble affirms "that the rules of customary international law will continue to govern questions not regulated by" its provisions. H. Thierry, S. Sur, J. Combacau, C. Vallee, *Droit International Public*, 4th ed., 98 (Article 38 disappeared from the Convention because of the uncertainty it brought to written law. But the Convention is not exhaustive in this regard. This type of modification can perfectly well subsist under general international law, on condition that the agreement of the parties is clearly established) (informal translation). Moreover, the Article 38 principle may be inferred from the well-accepted principle that treaties may be terminated by tacit agreement. The ILC considered that, when termination by obsolescence or desuetude occurred, it was based on the parties' consent to abandon the treaty, which was to be implied from their conduct and was covered by draft article 51(b) on termination by consent. 2 *ILC Yearbook* 237 (1966). . . .

* * * *

4. Suspending operation of a treaty provision as a response to material breach

The actions of the first few parties to deviate from a treaty norm may be in a legal gray area. If those actions are considered in material breach, the remaining practice may be viewed as a lawful response by tacit agreement, consistent with customary law reflected in Article 60(2)(a) of the Vienna Convention, which provides: "[a] material breach of a multilateral treaty by one of the parties entitles . . . the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part . . . as between all the parties." (For a party to the Vienna Convention, Article 65 requires notice.)

5. Loss of treaty provision force through estoppel

While original intent or later tacit consent of the parties may adequately explain modification of the effect of a treaty provision, estoppel may be the underlying principle in cases such as the 1958 LOS Conventions. "A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency and shorn of the technical features to be found in national law." Vamvoukos, at 294; *See*, separate opinions of Fitzmaurice and Alfaro and authorities cited therein, *Case concerning the Temple of Preah Vihar*, 1962 ICJ Reports 39–51, 62–66. "The primary foundation" of estoppel or waiver of right by failure to protest "is the good faith that must prevail in international relations." Alfaro, at 44. Estoppel is implicit in, not a derogation from, the principle *pacta sunt servanda*, of which good faith is also a fundamental element. Thus, at the Vienna Conference, Sir Humphrey Waldock "expressed surprise that some delegations should think article 38 constituted a quasi-violation of the principle *pacta sunt servanda*, especially as the legal basis of the article was good faith. The provision was based on the principle that a State which had taken up a position on a point of law, particularly in the interpretation of treaties, and allowed another State to act in accordance with that understanding of the legal position, could not go back on its representation of the legal position and declare the act performed illegal." Official Records, 215; Annex, 11.

In the present case, both the parties which have already extended their contiguous zone and those which have acquiesced would be estopped from objecting to an extension of the U.S. contiguous zone to 24 nautical miles. "The absence of protest may . . . in itself become a source of legal right inasmuch as it is related to—or forms a constituent element of—estoppel or prescription." Lauterpacht, *Sovereignty Over Submarine Areas*, 27 *Brit. Y.B. Int'l L.* 393–39. (19S0). The extensions were formal open state actions, monitored by many maritime states—and by the U.N. Secretariat, which disseminated the information to all member states. The eleven parties which extended their contiguous zone asserted a jurisdictional right over the vessels of the other parties and, with the acquiescing parties, contributed to the demise of the 12 nautical mile limit as actual or potential customary law. Given their conduct, for parties to invoke Article 24(2) against new contiguous zone extenders would be discriminatory and abuse the "good faith" element of *pacta sunt servanda*.

* * * *

Under all these approaches, the subsequent developments modify the operation or application of the treaty provision, not the treaty provision itself. *See, e.g.*, H. Briggs, 1 *ILC Yearbook* 165 (1966), and Statement of Netherlands, Official Records, 213, summarized Annex, 10. The distinction between modifying a treaty and modifying its effect may be unimportant except to avoid unnecessary doctrinal issues, such as the alleged principle of "formal parallelism" that "'modifications of a treaty at the domestic level should follow the same procedure as the original text." *See*, Statement of France, Official Records, 208–209, summarized Annex 7. In the case of law-stating treaties, the unmodified convention provision ceases to be internationally controlling; the new norm, as custom, becomes controlling for the parties. "At that stage, denunciation clauses, or other formal means provided for amending or terminating the convention will have become irrelevant; failure to invoke them produces inconclusive results, since the conventional rule is *ex hypothesi* no longer in force." Villager, at 215–216.

C. Arbitral and Judicial Precedent

The possibility of lawful change in the effect of a treaty, without formal textual amendment, is confirmed by substantial judicial and arbitral precedent.

In the *Case concerning the Temple of Preah Vihar*, 1962 ICJ Reports 6, 33–34, the I.C.J. held that Thailand had acquiesced by its conduct in a French map which placed the temple in Cambodia. The map "adopted an interpretation of the treaty settlement which caused the map line, in so far is it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty." The Court explained that it could have reached the same result were it to deal with the matter "as one solely of ordinary treaty interpretation."

In the *Case Concerning the Interpretation of the Air Transport Services Agreement*, (U.S. and France), XVI Reports of Int'l Arbitral Awards 6, 62–63 (1963) (Ago, President; Reuter and de Vries), the tribunal found that subsequent practice had given the United States a legal route right which could not be derived by interpreting the air transport agreement. It stated that a course of conduct "may in fact be taken into account not merely as a useful means for interpreting the Agreement, but also . . . as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the Parties and on the rights that each of them could properly claim."

In its *Namibia* advisory proceeding, 1971 ICJ Reports 16, 22, the I.C.J., despite Article 27(3) of the Charter which requires the "affirmative vote" of the permanent members, accepted an advisory opinion request made by the U.N. Security Council through a vote in which a permanent member abstained. The Court stated that "presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions."

In the *Case Concerning the Delimitation of the Continental Shelf*, (U.K. and France), XVII Reports of Int'l Arbitral Awards 3, 37 (1977)(Castren, President; Briggs, Gros, Ustor, Waldock), the Court recognized "the importance of the evolution of the law of

the sea which is now in progress and the possibility that a development in customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations." However, the Court rejected the contention of France that this had by then occurred with the 1958 Continental Shelf Convention.

D. The legal policy

The possibility that an obsolete treaty norm will lose its legal force meets the concern that use of conventions to codify and develop customary law would rigidify that law unduly, but does not introduce harmful instability. Villager, at 225; *see also* Rousseau, at 348–352. Law must adapt to the evolving needs of the international community. "It would clearly be rash to assume that international law in codified form, however great the care and effort with which it is prepared and drafted, will remain the most satisfactory solution of the problems with which it attempts to grapple, whatever changes may occur in international relationships." Thirlway, at 125. Amendment of a multilateral treaty is cumbersome and often impracticable for reasons which have nothing to do with the viability of a particular treaty norm. Requiring denunciation to escape one obsolete provision would unnecessarily destroy an otherwise valuable convention. Emergence of new custom and obsolescence of an inconsistent treaty rule require substantial open state practice and do not arise out of capricious action by one party over the objection of others. Dissenters have significant ability to preserve their customary law position from an emerging norm and even greater ability to protect their treaty position from loss through tacit agreement or estoppel.

E. Conclusion

Although one must be careful about the circumstances in which the principle is invoked, customary law permits the international legal effect or operation of a treaty provision to change through subsequent developments among the parties, particularly their acceptance of a customary norm inconsistent with a general norm stated by treaty.

This has occurred with regard to Article 24(2) of the 1958 Convention on the Territorial Sea and the Contiguous Zone: having accepted the new customary law norm and its enjoyment by those eleven parties which have already extended their contiguous zones beyond twelve miles, the parties are no longer legally in a position to invoke the convention's twelve mile language to bar similar action by another party.

Finally, should a party dispute our understanding of its position, the issue would be whether to refrain from exercising contiguous zone jurisdiction over its vessels, not whether to refrain from adopting that jurisdiction as a general matter.

II. Constitutional Issues

As a general matter, the President has "the power to determine how far this country will claim territorial rights in the marginal sea as against other nations." *United States v. Louisiana*, 363 U.S. 1, 35 (1960); *see also* Proclamation 5928, December 27, 1988 (extending the U.S. territorial sea to 12 nautical miles). *A fortiori*, the President has the power to extend a maritime jurisdiction under international law which is less than full sovereignty, such as the contiguous zone. This has been done by Presidential action with respect to the exclusive economic zone. Proclamation 5030, March 10, 1983.

The question has been raised, however, whether Article 24(2) of the 1958 Territorial Sea Convention limits the President's authority to extend the contiguous zone beyond 12 nautical miles. That it does not do so in present circumstances flows from two constitutional considerations: first, the President may unilaterally determine for the United States that Article 24(2) no longer binds the United States as a matter of international law; and second, a treaty provision's force in domestic law is generally no greater than its international law force.

A. Presidential Authority to Act on the International Plane

It is well-established that the President is "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320

(1936); *see also* 10 *Annals of Congress* 613 (1800) (Representative John Marshall) (President "the sole organ of the nation in its external relations, and its sole representative with foreign nations"), *rpt. in* 18 U.S. (5 Wheat.) Appendix note 1, at 26.

The President's constitutional authority to act for the United States in international relations includes the power to engage in state practice that contributes to or dissents from the establishment of customary norms, as well as the power to assess the customary norms relevant to United States action. As a leading scholar has stated,

> "It is principally the President, 'sole organ' of the United States in its international relations, who is responsible for the behavior of the United States in regard to international law, and who participates on her behalf in the indefinable process by which customary international law is made, unmade, remade. He makes legal claims for the United States and reacts to the claims of others; he performs acts reflecting views on legal questions and justifies them under the law, in diplomatic exchange, in judicial or arbitral proceedings, in international organizations or in the public forum."

L. Henkin, *Foreign Affairs and the Constitution* 188 (1972). His constitutional authority also includes significant power with relation to the operation of treaties. As Alexander Hamilton stated:

> "[The President's] power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive to decide upon the obligations of the country with regard to foreign nations. Hence . . . , treaties can only be made by the President and Senate jointly, but their activity may be continued or suspended by the President alone."

A. Hamilton, *Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793*, at 12–13 (Gideon ed. 1845). *But*

cf. Taylor v. Morton, 23 Fed. Cas. 784, 786 (C.C. Mass. 1855); 4 Moore, *Digest of International Law* 321 (1906) (quoting Jan. 2, 1791, letter of James Madison intimating that Senate must participate in decision to declare a treaty void).

* * * *

Acts in exercise of the foreign relations power may contribute to the modification or termination of a treaty provision. For example, when another party acts inconsistently with a treaty provision, it is the President who must determine whether it constitutes a material breach. Since such breach renders a treaty voidable but not void, a decision must also be made on the appropriate response under international law, e.g., suspension or termination of the agreement in whole or in part or acquiescence or waiver on behalf of the United States. It is settled that the President has the power to waive the right of the United States to terminate a treaty for breach by another party. *Charlton v. Kelly*, 229 U.S. 447, 474–76 (1913) . . . Implicit in this is the view that the executive can exercise the U.S. right rather than waive it. . . . If he acquiesces in general violations of the treaty by the other parties, this can have the effect of terminating the treaty obligation. *See* 5 Hackworth, *Digest of International Law* 340–41; 14 M. Whiteman, *Digest of International Law* 441 (1970).

> "The President is, of course, without authority, except by and with the advice and consent of the Senate, to modify a treaty provision. There are, however, instances in which he, acting through the Secretary of State, has tacitly acquiesced in action by foreign governments which had the effect of modifying stipulations in our treaties."

Memorandum of the Solicitor for the Department of State (Hackworth), Feb. 28, 1931, *quoted in* 5 Hackworth, *supra*, at 340.

The Court has also deferred to the executive branch in determining whether a treaty was abrogated due to the outbreak of war, *Clark v. Allen*, 331 U.S. 503, 508–09 (1947) . . . or was abrogated by the operation of law, due to the absorption of the other party into another state, *Terlinden v. Ames*, 184 U.S. 270

(1902) . . . Similarly, during World War II, the Attorney General ruled that the President had the authority to suspend or declare inoperative a peacetime treaty on the grounds of *rebus sic stantibus*. 40 *Op. Att'y Gen.* 119 (1941). As the Attorney General stated:

> "Attention to the observance of treaties is an executive responsibility. . . . The facts which bring into operation the right to declare the convention inoperative or suspended, are within the knowledge of and can be promptly and adequately appraised by the executive department; and it is proper that the President, as 'the sole organ of the nation in its external relations,' should speak for the nation in announcing action which international law clearly permits."

Id. at 123.

Another relevant and more routinely exercised aspect of the President's foreign affairs power is that the President has the initial and primary responsibility to interpret and apply treaty provisions. The President has submitted treaty construction issues to the Senate only in exceptional instances. S. Crandall, *Treaties, Their Making and Enforcement* 369 (2d ed. 1916). While courts may interpret treaty provisions in the context of cases properly before them, they have traditionally given great weight to the interpretations of the Executive Branch. *See Sullivan v. Kidd*, 254 U.S. 433 (1921); *Charlton V. Kelly*, 229 U.S. 447, 468 (1913); *Whitney v. Robertson*, 124 U.S. 190, 194–95 (1888); *Restatement* 326; L. Henkin, supra, at 167. Were the issue to arise before our courts, substantial deference would be given to the Executive Branch view that the 1958 Territorial Sea Convention was adopted as a law-stating treaty and was not intended to constitute a special regime, particularly given that no contrary interpretation was presented to the Senate during the ratification process. *See* Four Conventions and an Optional Protocol Formulated at the United Nations Conference on the Law of the Sea, Message of the President, Exec. J-N, 86th Cong. 2d Sess. (1959) (Conventions were mixture of codification of existing law and progressive development); Law of the Sea Conventions, Rpt. of the Senate Comm. on For. Rel.,

Exec. Rpt. No. 5, 86th Cong. 2d Sess. (1960); Conventions on the Law of the Sea, Hearings before the Senate Comm. on For. Rel., 86th Cong. 2d Sess. (1960) (testimony of Arthur Dean, head of U.S. delegation to UN Law of Sea Conference).

Thus, in the context of the contiguous zone extension, the President, as the "sole organ of the United States in its external relations," has the constitutional authority (1) to determine that customary international law now permits a 24 nautical mile contiguous zone, (2) to assess the intent of the 1958 Convention parties regarding the preservation of Article 24(2) as a special regime, (3) to acquiesce in conduct by other parties inconsistent with the wording of the 1958 Territorial Sea Convention, thereby leading to the termination of Article 24(2) by estoppel and (4) to decide that Article 24(2) no longer is operative under international law for the United States.

B. Treaties as Domestic Law

Article VI of the Constitution declares that treaties are among the "supreme law of the land." Although this provision appears largely to have been intended to ensure that the states abide by federal treaty obligations, see, S. Crandall, *Treaties, Their Making and Enforcement* 153 (2d ed. 1916); L. Henkin, *supra*, at 129, treaties are viewed as on a par with statutes, and, if self-executing, can be given direct effect by U.S. courts. Moreover, treaties are among the laws that the President must "faithfully execute." U.S. Constitution, Art. II, sec. 2; *see* Restatement (Third), at S 111, comment c . . .

The status of treaties as law of the land, however, does not mean that they are in all respects equivalent to statutes. Treaties are, at root, compacts among sovereigns. *Head Money Cases*, 112 U.S. 580, 598 (1884); Federalist No. 75. They become the law of the land through the combined action of the President and Senate—the "fourth branch of government" as Hamilton called it. *See* L. Henkin, *supra*, at 130. More importantly, their status as "law of the land" depends on their status as international law. Except perhaps with respect to treaties that create vested rights, "(a) rule of international law or an international agreement has no status as law of the United States if the United States is not in fact bound

by it: for example, . . . a provision in a treaty that is invalid or has been terminated or suspended." Restatement (Third), at S 111, comment b; *see also id.* at S 339, Reporters' Note 1; L. Henkin, supra, at 160. . . .

Based on these principles, it follows that, if Article 24(2) of the 1958 Territorial Sea Convention has been superseded on the international plane by a new rule of customary international law permitting a 24 nautical mile contiguous zone, then Article 24(2) no longer has effect as a law of the United States and need not be "faithfully executed" by the President. Henkin, *supra*, at 168 *note* (President's duty to see that treaties are faithfully executed ceases to apply if President terminates the treaty pursuant to his foreign affairs powers).

It is important to note that to reach this conclusion one need not reach the question of whether customary international law will supersede a statute. *See Paquete Habana*, 175 U.S. 677, 700 (1900) (only resort to customary international law if there is "no controlling executive or legislative act"). Treaty and custom both operate on the international plane and, on that plane, the customary norm can supersede the treaty norm; this terminates the domestic legal effects of the treaty because those effects are derivative of the treaty's status as binding under international law. In contrast, statutes derive their effect from independent action of domestic institutions. . . .

. . . It would be anomalous to have our domestic law on the obligations of the United States vis-a-vis other nations derive from but become more restrictive than our international law obligations. Where (i) the treaty has not created vested rights, (ii) the new rule of customary international law is clearly recognized as internationally controlling by the executive and (iii) there were no contrary assurances on which the Senate relied in granting advice and consent, there is no good reason to adopt a constitutional rule creating such an anomaly. . . .

C. Conclusion

In light of the international legal considerations set forth in the first section of this memorandum, Article 24(2) has lost its controlling effect internationally for the United States. The Constitution does

not provide Article 24(2) with independent continuing legal force and, therefore, does not require the President to refrain from exercising his foreign affairs power to extend the contiguous zone of the United States beyond the 12 nautical mile limit stated in that Article.

c. Status of treaties under domestic and international law

In a December 15, 1997, letter to the editor of the Wall Street Journal, eight former Legal Advisers of the Department of State replied to the view expressed in a November 17, 1997, letter that the United States was not legally obligated to pay its arrearages to the United Nations because its treaty obligations are not legally binding under U.S. law. The letter, from Abram Chayes, Leonard Meeker, Monroe Leigh, Herbert Hansell, Roberts Owen, Davis Robinson, Abraham Sofaer, and Conrad Harper, is set forth below in full.

As former Legal Advisers, we wish to reply to John R. Bolton's piece in the Wall Street Journal of November 17, 1997. In his piece, Mr. Bolton expresses his view that the United States is not legally obligated to pay its arrearages to the United Nations. We find that the piece fails to distinguish between obligations under U.S. law and obligations (including treaty obligations) under international law.

Mr. Bolton writes that "treaties have no special or higher status than other acts of Congress or, for that matter, than the U.S. Constitution." This is correct, as a matter of U.S. law. But what is lawful under U.S. law may not be lawful under international law. This is not because international law is "higher" than U.S. law, but because it imposes a separate set of obligations voluntarily undertaken and owed from one or more countries to other countries.

Mr. Bolton writes that "treaties are 'law' only for U.S. domestic purposes." "In their international operation, treaties are simply 'political' obligations," thus suggesting that treaty obligations may be set aside as mere matters of political discretion. This is a misconception. Contrary to Mr. Bolton's assertion, it is clear that treaties are legally binding in their international operation.

The United States government has demonstrated that it regards treaties as binding in their international operation. For example, when France and the Soviet Union refused in the early 1960s to pay their assessments for UN peacekeeping operations, the United States Department of State relied on the UN Charter, a treaty to which the United States is a party, when it challenged the legality of the French and Soviet withholdings. Article 17(2) of the UN Charter says that: "The expenses of the Organizations shall be borne by the Members as apportioned by the General Assembly." Citing this provision, the U.S. State Department asserted that "the [UN] General Assembly's adoption and apportionment of the Organization's expenses create a binding international legal obligation on the part of States Members to pay their assessed shares." (1979 Digest of United States Practice in International Law, p. 226). The State Department did not inquire whether French or Soviet domestic law excused the nonpayment of assessments. Nor did the International Court of Justice, which ruled (Advisory Opinion on Certain Expenses of the United Nations, 1962) that all members of the United Nations are legally bound by the Charter to pay their assessments.

Mr. Bolton also argues that "treaty obligations can be unilaterally modified or terminated by Congressional action." This is true only in the limited sense that a party to a contract retains the power to breach his contract and accept the legal consequences of his illegal act. Although international treaty law recognizes certain grounds for modifying or terminating treaty obligations, unilateral acts of domestic legislative bodies are not recognized, in themselves, as such.

We appreciate the opportunity to correct any misunderstanding which Mr. Bolton's piece may have created.

4. Reservation Practice and Related Issues

a. No-reservation clauses

The Senate Foreign Relations Committee has on a number of occasions expressed the view that the inclusion of articles

prohibiting reservations to treaties—"no-reservation clauses" —is inconsistent with the Senate's "constitutional prerogatives" relating to treaties.

For example Article XXII of the Chemical Weapons Convention (discussed in Chapter 18.C.1.) provides:

> The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose.

On April 24, 1997, in its resolution of advice and consent to ratification of the convention, the Senate included two conditions relating to this issue. 143 CONG. REC. S3570 (Apr. 24, 1997). *See also* S. Treaty Doc. No. 103-21 (1993). The first required the President to certify prior to deposit of the U.S. instrument of ratification that the United States had informed "all other States Parties to the Convention that the Senate reserves the right, pursuant to the Constitution of the United States, to give advice and consent to ratification of the Convention subject to reservations, notwithstanding Article XXII of the Convention."

In addition, the seventeenth condition made a number of findings concerning the Senate's role in giving advice and consent to treaties, which included one noting that "[d]uring the 85th Congress, and again during the 102d Congress, the Committee on Foreign Relations of the Senate made its position on this issue [of no-reservations clauses] clear when stating that 'the President's agreement to such a prohibition cannot constrain the Senate's constitutional right and obligation to give its advice and consent to a treaty subject to any reservation it might determine is required by the national interest.' " This condition also set forth the sense of the Senate that:

(i) the advice and consent given by the Senate in the past to ratification of treaties containing provisions which prohibit amendments or reservations should not be construed as a precedent for such provisions in future treaties;

(ii) United States negotiators to a treaty should not agree to any provision that has the effect of inhibiting the Senate from attaching reservations or offering amendments to the treaty; and

(iii) the Senate should not consent in the future to any article or other provision of any treaty that would prohibit the Senate from giving its advice and consent to ratification of the treaty subject to amendment or reservation.

In the 102nd Congress, referred to above, the Senate had voted its advice and consent to ratification of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, with Annexes, discussed in Chapter 13.A.4.a.(4)(ii), subject to one declaration. 142 CONG. REC. S7209 (June 27, 1996). The declaration provided:

> It is the Sense of the Senate that "no reservations" provisions as contained in Article 42 have the effect of inhibiting the Senate from exercising its constitutional duty to give advice and consent to a treaty, and the Senate's approval of this treaty should not be construed as a precedent for acquiescence to future treaties containing such a provision.

See also 90 Am. J. Int'l L. 647 (1996).

b. International Law Commission on Reservations to Treaties

(1) Preliminary conclusions of 1997

At the fifty-second session of the United Nations General Assembly in New York, October 27–November 7, 1997, the Sixth Committee (Legal) considered the report of the forty-ninth session of the International Law Commission ("ILC") in Geneva, May 12–July 18, 1997. U.N. Doc. A/52/10, available

at *www.un.org/law/ilc/reports/1997/97repfra.htm*. Among the issues considered were "Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties" contained in the ILC report; *see www.un.org/law/ilc/reports/1997/chap5.htm*.

The report of the Sixth Committee, U.N. Doc. A/52/648, available at *www.un.org/law/ga52.htm*, stated that "[t]here was general support [for the ILC view] that the regime established by the Vienna Convention on the Law of Treaties of 1969 regarding reservations should be maintained and is applicable to all treaties, including human rights treaties, despite certain ambiguities and lacunae. There was also discussion on the role of treaty-monitoring bodies."

Robert Dalton, Assistant Legal Adviser for Treaty Affairs, presented the views of the United States in support of the preliminary conclusions. A summary of his presentation, set forth below, was included in the summary record of the Sixth Committee on agenda item 147, November 4, 1997. U.N. Doc. A/C.6/52/SR.21. *See also* discussion of General Comment 24 in Chapter 6.B.3.

---

* * * *

20. Mr. Dalton (United States of America) said that his delegation welcomed the Commission's reaffirmation of the basic principles of treaty law in its preliminary conclusions. The flexible rules on reservations that had evolved since the advisory opinion of the International Court of Justice regarding the Convention on the Punishment and Prevention of the Crime of Genocide had enabled many States to accede to treaties and had thereby played a key role in the rapid development of international law. There was therefore no need to amend the Vienna regime and the Commission's work should take the form of a guide to practice rather than a new convention.

21. His delegation also agreed with the Commission's view that the legal reservations regime was unitary and that there could be no exceptions in the case of human rights. Where special regimes

might be applicable, for example in the cases covered by article 20, paragraphs 2 and 3, of the 1969 Vienna Convention, a special mechanism was provided.

22. Although human rights treaty monitoring bodies were entitled to formulate comments or recommendations regarding reservations, they nevertheless did not have the power to set aside a reservation or make legal determinations regarding the validity of a reservation. That was the prerogative of States, which must in any event abide by the obligations stemming from the treaties to which they were signatories.

23. Regional instruments could provide for exceptions to the reservations regime, on condition that they did so expressly.

* * * *

(2) Guide to Practice: 1999

On November 3, 1999, Assistant Legal Adviser for United Nations Affairs John H. Crook addressed the Sixth Committee (Legal) concerning the report of the 51st session of the ILC, as it related to reservations to treaties. In the 51st session of the ILC, held in Geneva, May 3–July 23, 1999, the Commission adopted draft guidelines pertaining to the first chapter of the Guide to Practice on Reservations to Treaties. The report of the 51st session, including the guidelines, U.N. Doc. No. A/54/10, is available at *www.un.org/law/ilc/reports/1999/english/99repfra.htm*.

Mr. Crook's remarks are excerpted below and are available in full at *www.state.gov/s/l/c8183.htm*.

---

* * * *

. . . [W]e welcome the Commission's adoption on first reading of 18 draft guidelines and commentaries designed to constitute the first chapter of its proposed Guide to Practice. . . .

It is interesting that in its presentation, the proposed Guide to Practice is different in its approach from the three Vienna Conventions dealing with the law of treaties. The rules contained

in those conventions' articles are what are important. The ILC's commentary may throw light on the meaning of particular Vienna Convention articles, but States seldom, if ever, look at that commentary before citing the Convention rule. With the Commission's guidelines, the contrary may be true. We suspect that States will be more likely to make use of the commentary than the guidelines themselves.

Professor Pellet and his colleagues on the Commission are to be congratulated for having marshaled an impressive array of published materials together with additional examples of state practice furnished by 22 governments. I am pleased that the United States was able to contribute to this effort. As a result, governments have a comprehensive view of state practice in respect of reservations for the first time since the drafting more than thirty years ago of the Vienna Convention on the Law of Treaties between States. This overview should be a valuable resource for States when they are drafting treaty provisions relating to reservations, declarations, and interpretative declarations; when considering the possibility of making reservations themselves; or when examining whether or not to respond to reservations or interpretative declarations made by other States.

The definitions that establish separate categories of statements that may be made by a State in respect of a treaty have the potential to shape State practice in the future if States see the guidelines as authoritative. This could lead the way to better analysis of the alternatives other than reservations by which a State may express its attitude to a treaty. The choice of a specific alternative described in the guidelines may persuade another State that it need not respond to a particular statement communicated to it by a bilateral treaty partner or circulated to it by the depositary of a multilateral treaty.

In this connection, Mr. Chairman, let me note that the United States has a practice of incorporating understandings in its instruments of ratification. In the practice of the United States an "understanding" is an interpretive statement for the purpose of clarifying or elaborating, rather than changing, the provisions of an agreement. Under the terms of Draft Guideline 1.4.4, which deals with general policy statements, it would appear that

understandings by the United States may fall outside the scope of the Guide to Practice. This is so because they do not purport to produce a legal effect on the treaty. Nevertheless, the commentary on the guideline may not be entirely clear. It may be well for this part of the Commentary to be considered further when the Commission turns to its second reading.

Mr. Chairman, I would like to thank the Commission for its willingness to include in Guideline 1.5 a discussion of the applicability of unilateral statements, including reservations, to bilateral treaties. As the commentary indicates, my Government has the most fully developed practice in this area, but other States also make interpretative declarations in respect of bilateral treaties. We believe that it is useful to include a provision on the subject within the Draft Guidelines.

* * * *

c. Conditions on entry into force of NATO accession protocols

As discussed in Chapter 7.C., the U.S. Senate included a number of declarations and conditions in its resolution of advice and consent to ratification of the Protocols to the North Atlantic Treaty of 1949 on the Accession of Poland, Hungary, and the Czech Republic. 144 CONG. REC. S4217 (May 4, 1998). On May 21, 1998, President William J. Clinton wrote to the Senate thanking the Senate for providing advice and consent to the protocols but commenting as follows on the resolution of ratification:

> The resolution of ratification that the Senate has adopted contains provisions addressing a broad range of issues of interest and concern, and I will implement the conditions it contains. As I have indicated following approval of earlier treaties, I will of course do so without prejudice to my authorities as President under the Constitution, including my authorities with respect to the conduct of foreign policy. I note in this connection that conditions in a resolution of advice and consent

cannot alter the allocations of authority and responsibility under the Constitution.

The full text of President Clinton's message is available at 34 WEEKLY COMP. PRESS. DOC. 938 (May 25, 1998) On the same day, in addition to the certification relating to the operations of NATO discussed in Chapter 7.C., President Clinton, in keeping with the Senate resolution, certified that the governments of Poland, Hungary, and the Czech Republic "are fully cooperating with United States efforts to obtain the fullest possible accounting of captured and missing U.S. personnel from past military conflicts or Cold War incidents, to include (A) facilitating full access to relevant archival material, and (B) identifying individuals who may possess knowledge relative to captured and missing U.S. personnel, and encouraging such individuals to speak with United States Government officials." 34 WEEKLY COMP. PRES. DOC. 940 (May 25, 1998).

d. Domingues v. Nevada

In 1998 the Supreme Court of Nevada affirmed the conviction and imposition of the death penalty on Michael Domingues for a murder committed when he was sixteen despite his arguments that his execution would violate the International Covenant on Civil and Political Rights ("ICCPR"), customary international law, and a *jus cogens* norm. *Domingues v. State*, 961 P.2d 1279 (Nev. 1998), *cert. denied, Domingues v. Nevada*, 528 U.S. 963 (1999). As discussed in Chapter 6.G.1.b., the U.S. brief opposing the grant of certiorari refuted, *inter alia,* Domingues' arguments that the U.S. reservation to Article 6(5) of the ICCPR was invalid as a matter of U.S. constitutional law and as a matter of the international law of treaties.

5. Depositary Functions

(1) U.S. views on changes to the text of the Rome Statute of the International Criminal Court

As depositary of the Rome Statute of the International Criminal Court, adopted at a United Nations diplomatic conference on July 17, 1998, the UN Secretary General informed states of certain proposed corrections to the original text of the statute by note dated September 25, 1998. In response, the U.S. Mission to the United Nations responded by diplomatic note, excerpted below, noting U.S. concerns and objections regarding the proposed changes. The United States participated in negotiating the Rome Statute and was entitled to become a party, but had declined to sign it at the time of this exchange. *See* Chapter 3.C.2.

The full text of the note is available as note 1 at *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp#N6.*

---

* * * *

First, the United States wishes to draw attention to the fact that, in addition to the corrections which the Secretary-General now proposes, other changes had already been made to the text which was actually adopted by the Conference, without any notice or procedure. The text before the Conference was contained in A/CONF.183/C.1/L.76 and Adds. 1–13. The text which was issued as a final document, A/CONF.183/9, is not the same text. Apparently, it was this latter text which was presented for signature on July 18, even though it differed in a number of respects from the text that was adopted only hours before. At least three of these changes are arguably substantive, including the changes made to Article 12, paragraph 2(b), the change made to Article 93, paragraph 5, and the change made to Article 124. Of these three changes, the Secretary-General now proposes to "re-correct" only Article 124, so that it returns to the original text, but the other changes remain. The United States remains concerned, therefore, that the corrections process should have been based on the text that was actually adopted by the Conference.

Second, the United States notes that the Secretary-General's communication suggests that it is "established depositary practice" that only signatory States or contracting States may object to a

proposed correction. The United States does not seek to object to any of the proposed corrections, or to the additional corrections that were made earlier and without formal notice, although this should not be taken as an endorsement of the merits of any of the corrections proposed. The United States does note, however, that insofar as arguably substantive changes have been made to the original text without any notice or procedure, as noted above in relation to Articles 12 and 93, if any question of interpretation should subsequently arise it should be resolved consistent with A/CONF.183/C.1/L.76, the text that was actually adopted.

More fundamentally, however, as a matter of general principle and for future reference, the United States objects to any correction procedure, immediately following a diplomatic conference, whereby the views of the vast majority of the Conference participants on the text which they have only just adopted would not be taken into account. The United States does not agree that the course followed by the Secretary-General in July represents "established depositary practice" for the type of circumstances presented here. To the extent that such a procedure has previously been established, it must necessarily rest on the assumption that the Conference itself had an adequate opportunity, in the first instance, to ensure the adoption of a technically correct text. Under the circumstances which have prevailed in some recent conferences, and which will likely recur, in which critical portions of the text are resolved at very late stages and there is no opportunity for the usual technical review by the Drafting Committee, the kind of corrections process which is contemplated here must be open to all.

In accordance with Article 77, paragraph 1 (e) of the 1969 Vienna Convention on the Law of Treaties, the United States requests that this note be communicated to all States which are entitled to become parties to the Convention.

(2) United States as depositary

The Office of Treaty Affairs in the Office of the Legal Adviser is responsible for functions connected with the U.S. role as depositary for multilateral treaties. As of the end of 1999, the United States was designated as depositary for treaties

in the following categories: Antarctica, Atomic Energy, Civil Aviation, Biological Weapons, Finance, Fisheries, North Atlantic Treaty, Nuclear Weapons, Peace, Pollution, Satellite Communications, Outer Space, Telecommunications, United Nations, Wills, and the World Meteorological Organization. A full list as of 1999 is available at *www.state.gov/s/c8183.htm*.

6. Succession

a. Breakup of the USSR

After the collapse of the Union of Soviet Socialist Republics in 1991, discussed in Chapter 9.B.2., questions arose regarding the impact that the dissolution would have on the bilateral and multilateral treaty agreements of the former Soviet Union. In December 1991 all of the successor states except Georgia agreed to establish the Commonwealth of Independent States ("CIS") and to "guarantee in accordance with their constitutional procedures the discharge of the international obligations deriving from treaties and agreements concluded by the former Union of Soviet Socialist Republics . . ." Armenia-Azerbaijan-Belarus-Kazakhstan-Kyrgyzstan-Moldova-Russian Federation-Tajikistan-Turkmenistan-Uzbekistan-Ukraine: Agreements Establishing the Commonwealth of Independent States, Done at Minsk, Dec. 8, 1991, and Done at Alma Ata, Dec. 21, 1991, *reprinted at* 31 I.L.M. 138, 149 (1992). Georgia joined the CIS in December 1993, bringing the CIS to twelve members.

In a speech to the American Society of International Law, April 1, 1992, Edwin D. Williamson, Legal Adviser of the U.S. Department of State, discussed issues of state succession in the breakup of the Soviet Union. Excerpts below address aspects related to treaty succession. *See also* Edwin D. Williamson and John E. Osborn, A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia, 33 Va. J. Int'l L. 261 (1993).

The full text of Mr. Williamson's April 1992 speech is available at *www.state.gov/s/l/c8183.htm*.

The breakup of the Soviet Union has presented our office with a host of fascinating issues. None are more compelling, at least as a theoretical legal matter, than the question of succession to treaty rights and obligations by the now-independent former republics. Indeed, given the unsettled nature of international law as to treaty succession—indeed, one might say the lack of it—it may well be that international practice in connection with the dissolution of the Soviet Union will prove to be critical to the future shape of the law. Today I would first like to give you a sense of some of the considerations that have gone into the formulation of our legal position on treaty succession and on several related issues, and then briefly review some of the policy consequences of this legal position.

Some international legal sources have adopted bright-line tests to determine whether or not states succeed to the rights and obligations of pre-existing treaties. The 1978 Vienna Convention on Succession of States in Respect of Treaties (which the United States has not signed and which has not entered into force) provides that former colonies (and other territories dependent upon a dominant state for the conduct of foreign policy) are entitled to a "clean slate" upon attaining their independence, but that all other states are bound to the treaties of their predecessor. The Third Restatement of the Law on Foreign Relations specifically rejects this approach, favoring instead a "clean slate" for all new states, regardless of whether or not they were dependent colonies.

State practice

We considered these sources in the course of our analysis but, given the absence of a governing multilateral treaty on state succession, we have looked principally to state practice to inform our views on this subject. As you are all aware, there are divergent approaches that have been employed with respect to treaty succession in this century. As a general matter, state practice may be viewed as falling along a continuum. At one end of this continuum, where a portion of the state breaks away from the primary, predecessor state, the practice tends to support a "clean

slate" approach. At the other extreme, where a state divides into its constituent parts, the practice supports the continuity of existing treaty rights and obligations.

Examples of the breakup of states in which continuity of treaty obligations followed include the following:

— The greater Colombian Union, formed between 1820 and 1830, which later dissolved into Colombia, Ecuador and Venezuela.
— The Union of Norway and Sweden, dissolved in 1905.
— The separation of Austria and Hungary in connection with the dissolution of the Austro-Hungarian empire after World War I.
— The separation of Syria from Egypt in connection with the dissolution of the United Arab Republic.

In each such case, although there were exceptions, the general practice was to treat the newly emerging states as bound by the terms of the existing treaties entered into by their predecessor unions.

In contrast, in the wake of the following separations, the practice of the majority of states has been to treat the newly emerging state as having a "clean slate" to establish anew the terms of their treaty relationships:

— The secession of Panama from Colombia in 1903 (though France did not accept the view of the U.S. and the UK that Panama was not bound by Colombia's treaties).
— The secession of Finland from the Soviet Union after World War I.
— The separation of Poland and Czechoslovakia from the Austro-Hungarian empire after World War I (though, as noted above, the "core" states of Austria and Hungary were deemed to succeed to the existing treaty rights and obligations).
— The secession of Pakistan from India in 1947 (though it was held to certain treaty terms under a devolution agreement).

Rationale for and impact of rules

We believe that U.S. interests in maintaining the stability of legal rights and obligations are, on balance, better served by adopting a presumption that treaty relations remain in force.

This is consistent with our efforts to foster respect for the rule of law around the world. In the broadest sense, therefore, we would favor the development of international legal principles that foster stability of legal rights and obligations. When this principle is applied to specific circumstances that arise from the establishment of new states in the late twentieth century, the desirability of maintaining existing treaty arrangements becomes readily apparent. Indeed, notwithstanding the clear applicability of the "clean slate" rule, the complex web of treaty relationships now extant has led many former colonies to adhere to the treaties of their predecessors under the terms of devolution agreements. Moreover, such adherence is especially vital to our own national security when the treaty obligations at issue concern arms control and nuclear weapons issues, as is true with respect to the former republics.

In sum, while we recognize that the law in this area is somewhat unsettled, we have decided that the better legal position is to presume continuity in treaty relations between the United States and the former republics. In other words, as a general principle, agreements between the United States and the USSR that were in force at the time of the dissolution of the union will be presumed to continue in force as to the former republics.

What is the legal basis for adopting this position? Except for the Baltic States, which we never recognized as part of the Soviet Union, we regard the concurrent emergence of Russia and the other former republics to have stemmed from what was essentially the complete breakup of the union. Thus, continuity of treaty relations is supported by our reading of state practice, and by the policy considerations underlying this rule. Perhaps most importantly, continuity has been supported by the republics themselves, who affirmed this approach in the Alma Ata declaration when they guaranteed the "fulfillment of international obligations stemming from the treaties and agreements of the former U.S.S.R."

This approach will not lead to the continuation in force of all agreements with all republics. There would be exceptions even under a strict rule of continuity, such as where the agreement is relevant only to the territory of one republic, or if it is simply not feasible to continue a particular agreement on its terms. The parties may, in any event, terminate a treaty by consensual agreement, or by unilateral action in accordance with its terms. Nevertheless, a presumption of continuity helps to preserve what is, by and large, a useful legal framework for the conduct of relations, and neither the United States nor the republics have the time and resources to renegotiate such a framework.

Application to specific treaties

It is generally advantageous, for example, for all republics to continue as parties to multilateral agreements of general application to all states. This would include agreements on law enforcement matters, including the major anti-terrorism and narcotics treaties; the major conventions on armed conflict, such as the 1949 Geneva conventions; the major environmental treaties, such as those on endangered species and marine pollution; nuclear agreements not giving special status to the USSR, including the IAEA statute and the Physical Protection Convention; and arms control agreements not giving special status to the USSR, including the Biological Weapons Convention, the Geneva Gas Protocol, the Limited Test Ban Treaty, and the Seabed Treaty, as well as to agreements creating international organizations where the USSR is not given special status, such as those for WHO, IMO, ILO, UNIDO and WMO.

It is also advantageous to continue bilateral agreements establishing general rules for relations of general application, such as agreements governing diplomatic and consular relations, including those relating to diplomatic properties and privileges and immunities and the issuance of visas; agreements on narcotics trafficking and Nazi war criminals; and agreements on atomic energy and various forms of cooperation.

Exceptions to continuity

As I noted earlier (and as the Vienna Convention recognizes), however, even under a rule of continuity there are agreements as to which continuation in force with a new state, either on the same terms as the original party or at all, would be inappropriate. The most obvious case would be where continuity would be inconsistent with the nature of the treaty regime or object and purpose of the treaty. Other exceptions to continuity exist for (1) agreements relating specifically to territory in or under the control of one or another republic (e.g., aviation agreements establishing routes, certain fisheries agreements); (2) agreements which allocate quotas or rights on the premise that the former USSR is a single territory (e.g., the bilateral textile agreement and CAFE); and (3) agreements which are relevant only to those republics with certain nuclear or military capacity.

Approach with the republics

As a practical matter, given the unsettled nature of the governing legal rules and the diversity of agreements in question, we believe that the only way to establish clearly with the republics what agreements remain in force is on an explicit, case-by-case basis. During the coming months, we expect to engage each republic in bilateral discussions to confirm which of the bilateral agreements will continue in force, and to determine which should be modified or terminated. In the interim, we continue to regard the various agreements as generally continuing in force with all of the republics until we have made a clear determination to the contrary.

(1) Russian Federation

> In a diplomatic note of January 13, 1992, the Ministry of Foreign Affairs of the Russian Federation requested heads of diplomatic missions in Moscow to inform their governments that the Russian Federation would continue to carry out

obligations under international treaties concluded by the U.S.S.R., and that the Government of the Russian Federation would perform the functions of the depositary for corresponding multilateral agreements in place of the Government of the U.S.S.R. *See* telegram from the American embassy in Moscow to the Department of State, telegram No. 01654, dated January 17, 1992, available at *www.state.gov/s/l/c8183.htm; see also II Cumulative Digest* 1981–1988 at 1936–37.

(2) Ukraine

As noted above, the United States held discussions with technical experts of various successor states regarding succession to bilateral treaties between the United States and the USSR. In resolving questions of succession with Ukraine, the two governments agreed, by an exchange of notes between the American Embassy at Kiev and the Ukraine Ministry of Foreign Affairs in May 1995, to continue in force thirty-eight bilateral treaties set out in an annex to their respective notes. Excerpts from the text of the embassy's note No. 420/95 are set forth below. *See also* 89 Am. J. Int'l L. 761 (1995).

---

* * * *

In conducting their discussions, the experts took as a point of departure the continuity principle set forth in Article 34 of the Vienna Convention on Succession of States in Respect of Treaties.* In examining the texts they found that certain treaties to which

---

* Editor's note: Article 34 of the UN Convention on the Succession of States in Respect of Treaties, Aug. 23, 1978, reads:

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

the principle applied had since expired by their terms. Others had become obsolete and should not be continued in force between the two countries. Finally, after a treaty-by-treaty review, which included an examination of the practicability of the continuance of certain specific treaties, they recommended that our two Governments agree no longer to apply those treaties.

In light of the foregoing, the Embassy proposes that, subject to [the] condition that follows, the United States of America and Ukraine confirm the continuance in force as between them of the treaties listed in the Annex to this note.

Inasmuch as special mechanisms have been established to work out matters concerning succession to bilateral arms limitation and related agreements concluded between the United States and the former Union of Soviet Socialist Republics, those agreements were not examined by the technical experts. Accordingly, this note does not deal with the status of those agreements and no conclusion as to their status can be drawn from their absence from the list appearing in the Annex.

With respect to those treaties listed in the Annex that require designations of new implementing agencies or officials by Ukraine, the United States understands that Ukraine will inform it of such designations within two months of the date of this note.

If the foregoing is acceptable to the Government of Ukraine, this note and the Ministry's note of reply concurring therein shall constitute an agreement between our two Governments which shall enter into force on the date of receipt by the Embassy of the Ministry's note in reply.

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

In its reply, the Ministry of Foreign Affairs confirmed that the Embassy's note was acceptable to the Government of Ukraine and that the Embassy's note and the Ministry's note of reply "shall constitute an agreement on this issue between our two Governments which shall enter into force on the date of receipt by the Embassy of the Ministry's note of reply." May 15, 1995 Telegram from the American Embassy Kiev to Department of State, No. 5960 (May 19, 1995), available at *www.state.gov/s/l/c8183.htm*.

The annex listed thirty-eight agreements, including agreements dealing with such matters as problems arising during World War II, deep seabed areas, cooperation to combat illegal traffic in narcotics, scientific and technical cooperation, and reactions to emergencies.

(3) Succession to ABM treaty

One treaty that attracted particular attention in the context of succession was the Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, TIAS No. 7503. ("ABM Treaty"), signed on May 26, 1972, by President Richard M. Nixon and General Secretary of the Central Committee of the Communist Party of the Soviet Union L.I. Brezhnev. A companion interim agreement putting a moratorium on the acquisition or production of strategic offensive systems was signed on the same date. Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms ("Interim Agreement"), May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3462, T.I.A.S. No. 7504. The ABM Treaty and the Interim Agreement are known as the SALT I Accords.

On October 9, 1992, ten of the member states of the CIS signed a resolution in Bishkek, Kyrgyzstan, specifically asserting their succession to the Soviet Union's rights and obligations under the ABM Treaty.

(i) Negotiation of Memorandum of Understanding on Succession

Five years later, the United States and the four former Soviet Republics in which facilities referenced in the ABM Treaty were located—Belarus, Kazakhstan, Russia, and Ukraine—signed the Memorandum of Understanding Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, Sept. 26, 1997 ("Memorandum of Understanding on Succession" or "MOUS"). The MOUS would have established that the parties to the ABM Treaty were the United States, Belarus, Kazakhstan, the Russian Federation, and Ukraine. For the purposes of the MOUS and the ABM Treaty, the latter four states were referred to as the USSR successor states.

Pursuant to the MOUS provisions, the USSR successor states would have collectively assumed the rights and obligations of the USSR. This meant that only a single ABM deployment area would have been permitted among the four successor states. Furthermore, given the limit of 15 ABM launchers at ABM test ranges permitted for the USSR, 15 would have been collectively permitted under the MOUS. As discussed below, however, the MOUS never entered into force.

The full text of the MOUS, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

The United States of America, and the Republic of Belarus, the Republic of Kazakhstan, the Russian Federation and Ukraine, hereinafter referred to for purposes of this Memorandum as the Union of Soviet Socialist Republics (USSR) Successor States,

Recognizing the importance of preserving the viability of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, hereinafter referred to as the Treaty, with the aim of maintaining strategic stability,

Recognizing the changes in the political situation resulting from the establishment of new independent states on the territory of the former USSR,

Have, in connection with the Treaty, agreed as follows:

* * * *

Article III
Each USSR Successor State shall implement the provisions of the Treaty with regard to its territory and with regard to its activities, wherever such activities are carried out by that State, independently or in cooperation with any other State.

* * * *

Article V
A USSR Successor State or USSR Successor States may continue to use any facility that is subject to the provisions of the Treaty and that is currently located on the territory of any State that is not a Party to the Treaty, with the consent of such State, and provided that the use of such facility shall remain consistent with the provisions of the Treaty.

Article VI
The USSR Successor States shall collectively be limited at any one time to a single anti-ballistic missile (ABM) system deployment area and to a total of no more than fifteen ABM launchers at ABM test ranges, in accordance with the provisions of the Treaty and its associated documents, including the Protocols of July 3, 1974.

Article VII
The obligations contained in Article IX of the Treaty and Agreed Statement "G" Regarding the Treaty shall not apply to transfers between or among the USSR Successor States.

* * * *

(ii) U.S. domestic issues

The Senate acted on several occasions during the negotiation of the MOUS to require that the MOUS be submitted for advice and consent to ratification by the Senate. Section 232(a)

of the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103–337, 108 Stat. 2663 (1994), provided:

> Requirement for Use of Treaty Making Power.—The United States shall not be bound by any international agreement entered into by the President that would substantively modify the ABM Treaty unless the agreement is entered pursuant to the treaty making power of the President under the Constitution.

In signing Pub. L. No. 103–337 into law, President William J. Clinton took issue with this provision, stating that "section 232, relating to modifications to the Anti-Ballistic Missile Treaty, cannot restrict the constitutional options for congressional approval of substantive modifications of treaties." 30 WEEKLY COMP. PRES. DOC. 1955 (Oct. 5, 1994).

In May 1996 the Senate included a similar provision in S. 1745, National Defense Authorization Act for Fiscal Year 1997. Section 233(a) of the bill would have added specifically that international agreements to which the United States was not to be bound "include[ed] any agreement that would add one or more countries as signatories to the [ABM] treaty or would otherwise convert the treaty from a bilateral treaty to a multilateral treaty."

A June 26, 1996, memorandum prepared by the Office of Legal Counsel, U.S. Department of Justice, determined that there were "serious doubts about the constitutionality of section 233(a), given that it intrudes on two exclusively Executive prerogatives: the power to interpret and execute treaties, and the power of recognition." Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to the Counsel to the President re: Constitutionality of Legislative Provision Regarding ABM Treaty. The provision was not included in the final text of the law, Pub. L. No. 104–201.

Excerpts from the memorandum follow. The full text is available at: *www.usdoj.gov/olc/abmjq.htm*.

---

* * * *

Section 233(a) raises serious constitutional questions. It is "a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, No. 94–1966, slip op. at 7 (U.S. June 3, 1996); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986). It follows that Congress may not hamper or curtail the prerogatives that the Constitution commits exclusively to the Executive branch. *See Morrison v. Olson*, 487 U.S. 654, 694 (1988); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). We have serious doubts about the constitutionality of section 233(a), given that it intrudes on two exclusively Executive prerogatives: the power to interpret and execute treaties, and the power of recognition.

1. The dissolution of the former Soviet Union during the autumn and winter of 1991 required the United States to re-evaluate the bilateral treaties that had existed between the Soviet Union and itself, including the ABM Treaty. (footnote omitted) Both President Bush and President Clinton operated on the general principle that the treaty rights and obligations of the former Soviet Union had passed to the successor States, (footnote omitted) unless the terms or the object and purpose of the treaty required a different result. As the Legal Adviser to the State Department during the Bush Administration explained,

> [a]s an operating principle, agreements between the United States and the USSR that were in force at the time of the dissolution of the Soviet Union have been presumed to continue in force with respect to the former republics. What is the legal basis for adopting this position? Except for the Baltic states, which the United States never recognized as part of the Soviet Union, we regarded the emergence of Russia and the other former republics to have stemmed from what was essentially the complete breakup of the Soviet Union. Thus, continuity of treaty relations is supported by our reading of state practice, and by policy considerations underlying this rule. Perhaps most importantly, however, continuity has been supported

> by the republics themselves, who affirmed this approach in the Alma Ata Declaration when they guaranteed the "fulfillment of international obligations stemming from the treaties and agreements of the former U.S.S.R."

Edwin D. Williamson and John E. Osborn, A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Break-up of the USSR and Yugoslavia, 33 Va. J. Int'l L. 261, 264–65 (1993).

Congress was well aware that the Executive branch was conducting discussions with Russia and several other successor States regarding their rights and obligations under the ABM Treaty, and it twice "urged" the President to pursue such discussions on particular topics. *See* Missile Defense Act of 1991, Pub. L. No. 102–190, § 233(c), 105 Stat. 1321, 1322, reprinted as note to 10 U.S.C. § 2431; National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103–160, § 232(c), 107 Stat. 1547, 1593.

The United States' presumption that the successor States are generally subject to our bilateral treaties with the former Soviet Union is rooted, not only in the United States' past diplomatic practice, but in its understanding of international law. In a May 10, 1995 diplomatic note to the Government of Ukraine, the United States took as its point of departure the "continuity principle" of article 34 of the Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 17 I.L.M. 1488, 1509, which reads in relevant part:

> 1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed . . .

The State Department informs us that the resolution of succession questions after the dissolution of a State has been

regarded as a function of the Executive branch, and that many executive agreements have been concluded that recognized the succession of new States to the treaty rights and obligations of their predecessors. Furthermore, the State Department advises us, such agreements have not been regarded as treaty amendments or as new treaties requiring Senate advice and consent, but rather as the implementation of existing treaties.

2. It belongs exclusively to the President to interpret and execute treaties. This is a direct corollary of his constitutional responsibility to "take care" that the laws are faithfully executed. *See* U.S. Const. art. II, § 3; *Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring in judgment) (President has "duty to execute" treaty provisions). (footnote omitted) As the Congressional Research Service has stated, "[t]he executive branch has the primary responsibility for carrying out treaties and ascertaining that other parties fulfill their obligations. . . . The executive branch interprets the requirements of an agreement as it carries out its provisions." Treaties and Other International Agreements: The Role of the United States Senate, S. Rpt. No. 53, 103d Cong., 1st Sess. xxiv–xxv (Comm. Print 1993).

The responsibility to interpret and carry out a treaty necessarily includes the power to determine whether, and how far, the treaty remains in force. . . . [Moreover], "[u]nder the law of the United States, the President has the power . . . to elect in a particular case not to suspend or terminate" a treaty. [Restatement (Third) of the Foreign Relations Law of the United States § 339(c) (1987)]. Accordingly, in circumstances in which a State that was a party to a bilateral treaty with the United States has been dissolved, the President must determine, in executing the treaty, whether and how far it remains in force, whether another State or States has or have succeeded to it, and whether their actions do or do not constitute compliance with its terms. In this instance, the President has determined that the ABM Treaty's obligations should be imputed to the Soviet Union's successor States, including Russia. Congress may not interfere with or direct the President's interpretation and execution of a treaty any more than it may do so in

the case of a statute. Under the proposed legislation, however, Congress appears to be impermissibly interfering in the President's discharge of those responsibilities with respect to the ABM Treaty, thus violating separation of powers principles. *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

We are aware that the Senate Committee on Foreign Relations, in its Report on the Intermediate Range Nuclear Forces (INF) Treaty, maintained that it is a constitutional requirement that "[t]he meaning of a treaty is to be determined in light of what the Senate understands the Treaty to mean when it gives its advice and consent." Treaties and Other International Agreements: The Role of the United States Senate, S. Rpt. No. 53, at 95. While we have not been able to review the entire record of the Senate's ratification of the ABM Treaty, we would point out that the treaty was adopted against a background of diplomatic practice by the United States and other nations, and that "where a state divides into its constituent parts, the [diplomatic] practice supports the continuity of existing treaty rights and oibligations." Although the dissolution of the Soviet Union was not likely to have been contemplated when the ABM Treaty was ratified, insofar as the Senate may be taken to have had an understanding of what the treaty would mean in such circumstances, that understanding would have been informed by the pattern of diplomatic practice in similar contingencies. Thus, we do not believe that the Executive branch's interpretation of the ABM Treaty contradicts the Senate's understanding at the time of ratification.

The Senate Foreign Relations Committee also maintained that it is constitutionally required that "[t]he President may not amend a treaty without the agreement of the parties and the advice and consent of the Senate." Treaties and Other International Agreements: The Role of the United States Senate, S. Rpt. No. 53, at 95. Section 233(a) appears to be designed to apply this principle to the ABM Treaty, by deeming "any agreement that would add one or more countries as signatories to the treaty or [that] would otherwise convert the treaty from a bilateral treaty to a multilateral treaty" to constitute a "substantive[] modif[ication]" of the treaty.

We would take issue with the proposition that the inclusion of other Soviet successor States along with the United States

and Russia as parties to the ABM Treaty would necessarily comprise a substantive modification of that treaty, such as to require Senate advice and consent. We think this in part because of the international law and general diplomatic practice regarding successorship, and in part because, even without the addition of Ukraine, Belarus, Kazakhstan, and possibly other successor States, the ABM Treaty will remain in effect as between the United States and Russia. Thus, although some changes in the administration of the ABM Treaty may be entailed by the inclusion of other successor States as parties, we do not see why their inclusion must be considered a matter of "substantively modifying," as distinct from "interpreting" and "implementing," the treaty. If the changes do not rise to the level of substantive modifications, then to insist that the proposed executive agreements be submitted to the Senate for its advice and consent would appear to intrude on the President's exclusive authority to interpret and implement treaties.

* * * *

3. Section 233(a) also raises a serious constitutional question with respect to the President's recognition power.

It is by now firmly established that the power of recognition is exclusively Executive in character. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."). . . . A Presidential decision to recognize, or not to recognize, a foreign State or government is binding upon the other organs of the Federal Government: for instance, "[i]t has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue." *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 319–20 (1978). In sum, the President's recognition authority is not only exclusive, but broad.

The question of determining which States are the "successors" to a State that, like the former Soviet Union, has been completely

dissolved, is a matter for the President alone to determine in the exercise of his recognition authority. Moreover, we believe, in determining which States are the successors of a dissolved State, the President may also determine which of the successors are bound by the former State's treaty obligations towards the United States, and the extent to which they are so bound. The power to recognize newly emergent States formed from a State's dissolution thus encompasses the power to determine the treaty consequences of their successorship to the parent State.

One of the elements of the recognition of these newly emergent States was and is their succession to applicable Soviet treaties. By purporting to determine that the addition of these successor States to the ABM Treaty would constitute an amendment to that treaty requiring the advice and consent of two-thirds of the Senate, the proposed legislation would act in derogation of the President's recognition power. Because the recognition power is exclusively Presidential, it is doubtful that Congress may take that step.

On May 14, 1997, the Senate again addressed this issue through a condition to its advice and consent to ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe of November 19, 1990 ("CFE Flank Document"). 143 CONG. REC. S4476. *See* Chapter 18.B.3.b. Condition 9 was entitled "Senate prerogatives on multilateralization of the ABM Treaty." After referring to § 232 of Pub. L. No. 103–337, *supra*, and to language included in the conference report accompanying Pub. L. No. 104–201, condition 9 provided as follows:

> (B) Certification required.—Prior to the deposit of the United States instrument of ratification [to the CFE Flank Document], the President shall certify to the Senate that he will submit for Senate advice and consent to ratification any international agreement—

(i) that would add one or more countries as States Parties to the ABM Treaty, or otherwise convert the ABM Treaty from a bilateral treaty to a multilateral treaty; or
(ii) that would change the geographic scope or coverage of the ABM Treaty, or otherwise modify the meaning of the term "national territory" as used in Article VI and Article IX of the ABM Treaty.

On May 15, 1997, President Clinton transmitted a message to the Senate objecting to aspects of the imposition of conditions in the resolution of ratification as inconsistent with his Constitutional authorities. 143 CONG. REC. S4587. Nevertheless, he stated his intent to implement the conditions without prejudice to his Constitutional authorities. The message is excerpted below.

---

* * * *

I am gratified that the Senate has given its advice and consent to the ratification to the CFE Flank Document . . .

I must, however, make clear my view of several of the Conditions attached to the resolution of advice and consent to ratification, including Conditions 2, 3, 4, 6, 7, 9 and 11. These Conditions all purport to direct the exercise of authorities entrusted exclusively to the President under our Constitution, including for the conduct of diplomacy and the implementation of treaties. The explicit limitation on diplomatic activities in Condition 3 is a particularly clear example of this point. As I wrote the Senate following approval of the Chemical Weapons Convention, a condition in a resolution of ratification cannot alter the allocation of authority and responsibility under the Constitution. I will, therefore, interpret the Conditions of concern in the resolution in a manner consistent with the responsibilities entrusted to me as President under the Constitution. Nevertheless, without prejudice to my Constitutional authorities, I will implement the Conditions in the resolution.

Condition (9), which requires my certification that any agreement governing ABM Treaty succession will be submitted to the Senate for advice and consent, is an issue of particular concern not only because it addresses a matter reserved to the President

under our Constitution, but also because it is substantively unrelated to the Senate's review of the CFE Flank Document. It is clearly within the President's authorities to determine the successor States to a treaty when the original Party dissolves, to make the adjustments required to accomplish such succession, and to enter into agreements for this purpose. Indeed, throughout our history the executive branch has made a large number of determinations concerning the succession of new States to the treaty rights and obligations of their predecessors. The ABM Succession MOU negotiated by the United States effectuated no substantive change in the ABM Treaty requiring Senate advice and consent. Nonetheless, in light of the exceptional history of the ABM Treaty and in view of my commitment to agree to seek Senate approval of the Demarcation Agreements associated with the ABM Treaty, I have, without prejudice to the legal principles involved, certified, consistent with Condition (9), that I will submit any agreement concluded on ABM Treaty succession to the Senate for advice and consent.

The certification referred to in relation to condition 9 was included in reports to both the House and Senate relating to a number of conditions, available at 143 CONG. REC. S4587 and H2697 (May 15, 1997). The issue was mooted by the decision of President George W. Bush to withdraw from the ABM Treaty. *See Digest 2001* at 829–33.

b. Reunification of Germany

In conjunction with the reunification of Germany, on April 22, 1991, delegations of the Federal Republic of Germany and the United States of America held consultations regarding agreements that had been entered into between the United States and the German Democratic Republic ("GDR"). At the conclusion of the meeting, representatives of the two delegations signed a protocol, excerpts of which appear below. *See also* 85 Am. J. Int'l L. 539 (1991), which includes the list of terminated agreements from the annex referenced below.

---

* * * *

The German side emphasized the significance that it attached to Article 12 of the Treaty of August 31, 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (Unification Treaty)* which had been notified to the United States of America.

In the course of the consultations the delegations noted that most of the international agreements between the United States and the German Democratic Republic had expired in accordance

---

* Editors' footnote: Article 11 and 12 of the Treaty on the Establishment of German Unity (Unification Treaty), Aug. 31, 1990, 30 I.L.M. 463, 471–72 (1991), provided as follows:

Article 11
Treaties of the Federal Republic of Germany
The Contracting Parties proceed on the understanding that international treaties and agreements to which the Federal Republic of Germany is a contracting party, including treaties establishing membership of international organizations or institutions, shall retain their validity and that the rights and obligations arising therefrom, with the exception of the treaties named in Annex 1, shall also relate to the territory specified in Article 3 of this Treaty. Where adjustments become necessary in individual cases, the all-German Government shall consult with the respective contracting parties.

Article 12
Treaties of the German Democratic Republic
(1) The Contracting Parties are agreed that, in connection with the establishment of German unity, international treaties of the German Democratic Republic shall be discussed with the contracting parties concerned with a view to regulating or confirming their continued application, adjustment or expiry, taking into account protection of confidence, the interests of the states concerned, the treaty obligations of the Federal Republic of Germany as well as the principles of a free, democratic basic order governed by the rule of law, and respecting the competence of the European Communities.

(2) The united Germany shall determine its position with regard to the adoption of international treaties of the German Democratic Republic following consultations with the respective contracting parties and with the European Communities where the latter's competence is affected.

(3) Should the united Germany intend to accede to international organizations or other multilateral treaties of which the German Democratic Republic but not the Federal Republic of Germany is a member, agreement shall be reached with the respective contracting parties and with the European Communities where the latter's competence is affected.

with international law on October 3, 1990 with the unification of Germany. A list of those agreements appears in the Annex.

The delegations further agreed that three agreements required reference to experts. As to the first of these, the agreement regarding inspections on the territory of the German Democratic Republic under the treaty of December 8, 1987 on the elimination of intermediate-range and shorter-range missiles, the German delegation made reference to Article[s] 3 and 11 and to Annex I, Chapter I, Section I, paragraph 10 of the Unification Treaty. The other agreements requiring examination by experts are the agreement concerning trade in certain steel products signed on November 21, 1989 and the arrangements with respect to property in Berlin concluded between the United States and the German Democratic Republic late in 1987.

The German side indicated that it intended to publish officially in due course a list of the terminated agreements. The United States side said that the United States would annotate its records to reflect the termination of the agreements in the Annex.

* * * *

In September 1990 the U.S. Senate had taken the unusual step of addressing application of a treaty entered into with the Federal Republic of Germany in the event of reunification. In its resolution of advice and consent to the Tax Convention with the Federal Republic of Germany, with related protocol, S. Treaty Doc. No. 101–10 (1989), S. Exec. Rep. 101–27 (1990), the Senate included the following understanding:

> That in the event that the German Democratic Republic and the Federal Republic of Germany unite under the Government of the Federal Republic of Germany, the Convention will apply, according to its terms, to residents of the area currently comprising the German Democratic Republic, and to income from sources within, and to capital situated in, such area, only at such time as the laws imposing the covered national taxes in the area currently comprising the German Democratic Republic and the laws imposing the covered national taxes in the area currently

> comprising the Federal Republic of Germany are identical in substance. The preceding sentence shall not affect the application of the Convention to any income or capital to which the Convention would apply absent unification.

136 CONG. REC. S13293 (1990).

c. Czech Republic and Slovak Republic

On January 1, 1993, the United States recognized the new Czech and Slovak Republics. *See* Chapter 9.A.2.d. A statement by White House Press Secretary Marlin Fitzwater on that date indicated that "[b]oth leaders provided assurances that the new states will fulfill the obligations and commitments of the former Czechoslovakia and will abide by the principles and provisions of the UN Charter, the Charter of Paris, the Helsinki Final Act, and subsequent CSCE [Conference on Security and Cooperation in Europe] documents."

d. Hong Kong

As noted in A.4., *supra*, on June 30, 1997, Hong Kong reverted to the sovereignty of the People's Republic of China. See discussion in Chapter 9.B.4. In order to encourage the autonomous functioning of Hong Kong, Congress enacted the Hong Kong Policy Act. ("HKPA"), Pub. L. No. 102–283, 106 Stat 1448 (1992) which noted the U.S. recognition and acceptance of the then-pending transfer of sovereignty over Hong Kong to the PRC and, in particular, the ability of Hong Kong to conclude new agreements either on its own or with the assistance of the Government of China. 22 U.S.C. § 5701(1)(E). With respect to succession, the Act declared that the United States intended to "continue to fulfill its obligations to Hong Kong under international agreements, so long as Hong Kong reciprocates, regardless of whether the People's Republic of China is a party to the particular international agreement . . ." 22 U.S.C. § 5712(2).

The government-wide memorandum excerpted in Chapter 9 provided as follows concerning the effect of reversion on treaty relations with the United States.

---

* * * *

Application of Multilateral and Bilateral Treaties

The HKPA also "approves the continuation in force" of treaties and international agreements applicable to Hong Kong unless or until terminated in accordance with law. § 201(b), 22 U.S.C. 85721(b). Based on this authority, principles of international law, and relevant agreements between the UK, PRC, Hong Kong, and United States, as appropriate, most multilateral agreements will continue to apply to Hong Kong but the situation with regard to bilateral agreements is more complicated.

Multilateral Agreements Now Applicable to Hong Kong. The UK and PRC have agreed generally in the Joint Declaration that multilateral agreements which are currently applicable to Hong Kong should continue to apply. There will be few if any exceptions. Thus, the presumption is that any given multilateral agreement will continue to apply to Hong Kong, including some treaties to which the PRC itself is not a party. To confirm the exact status of each agreement, the People's Republic of China is providing formal notice to the various treaty depositaries. Because the UK and the PRC may have different reservations, declarations, and understandings with respect to each agreement, the PRC notes will specify which, if any, reservations, declarations, or understandings will apply to Hong Kong. In addition, where the agency calls for a central administering authority, the PRC may separately indicate what agency would be the "central authority" for Hong Kong.

New Multilateral Agreements. The PRC is a party to a few multilateral agreements that the UK did not extend to Hong Kong, so it is possible that some additional agreements will apply to Hong Kong in the future that have not previously applied. We understand that the PRC intends to consult with the HKSAR government after July 1 before deciding on the applicability of any such agreements so that notification regarding their applicability can be expected only in the future.

The Office of Treaty Affairs of the Office of the Legal Adviser will be taking note of the notifications which are received. This information will be circulated periodically and will be included in the publication *Treaties In Force* beginning with the 1998 edition. . . .

Bilateral Agreements with the U.K. With respect to bilateral agreements, the UK, Hong Kong, and the PRC all agree that existing agreements between the U.S. and UK will cease to apply to Hong Kong as of July 1. This is consistent with the principle of international law which provides that, when a part of a territory (e.g., Hong Kong) becomes part of another country (e.g., China), agreements of the former sovereign cease to apply and instead the applicable agreements are those in force for the new sovereign. (This is sometimes called the "Moving Treaty Frontier Rule.") The United States will regard these agreements as terminating by application of law (insofar as they concern Hong Kong) as of midnight June 30.

Given the unique circumstances of Hong Kong, however, there will be exceptions to the Moving Treaty Frontier rule with respect to certain agreements between the US and Hong Kong and also agreements between the US and the PRC.

Bilateral Agreements with Hong Kong. Current agreements directly between the United States and Hong Kong—that is, where the United States and Hong Kong are the named parties and not the United Kingdom—will continue in force. This includes [agreements on postal matters, taxation, and aviation].

There has also been agreement in principle to negotiate a new agreement relating to the reciprocal granting of authorizations to permit licensed amateur radio operators of either country to operate their stations in the other country, to replace the US–UK agreement.

In addition, we are seeking Senate advice and consent for three new agreements between the United States and Hong Kong [on extradition, mutual legal assistance, and prisoner transfer; *see* Chapter 3.A.1.b.(3)(ii), 3.A.3, and Chapter 2.C.2., respectively.]

Bilateral Agreements with PRC. The applicability of bilateral agreements between the US and the PRC has been discussed with both PRC and Hong Kong officials, but has not been finally agreed,

pending further consultations between the PRC and HKSAR. In general, however, it is not likely that any US–PRC agreement which addresses a subject-matter within the Hong Kong government's sphere of autonomy will be applied to Hong Kong. Rather, in such areas it will generally be more appropriate to negotiate new agreements directly with Hong Kong which can be adapted to and take account of the different system and conditions. An exception could be where the US, Hong Kong, and PRC agree that it is feasible and desirable to include Hong Kong within a US–PRC treaty regime, e.g. because the terms of the US–PRC agreement do not require any changes to apply to Hong Kong.

* * * *

On June 27, 1997, communications submitted by the PRC and the United Kingdom to UN Secretary General Kofi Annan concerning applicability of multilateral treaties to Hong Kong were circulated to permanent missions of UN members and specialized agencies. U.N. Doc. No. NV/97/35, *reprinted in* 36 I.L.M. 1675 (1997).

Cross-references

U.S. treaty relationship with Taiwan and Hong Kong, **Chapter 2.C.2., 3.A.1., and Chapter 4.A.4. & B.2.**
Extradition Treaties Interpretation Act, **Chapter 3.A.1.c.**
Analysis of Hong Kong Extradition Treaty, **Chapter 3.A.1.d.(1).**
Treaty preemption of state regulation of maritime issues, **Chapter 5.A.3.a.**
General Comment 24 re reservations to human rights treaties, **Chapter 6.B.3.**
No private right of action for breach of 1907 Hague Convention, **Chapter 8.B.1.**
Supreme Court interpretations of Warsaw Convention, **Chapter 11.A.3.**
Role of intergovernmental organizations as parties to intellectual property treaty, **Chapter 11.D.2.b.**
Provisional application of U.S.-Mexico maritime boundary treaty, **Chapter 12.A.3.a.**

CHAPTER 5

Federal Foreign Affairs Authority

A. FOREIGN RELATIONS LAW OF THE UNITED STATES

1. U.S. Relations with Taiwan and Hong Kong

See discussion in Chapter 4.A.4, and B.2.

2. Alienage Diversity Jurisdiction

In 1995 Matimak Trading Co. Ltd. ("Matimak"), a corporation organized under the laws of Hong Kong, with its principal place of business there, sued Albert Khalily and D.A.Y. Kids Sportswear Inc., two New York corporations, in the Southern District of New York, for breach of contract. Matimak invoked the court's alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2). That provision authorizes district court jurisdiction where the matter in controversy exceeds $50,000, exclusive of interest and costs, and the action "is between . . . citizens of a State and citizens or subjects of a foreign state." A default judgment was entered against the defendants, which D.A.Y. subsequently sought to vacate.

On June 10, 1996, the district court *sua sponte* raised the issue of subject matter jurisdiction under the alienage diversity provision and permitted the parties to submit short briefs on the jurisdictional issue, which it characterized as "whether this court lacks subject matter jurisdiction because Hong Kong is not recognized by the United States as a foreign state." *See Matimak Trading Co. Ltd. v. Khalily*, 936 F. Supp.

151 (S.D.N.Y. 1996). Matimak contended that the court had subject matter jurisdiction under § 1332 on the basis that Hong Kong was a *de facto* "foreign state." Attached to its letter brief was a June 21, 1996, letter from James G. Hergen, Assistant Legal Adviser for East Asian and Pacific Affairs, U.S. Department of State. Mr. Hergen affirmed that "it would be consistent with the foreign policy interests of the United States and the commercial interests of its nationals that courts in the United States be available to resolve private commercial claims between the United States and Hong Kong nationals and business enterprises." Mr. Hergen also explained that the requirements for diversity jurisdiction were satisfied in this case since the "reference to 'subjects'" in the statute could be understood as a reference to the "numerous colonial subjects" of the European powers, such as Hong Kong nationals, "who were not necessarily citizens of their respective foreign States."

On August 19, 1996, the district court vacated the default judgment and dismissed the case without prejudice. The court rejected plaintiff's arguments as based on "policy considerations," which were inappropriate "because it is not the role of the judiciary to recognize foreign states. . . ." *Id.* at 152. Distinguishing other cases, the court took the view that "foreign state" for purposes of the alienage diversity provision required full diplomatic recognition and held that the lack of such recognition of Hong Kong as a foreign sovereign by the United States was fatal to plaintiff's arguments.

On August 28, 1996, plaintiff appealed to the U.S. Court of Appeals for the Second Circuit. The United States submitted a brief as *amicus curiae*, supporting the existence of alienage diversity jurisdiction in this case. The Court of Appeals rejected the arguments put forth by the United States and affirmed the district court decision. *Matimak Trading Co. Ltd. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998).

In its decision, the court identified three issues to be considered and found against Matimak on all three. The three issues were characterized as follows:

> (1) whether Hong Kong is a "foreign state," such that Matimak is a "citizen or subject" of a "foreign state"; (2) whether Matimak is a "citizen or subject" of the United Kingdom, by virtue of Hong Kong's relationship with the United Kingdom when it brought suit; and (3) whether any and all non-citizens of the United States may ipso facto invoke alienage jurisdiction against a United States citizen.

Id. at 79. The court concluded that "Matimak is not a 'citizen or subject' of a foreign state. It is thus stateless. And a stateless person—the proverbial man without a country—cannot sue a United States citizen under alienage jurisdiction." *Id.* at 86.

In so holding, the court rejected the views of the United States provided in its amicus brief, excerpted below (footnotes omitted). The basis for the *Matimak* decision was subsequently rejected by the Supreme Court in *JPMorgan Chase Bank v. Traffic Stream(BVI) Infrastructure Ltd.*, 536 U.S. 88 (2002), which adopted the views of the United States in finding 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. See *Digest 2002* at 227–31.

The full texts of the U.S. *amicus* brief and the letter of James Hergen filed in the district court are available at *www.state.gov/s/l/c8183*.

---

* * * *

A HONG KONG CORPORATION IS A "SUBJECT" OF A "FOREIGN STATE" FOR PURPOSES OF ALIENAGE DIVERSITY JURISDICTION.

* * * *

1. Plaintiff may invoke the alienage diversity jurisdiction of the federal courts to resolve its dispute in this case because, in the last

analysis, Hong Kong nationals, including corporations, are subjects of United Kingdom sovereignty.

* * * *

The United States' international agreements with Hong Kong are identified in the State Department's authoritative "Treaties In Force" under the heading of the "United Kingdom." *See* Treaties In Force 280, 290 (1996). "Treaties In Force" also notes the Consular Convention currently in effect between the United States and "His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas." 3 U.S.T. 3426, 3427, TIAS No. 2494 (1952). As Treaties In Force explains, that Convention is "applicable to all territories over which the United States has jurisdiction or international responsibility and *to all British Territories*." Treaties In Force, *supra*, at 282 (emphasis added); *see* Consular Convention, art. 1, sec. (2), 3 U.S.T. at 3427 ("Convention applies * * * on the part of His Majesty * * * to all His Majesty's colonies and protectorates * * *"). The Convention also defines those "nationals" of each country who may avail themselves of the consular arrangements established by that agreement. "[I]n relation to His Majesty," the Convention defines "nationals" to include "*all citizens of the United Kingdom and colonies* * * *, *including, where the context permits, all juridical entities duly created under the law of any of those territories*." Consular Convention, Art. 2, sec. (4), 3 U.S.T. at 3428 (emphasis added). In short, for purposes of section 1332(a)(2), Hong Kong nationals should be viewed as subjects of United Kingdom sovereignty, as recognized by the United States.

b. The last phrase of the Consular Convention emphasized above, raises an important issue related to the question presented here. The plaintiff in this case, of course, is a corporation, rather than a natural person. A corporation, for purposes of diversity jurisdiction, is viewed as a "citizen" or "subject" of the entity under whose sovereignty it is created. *See National S.S. Co.* v. *Tugman*, 106 U.S. 118, 121 (1882) (Harlan, J.). *Compare Windert Watch Co.*, 468 F. Supp. at 1244. The obvious purpose of this attribution is to align the corporation with the entity under whose

authority it was created. In this case, that sovereign authority is the British Crown.

As a Hong Kong corporation, plaintiff is governed by the Hong Kong Companies Ordinance, which is modelled on the British Companies Act of 1948. Commercial Laws Of The World, Hong Kong Companies Ordinance, Chapter 32 (Foreign Tax Law Pub. 1994). The authority under which that statute was enacted is ultimately traceable to the British Crown. The Letters Patent for Hong Kong issued by the Crown make clear that sovereignty and authority over Hong Kong is reserved to the British Crown. Laws Of Hong Kong (App. I), Letters Patent ¶¶ VIII–XII, at C4 (rev. ed. 1989). Further, the instructions issued by the British Crown to the Governor of Hong Kong also reserve final approval of all Hong Kong Ordinances (including, presumably, the Companies Ordinance applicable to plaintiff) to the Crown, as transmitted through one of British Principal Secretaries of State. Laws of Hong Kong (App. I), Royal Instructions XXVIII, at D11 (rev. ed. 1989). Hence, the final authority for approval of the Hong Kong Companies Ordinance under which plaintiff operates is the British Crown. Since the ultimate sovereign authority over the plaintiff-corporation is the British Crown, plaintiff should be treated as a subject of United Kingdom sovereignty for purposes of section 1332.

* * * *

4. Finally, there are significant practical reasons for holding that a Hong Kong corporation can either sue or be sued in federal court under the alienage diversity provision. As Mr. Hergen noted in the State Department's letter, as of 1994, Hong Kong was the United States' 12th largest trading partner, with direct United States financial investment of almost 12 billion dollars. App. 16. Congress also recently enacted the United States-Hong Kong Policy Act of 1992, which makes clear that Congress wants the strong U.S.-Hong Kong relations (including commercial relations) to continue after July 1, 1997, the date on which Hong Kong becomes a special administrative region of the People's Republic of China. *See* 22 U.S.C. §§ 5711–15. These strong ties, economic and otherwise, provide substantial practical justification for holding

that a Hong Kong corporation can either sue or be sued in federal court under the alienage diversity provision. As Mr. Hergen states in his letter, " 'it would be consistent with the foreign policy interests of the United States and the commercial interests of its nationals that courts in the United States be available to resolve private commercial claims between the United States and Hong Kong nationals and business enterprises.' "

* * * *

The status of Hong Kong corporations was re-examined in *Favour Mind Limited v. Pacific Shores, Inc.*, 1999 U.S. Dist. LEXIS 18887 (S.D.N.Y. 1999) (not reported), an action brought by a Hong Kong corporation subsequent to Hong Kong's 1997 reversion to the sovereignty of the People's Republic of China. The court noted that "defendant's jurisdictional challenge demands resolution of the precise question left open in *Matimak*, namely whether a Hong Kong corporation may assert alienage diversity jurisdiction in federal district court in the wake of Hong Kong's reversion to China." The court first found that "post-reversion Hong Kong like pre-reversion Hong Kong is not a foreign state, either de jure or de facto," for purposes of such jurisdiction. The court denied defendant's motion to dismiss for lack of jurisdiction, however, agreeing with the United States as *amicus* that corporations of post-reversion Hong Kong are citizens of China, clearly a foreign state for the purposes of alienage diversity juridiction: "The *Matimak* analysis produces a different result here both because Hong Kong's relationship with China is materially different than Hong Kong's relationship with Great Britain, and because China has explicitly stated that Hong Kong corporations are citizens of China, something Great Britain never did." The court noted:

> China places great significance on its resumption of sovereignty over Hong Kong, a sovereignty which China considers to have been unjustly and only temporarily interrupted by a century of British rule. . . . A judicial finding that Hong Kong corporations are not citizens of

China would engender precisely the harm to our foreign relations that the founders intended to forestall through the creation of alienage jurisdiction.

3. Preemption of State Laws by Federal Statutes and Treaties

a. International maritime commerce

In 1989 the supertanker *Exxon Valdez* spilled crude oil off the coast of Alaska, the largest oil spill in U.S. history. Both the U.S. Congress and the state of Washington took steps aimed at preventing future oil spills. Congress enacted the Oil Pollution Act of 1990, Pub. L. No. 101–380, 104 Stat. 484 (1990), 33 U.S.C. §§ 2701–19 ("OPA"). The state of Washington created a new agency and directed it to establish standards to provide the "best achievable protection" from oil spill damages. The regulations adopted by Washington applied to all ships, including foreign-flag vessels. Wash. Admin. Code §§ 317–21–010, *et seq.* (1996). The International Association of Independent Tanker Owners ("Intertanko"), a trade association of tanker operators of both U.S. and foreign registry, sued in the U.S. District Court for the Western District of Washington. Intertanko sought declaratory and injunctive relief against state and local officials responsible for enforcing the new state regulations on the ground that they were preempted by federal law. The district court upheld the state's regulations. *Int'l Ass'n of Indep. Tanker Owners v. Locke*, 947 F. Supp. 1484 (W.D. Wash. 1996). The Ninth Circuit affirmed. 148 F.3d 1053 (9th Cir. 1998), *rehearing en banc denied*, 159 F.3d 1220 (9th Cir. 1998).

The United States participated in the case at the appellate level and filed a petition with the Supreme Court for a writ of certiorari, which was granted in 1999. *United States v. Locke*, 527 U.S. 1063 (1999). In its brief on the merits in the Supreme Court, filed October 22, 1999, and discussed below, the United States argued that the Washington state regulations were preempted by a comprehensive federal scheme,

composed of federal legislation, U.S. Coast Guard regulations, and international treaty obligations. On March 6, 2000, the Supreme Court reversed the appellate decision, finding some of the Washington regulations to be preempted and remanding as to others. *United States v. Locke*, 529 U.S. 89 (2000). In August 2000 Washington rescinded its regulations. Excerpts below from the unanimous Supreme Court decision by the Chief Justice explain the international nature of the Washington maritime traffic and provide the Court's analysis of the preemptive effect of federal laws and regulations in this case.

---

* * * *

The maritime oil transport industry presents ever-present, all too real dangers of oil spills from tanker ships, spills which could be catastrophes for the marine environment. After the supertanker *Torrey Canyon* spilled its cargo of 120,000 tons of crude oil off the coast of Cornwall, England, in 1967, both Congress and the State of Washington enacted more stringent regulations for these tankers and provided for more comprehensive remedies in the event of an oil spill. The ensuing question of federal pre-emption of the State's laws was addressed by the Court in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 55 L. Ed. 2d 179, 98 S. Ct. 988 (1978).

* * * *

The State of Washington embraces some of the Nation's most significant waters and coastal regions. . . . Of special significance in this case is the inland sea of Puget Sound, a 2,500 square mile body of water consisting of inlets, bays, and channels. More than 200 islands are located within the sound, and it sustains fisheries and plant and animal life of immense value to the Nation and to the world.

Passage from the Pacific Ocean to the quieter Puget Sound is through the Strait of Juan de Fuca, a channel 12 miles wide and 65 miles long which divides Washington from the Canadian Province of British Columbia. The international boundary is located

midchannel. Access to Vancouver, Canada's largest port, is through the strait. Traffic inbound from the Pacific Ocean, whether destined to ports in the United States or Canada, is routed through Washington's waters; outbound traffic, whether from a port in Washington or Vancouver, is directed through Canadian waters. The pattern had its formal adoption in a 1979 agreement entered by the United States and Canada. Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, 32 U.S.T. 377, TIAS No. 9706.

* * * *

II

The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established. The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution. *E.g.*, The Federalist Nos. 44, 12, 64. In 1789, the First Congress enacted a law by which vessels with a federal certificate were entitled to "the benefits granted by any law of the United States." Act of Sept. 1, 1789, ch. 11, § 1, 1 Stat. 55. The importance of maritime trade and the emergence of maritime transport by steamship resulted in further federal licensing requirements enacted to promote trade and to enhance the safety of crew members and passengers. See Act of July 7, 1838, ch. 191, 5 Stat. 304; Act of Mar. 3, 1843, ch. 94, 5 Stat. 626. In 1871, Congress enacted a comprehensive scheme of regulation for steam powered vessels, including provisions for licensing captains, chief mates, engineers, and pilots. Act of Feb. 28, 1871, ch. 100, 16 Stat. 440.

. . . Where Congress had acted . . . the [Supreme] Court had little difficulty in finding state vessel requirements were pre-empted by federal laws which governed the certification of vessels and standards of operation. . . .

Against this background, Congress has enacted a series of statutes pertaining to maritime tanker transports and has ratified international agreements on the subject. . . .

1. The Tank Vessel Act

The Tank Vessel Act of 1936, 49 Stat. 1889, enacted specific requirements for operation of covered vessels. The Act provided that "in order to secure effective provisions against the hazards of life and property," additional federal rules could be adopted with respect to the "design and construction, alteration, or repair of such vessels," "the operation of such vessels," and "the requirements of the manning of such vessels and the duties and qualifications of the officers and crews thereof." The purpose of the Act was to establish "a reasonable and uniform set of rules and regulations concerning . . . vessels carrying the type of cargo deemed dangerous." H. R. Rep. No. 2962, 74th Cong., 2d Sess., 2 (1936). The Tank Vessel Act was the primary source for regulating tank vessels for the next 30 years, until the *Torrey Canyon* grounding led Congress to take new action.

2. The Ports and Waterways Safety Act of 1972

Responding to the *Torrey Canyon* spill, Congress enacted the Ports and Waterways Safety Act of 1972 (PWSA). The Act, as amended by the Port and Tanker Safety Act of 1978, 92 Stat. 1471, contains two somewhat overlapping titles, both of which may, as the *Ray* Court explained, preclude enforcement of state laws, though not by the same pre-emption analysis. Title I concerns vessel traffic "in any port or place under the jurisdiction of the United States." 110 Stat. 3934, 33 U.S.C. § 1223(a)(1) (1997 ed. Supp. III). Under Title I, the Coast Guard may enact measures for controlling vessel traffic or for protecting navigation and the marine environment, but it is not required to do so. *Ibid.*

Title II does require the Coast Guard to issue regulations, regulations addressing the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels . . . that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 46 U.S.C. § 3703(a).

The critical provisions of the PWSA described above remain operative, but the Act has been amended, most significantly by the

Oil Pollution Act of 1990 (OPA), 104 Stat. 484. OPA, enacted in response to the *Exxon Valdez* spill, requires separate discussion.

3. The Oil Pollution Act of 1990

The OPA contains nine titles, two having the most significance for these cases. Title I is captioned "Oil Pollution Liability, and Compensation" and adds extensive new provisions to the United States Code. See 104 Stat. 2375, 33 U.S.C. § 2701 *et seq*. (1994 ed. and Supp. III). Title I imposes liability (for both removal costs and damages) on parties responsible for an oil spill. § 2702. Other provisions provide defenses to, and limitations on, this liability. 33 U.S.C. §§ 2703, 2704. Of considerable importance to these cases are OPA's saving clauses, found in Title I of the Act, § 2718, and to be discussed below.

* * * *

At the outset, it is necessary to explain that the essential framework of *Ray*, and of the PWSA which it interpreted, are of continuing force, neither having been superseded by subsequent authority relevant to these cases. In narrowing the pre-emptive effect given the PWSA in *Ray*, the Court of Appeals [in this case] relied upon OPA's saving clauses, finding in their language a return of authority to the States. Title I of OPA contains two saving clauses [under the heading "Preservation of State authorities"]. . . .

The Court of Appeals placed more weight on the saving clauses than those provisions can bear, either from a textual standpoint or from a consideration of the whole federal regulatory scheme of which OPA is but a part.

* * * *

From the text of OPA and the long-established understanding of the appropriate balance between federal and state regulation of maritime commerce, we hold that the pre-emptive effect of the PWSA and regulations promulgated under it are not affected by OPA. We doubt Congress will be surprised by our conclusion, for the Conference Report on OPA shared our view that the statute

"does not disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 55 L. Ed. 2d 179, 98 S. Ct. 988 (1978)." H. R. Conf. Rep. No. 101–653, 101, p. 122 (1990). The holding in *Ray* also survives the enactment of OPA undiminished. . . .

* * * *

The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce. No artificial presumption aids us in determining the scope of appropriate local regulation under the PWSA, which, as we discuss below, does preserve, in Title I of that Act, the historic role of the States to regulate local ports and waters under appropriate circumstances. At the same time, as we also discuss below, uniform, national rules regarding general tanker design, operation, and seaworthiness have been mandated by Title II of the PWSA.

The *Ray* Court confirmed the important proposition that the subject and scope of Title I of the PWSA allows a State to regulate its ports and waterways, so long as the regulation is based on "the peculiarities of local waters that call for special precautionary measures." 435 U.S. at 171. Title I allows state rules directed to local circumstances and problems, such as water depth and narrowness, idiosyncratic to a particular port or waterway. *Ibid.* There is no pre-emption by operation of Title I itself if the state regulation is so directed and if the Coast Guard has not adopted regulations on the subject or determined that regulation is unnecessary or inappropriate. This principle is consistent with recognition of an important role for States and localities in the regulation of the Nation's waterways and ports. *E.g.*, *Cooley*, 12 HOW at 319 (recognizing state authority to adopt plans "applicable to the local peculiarities of the ports within their limits"). It is fundamental in our federal structure that states have vast residual powers. Those powers, unless constrained or displaced

by the existence of federal authority or by proper federal enactments, are often exercised in concurrence with those of the national government. *McCulloch* v. *Maryland*, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819).

As *Ray* itself made apparent, the States may enforce rules governed by Title I of the PWSA unless they run counter to an exercise of federal authority. The analysis under Title I of the PWSA, then, is one of conflict pre-emption, which occurs "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.'" . . . In this context, Coast Guard regulations are to be given pre-emptive effect over conflicting state laws. . . .

While *Ray* explained that Congress, in Title I of the PWSA, preserved state authority to regulate the peculiarities of local waters if there was no conflict with federal regulatory determinations, the Court further held that Congress, in Title II of the PWSA, mandated federal rules on the subjects or matters there specified, demanding uniformity. *Id.*, at 168. ("Title II leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted with the hope of having them internationally adopted or has accepted as the result of international accord. A state law in this area . . . would frustrate the congressional desire of achieving uniform, international standards"). . . .

* * * *

. . . Local rules not pre-empted under Title II of the PWSA pose a minimal risk of innocent noncompliance, do not affect vessel operations outside the jurisdiction, do not require adjustment of systemic aspects of the vessel, and do not impose a substantial burden on the vessel's operation within the local jurisdiction itself.

* * * *

We have determined that Washington's regulations regarding general navigation watch procedures, English language skills, training, and casualty reporting are pre-empted. Petitioners make

substantial arguments that the remaining regulations are preempted as well. It is preferable that the remaining claims be considered by the Court of Appeals or by the District Court within the framework we have discussed. . . .

. . . The judgment of the Court of Appeals is reversed, and remand[ed] for further proceedings consistent with this opinion.

In its opinion the Court did not reach arguments raised by the United States concerning preemption of the state regulations by international treaties. The Court stated:

> The United States argues that these treaties, as the supreme law of the land, have preemptive force over the state regulations in question here. . . . The existence of the treaties and agreements on standards of shipping is of relevance, of course, for these agreements give force to the longstanding rule that the enactment of a uniform federal scheme displaces state law, and the treaties indicate Congress will have demanded national uniformity regarding maritime commerce. *See Ray*, 435 U.S. at 166 (recognizing Congress anticipated "arriving at international standards for building tank vessels" and understanding "the Nation was to speak with one voice" on these matters). In later proceedings, if it is deemed necessary for full disposition of the case, it should be open to the parties to argue whether the specific international agreements and treaties are of binding, preemptive force. . . .

Id. The U.S. brief on certiorari had set forth its views on the treaty issue, as excerpted below (footnotes omitted).

The full text of the U.S. brief is available at *www.usdoj.gov/osg/briefs/1999/3mer/2mer/toc3index.html*.

---

* * * *

2. International Treaties And Maritime Agreements . . . Have Preemptive Force

In addition to identifying the preemptive scope of the PWSA, the Court in Ray also noted that in passing that Act, "Congress

expressed a preference for international action and expressly anticipated that foreign vessels would or could be considered sufficiently safe for certification by the Secretary if they satisfied the requirements arrived at by treaty or convention." 435 U.S. at 167–168. Thus, to the extent an international agreement creates a standard that is embodied in Coast Guard regulations or is formally recognized by the Coast Guard as applicable, that standard will also preempt a contrary state law.

Since Ray was decided, the United States has also become party to numerous international agreements regulating tankers that independently have preemptive power over state laws. An international treaty can have just as much preemptive force as a federal statute. See U.S. Const. Art. VI. This Court has recognized that, "[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 v. Rossi, 456 U.S. 25, 29 & n.5 (1982) (citing Restatement of Foreign Relations, Pt. III, introd. note at 74 (Tent. Draft No. 1, 1980)). Under international law, an international treaty or agreement is binding on all political subdivisions of the ratifying nation, and a party would not be excused from compliance because of the actions of a political subdivision.

Because international agreements reflect the intentions of nation-states, this Court has emphasized that any concurrent power held by States in fields that are the subject of international agreements is "restricted to the narrowest of limits." Hines v. Davidowitz, 312 U.S. 52, 68 (1941). Thus, where the United States has exercised the authority of the Nation, a State "cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities." Kolovrat v. Oregon, 366 U.S. 187, 198 (1961). Accordingly, whether viewed through the lens of preemption by treaty or interference with the federal government's exclusive authority to conduct the foreign affairs of the United States, this Court has repeatedly struck down state laws that conflict with duly promulgated federal law touching on matters of international concern. See, e.g., Zschernig v. Miller,

389 U.S. 429 (1968); United States v. Pink, 315 U.S. 203, 232 (1942); United States v. Belmont, 301 U.S. 324, 327 (1937).

Those considerations have particular force in this case, because Congress has long recognized the importance of international rules in promoting safety and environmental protection in vessel operations. For example, although the Tank Vessel Act of 1936 contained a provision requiring vessels to carry a certificate of inspection evidencing compliance with the terms of the Act, it specifically provided that "the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States." 49 Stat. 1890. Congress included similar language in the PWSA, see § 201, 86 Stat. 429, 46 U.S.C. 391a(5) (Supp. V 1975), as amended by the PTSA, see § 5, 92 Stat. 1486–1487, 46 U.S.C. 3711.

As a result, under current law, a foreign vessel's compliance with international standards will satisfy domestic requirements for entering United States ports or waters. See, e.g., 46 U.S.C. 3303 (Supp. III 1997) ("A foreign country is considered to have inspection laws and standards similar to those of the United States when it is a party to an International Convention for Safety of Life at Sea to which the United States Government is currently a party."); 46 U.S.C. 3711(a) ("The Secretary may accept any part of a certificate, endorsement, or document, issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a [U.S.] certificate of compliance."). The certification requirements imposed by international conventions and codes such as the STCW Convention, MARPOL, ISM Code, and SOLAS require extensive enforcement efforts by the Coast Guard. See note 5, supra; 33 C.F.R. 151.01 (MARPOL), 96.100 (ISM Code); 46 C.F.R. 10.101(a)(2), 12.01–1(a)(2), 15.101 (STCW), 199.01(b) (SOLAS). With regard to SOLAS, for example, Congress has specifically provided that a SOLAS certificate shall be respected by the United States, see 46 U.S.C. 3303 (Supp. III 1997), and by executive order the President has directed the Coast Guard to enforce SOLAS, see Exec. Order No. 12,234, 3 C.F.R. 277 (1981). The various provisions of SOLAS, MARPOL, STCW,

and the ISM Code must be taken into account, in conjunction with Coast Guard regulations that implement those agreements, to assess whether individual state rules are preempted.

As the Court emphasized in Ray, "[t]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." 435 U.S. at 165. Congress no more intended to permit States to frustrate that federal purpose here, where the relevant certifications concern training, manning, and related policies, than it did in Ray, in which the Court specifically addressed design and construction standards. See United States v. Belmont, 301 U.S. at 331 ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.").

* * * *

b. Trade with Burma

In 1996 the State of Massachusetts adopted legislation regulating procurement by state entities from companies that did business with Burma. Mass. Gen. Laws ch. 7, §§ 22G–22M (1998). In a suit brought by the National Foreign Trade Council, a trade association whose members included companies affected by the Massachusetts law, the U.S. District Court for the District of Massachusetts permanently enjoined enforcement of the state law, holding that it unconstitutionally impinged on the federal government's exclusive authority to conduct foreign affairs. *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998). The U.S. Court of Appeals for the First Circuit affirmed, finding that the state statute unconstitutionally interfered with the foreign affairs power of the federal government, violated the "dormant" Foreign Commerce Clause and the Supremacy Clause of the U.S. Constitution, and was preempted by federal sanctions against Burma. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999).

On June 19, 2000, the Supreme Court affirmed the holding of the lower courts, finding that the Massachusetts law was invalid under the Supremacy Clause of the U.S. Constitution. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 388 (2000). *See Digest 2000* at 319–40 for a discussion of the case and excerpts from the U.S. brief as *amicus curiae,* filed in February 2000.

c. California ballot initiative Proposition 187

On November 8, 1994, the voters of the state of California adopted by referendum an initiative known as Proposition 187. *See* 1994 Cal. Legis. Serv., Prop. 187 (West). Section one of the proposition set forth as its purpose to "provide for cooperation between [the] agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California."

A statement released by the U.S. Embassy in Mexico on November 9, 1994, stated that U.S. Ambassador James R. Jones "cautioned that this is not the policy of the United States. It is the policy of a single state with which our federal government disagrees. . . . The Ambassador further stated his belief that the state proposition is unconstitutional, and that it will be challenged in the courts of the U.S."

Immediately after Proposition 187 was passed, actions challenging the constitutionality of the initiative were brought by a number of plaintiffs in state and federal courts in California. Five actions filed in the federal district court against the governor and attorney general of California and other state officials were consolidated in the U.S. District Court for the Central District of California. *See League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) ("*LULAC*"). As described in that opinion, the initiative's eight substantive provisions, §§ 2–9, "require law enforcement, social services, health care and public education personnel to (i) verify the immigration status of persons with whom

they come in contact; (ii) notify certain defined persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care, and education." The district court had issued a temporary restraining order enjoining implementation of §§ 4, 5, 6, 7 and 9 of the initiative on November 16, 1994, and a preliminary injunction enjoining implementation and enforcement of those sections on December 14, 1994.

In *LULAC,* the district court granted in part and denied in part motions for summary judgment filed by plaintiffs contending that Proposition 187 was unconstitutional. The court noted that the question of whether part or all of Proposition 187 was preempted under federal law was governed by the Supreme Court's decision in *De Canas v. Bica*, 424 U.S. 351 (1976), which established three tests to determine whether a state act related to immigration is preempted. Under the first test, "since the 'power to regulate immigration is unquestionably exclusively a federal power,' any state statute which regulates immigration is 'constitutionally proscribed.' " Even if the state law is not found to be a regulation of immigration, it is preempted if it was the "'clear and manifest purpose of Congress' . . . to 'occupy the field' which the statute attempts to regulate" or if the state law "conflicts with federal law making compliance with both state and federal law impossible." The court found that Proposition 187 "create[d] an impermissible state scheme to regulate immigration and [was] preempted under the first and second *De Canas* tests" because:

> [t]he classification, notification and cooperation/reporting provisions in sections 4 through 9 of the initiative, taken together, constitute a regulatory scheme (1) to detect persons present in California in violation of state-created categories of lawful immigration status; (2) to notify state and federal officials of their purportedly unlawful status; and (3) to effect their removal from the United States.

The court also found that the subsections of §§ 5, 6 and 8 denying law enforcement, social services, health care and

post-secondary education benefits might be constitutionally implemented, but only if state regulations could be promulgated whereby state agents "do not themselves determine whether a person is lawfully present in the United States and only verify a person's immigration status for benefits denial purposes by relying on determinations made by the INS. . . ." 908 F. Supp. at 771. The court held, however, that the provisions of § 7, which prohibited elementary and secondary schools from admitting or permitting attendance of illegal alien children, were preempted by federal law "[i]n light of the United States Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982) in which the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits states from excluding undocumented alien children from public schools." *Id.* at 774.

In May 1997 the defendants indicated that they did not intend to promulgate implementing regulations and that they wished the Court to decide the issues without any such regulations. In the meantime, additional relevant federal law was enacted in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996), 42 U.S.C. § 601 ("PRA"). *See League of United Latin Am. Citizens v. Wilson*, 1998 U.S. Dist. LEXIS 3418 (C.D. Cal. Mar. 13, 1998).

As the court explained in the March 1998 opinion:

> [o]n August 22, 1996, the President signed the PRA. The PRA creates a comprehensive statutory scheme for determining aliens' eligibility for federal, state and local benefits and services. It categorizes all aliens as "qualified" or not "qualified" and then denies public benefits based on that categorization. In the PRA, Congress expressly stated a national policy of restricting the availability of public benefits to aliens. [8 U.S.C. § 1601].

The court concluded:

> . . . [T]he PRA ousts state power to legislate in the area of public benefits for aliens. When President Clinton

> signed the PRA, he effectively ended any further debate about what the states could do in this field. As the Court pointed out in its prior Opinion, California is powerless to enact its own legislative scheme to regulate immigration. It is likewise powerless to enact its own legislative scheme to regulate alien access to public benefits. It can do what the PRA permits, and nothing more. Federal power in these areas was always exclusive and the PRA only serves to reinforce the Court's prior conclusion that substantially all of the provisions of Proposition 187 are preempted under De Canas v. Bica. Only sections 2, 3 and 10 are enforceable.*

4. Protection from Disclosure of Confidential Communication from a Foreign Government

On November 29, 1994, Leslie R. Weatherhead filed a request for disclosure under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), of a letter from officials of the Government of Great Britain to U.S. officials concerning a sensitive extradition matter involving his client. The United States summarized the case as follows in a submission to the Supreme Court at a later stage of the ensuing litigation:

> This case involves a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for a copy of a letter, dated July 28, 1994, sent by the Home Office of the British government to the United States Department of Justice concerning the extradition of [Weatherhead's] client . . . and another person from the United Kingdom to the United States, to stand trial on charges of conspiring to murder the United States Attorney for the District of Oregon. The extradition was a sensitive matter between

---

* Sections 2 and 3 of the initiative, which established criminal penalties for manufacture, distribution, sale, or use of false citizenship or resident alien documents, were never enjoined and were not found to be preempted by federal law. Section 10 concerned amendment and severability.

> the two nations. The letter from the Home Office was classified and withheld under Exemption 1 of FOIA, 5 U.S.C. 552(b)(1), because it constituted a confidential communication by a foreign government and the breach of that confidentiality by the United States could reasonably be expected to harm the national security. The United States' decision to withhold the document was based, in large part, on the position of the British government (in which our government concurred) that such correspondence between governments is ordinarily confidential and that the letter accordingly should remain confidential.

U.S. Motion to Vacate the Judgment of the Court of Appeals and Remand the Case with Directions to Dismiss the Case as Moot, November 23, 1999, discussed further below.

In the litigation, the State Department had submitted affidavits explaining that disclosure and the resultant breach of the British government's trust would damage the United States' foreign relations both by impairing the ability of the United States to engage in and receive confidential diplomatic communications and by impeding international law enforcement cooperation.

The U.S. District Court for the Eastern District of Washington initially ordered the document disclosed, but reconsidered its decision after undertaking *in camera* review and agreed with the United States in an unreported decision that the letter was exempt from disclosure under 5 U.S.C. 552(b)(1). The U.S. Court of Appeals for the Ninth Circuit reversed the district court, ordering the United States to release the letter. *Weatherhead v. United States*, 157 F.3d 735 (9th Cir. 1998). The Supreme Court granted certiorari, 527 U.S. 1063 (1999).

In his brief on the merits in the Supreme Court of November 19, 1999, Weatherhead for the first time disclosed a letter dated November 16, 1994, that he had received from the British Consul in Seattle, Washington, containing much of the substance of the Home Office letter. Neither the U.S.

Department of State nor the British Home Office had been aware of the Consul's letter. In light of that letter, however, the British government informed the United States that it no longer insisted upon maintaining the confidentiality of the Home Office letter and requested the United States to release it. The letter was declassified and provided to Weatherhead.

Because these developments rendered the case before the Supreme Court moot, the United States filed a motion with the Supreme Court on November 23, 1999, to vacate the court of appeals decision since it could not now be reviewed. The Supreme Court vacated the decision in a one-sentence order on December 3, 1999. *United States v. Weatherhead*, 528 U.S. 1042 (1999). *See also* 199 F.3d 1375 (9th Cir. 2000).

The U.S. motion explained its reasons for requesting vacatur, as excerpted below. The full text is available at *www.state.gov/sl/c8183.htm*. U.S. replies filed December 1999 are available at *www.usdoj.gov/osg/briefs/1999/3mer/2mer/98-1904.mer.supp.rep.html*.

---

* * * *

3. The adverse consequences for the national security of the erroneous ruling by the court of appeals extend well beyond the circumstances of this case; they threaten the same harm to the foreign relations of the United States generally that led the United States to request review by this Court in the first place. . . .

The court of appeals' decision refusing to afford any deference to the conclusion of Executive Branch officials that the harm to national security against which the Executive Order protects includes the harm arising from the very act of disclosure likewise exceeded the proper boundaries of judicial review and, if permitted to stand, would significantly handicap the government's ability to protect foreign government communications. . . .

Vacatur of the court of appeals' now unreviewable judgment is . . . of great importance to the Executive Branch's ability to conduct foreign relations and administer its own Executive Order in a manner that protects vital diplomatic interests. In the absence of a single, uniform rule governing the standard of deference owed

Executive Branch classification decisions under Exemption 1, FOIA plaintiffs will have an incentive to file suit within the circuit that accords classification judgments the least amount of deference. From a practical perspective, a lack of cohesion in the judicial standards governing review of classification decisions by the Executive will deny Executive Branch officials and foreign governments a stable framework within which to engage in candid exchanges of diplomatic information, thereby creating a real danger of "restricting the flow of essential information to the Government." FBI v. Abramson, 456 U.S. 615, 628 n.12 (1982). It will be of little solace to those United States diplomats whose assurances of confidentiality would be rendered empty promises under the Ninth Circuit's decision—or to foreign governments whose secrets would be exposed within the Ninth Circuit—that their expectation of confidentiality might have carried the day in another region of the United States. From the foreign government's perspective and from ours, "an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

Relatedly, the prospect that courts may make their own independent judgments about maintaining the confidentiality of national security information—either because deference is not deemed to have been "justified" through an unspecified "initial showing" in a particular case, or because of a disagreement with the Executive Branch about the causes and nature of damage to foreign relations that may be taken into account—would have an immediate and deleterious impact on the Executive's conduct of diplomatic and other foreign relations. . . .

* * * *

Excerpts below from the U.S. brief on the merits, filed in the Supreme Court in October 1999, provide further background of the case and address the obligations of the United States to protect confidential communications with another government and the importance of preserving its right to do so under the national security exemption of the FOIA. Footnotes have been omitted.

The full text of the U.S. brief on the merits is available at *www.usdoj.gov/osg/briefs/1999/3mer/2mer/98-1904.mer.aa.html*. *See also* U.S. Reply brief available at *www.usdoj.gov/osg/briefs/1999/3mer/2mer/98-1904.mer.rep.html*.

---

* * * *

THE COURT OF APPEALS DISREGARDED THE REQUIREMENT UNDER THE CONSTITUTION AND THE FREEDOM OF INFORMATION ACT THAT IT ACCORD THE UTMOST DEFERENCE TO THE EXECUTIVE BRANCH'S DETERMINATION THAT THE REQUESTED INFORMATION MUST BE CLASSIFIED IN THE INTEREST OF NATIONAL SECURITY

Section 552(b)(1) of the Freedom of Information Act (FOIA) exempts from disclosure all matters that are "specifically authorized under criteria established by Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such an Executive order." The Executive Order applicable to this case is Executive Order No. 12958, 3 C.F.R. 333 (1996). It provides that information may be classified if four conditions are met. Only the fourth condition is at issue in this case. That criterion is that the original classification authority—here, the responsible State Department official—has "determine[d] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and has been "able to identify or describe th[at] damage." Exec. Order. No. 12958, § 1.2(a)(4). The uncontested State Department declarations meet that standard. They identify and describe a concrete harm to the United States' foreign policy interests—a breach of the trust of an important ally. They also explain how disclosure of the letter in violation of that trust reasonably could be expected to damage the United States' foreign relations with Great Britain and other nations by impairing the United States' ability to engage in and obtain confidential diplomatic communications and by impeding international law enforcement

cooperation. That explanation fully satisfied the governing Executive Order and, therefore, also satisfied Exemption 1 of FOIA.

A. The President's Constitutional Responsibilities For National Defense And Foreign Relations Include The Authority, Long Recognized By Congress, To Protect Confidential National Security Information

* * * *

1. The Executive Branch's "authority to classify and control access to information bearing on national security *** flows primarily from th[e] constitutional investment of power in the President *** as head of the Executive Branch and as Commander in Chief," and thus "exists quite apart from any explicit congressional grant." Department of the Navy v. Egan, 484 U.S. 518, 527 (1988). The President's exclusive authority to "receive Ambassadors and other public Ministers," U.S. Const. Art. II, § 3, provides further textual grounding specifically for the Executive's primacy in managing the Nation's diplomatic relations. Accordingly, "courts traditionally have been reluctant to intrude upon the authority of the Executive" over the management of national security information, because of "the generally accepted view that foreign policy [is] the province and responsibility of the Executive." Egan, 484 U.S. at 529–530 (quoting Haig v. Agee, 453 U.S. 280 293–294 (1981)). With respect to that area of Presidential responsibility, "the courts have traditionally shown the utmost deference." Egan, 484 U.S. at 530 (emphasis added) (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

The President's paramount authority in the area of foreign relations has been recognized since the founding of the Republic. Thomas Jefferson advised President Washington that "[t]he transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly." 16 The Papers of Thomas Jefferson 379 (J. Boyd, ed. 1961). In an early extradition matter involving Great Britain, John Marshall, who was then a Member of Congress, declared that the President is "the sole organ of the nation in its

external relations, and its sole representative with foreign nations," and that "[t]he [executive] department *** is entrusted with the whole foreign intercourse of the nation." Speech of March 7, 1800, in 4 The Papers of John Marshall 104–105 (C. T. Cullen ed., 1984).

2. It also has been recognized "since the beginning of the Republic" that the "President's constitutional authority to control the disclosure of documents and information relating to diplomatic communications" is an indispensable adjunct of his foreign affairs power. Thus, John Jay explained in The Federalist No. 64:

> There are cases where the most useful [foreign policy] intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. *** [T]here doubtless are many [such persons] who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

The Federalist No. 64, at 392–393 (C. Rossiter ed., 1961).

So complete is the President's ability to protect against the unauthorized disclosure of foreign relations information that it includes the authority to withhold information about foreign affairs and diplomatic negotiations even from Congress, "if in [the President's] judgment disclosure would be incompatible with the public interest;" and that is so notwithstanding the Senate's role under Article II, Section 2 of the Constitution in giving its advice and consent to the making of treaties. That discretion to withhold confidential national security information even from Congress, or to restrict the extent of Congress's access to it, has been exercised by almost every President, from the time of George Washington to the present, in those instances when the President has determined that disclosure would be "incompatible with the public interest." President Washington refused to lay before the House of Representatives instructions, correspondence, and

documents underlying the negotiation of the Jay Treaty because "[t]o admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent." 1 J. Richardson, Messages and Papers of the Presidents 195 (1896). The "wisdom" of that decision "was recognized by the House itself and has never since been doubted." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). That is because "[a] discretion in the Executive Department how far and where to comply in such cases is essential to the due conduct of foreign negotiations." 20 The Papers of Alexander Hamilton 68 (H. Syrett ed., 1974) (Letter from Alexander Hamilton to President Washington (Mar. 7, 1796)).

President Tyler likewise withheld from the House of Representatives correspondence between the United States and Great Britain over the United States' Northeastern and Northwestern boundaries, because "no communication could be made by me at this time on the subject of its resolution without detriment or danger to the public interests." 4 J. Richardson, supra, at 101, 201–211. President Polk declined to comply with a request from the House of Representatives for information concerning efforts to negotiate a peaceful resolution of disputes with Mexico because disclosure "could not fail to produce serious embarrassment in any future negotiation between the two countries." Id. at 566.

Correspondingly, Congress historically has accorded the utmost deference to such Presidential judgments in the foreign policy area. "A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned." Curtiss-Wright, 299 U.S. at 321. . . .

In short, at the time Congress amended Exemption 1 of FOIA in 1974, Congress itself had, over the course of almost 200 years, consistently acquiesced in decisions by the President to decline to furnish information pertaining to foreign affairs, or otherwise accommodated his requests to maintain the confidentiality of such information. And, where the Executive Branch has made such information available to Congress, the conditions of secrecy have been respected between the Branches, so that confidentiality could be maintained as against the outside world. That history of

congressional respect for the Executive's judgments concerning the confidentiality of information about foreign relations or national defense provides compelling support for a rule of great deference to the Executive's classification judgments in the context of FOIA, which provides for disclosure of non-exempt documents to the public at large.

B. The Complex And Delicate Character Of Diplomatic Relations Requires That Courts Also Accord Utmost Deference To Executive Branch Determinations To Preserve The Confidentiality Of National Security Information

Like Congress, the courts have historically afforded the Executive Branch's foreign policy judgments and concomitant classification decisions the utmost deference, reflecting the distinct institutional roles and capabilities of the two Branches:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); accord Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–166 (1803). Accordingly, "[e]ven if there is some room for the judiciary to override the executive determination [on classification], it is plain that the scope of review must be exceedingly narrow." New York Times Co. v. United States, 403 U.S. 713, 758 (1971) (Harlan, J., dissenting).

First, deference to the Executive Branch is indispensable because the impact that revelation of a foreign government's confidences

would have on the conduct of the Nation's foreign policy cannot be assessed in a vacuum. The United States' relationship with a particular foreign government—especially as close an ally as Great Britain—necessarily involves multiple negotiations and dialogues about a variety of sensitive subjects at any given time. In light of the inevitable give-and-take and delicate balancing of interests that such ongoing relations entail, courts considering Executive Branch declarations in FOIA cases must keep in mind that geopolitical developments outside the courtroom can give a document a sensitivity that is not apparent to a non-expert from the face of the document.

Second, judgments about the harm to foreign relations and national security necessarily entail large elements of prediction, and those predictive judgments "must be made by those with the necessary expertise in protecting classified information." Egan, 484 U.S. at 529.

* * * *

Executive Order No. 12,958 itself incorporates those elements of judgment and prediction in safeguarding the Nation's secrets. It permits the classification of information if the responsible classifying official "determines," on the basis of his or her expertise, that disclosure "reasonably could be expected to result in damage to the national security." Id. § 1.2(a)(4). Courts must respect such determinations. Executive Branch experts are better acquainted than courts, for example, with the politically sensitive and volatile context in which a government extradites one of its own citizens to stand trial in a foreign land, and the adverse consequences that might ensue for a foreign government if a confidential diplomatic communication with the United States were to be disclosed.

Third, diplomatic relationships come with a history and a future. With respect to any particular nation at any given time, the United States may be attempting to repair a serious breach in relations, to set the foundation for a new and enduring relationship, or to build upon and expand a prior history of cooperation. In that context, the old saw that "timing is everything" assumes critical weight. Elections, coups, no-confidence votes, and unforeseen domestic developments in a foreign country can transform

overnight the significance and sensitivity of a communication. Likewise, a judicial order to breach a foreign government's trust and disclose a sensitive communication that issues at a time when the Executive Branch is struggling to repair or maintain contacts with that government due to other developments in the international arena could have grave and enduring repercussions for United States' foreign policy.

* * * *

International law enforcement efforts and extradition matters, like those at issue in this case, well illustrate the need for substantial judicial deference to the "broad view of the scene," Marchetti, 466 F.2d at 1318, and to the contextual judgment that Executive Branch officials bring to bear on classification decisions. "[R]elations with foreign nations *** are necessarily implied in the extradition of fugitives from justice." United States v. Rauscher, 119 U.S. 407, 414 (1886). . . .

For those reasons, the concerns that State Department officials expressed (Pet. App. 53a, 57a–58a, 62a–63a) about the real-world impact of breaching Great Britain's confidence on the United States' law enforcement efforts in the United Kingdom and more generally with other nations do not "lack [] *** particularity" (id. at 12a). Quite the opposite, they reflect realistic appraisals of a complicated and intertwined diplomatic situation by State Department experts who have the institutional responsibility and experience to see the foreign relations "forest" and not just the particular "tree" before the court, and who thus can foresee the ripple effect that a single breach of trust would have on important United States foreign policy and international law enforcement objectives. "The judiciary is not well-positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." INS v. Aguirre-Aguirre, 119 S. Ct. 1439, 1445 (1999).

C. Courts Likewise Must Accord The Utmost Deference To Executive Branch Classification Decisions Concerning Documents That Are The Subject Of Suits Under The Freedom Of Information Act

* * * *

1. The Utmost Deference Is Owed To The Executive's Interpretation Of Its Own Executive Order That Damage To The National Security Includes Harm Resulting From The Act Of Disclosing A Confidential Communication From A Foreign Government

* * * *

. . . [C]ases recognize the utter unworkability of a scheme under which courts would make their own independent judgments about maintaining the confidentiality of national security information—either because deference is not deemed to have been "justif[ied]" through an unspecified "initial showing" in a particular case, or because of a disagreement with the Executive Branch about the causes and nature of damage to foreign relations that may be taken into account. . . .

* * * *

Preserving the confidentiality of communications in the area of international law enforcement and extradition is critical in its own right. Under the extradition treaty between the United States and the United Kingdom, like most of the extradition treaties entered into by the United States in the last fifteen years, the government from whom extradition is requested is obligated to represent the requesting State in the extradition proceedings. When extradition is contested, as it was by respondent's client, the requesting and sending governments may spend years engaged in sensitive communications pertaining to issues raised in the legal proceedings, the location of fugitives, investigative sources and methods, investigative or prosecutorial strategies, security issues, humanitarian concerns, and the domestic and diplomatic repercussions of the extradition. One government may question the strength of a case or the commitment of the other government to a pending extradition matter, or it may seek to assuage particular political or humanitarian concerns in the sending country. With many countries whose legal systems differ from ours, concerns about the nature of the criminal proceedings, the motivation for the prosecution, or conditions of incarceration may be expressed confidentially that neither government would wish to have voiced publicly.

With respect to international law enforcement more generally, preserving the trust and ongoing cooperation of foreign governments and protecting the confidentiality of the candid information they share—as participants in transnational efforts to prevent terrorism, to locate and bring to justice international fugitives, and to combat (for example) narcotics trafficking, alien smuggling, and illegal weapons sales—represent distinct foreign policy objectives, separate and apart from any individual criminal matter. Given the vital importance of cultivating an atmosphere of trust in which candid and timely exchanges of information can be encouraged, "[g]reat nations, like great men, should keep their word." Sims, 471 U.S. at 175 (quoting FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting)). "Effectiveness in handling the delicate problems of foreign relations requires no less." United States v. Pink, 315 U.S. 203, 229 (1942).

Accordingly, this Court should reject the court of appeals' counterintuitive and perilous conclusion that no threat of "harm" to the "foreign relations of the United States" (Exec. Order No. 12,958, § 1.1(l)) is presented by the prospect of a foreign government limiting or terminating negotiations or cooperation with the United States on a sensitive matter, or refusing to afford reciprocal protection for the confidences of the United States, if its confidences are not preserved. The "changeable and explosive nature of contemporary international relations," Haig, 453 U.S. at 292, and the breach of trust that disclosure of the British government's confidences would cause in foreign relations generally and in the delicate arena of international law enforcement and extradition in particular, warrant reversal of the court of appeals' judgment.

* * * *

5. Foreign Policy Issues in U.S. Legislation

a. Presidential authorities

On November 3, 1993, the Office of Legal Counsel, U.S. Department of Justice ("OLC"), provided a memorandum to

the Counsel to the President concluding as follows (footnotes omitted):

> Presidential signing statements . . . may on appropriate occasions perform useful and legally significant functions. These functions include . . . (3) informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the Executive Branch to the extent that such enforcement would create an unconstitutional condition.
>
> * * * *
>
> . . . [T]he President may use a signing statement to announce that, although the legislation is constitutional on its face, it would be unconstitutional in various applications, and that in such applications he will refuse to execute it. . . . Relatedly, a signing statement may put forward a "saving" construction of the bill, explaining that the President will construe it in a certain manner in order to avoid constitutional difficulties. . . .
>
> More boldly still, the President may declare in a signing statement that a provision of the bill before him is flatly unconstitutional, and that he will refuse to enforce it. . . .

Memorandum for Bernard N. Nussbaum, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: The Legal Significance of Presidential Signing Statements (Nov. 3, 1993). The full text of the memorandum, including an appendix providing historical examples of Presidential signing statements, is available at *www.usdoj.gov/olc/signing.htm*.

On November 2, 1994, OLC provided a memorandum to the Counsel to the President on the underlying issue of the President's authority to decline to execute unconstitutional statutes. The memorandum "start[ed] with a proposition that I believe to be uncontroversial: there are circumstances in

which the President may appropriately decline to enforce a statute that he views as unconstitutional." Recognizing that this proposition "does not offer sufficient guidance as to the appropriate course in specific circumstances," the memorandum also offered a series of propositions, including that "[t]he President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. . . ." Memorandum for the Honorable Abner J. Mikva, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994). An appended "Brief Description of Attached Materials" provided synopses of relevant prior Attorney General opinions, Office of Legal Counsel opinions, and Presidential Signing Statements, including examples in the foreign affairs area. The full text of the memorandum is available at *www.usdoj.gov/olc/nonexcut.htm*.

See also Memorandum For Alan J. Kreczko, Special Assistant to the President and Legal Adviser To The National Security Council, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Department of Justice, re: Presidential Discretion to Delay Making Determinations Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, November 16, 1995, available at *www.usdoj.gov/olc/cbw_b10.htm*, discussed in Chapter 18.D.3; Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to the Counsel to the President re: Constitutionality of Legislative Provision Regarding ABM Treaty, June 26, 1996, available at *www.usdoj.gov/olc/abmjq.htm*, discussed in Chapter 4.B.6.a.(3).

b. Presidential signing statements

On a number of occasions during the 1990s the President included language in signing statements preserving his Constitutional prerogatives in this manner. A few

examples invoking the President's Constitutional powers as Commander-in-Chief and in foreign affairs are provided below.

On October 5, 1999, in signing the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106–65. President William J. Clinton objected to a number of provisions, including as excerpted below. 35 WEEKLY COMP. PRES. DOC. 1927 (Oct. 11, 1999).

. . . Although I have serious reservations about some portions of this Act, I believe S. 1059 provides for a strong national defense, maintains our military readiness, and supports our deep commitment to a better quality of life for our military personnel and their families.

* * * *

I am concerned about section 1232, which contains a funding limitation with respect to continuous deployment of United States Armed Forces in Haiti pursuant to Operation Uphold Democracy. I have decided to terminate the continuous deployment of forces in Haiti, and I intend to keep the Congress informed with respect to any future deployments to Haiti; however, I will interpret this provision consistent with my Constitutional responsibilities as President and Commander in Chief.

A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164). Furthermore, because the Constitution vests the conduct of foreign affairs in the President, the Congress may not direct that the President initiate discussions or negotiations with foreign governments (section 1407 and 1408). Nor may the Congress unduly restrict the President's constitutional appointment authority by limiting the President's selection to individuals recommended by a subordinate officer (section 557). To the extent that these provisions conflict with my constitutional responsibilities in these

areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise.

* * * *

In 1994, President Clinton noted a number of areas of disagreement in signing the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, as excerpted below. 30 WEEKLY COMP. PRES. DOC. 948 (May 9, 1994).

---

* * * *

Section 141 would require the Department of State to allow local guard contracts awarded to U.S. firms to be paid in U.S. dollars in certain countries. Because many countries require that payment for services rendered locally be paid in local currency, this provision could force the United States to violate both host country law and its obligations under the Vienna Convention on Diplomatic Relations. I will seek to implement this section in the manner most consistent with U.S. obligations under international law.

Other provisions raise constitutional concerns. Article II of the Constitution confers the Executive power of the United States on the President alone. Executive power includes special authority in the area of foreign affairs. Certain provisions in H.R. 2333, however, could be construed so as to interfere with the discharge of my constitutional responsibilities.

For example, section 412 (reforms in the World Health Organization), section 501 (protection of refugee women and children), section 527(b) (loans by international financial institutions to governments that have expropriated property of U.S. citizens), and section 823 (loans or other payments by international financial institutions for the purpose of acquiring nuclear materials by non-nuclear states), purport specifically to direct the President on how to proceed in negotiations with international organizations. These provisions might be construed to require the Executive branch to espouse certain substantive positions regarding specific issues. I support the policies underlying these sections. My constitutional authority over foreign affairs, however, necessarily entails discretion

over these matters. Accordingly, I shall construe these provisions to be precatory.

Section 221 (the establishment of an office in Lhasa, Tibet), section 236 (an exchange program with the people of Tibet), and section 573 (an Office of Cambodian Genocide Investigation, the activities of which are to be carried out primarily in Cambodia), could also interfere with the President's constitutional prerogatives. I am sympathetic to the goals of these provisions. However, they could be construed to require the President to negotiate with foreign countries or to take actions in those countries without their consent. I will, therefore, implement them to the extent consistent with my constitutional responsibilities.

* * * *

Section 401 requires certain withholdings from U.S. assessed contributions for the United Nations (U.N.) regular budget, and from the fiscal year 1994 supplemental until the President makes the requisite certification that the U.N. has established an office of and appointed an Inspector General, empowered with specified authorities. Section 404 also sets forth ceilings on assessments on the United States for peacekeeping contributions. Although I share the Congress' goal of encouraging U.N. reform and broader cost sharing, I cannot endorse the method proposed by these provisions because they could place the United States in violation of its international treaty obligations if reform is not achieved within the stated time.

Section 407 sets forth new reporting and notification requirements, including a requirement for 15-day advance notification (with no waiver provision) before the United States provides certain in-kind assistance to support U.N. peacekeeping operations. It is understood that the Congress, however, does not consider this provision to be subject to the regular procedures on reprogramming notifications. It is imperative at times to provide such assistance on an urgent basis to further U.S. foreign policy interests. I will, therefore, construe these reporting and notification requirements consistent with my constitutional prerogatives and responsibilities as Commander in Chief and head of the Executive branch. I also note the understanding reached with the Congress that this

notification process will not include congressional "holds" on assistance when notification does occur.

On October 28, 1991, in signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, FY 1992, Pub. L. No. 102–140, President George H. W. Bush addressed the issue of Constitutional prerogatives in international negotiations as excerpted below. 27 WEEKLY COMP. PRES. DOC. 1529 (Oct. 28, 1991).

---

* * * *

Section 503 of the Act prohibits the use of funds to issue Israel-only passports and more than one official or diplomatic passport to Government employees in certain circumstances. This prohibition applies to issuing passports for the purpose of complying with the policy of some Arab League nations of denying entry to persons whose passports reflect that they have previously visited Israel. I am sympathetic to the goals of this provision and have made this issue part of the Administration's discussions with the countries that engage in such practices.

The Constitution, however, vests exclusive authority in the President to control the timing and substance of negotiations with foreign governments and to choose the officials who will negotiate on behalf of the United States. A purported blanket prohibition on the use of funds to issue more than one official or diplomatic passport to U.S. Government officials could interfere with the President's ability to conduct diplomacy by denying U.S. diplomats the documentation necessary for them to travel to all countries in the Middle East and could upset delicate and complex negotiations. I therefore am directing the Secretary of State to ensure that this provision does not interfere with my constitutional prerogatives and responsibilities.

* * * *

See also, *e.g.*, signing statements discussed in Chapters 4.B.6.a.(3)(30 WEEKLY COMP. PRES. DOC. 1955 (Oct. 11, 1994), succession to ABM treaty); 13.A.4.a.(7)(iii) and a.(9).

(28 WEEKLY COMP. PRES. DOC. 2281 (Nov. 2, 1992) and 32 WEEKLY COMP. PRES. DOC. 2040 (Oct. 14, 1996), negotiations in connection with driftnet fishing moratorium and bycatch reduction); 16.A.3.b.(32 WEEKLY COMP. PRES. DOCS 478 (Mar. 18, 1996), sanctions against Cuba).

B. CONSTITUENT ENTITIES

1. General

In a letter of April 12, 1991, the U.S. Department of Justice provided comments on a draft U.S. General Accounting Office ("GAO") report entitled "U.S. Possessions, Applicability of Relevant Provisions of the U.S. Constitution." Letter from Harry H. Flickinger, Assistant Attorney General for Administration, to Linda G. Morra, Director, Human Services Policy and Management Issues, GAO, reprinted as Appendix VIII in H.R. Rep. 104–713, Part 1 at 66–87 (1996). Excerpts from the letter below address additional legal issues primarily concerning Puerto Rico's status.

---

* * * *

I. . . . [W]e shall focus first on the applicability of the Territory Clause of the Constitution (art. IV, § 3, cl. 2)[1] to the Commonwealths of Puerto Rico and the Northern Mariana Islands and the territories of Guam, American Samoa, and the Virgin Islands. Those five areas are under the sovereignty of the United States,[2]

---

[1] The Territory Clause provides in pertinent part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

[2] The United States acquired sovereignty over those five areas as follows: Puerto Rico and Guam, Article II of the Treaty of Paris of December 10, 1898, 30 Stat. 1754, 1755; American Samoa, cessions of April 10, 1900 and July 16, 1904, accepted, ratified, and confirmed by the Act of February 20, 1929, 48 U.S.C. § 1661; Virgin Islands, Convention with Denmark of August 4, 1916, Art. I, 39 Stat (Pt. II) 1706; Northern Mariana Islands Covenant, Section 101, 90 Stat. 263, 264 (1976), 48 U.S.C. § 1681 note.

but not States or included in States. National Bank v. County of Yankton, 101 U.S. 129, 133 (1880) has established that "[a]ll territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress" under the Territory Clause.

Various factions within the Commonwealths of Puerto Rico and the Northern Mariana Islands have argued that the Territory Clause does not apply there. (fn. omitted) The United States has sovereignty in these Commonwealths, however, and under the Constitution and applicable law, the source of constitutional authority for exercise of federal authority in all areas under the sovereignty of the United States is the Territory Clause. The argument that the Territory Clause does not apply is tantamount to a claim that there is no constitutional source for federal lawmaking in Puerto Rico and the Northern Marianas, and that these entities are basically independent sovereigns. Not surprisingly, every court to consider the Territory Clause issue has reaffirmed that the Territory Clause provides the fundamental constitutional source of authority governing the relationship between the U.S. and the Commonwealths.

* * * *

II. . . . As a general observation, we would avoid the use of the term "possession" when referring to the territories of American Samoa, Guam and the Virgin Islands, and the Commonwealth of the Northern Mariana Islands and Puerto Rico. . . . In our view, the term "an unincorporated area under the sovereignty of the United States that is not a Sate or included in a State" technically would be more accurate. . . .

Background

According to the Insular Cases and their progeny (fn. omitted), areas under the sovereignty of the United States that are not States fall into two categories: incorporated and unincorporated. The first group comprises those that are destined to become States; to those the Constitution of the United States applies in full. Included in the other group are those areas that are not intended for statehood; to those only fundamental parts of the Constitution apply

of their own force. *Downes v. Bidwell*, 182 U.S. 244, 290–91 (1901). Although the Court has not precisely defined which parts of the Constitution are fundamental, it has held various parts to be fundamental. See, *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922) (due process); *Examining Board v. Flores de Otero*, 426 U.S. 572, 599–601 (1976) (Equal Protection Clause of the Fourteenth Amendment or the Equal Protection Element of the Due Process Clause of the Fifth Amendment (fn. omitted)); *Torres v. Puerto Rico*, 442 U.S. 465, 468–71 (1979) (prohibition against unreasonable search and seizure either of the Fourth Amendment directly or by operation of the Fourteenth Amendment.)

On the other hand, the right to a jury trial has not been held fundamental, *Balzac, supra*; see also, *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244 (1984).

Apart from those provisions that apply to the insular areas of their own force, Congress has introduced other parts of the Constitution into them by legislation. . . . Sometimes those provisions have been made applicable only as a protection against the local government. See e.g., the Bill of Rights in the Organic Acts of Guam and the Virgin Islands, 48 U.S.C. §§ 1421b (a)–(t); 1561 (except the last two paragraphs). On the other hand, some constitutional provisions have been introduced into those areas so as to be effective against the federal government. See e.g., 48 U.S.C. § 1421b(u) (Guam); the Covenant with the Northern Mariana Islands, 48 U.S.C. § 1681 note, § 501; 48 U.S.C. § 1561, penultimate paragraph (Virgin Islands). . . .

* * * *

The Uniformity Clause of art. I, § 8, cl. 1 of the Constitution provides that all duties, imports, and excises shall be uniform throughout the United States. In 1901 the Supreme Court held in *Downes v. Bidwell*, *supra*, one of the *Insular Cases*, and involving custom duties, that this clause did not apply to special customs duties imposed on imports from Puerto Rico to the United States, because Puerto Rico, as an unincorporated territory, was not a part of the United States within the meaning of the Uniformity Clause. In spite of that decision, Puerto Rico is now a part of the

customs territory of the United States. 19 U.S.C. § 1401(h). The other four insular areas, however, are not. *Id*. Covenant with the Northern Mariana Islands, Section 603.

Similarly, because the insular areas are exempt from the uniformity requirement with respect to taxation, the federal income tax is not required to apply to income from sources within an insular area earned by a resident of that area. 26 U.S.C. §§ 931, 932, 936. . . .

The Constitution contains another uniformity requirement, art. I, § 8, cl. 4, relating to rules of naturalization and bankruptcy laws. Statutes have been enacted on the theory that these two uniformity requirements do not extend to the insular areas. . . .

Since the term "national" refers to all persons who owe permanent allegiance to the United States, whether citizens or not, we suggest that the report refer to the residents of American Samoa who owe permanent allegiance to the United States but are not United States citizens, as "non-citizen nationals," in accord with the 1986 amendment to § 341 of the Immigration and Nationality Act, 8 U.S.C. § 1452(b).

* * * *

The Commerce Clause (art. I, § 8, cl. 3 of the Constitution) confers upon Congress the power "To regulate Commerce with Foreign Nations, and among the several States, and with the Indian tribes." There are two aspects to the Commerce Clause; first, the power of Congress to enact legislation; and second, the clause's negative implication that prohibits the States from burdening interstate or foreign commerce, frequently called the Dormant Commerce Clause. The question is whether those two aspects of the Commerce Clause also apply to the unincorporated insular areas.

The judicial decisions in this area have not been consistent.

* * * *

2. Palau

a. Not "foreign nation" for U.S. domestic law purposes

Prior to the 1994 termination of the Trusteeship Agreement applicable to Palau, *see* 2.b., below, the U.S. Court of Appeals

for the Second Circuit vacated a judgment by the U.S. District Court for the Southern District of New York that had denied a motion by Palau to remand a money judgment action to state court. *Morgan Guar. Trust Co. v. Republic of Palau*, 924 F.2d 1237 (2d Cir. 1991). Plaintiff banks in the case were guarantors of loans made to Palau for the construction of an electric power plant and fuel storage facility. Palau defaulted. The banks repaid the loans and then brought an action in New York State Supreme Court against Palau to recover their losses. The case was removed to federal court under the removal jurisdiction of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1441(d), which provides for the removal of "any civil action brought in a State court against a *foreign state* as defined in 1603(a)" (emphasis added). *See Morgan Guar. Trust Co. v. Republic of Palau*, 639 F. Supp. 706 (S.D.N.Y. 1986).

On appeal, the Second Circuit disagreed with the district court's conclusion that Palau was a foreign state within the meaning of the applicable statutes, finding that "there was no basis for the exercise of removal jurisdiction in this case and that the district court therefore erred in denying the Banks' motion to remand the action to the New York Supreme Court." The court of appeals also noted that the same consideration would preclude original jurisdiction over Palau under the FSIA in federal court. The court's analysis of the status of Palau as a trust territory at the time of the litigation is provided below.

---

* * * *

Although both the removal and original jurisdiction provisions refer to the definition of foreign state found in section 1603(a), the section is more descriptive than definitional:

> A "foreign state", except as used in section 1608 of this title [pertaining to service], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b) [defining agency or instrumentality of foreign state].

To resolve the dispute whether the Republic of Palau is a foreign state subject to original or removal jurisdiction, it therefore is necessary to examine other sources for guidance.

In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318–319, 81 L. Ed. 255, 57 S. Ct. 216 (1936), the Supreme Court listed the following attributes of sovereign statehood: the power to declare and wage war; to conclude peace; to maintain diplomatic ties with other sovereigns; to acquire territory by discovery and occupation; and to make international agreements and treaties. Under international law, a state is said to be an entity possessed of a defined territory and a permanent population, controlled by its own government, and engaged in or capable of engaging in relations with other such entities. *Restatement (Third) of the Foreign Relations Law of the United States* § 201 (1987) ("*Restatement 3d*"). We recently referred to this definition in the course of holding that recognition of a state that satisfies the elements of the definition does not require recognition of the particular government in control of the state. *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988), *cert. denied*, 489 U.S. 1081, 103 L. Ed. 2d 840, 109 S. Ct. 1535 (1989).

According to international law, a sovereign state has certain well accepted capacities, rights and duties:

(a) sovereignty over its territory and general authority over its nationals;
(b) status as a legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international organizations, and to pursue, and be subject to, legal remedies;
(c) capacity to join with other states to make international law, as customary law or by international agreement.

Restatement 3d § 206.

Palau simply does not have the attributes of statehood, and cannot be considered a foreign sovereign. *See World Communications Corp. v. Micronesian Telecomms. Corp.*, 456 F. Supp. 1122

(D. Haw. 1978); *People of Saipan v. United States Dept. of Interior*, 356 F. Supp. 645 (D. Haw. 1973), *aff'd as modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003, 95 S. Ct. 1445, 43 L. Ed. 2d 761 (1975). We are willing to accept the proposition that a trust territory held under United Nations auspices is not a territory "belonging to the United States" within the meaning of the territorial clause of the Constitution. U.S. Const. art. IV, § 3, cl. 2. Accordingly, the authority to govern Palau does not rest upon the rule-making powers granted to Congress by the Constitution for the regulation of territories or other property that "belong" to the United States. *Id.* Rather, it is the Trusteeship Agreement, entered into under the treaty-making power of the Constitution, that provides the authority for the governance of Palau by the United States. U.S. Const. art. II, § 2, cl. 2. *See* McKibben, *The Political Relationship Between the United States and Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam*, 31 Harv. Int'l L.J. 257, 264 (1990). The Trusteeship Agreement, of course, confers upon the United States "full power of administration, legislation and jurisdiction over the territory," as well as the right to apply "such of the laws of the United States as it may deem appropriate." A more wide-ranging authority to govern is hard to imagine. The United States exercised that authority at the time of the transactions giving rise to this action, and continues to exercise it.

We take judicial notice of the fact that the United Nations Security Council has approved the termination of the trusteeship arrangement as to the Northern Mariana Islands, which has acquired the status of commonwealth, and the Marshall Islands and the Federated States of Micronesia, both of which have agreed to Compacts of Free Association with the United States. N.Y. Times, Dec. 24, 1990, at A5, col. 1. Palau therefore is the sole remaining part of the Pacific Trust Territory remaining under the trusteeship. It seems clear that Palau must continue as a trust territory until the United Nations Security Council acts to relieve the United States of its responsibilities under the trust. *See* Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust*?, 21 Harv. Int'l L.J. 1, 6 (1980).

While Palau's approval of a Compact of Free Association might hasten the day, the status quo continues. *See generally* Armstrong & Hills, *The Negotiations for the Future Political Status of Micronesia (1980–1984)*, 78 Am. J. Int'l L. 484 (1984). Whether United Nations termination of the Pacific Territory Trust as to Palau is essential for Palau to be considered a foreign state within the meaning of the Foreign Sovereign Immunities Act is a question that need not be answered here. While it appears to us that termination at least is necessary to the acquisition of de jure status, the district court determined that Palau has achieved a de facto status as a foreign state, and it is to this determination that we now turn.

The district court found that the Compact of Free Association between the United States and Palau, "which was ratified in a Palauan plebiscite on February 24, 1986," served to establish "Palau's independent sovereignty and equal diplomatic status in the international community." *Morgan Guar. Trust*, 639 F. Supp. at 709. This finding of ratification, erroneous in light of subsequent events, underlies the district court's conclusion that the trusteeship has been "effectively" terminated and that Palau has "*de facto*" sovereignty with only some "further acts" standing in the way of "complete unfettered sovereignty." *Id.* at 716. In fact, the Compact of Free Association never has been ratified by Palau, and the limited powers of self-government afforded to Palau under its Constitution do not justify a finding of "de facto" sovereignty.

It seems to us that a political entity whose laws may be suspended by another cannot be said to be possessed of sovereignty of any kind, de facto or de jure. That is the case with respect to the United States and Palau. Moreover, the Palauan courts are not independent of the United States. The Justices of the High Court of Palau are appointed by the Secretary of the Interior, and the court is constrained to apply the law of the United States in effect in the territory, including the executive orders of the Secretary of the Interior. *See Matter of Bowoon Sangsa Co., Ltd.*, 720 F.2d 595, 600–01 (9th Cir. 1983). This, too, is inconsistent with the concept of sovereignty. In *Bowoon Sangsa*, the Ninth Circuit characterized Palau as "quasi-sovereign." *Id.* at 602. The district court in this case recognized the authority of the High Commissioner (now the Secretary of the Interior) to screen budgets,

conduct audits and process grants for the executive branch of the Palauan government. The reality is that the United States has ultimate authority over the governance of Palau, *see Sablan Constr. Co. v. Government of Trust Territory*, 526 F. Supp. 135, 141 (D.N. Mar. I., App. Div. 1981), and it therefore cannot be said that Palau is an entity "under the control of its own government," *Restatement 3d* § 201. Neither can it be said to be sovereign over its own territory, with general authority over its nationals in the manner contemplated by *Restatement 3d* § 206(a).

* * * *

Our conclusion in this case well may have been different had the Compact of Free Association been fully approved by the parties to the Compact. Such approval would have marked the entry of Palau into the final stage of its transition to self-government and would have signaled the certain and unavoidable termination of the Trusteeship. *See United States v. Covington*, 783 F.2d 1052, 1056 (9th Cir. 1985) (confession given in Republic of the Marshall Islands after approval of free association status treated as given in "foreign country"), *cert. denied*, 479 U.S. 831, 107 S. Ct. 117, 93 L. Ed. 2d 64 (1986); *Commonwealth of Northern Mariana Islands v. Atalig*, 723 F.2d 682, 687 (9th Cir.) (application of local law after approval of Covenant granting Commonwealth status to Northern Mariana Islands), *cert. denied*, 467 U.S. 1244, 82 L. Ed. 2d 826, 104 S. Ct. 3518 (1984). Subject to the control of its internal and external affairs by the United States, deficient in all the major attributes of statehood, its Compact of Free Association remaining unapproved after seven plebiscites, the Republic of Palau concedes its lack of sovereignty. We are constrained to agree.

b. Entry into force of Compact of Free Association with Palau

On October 1, 1994, the Compact of Free Association between the United States and the Republic of Palau ("Compact") entered into force. This terminated the last of the U.S. obligations under the terms of the Trusteeship Agreement of 17 July 1947 establishing the UN Trust Territory of the Pacific Islands ("TTPI"). *See* Trusteeship Agreement for the

Former Japanese Mandated Islands, Approved by the Security Council April 2, 1947, entered into force July 18, 1947, 61 Stat. 3301, TIAS No. 1665, 8 U.N.T.S. 189 (1947).

(1) Presidential Proclamation

On September 27, 1994, President William J. Clinton issued Proclamation 6726, providing that "on October 1, 1994, 1:01 p.m. local time in Palau the Compact will enter into force between the United States and the Republic of Palau, and Palau will thereafter be self-governing and no longer subject to the Trusteeship." 59 Fed. Reg. 49,777 (Sept. 29, 1994). The proclamation summarized the history of the U.S. role in the TTPI, the background of the Compact with Palau, and its approval by both Palau and the United States, as set forth below.

Since July 18, 1947, the United States has administered the United Nations Trust Territory of the Pacific Islands ("Trust Territory"), which has included the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, and Palau.

On November 3, 1986, a Covenant between the United States and the Northern Mariana Islands came into force. This Covenant established the Commonwealth of the Northern Mariana Islands as a self-governing Commonwealth in political union with and under the sovereignty of the United States.

On October 21, 1986, in the case of the Republic of the Marshall Islands, and on November 3, 1986, in the case of the Federated States of Micronesia, Compacts of Free Association with the United States became effective. Under the Compacts, the Federated States of Micronesia and the Republic of the Marshall Islands became self-governing sovereign states, in free association with the United States. Following the changes in political status of the Northern Mariana Islands, the Marshall Islands, and the Federated States of Micronesia, the Trusteeship Agreement ceased to be applicable to those entities and only Palau remained as the Trust Territory of the Pacific Islands.

On January 10, 1986, the Government of the United States and the Government of Palau concluded a Compact of Free Association similar to those that the United States entered into with the Republic of the Marshall Islands and with the Federated States of Micronesia. As in those instances, it was specified that the Compact with Palau would come into effect upon (1) mutual agreement between the Government of the United States, acting in fulfillment of its responsibilities as Administering Authority of the Trust Territory of the Pacific Islands, and the Government of Palau; (2) the approval of the Compact by the two Governments, in accordance with their constitutional processes; and (3) the approval of the Compact by plebiscite in Palau.

In Palau the Compact has been approved by the Government in accordance with its constitutional processes and by a United Nations-observed plebiscite on November 9, 1993, a sovereign act of self-determination. In the United States the Compact was approved by Public Law 99–658 of November 14, 1986, and Public Law 101–219 of December 12, 1989.

On May 25, 1994, the Trusteeship Council of the United Nations concluded that the Government of the United States had satisfactorily discharged its obligations as the Administering Authority under the terms of the Trusteeship Agreement and that the people of Palau had freely exercised their right to self-determination and considered that it was appropriate for the Trusteeship Agreement to be terminated. The Council asked the United States to consult with the Government of Palau and to agree on a date, on or about October 1, 1994, for entry into force of their new status agreement.

On July 15, 1994, the Government of the United States and the Government of the Republic of Palau agreed, pursuant to section 411 of the Compact of Free Association, that as between the United States and the Republic of Palau, the effective date of the Compact shall be October 1, 1994.

As of this day, September 27, 1994, the United States has fulfilled its obligations under the Trusteeship Agreement with respect to the Republic of Palau. On October 1, 1994, the Compact will enter into force between the United States and the Republic of Palau, and Palau will thereafter be self-governing and no longer

subject to the Trusteeship. In taking these actions, the United States is implementing the freely expressed wishes of the people of Palau.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by the Constitution and laws of the United States, including sections 101 and 102 of the Joint Resolution to approve the "Compact of Free Association" between the United States and the Government of Palau, and for other purposes, approved on November 14, 1986 (Public Law 99–658), and section 101 of the Joint Resolution to authorize entry into force of the Compact of Free Association between the United States and the Government of Palau, and for other purposes, approved on December 12, 1989 (Public Law 101–219), and pursuant to section 1002 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, and consistent with sections 101 and 102 of the Joint Resolution to approve the "Compact of Free Association" and for other purposes, approved on January 14, 1986 (Public Law 99–239), do hereby find, declare, and proclaim as follows:

Section 1. I determine that the Trusteeship Agreement for the Pacific Islands will be no longer in effect with respect to the Republic of Palau as of October 1, 1994, at one minute past one o'clock p.m. local time in Palau. This constitutes the determination referred to in section 1002 of the Covenant with the Northern Mariana Islands (Public Law 94–241).

Sec. 2. The Compact of Free Association with the Republic of Palau will be in full force and effect as of October 1, 1994, at one minute past one o'clock p.m. local time in Palau.

Sec. 3. I am gratified that the people of the Republic of Palau, after 47 years of Trusteeship, have freely chosen to establish a relationship of Free Association with the United States.

(2) Resolution of legal challenges to ratification in Palau

As noted in the proclamation, new status arrangements for other entities of the Trust Territory had entered into force eight years earlier, in 1986. *See 1 Cumulative Digest 1981–1988*

at 442–55. The United States had initially envisaged that the new status arrangements for all of the entities of the Trust Territory could enter into force simultaneously. However, when it became apparent that the entry into force of the Compact of Free Association with Palau would be delayed due to a series of legal actions, the United States decided to proceed with the new status of the other three entities.

In a letter to Congress dated July 26, 1994, the President indicated that litigation in Palau continued to make the date of entry into force of the Compact uncertain. The letter transmitted relevant documents "in accordance with section 101 of the Compact of Free Association Palau Act, Public Law 101–219 (December 12, 1989), section 101(d)(1)(C) and (2) of the Compact of Free Association Approval Act, Public law 99–658 (November 14, 1986), and section 102(b) of the Compact of Free Association Act of 1985, Public Law 99–239 (January 14, 1986)," including

> an agreement between Palau and the United States establishing October 1, 1994, as the effective date for the Compact, provided that all lawsuits in Palau challenging the Compact have been resolved by that date. . . .

The letter explained:

> The Congress . . . required that approval of the Compact be free of legal challenge in Palau and that I certify that there are no legal impediments to the ability of the United States to carry out fully its responsibilities and to exercise its rights under the defense-related provisions of the Compact. There is currently a lawsuit challenging the Compact in Palau. I will make this final certification once that lawsuit is resolved.
>
> The July 15, 1994, Agreement Regarding the Entry Into Force of the Compact of Free Association establishes October 1, 1994, as the effective date of the Compact, provided that all legal challenges in Palau have been resolved by that date ("provided that the requirements of section 101(1) of United States Public Law 101–219 (December 12, 1989) have been met"). See Senate Report

> No. 101–189, at 9 (1989). If all legal challenges in Palau have not been resolved by that date, the agreement provides that the effective date shall be the earliest possible date thereafter as established by exchange of letters between the two governments. . . .

See 89 Am.J. Int'l L. 96 (1995). The July 15 agreement and July 26 letter from the President are available at *www.state.gov/s/l/c8183.htm*.

The litigation over approval of the Compact dated from a 1981 Supreme Court of Palau decision holding that approval of any Compact would require a 75% majority. The decision was based on Article II, § 3 of the constitution of Palau, effective January 1, 1981, which required approval by 75% of the registered voters of any agreement that authorized the "use, testing, storage or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare." As explained by the Second Circuit in *Morgan Guar., supra*,

> The Compact of Free Association between the United States and Palau originally was submitted for approval by the Palauan people with the condition that a separate bilateral agreement would be entered into permitting the United States to locate nuclear devices in Palau. After two plebiscites failed to produce the 75% approval required by the Palau Constitution, the Compact was renegotiated to allow the United States to "operate nuclear capable or nuclear propelled vessels and aircraft within the jurisdiction of Palau without either confirming or denying the presence or absence of such weapons within the jurisdiction of Palau." *See* Compact of Free Association, Pub. L. No. 99–658, tit. III, § 324, 100 Stat. 3672 (1986). The Compact as modified was approved by a 72% margin in a plebiscite held on February 21, and reported on February 24, 1986. Because of the change in the nuclear use provision, the Compact was thought to be outside the 75% requirement on the third go-around. Accordingly, the Compact was considered adopted and was approved by Congress and the President of the United States. *See* Approval of the Compact of Free

> Association with the Government of Palau, Pub. L. No. 99–658, tit. I, § 101, 100 Stat. 3672 (1986); Exec. Order No. 12,569, 51 Fed. Reg. 37,171 (1986).
>
> Shortly after the approval of the Compact by Congress and the President, the Supreme Court of Palau determined that the revised language of the Compact did not serve to eliminate the 75% majority requirement and held that the Compact had not been approved at the third referendum. *See Gibbons v. Salii*, No. 8–86, at 2 (Sup. Ct. Palau, App. Div. Sept. 17, 1986). . . .

Morgan Guar. Trust Co. v. Republic of Palau, 924 F.2d 1237, 1240 (2d Cir. 1991).

The Palau constitution was amended in 1987 to reduce the required Compact referendum majority from 75% to a simple majority. That amendment was struck down by the Palau Supreme Court in 1988, finding that the proposed amendment had not been approved as required by Article XIV(1) of the constitution before being submitted to the voters. *Fritz v. Salii*, 1 ROP Intrm. 521 (1988). Although the Compact had by then been approved in four plebiscites, by votes of 72, 67, 62 and 73 percent, none had met the 75 percent requirement. *See Cumulative Digest 1981–1988* at 442–51.

In November 1992 the constitution was once again amended through a public referendum to allow the Compact to be passed by a simple majority rather than 75 percent. On October 8, 1992, the Palau Supreme Court had rejected a suit seeking to prevent the referendum from going forward, finding that the proposed amendment had been approved as required by the constitution. *Gibbons v. Etpison*, 3 ROP Intrm. 385A (Tr. Div. 1992). On July 2, 1993, the Court denied a suit challenging the referendum after the fact, rejecting claims that the ballot was misleading or insufficiently informative. *Gibbons v. Etpison*, 3 ROP Intrm. 398 (Tr. Div. 1993). The two cases were consolidated and affirmed on appeal. *Gibbons v. Etpison*, 4 ROP Intrm. 1 (1993).

A plebiscite on the Compact was held on November 9, 1993, and, on November 19, 1993, the Palau Election

Commission certified that the Compact had been approved, with 68.26% of the voters in favor.

On January 3, 1994, two new complaints were filed seeking nullification of the constitutional amendment and compact ratification. *Wong v. Nakamura,* Civil Action No. 1–94, and *Sumang v. Republic of Palau,* Civil Action No. 2–94. These suits alleged failure to satisfy constitutional and statutory requirements and coercion by the United States. The two suits were consolidated and dismissed, the Court rejecting all claims. *Wong v. Nakamura*, 4 ROP Intrm. 331 (Tr. Div. 1994), *appeal dismissed*, 4 ROP Intrm. 262 (1994).

Finally, in a letter of September 14, 1994, from Kuniwo Nakamura, President of the Republic of Palau, to Winston Lord, Assistant Secretary, Bureau of East Asian and Pacific Affairs, U.S. Department of State, President Nakamura stated that no legal challenges remained:

> The Government of Palau is pleased to notify the Government of the United States that the approval of the Compact of Free Association between Palau and the United States by the requisite percentage of votes cast in the referendum conducted pursuant to the Constitution of Palau on November 9, 1993 is free from any legal challenge in the Courts of Palau.
>
> Furthermore, under the statute of limitations contained in Section 114) of Republic of Palau Public Law No. 4–9, the time period during which any such challenge could be brought expired on January 2, 1994, and no such challenges are now pending in the Courts of Palau.

(3) Admission to United Nations and establishment of diplomatic relations with United States

On November 10, 1994, the Security Council adopted Resolution 956, terminating the Trusteeship Agreement applicable to Palau, S/RES/956 (1994). Set forth below is a declaration transmitted by Palau on November 10, 1994, to the Secretary-General of the United Nations stating the

position of the Government of the Republic of Palau with regard to international agreements that had been applied to the Republic of Palau prior to termination of the Trusteeship Agreement. The full text is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

With regard to bilateral treaties concluded by the United States on behalf of the Republic of Palau, or applied or extended by the former to the latter prior to termination of the Trusteeship Agreement with respect to the Republic of Palau, the Government of the Republic of Palau will continue to apply within its territory, on a basis of reciprocity, terms of all such treaties until October 1, 1999, unless abrogated or modified earlier by mutual consent. At the expiration of that period, or any subsequent extension period properly notified, the Government of the Republic of Palau will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated. It is the earnest hope of the Government of the Republic of Palau that during the aforementioned period of examination, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the State parties concerned upon the possibility of the continuance or modification of such treaties.

With regard to multilateral treaties previously applied, the Government of the Republic of Palau intends to review each of them individually and to communicate to the depositary in each case what steps it wishes to take, whether by way of confirmation of termination, confirmation of succession or accession. . . .

* * * *

In an agreement signed at Washington, December 14, 1994, the Governments of the United States of America and of the Republic of Palau agreed that relations between the two Governments were to be conducted in accordance with the Vienna Convention on Diplomatic Relations, and that, in addition to diplomatic missions, the Governments might

establish and maintain other offices on terms and in locations as may be mutually agreed. The agreement entered into force March 2, 1995. *See also* 89 Am. J. Int'l L. 761 (1995).

The agreement provided (in Article II, paragraph 1) that diplomatic agents accredited under the Vienna Convention were also authorized to carry out, in addition to functions under that Convention, all functions that resident representatives are otherwise authorized to perform under the Compact of Free Association (which was signed by the two Governments on January 10, 1986, and became effective on October 1, 1994) and its subsidiary agreements.

3. Puerto Rico

a. Proposed Puerto Rican status legislation

On several occasions during the 1990s the U.S. Congress considered legislation regarding Puerto Rico's political status. During the 102nd Congress, two bills were introduced, H.R. 316 and S. 244, that would have provided for a referendum in Puerto Rico to allow residents to express their preference of political status from among the options of statehood, independence, and continued commonwealth status. The bills also provided for appropriate U.S. legislation to implement the choice.

On February 7, 1991, Attorney General Dick Thornburgh testified on S. 244 before the Senate Committee on Energy and Natural Resources, stating:

> President [George H.W. Bush] and his Administration strongly favor the right of the people of Puerto Rico to choose their political status by means of a referendum. . . . In [the President's] view, it is inconsistent for us to 'applaud the exciting and momentous movements toward freedom in Eastern Europe, Latin America and elsewhere while refusing to grant to our own citizens the right to self-determination.' . . . We believe that the approach of S. 244, with certain necessary modifications [of a purely

legal or constitutional character] can be an appropriate vehicle to achieve this goal.

Statement of Dick Thornburgh, Attorney General, before the Senate Committee on Energy and Natural Resources, February 7, 1991, available at *www.state.gov/s/l/c8183.htm*. Bills relating to Puerto Rico's political status were also introduced in the 103rd Congress (H.Con.Res. 94, H.R. 4442, and H.R. 5005), the 104th Congress (H.R. 3024), and 105th Congress (H.R. 856). Although no legislation was enacted, Puerto Rico held status plebiscites in both 1993 and 1998. In the 1993 plebiscite the status gaining the most votes (48.6%) was retention of commonwealth status. In 1998 a majority of voters rejected all four options offered—'territorial' commonwealth, free association, statehood, and independence, choosing instead "none of the above." *See The Results of the 1998 Puerto Rico Plebiscite, Report to Members, House Committee on Resources,* 106th Cong. (1999).

Excerpts from Mr. Thornburgh's 1991 testimony below provided an analysis of several legal aspects relevant to the different status possibilities for Puerto Rico. *See also* Letter from Harry H. Flickinger, Assistant Attorney General for Administration, to Linda G. Morra, Director, Human Services Policy and Management Issues, GAO, reprinted as Appendix VIII in H.R. Rep. 104–713, Part 1 at 66–87 (1996), excerpted in B.1. *supra*.

---

* * * *

At present, Puerto Rico is a commonwealth under the sovereignty of the United States. It has been given the right to organize a government pursuant to a constitution of its own adoption. . . .

The residents of Puerto Rico have enjoyed United States citizenship since 1917, and Puerto Rico's sons and daughters have contributed to American society in every walk of life. . . .

Puerto Ricans . . . govern themselves through a freely elected commonwealth government, and actively participate in United States presidential primaries and national party conventions. Not

since 1967, however, have the people of Puerto Rico had the opportunity to vote on the form of their continuing relationship with the United States. . . .

* * * *

I would . . . like to highlight some aspects of the substantive proposals for statehood and commonwealth that we find troubling. . . .

Should the statehood option be chosen, we believe it is unnecessary and indeed inappropriate to delay the onset of statehood for five years following the adoption of implementing legislation. To do so would not achieve what we presume is the desired result, that is, to avoid constitutional concerns under the tax uniformity provision of the Constitution, U.S. Const. Art. I, § 8, cl. 1, which requires that "all Duties, Imposts and Excises . . . be uniform throughout the United States." The five-year delay apparently would be aimed at permitting, before statehood, a transition from Puerto Rico's current, favored, tax status as an unincorporated territory to strict tax uniformity. This approach overlooks two crucial points.

First, it appears to assume that the Uniformity Clause would apply to Puerto Rico only after it actually became a state. This assumption, however, is incorrect. At present, Puerto Rico is exempt from the requirements of the Uniformity Clause only because it is an "unincorporated" territory; that is, a territory that has not been incorporated into "the United States" because it has not previously been anticipated that Puerto Rico would become a state. Under the Supreme Court's precedents, however, Puerto Rico would become an incorporated territory once it becomes destined for statehood. Puerto Rico therefore would become subject to the requirements of the Uniformity Clause as soon as Congress passes implementing legislation to make Puerto Rico a state. Therefore, for purposes of applying the Uniformity Clause, it makes no difference whatsoever whether statehood becomes effective immediately or is delayed for five years.

This does not mean, however, that Puerto Rico's tax status must be changed immediately once the decision is made to bring Puerto Rico into the union as a state. . . . Whether Puerto Rico

becomes a state or an incorporated territory, the Uniformity Clause permits tax transition provisions, provided they are narrowly tailored to prevent specific and identified problems of economic dislocation that Congress concludes would otherwise result from the transition from a non-incorporated territorial status to either an incorporated territorial or state status. . . .

. . . [W]hatever political status option is chosen by the people of Puerto Rico should not be delayed by unfounded constitutional concerns.

We also have concerns with some of the provisions that define the commonwealth option. For example, section 402(a) would declare that Puerto Rico "enjoys sovereignty, like a state, to the extent provided by the Tenth Amendment," and that "[t]his relationship is permanent unless revoked by mutual consent." These declarations are totally inconsistent with the Constitution.

Under the Territory Clause of the Constitution, U.S. Const. Art. IV, § 3, cl. 2, an area within the sovereignty of the United States that is not included in a state must necessarily be governed by or under the authority of Congress. Congress cannot escape this Constitutional command by extending to Puerto Rico the provisions of the Tenth Amendment, which by its terms applies only to the relationship between the federal government and states. We also doubt that Congress may effectively limit, by a statutory mutual consent requirement, its constitutional power under the Territory Clause to alter Puerto Rico's commonwealth status in some respect in the future. Not even so-called "enhanced commonwealth" can ever hope to be outside this constitutional provision.

. . . With these concerns addressed, we would hope that this legislation can be moved toward quick passage, so that the people of Puerto Rico may make the historic decision about their political destiny that S. 244 would permit.

b. Presidential memorandum

On November 30, 1992, President George H.W. Bush issued a document entitled "Memorandum on the Commonwealth

of Puerto Rico for the Heads of Executive Departments and Agencies." 28 WEEKLY COMP. PRES. DOC. 2324 (Dec. 7, 1992). The memorandum addressed the administrative treatment of Puerto Rico by the United States, as excerpted below.

Puerto Rico is a self-governing territory of the United States whose residents have been United States citizens since 1917 and have fought valorously in five wars in the defense of our Nation and the liberty of others.

On July 25, 1952, as a consequence of steps taken by both the United States Government and the people of Puerto Rico voting in a referendum, a new constitution was promulgated establishing the Commonwealth of Puerto Rico. The Commonwealth structure provides for self-government in respect of internal affairs and administration, subject to relevant portions of the Constitution and the laws of the United States. As long as Puerto Rico is a territory, however, the will of its people regarding their political status should be ascertained periodically by means of a general right of referendum or specific referenda sponsored either by the United States Government or the Legislature of Puerto Rico.

Because Puerto Rico's degree of constitutional self-government, population, and size set it apart from other areas also subject to Federal jurisdiction under Article IV, section 3, clause 2 of the Constitution, I hereby direct all Federal departments, agencies, and officials, to the extent consistent with the Constitution and the laws of the United States, henceforward to treat Puerto Rico administratively as if it were a State, except insofar as doing so with respect to an existing Federal program or activity would increase or decrease Federal receipts or expenditures, or would seriously disrupt the operation of such program or activity. With respect to a Federal program or activity for which no fiscal baseline has been established, this memorandum shall not be construed to require that such program or activity be conducted in a way that increases or decreases Federal receipts or expenditures relative to the level that would obtain if Puerto Rico were treated other than as a State.

* * * *

This guidance shall remain in effect until Federal legislation is enacted altering the current status of Puerto Rico in accordance with the freely expressed wishes of the people of Puerto Rico. The memorandum for the heads of executive departments and agencies on this subject, issued July 25, 1961, is hereby rescinded.

c. Role of the United States in foreign affairs

From time to time issues arise related to Puerto Rico's commonwealth status and the conduct of foreign affairs. Excerpts below from an August 1995 letter from Anne W. Patterson, Deputy Assistant Secretary of State for Inter-American Affairs, explained, among other things, the Department of State's conclusions that it could not agree to the Governor of Puerto Rico attending a meeting of the Association of Caribbean States ("ACS") but had no objection to his attending a meeting of the Caribbean Tourism Organization ("CTO").

The reasons for the Department's divergent positions with respect to the Governor's attendance at the ACS and CTO meetings deserve explanation, as they may not be obvious. Under the U.S. Constitution, our federal government, acting primarily through the Department of State, is responsible for conducting the foreign affairs of the United States. Notwithstanding Puerto Rico's commonwealth relationship with the United States, it has no legal authority to engage in foreign relations activities, absent the express permission of U.S. federal authorities.

Within this framework, the Department has tried to regulate the scope and propriety of Puerto Rico's foreign activities on a case-by-case basis. Puerto Rican participation in some international activities, such as those of a technical, cultural or sports nature, have frequently received our approval. Other activities, however, can be more problematic and therefore require closer scrutiny because they could have material impact on important U.S. foreign policy issues or constitutional prerogatives.

The Association of Caribbean States (ACS) is an example of an issue that can be problematic. We have stated previously, as in the Department's letter of March 15, 1994 to the Secretary of State of Puerto Rico, that Puerto Rico's participation in the ACS would not be appropriate given the stated goals of the ACS Charter and given Cuba's participation in that organization, to cite just two considerations. . . . For these reasons, the Department considers it unacceptable that Puerto Rico's Governor participate in the ACS meeting.

By contrast, the Department has no objection to Puerto Rico's participation in the upcoming CTO meeting, provided that meeting is a separate, distinct event that is unrelated to the ACS meeting. We recognize that Puerto Rico is already a member of the CTO, which we consider as essentially a technical organization, whose goals are not inherently inconsistent with U.S. foreign policy interests. We therefore approve of Puerto Rico's participation in the CTO, despite Cuba's membership in that organization.

As you know, U.S. and Puerto Rican authorities have recently had very useful written and oral exchanges with a view to coordinating more effectively our joint efforts to deal with Colombian drug trafficking activities and counter-narcotics programs, as they may impact Puerto Rico. . . .

* * * *

Because cooperation with foreign governments on counter-narcotics and other major foreign policy matters is so inherently "federal" in nature, we consider it essential as a matter of general policy that Puerto Rico coordinate with the Department in advance regarding any matters that Puerto Rican officials wish to discuss in meetings with foreign officials.

* * * *

4. Claims to Submerged Lands by Commonwealth of the Northern Mariana Islands

In May 1992 Special Representatives of the President of the United States and the Governor of the Commonwealth of

the Northern Mariana Islands ("CNMI") held consultations in Santa Fe pursuant to § 902 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States ("Covenant"), 48 U.S.C. § 1801. During those consultations, the United States stated that it would support federal legislation granting to the CNMI the submerged lands surrounding each of the Mariana Islands out to three nautical miles in the same manner as those lands were conveyed by the U.S. Congress to Guam, American Samoa and the U.S. Virgin Islands in 1974. At the conclusion of the round of consultations, on May 22, 1992, the CNMI Special Representative indicated that it opposed the U.S. position, stating that the United States had promised during the Covenant negotiations to confirm the Commonwealth's title to submerged lands through administrative action.

In September 1992 the State Department Office of the Legal Adviser concluded a review of the question of the CNMI's rights to submerged lands offshore each of its islands. The Office of the Legal Adviser found that the only potentially relevant statement in the negotiating record of the Covenant had been made in informal talks in May 1973, when a U.S. representative indicated that vesting the submerged lands surrounding the Mariana Islands in the Marianas government under the Covenant was to occur in the same manner as in the case of the states of the United States and other territories, i.e., by act of Congress. The resulting Covenant and accompanying documents were silent on the issue. The review also examined contemporary understandings of references to submerged lands in the CNMI Constitution as well as claims by CNMI to submerged lands deriving from Japanese law and identified two Marianas laws asserting maritime claims as if CNMI were an independent nation. For later developments on this issue, see *Digest 2002* at 246–59.

The full text of the U.S. analysis of these issues, excerpted below, is available at *www.state.gov/s/l/c8183.htm. See also*

letter from Harry H. Flickinger, Assistant Attorney General for Administration, to Linda G. Morra, Director, Human Services Policy and Management Issues, GAO, reprinted as Appendix VIII in H.R. Rep. 104–713, Part 1 at 66–87 (1996), excerpted in 1, *supra.*

---

* * * *

I. Covenant Negotiations

* * * *

CNMI Constitution

The conclusion that the Covenant negotiators were not considering Marianas claims to submerged lands is confirmed by the CNMI Constitution and the Commission on Federal Laws.

* * * *

A careful reading of Article XI makes clear that the CNMI Constitution recognizes four distinct categories of public lands. . . .

The Constitutional provision refers to those submerged lands "to which the Commonwealth now or hereafter may have a claim under United States law". Several points should be made about this clause. First, it refers only to those submerged lands to which the Commonwealth "may have a claim" as opposed to those lands to which it previously had, or later gained, title, a situation common to the other three categories of land mentioned in this article. Thus the CNMI Constitution asserts no preexisting title to submerged lands except that to which title is vested in the CNMI by the actions of the United States. Second, the clause refers only to those submerged lands to which a CNMI claim of ownership arises under "United States law," and not under some other law or source. This limitation is repeated in the Constitution's Article XIV reference to the CNMI's marine resources arising "under United States law".

This textual analysis is supported by the Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands prepared by the CNMI Constitutional Convention and

approved on December 6, 1976. . . . The Analysis was approved by the Convention "with the direction that it be available to the people along with the Constitution for their consideration before the referendum on the Constitution."

. . . The Analysis . . . suggests that no submerged lands were included in the lands covered by the preceding three categories, notwithstanding the cross-reference to Title 67 of the Trust Territory Code. The Analysis discusses submerged lands (on page 144) as follows:

> Section 1 includes all submerged lands to which the Commonwealth now or at any time in the future may have any right, title or interest. The United States is the owner of submerged lands off the coasts of the states under territorial waters. The states have no rights in these lands beyond that transferred by the United States. The federal power over these lands is based on the provisions of the United States Constitution with respect to defense and foreign affairs. Under article 1, section 104, of the Covenant, the United States has defense and foreign affair powers with respect to the Commonwealth and thus has a claim to the submerged lands off the coast of the Commonwealth as well. Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts. Under this section, any interest in the submerged lands granted to the states or to the Commonwealth in the future also will become part of the public lands of the Commonwealth.

It appears that the drafters of the CNMI Constitution believed then, contrary to the present position of the CNMI Special Representatives, that the submerged lands would belong to the United States and not to the CNMI until the U.S. Congress enacted legislation giving the CNMI an interest in them.

The Constitution was approved by the people of the Northern Marianas Islands in a 1977 referendum.

Northern Mariana Islands Commission on Federal Laws

The foregoing conclusions are bolstered by the recommendations of the Northern Mariana Islands Commission on Federal Laws, appointed by the President in 1980 pursuant to Section 504 of the Covenant, to survey the laws of the United States and to make recommendations to the U.S. Congress as to what laws should be made applicable to the Northern Marianas. . . .

The issue of submerged lands was addressed in the Commission's Second Interim Report to Congress, August 1985, pages 172–188. The Commission recommended that:

> Legislation should be enacted to convey to the Northern Mariana Islands any property rights of the United States in lands permanently or periodically covered by tidal waters within three geographical miles of the coastlines of the Northern Mariana Islands.

(A nautical mile is also called a geographic mile, or 1,820 meters. A. Shalowitz, Shore and Sea Boundaries, vol. I, page 25 (1962).) The Commission noted that "The proposed legislation is similar to laws already enacted to convey federal interests in submerged lands of the States of the Union, Guam, the Virgin Islands, and American Samoa." The Commission concluded its recommendation as follows:

> The legislation would be without prejudice to any claims the Northern Mariana Islands may have to submerged lands seaward of those conveyed by the legislation. The legislation would become effective on termination of the trusteeship, when sovereignty over the Northern Mariana Islands becomes vested in the United States.

Id. at 172. The recommendation is then followed by an extensive discussion of the rationale for the legislation, and sets forth some arguments for and against United States and CNMI ownership of the submerged lands.

With regard to the question of Federal ownership, the discussion notes that prior to termination of the Trusteeship the United

States could have no claim of ownership. (On the other hand, the Analysis made no claim that the Northern Marianas had sovereignty over the submerged lands prior to termination of the Trusteeship.) The Analysis recites the terms of Secretarial Orders 2969 and 2989 and Covenant Section 801 (see below). The Analysis then turns (p. 177) to the question of ownership following termination of the Trusteeship, as follows:

> On termination of the trusteeship, sovereignty over the Northern Mariana Islands will become vested in the United States. Covenant §§ 101, 1003(c). At that time, ownership of the submerged lands adjacent to the Northern Mariana Islands becomes uncertain. Substantial arguments favor the proposition that the Northern Mariana Islands will continue to be the owner of those submerged lands at that time. There is, however, respectable argument to the contrary, that the Federal Government and not the Northern Mariana Islands will be the owner at that time.

Before setting out those arguments, the Analysis notes that the proposed legislation "resolves the issue, as it has been resolved for all other permanently-inhabited jurisdictions under the American flag, by conveying any and all interests the United States may have to the Northern Mariana Islands on termination of the trusteeship."

In stating the case for United States ownership of the submerged lands on termination of the trusteeship, the Analysis recalls that Texas, an independent nation prior to admission to the union, relinquished her sovereignty and "by that relinquishment, her proprietary claims to the submerged lands adjacent to her shores," citing United States v. Texas, 339 U.S. 707, 717–18 (1950). . . .

The Analysis makes the case for continued ownership by the Northern Mariana Islands of adjacent submerged lands after termination of the trusteeship by reliance on Section 801 of the Covenant and on Marianas law including submerged lands in public lands. The Analysis asserts it makes "little sense" for the United States to "agree in the Covenant that the government of the Trust Territory of the Pacific Islands should transfer title to the Northern Mariana Islands on or before termination of the

trusteeship, only to have the title revert to the United States on that date under the doctrine of United States v. Texas". Inexplicably, the Analysis makes no reference to the provisions of the Marianas Constitution quoted above.

II. The CNMI Special Representatives rely on Secretarial Orders 2969 and 2989, and Covenant Section 801, for their claim to submerged lands.

Department of the Interior Secretarial Order 2969

The 1973 U.S. policy on early return of public lands was implemented through Secretarial Order 2969, December 26, 1974, Transfer of Trust Territory Public Lands to District Control. Section 4 of that Order authorized and directed the High Commissioner, upon formal request by a district legislature, "to transfer and convey . . . to each district legal entity all right, title and interest of the Government of the Trust Territory of the Pacific Islands in public lands, except Ujelang Atoll, within their respective districts." The CNMI argues that Order contemplates the transfer of submerged lands because the definition of "public lands" in Section 2(c)(1) of the Order refers to "those lands defined as public lands by Section 1 and 2, Title 67, of the Trust Territory Code".

Section 1 of Title 67 of the TTPI Code defines public lands—without mentioning submerged lands—"as being those lands situated within the Trust Territory which were owned or maintained by the Japanese government as government or public lands, and such other land as the government of the Trust Territory has acquired or may hereafter acquire for public purposes."

On the other hand, section 2, entitled "rights in areas below high water mark", explicitly refers to rights in "marine areas", as follows:

> (1) That portion of the law established during the Japanese administration of the area which is now the Trust Territory, that all marine areas below the ordinary high water-mark belong to the government, is hereby confirmed as part of the law of the Trust Territory, with the following exceptions [not here relevant].

This definition clearly includes tidal lands, i.e., those lands between the high and low water lines that uncover at low tide. It could also be read to extend to submerged lands, since the breadth of the territorial sea and submerged lands in international law is traditionally measured from the low water mark on shore.

Submerged Lands under Japanese Law

The TTPI Code, including sections 1 and 2 of Title 67 of the Trust Territory Code, does not define the seaward extent of the submerged lands appertaining to the Northern Mariana Islands, except by reference to Japanese law. Japan administered the Mariana Islands 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. Prior to 1945 no state asserted rights over the resources of the continental shelf seaward of the territorial sea. Accordingly, sections 1 and 2 of Title 67 of the Trust Territory Code cannot be read to refer to submerged lands extending seaward more than three nautical miles from the low water line along the coast of each Mariana island.

* * * *

Submerged Lands under International Law

Prior to the 1980s, international law recognized three nautical miles as the maximum breadth of the territorial sea and continental shelf claims seaward of the territorial sea to a depth of 200 meters or beyond where the depth of the superjacent waters admits of the exploitation of the natural resources of seabed. The 200 meter isobath generally lies less than five nautical miles off shore of the Northern Mariana Islands.

* * * *

Submerged Lands, Public Lands and Tidelands under Federal Law

. . . [A]lthough the Secretary of the Interior, the High Commissioner and the Resident Commissioner may arguably have had the authority to transfer title to the submerged lands out to three nautical miles surrounding the Mariana Islands, none of them so acted prior to termination of the Trusteeship with respect to the Northern

Mariana Islands, on November 3, 1986, and the Islands coming under the sovereignty of the United States as of 12:01 a.m., November 4, 1986. (Presidential Proclamation 5564, Nov. 3, 1986, 3 C.F.R. 146 (1986 Comp.).)

Federal property (including submerged lands) cannot be conveyed or disposed of except as authorized by Act of Congress. Under Article IV, section 3, clause 2, of the U.S. Constitution, only the Congress can "dispose" of the property of the United States. An officer of the United States cannot do so by administrative action, unless authorized by U.S. law. Sioux Tribe of Indians v. United States, 316 U.S. 317, 326 (1942). Hence, upon termination of the trusteeship in 1986, when the United States acquired title to submerged lands as an attribute of its sovereignty over the Northern Mariana Islands under the Covenant, United States v. California, 332 U.S. 19 (1947), and United States v. Texas, 339 U.S. 707 (1950), only an act of Congress could serve to divest the United States of title to the submerged lands. No U.S. law expressly addressing submerged lands around the Northern Marianas existed at the moment of trusteeship termination, and none has since. So whatever effect that Orders 2969 and 2989 might have had in authorizing conveyance of submerged lands before termination ceased at the moment of termination.

The CNMI may argue that Section 801 of the Covenant, being a Joint Resolution, Pub.L. 94–241, is such an act. However, Section 801 speaks of "real property" and makes no mention of submerged lands. In the context of the Covenant negotiations, "real property" refers to public lands. Under federal law, public lands do not include tide lands, i.e., land that is covered and uncovered by the ebb and flow of the tide. . . .

Consequently, as a general rule a provision dealing with the conveyance of public lands does not include permanently submerged lands. Montana v. United States, 450 U.S. 544, 550–57 (1981). Congress has not enacted a definition of "real property" or "public lands" of general applicability; rather the terms are differently defined in several statutes, none of which include submerged lands. Of particular significance is the fact that neither term is used in the 1953 Submerged Lands Act, 43 U.S. §§ 1301–1315, which vested "title and ownership of the lands beneath the

navigable waters within the boundaries of the several States". 43 U.S. § 1311(a).

III. Congressional Action

The United States Congress has not yet acted to convey any submerged lands to the CNMI, as it has done for other U.S. territories: Guam, American Samoa and the U.S. Virgin Islands in 1974 (by 48 U.S.C. § 1705), and Puerto Rico in 1917 and 1980 (control and administration only, by 48 U.S.C. § 749).

* * * *

IV. CNMI Marine Sovereignty Act of 1980 and Submerged Lands Act

From the foregoing it is apparent that in 1985 the Commission on Federal Laws had to deal with conflicting views of the ownership and seaward extent of the submerged lands. This situation arose in part because of two public laws enacted by the Marianas Legislature in 1979 and 1980 (one of which was reenacted in 1988).

The Marianas Marine Sovereignty Act of 1980, Public Law 2–7, 2 CMC § 1101 et seq., asserted a number of maritime claims as if the CNMI were an independent nation entitled to archipelagic status, with a 12 mile territorial sea surrounding archipelagic waters enclosed by archipelagic straight baselines, a 24 mile contiguous zone, and a 200 mile exclusive economic zone. This act also recognized certain rights of other nations in its "sovereign waters" such as innocent passage, archipelagic sea lanes passage, existing submarine cables and navigational freedoms in its exclusive economic zone.

The Marianas Submerged Lands Act, Public Law 6–13, 2 CMC § 1201 et seq., effective January 3, 1988, replaced in its entirety the Submerged Lands Act, Marianas Public Law 1–23, as amended by Marianas Public Law 2–7. Both laws claimed the "submerged lands" 200 miles seaward, as follows:

> all lands below the ordinary high water mark extending seaward to the outer limit of the exclusive economic zone established pursuant to the Marine Sovereignty Act of 1980 . . . or to any line of delimitation between such zone and a similar zone of any adjacent State.

This legislation also purports to assign to the Marianas Director of Natural Resources the responsibility for the management, use and disposition of the submerged lands of the Commonwealth, including exploration licenses, development leases and permits for the extraction of petroleum or mineral deposits, as well as granting him significant enforcement powers of arrest and detention of foreign flag vessels, as well as other civil and criminal penalties.

This legislation is plainly void as being in direct conflict with the Marianas Constitution, the Covenant and the Constitution of the United States. Under Section 102 of the Covenant, the Covenant, together with the applicable provisions of the U.S. Constitution, treaties and laws of the United States, are the supreme law of the Northern Mariana Islands. As noted in the *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands*, prepared by the Marianas Political Status Commission, and issued February 15, 1975:

> In this respect Section 102 is similar to Article VI, Clause 2 of the Constitution of the United States, which makes the Constitution, treaties and laws of the United States the supreme law in every state of the United States. This means that federal law will control in the case of a conflict between local law (even a state's constitution) and a valid federal law.

Conclusions

The United States Government owns the submerged lands out to 200 nautical miles surrounding the Northern Mariana Islands unless and until Congress says otherwise. The Covenant and its negotiating history, as well as the CNMI Constitution and related documents, support this conclusion. CNMI actions to the contrary are void.

5. Navassa, a Guano Island

On November 20, 1998, the United States filed a Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment in *Warren v. United States*, U.S. District Court for the District of Columbia, Civil Action No. 97–2415 (PLF). In that case, the plaintiff asserted ownership of, and the right to mine guano on, Navassa Island. Among other things, Warren contested the U.S. claim of sovereignty over Navassa Island and sought fee simple title to the island. The U.S. District Court of the District of Columbia granted the U.S. Government's motion for summary decision on the ground that it lacked subject matter jurisdiction over the claims following a hearing held on February 16, 2000. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court on appeal, holding, among other things, that "[t]he [Guano Islands] Act conveyed only a license that was revocable at will by the United States, and that revocation occurred when the President reserved Navassa Island for navigational purposes in 1916 pursuant to [a] 1913 congressional appropriation." *Warren v. United States*, 234 F.3d 1331 (D.C. Cir. 2000).

Excerpts below from the court's opinion address the legal framework applicable to the status of guano islands under U.S. law and of Navassa specifically.

---

* * * *

Navassa Island is an island of less than three square miles, located in the Caribbean Sea between Haiti and Jamaica, approximately 100 miles south of Guantanamo Bay, Cuba. See OFFICE OF THE GENERAL COUNSEL, U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/OGC-98-5, REPORT TO HOUSE COMM. ON RESOURCES, U.S. INSULAR AREAS: APPLICATION OF U.S. CONSTITUTION 47 (1997); *Jones v. United States*, 137 U.S. 202, 205, 34 L. Ed. 691, 11 S. Ct. 80 (1890). Peter Duncan discovered the Island, and claimed it for the United States on November 18, 1857, pursuant to the Guano Islands Act of August

18, 1856, 48 U.S.C. §§ 1411–1419 (1994). *See Jones*, 137 U.S. at 204–06, 217.

The Guano Islands Act provides for islands, rocks, or keys, not within the jurisdiction of any other government, to "be considered as appertaining to the United States," if a United States citizen discovers upon them a deposit of guano and provides notice of discovery to the Department of State. 48 U.S.C. §§ 1411, 1412. Upon giving the appropriate notice, "the discoverer, or his assigns . . . may be allowed, at the pleasure of Congress, the exclusive right of occupying such island, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States." 48 U.S.C. § 1414.

On December 8, 1859, then-Secretary of State, Lewis Cass, issued a proclamation granting Edward Cooper, the assignee of Peter Duncan, "all the privileges and advantages intended by [the] act." *Jones*, 137 U.S. at 206. . . .

* * * *

The removal of guano from Navassa Island continued until 1898 when, at the outset of the Spanish-American War, President William McKinley ordered all inhabitants of Navassa Island removed. . . .

* * * *

. . . The Coast Guard maintained lighthouse facilities on Navassa Island until September 1996, at which time the Coast Guard removed its equipment and facilities from the property. *See* Hearing Tr. at 31.

On July 16, 1996, Warren requested permission from the Coast Guard to land on Navassa Island to shoot a documentary. . . . He stated [in his request that] "although Navassa is U.S. owned, we understand that even U.S. Citizens such as ourselves are required to get your permission to land there." *Id*. On September 11, 1996, the United States granted Warren's request to visit the Island, subject to his submission of a waiver of liability and acceptance of responsibility form prior to landing. . . . The following day, Warren submitted a letter providing "notice of his discovery, occupation and possession of Navassa Island." . . . The letter claimed that

the Coast Guard had abandoned the Island, and requested that the Department of State enter and certify Warren's claim of discovery under the Guano Islands Act. . . .

On January 7, 1997, the Department of State sent an interim response to Warren, indicating that Navassa Island was already under United States' jurisdiction and that the matter had been taken under advisement. . . . On January 16, 1997, the Secretary of the Interior issued Order No. 3205, placing the civil administration of Navassa Island under the Director of the Office of Insular Affairs. *See* Secretary's Order No. 3205, Department of the Interior (Jan. 16, 1997). . . . Secretary's Order No. 3205, Amendment No. 1, Department of the Interior (Jan. 14, 1998). . . . Order No. 3205 was superseded by a Memorandum of Understanding entered between the Office of Insular Affairs and the U.S. Fish and Wildlife Service on April 22, 1999, pursuant to which the Fish and Wildlife Service currently manages Navassa Island as a National Wildlife Refuge. *See* Memorandum of Understanding between the Director, U.S. Fish and Wildlife Service and the Director, Office of Insular Affairs (Apr. 22, 1999), *reprinted in* J.A. 388–90.

* * * *

II. ANALYSIS

The Quiet Title Act ("QTA") is the "exclusive means by which adverse claimants [may] challenge the United States' title to real property." . . .

In this case, there is undisputed evidence in the record demonstrating that Warren and his predecessors in interest "knew or should have known" that the United States claimed an interest in Navassa Island more than 12 years before Warren filed his quiet title action. Actual notice of the United States' adverse claim of title to Navassa Island was given to Warren's predecessor in interest, James Woodward, as early as 1915, in a letter from the Assistant Secretary of the Department of Commerce. . . . In response to a communication from Woodward to President Wilson in which Woodward offered to sell Navassa Island to the United

States, Assistant Secretary Sweet informed Woodward that "as the title to the island [of Navassa] is in the United States it is considered unnecessary to take any measures looking to the purchase of land on the island in connection with the establishment of a lightstation thereon." *Id.*

Warren's predecessors in interest were also afforded constructive notice of the United States' claim to Navassa Island. The most significant instance of such notice arose in 1916, when President Woodrow Wilson, pursuant to a congressional authorization, issued a Proclamation declaring that all of Navassa Island was unqualifiedly reserved for a lighthouse base. The Proclamation stated that

> the *said Island* of Navassa in the West Indies be and the same *is hereby reserved* for lighthouse purposes, such reservation being deemed necessary in the public interests, subject to such legislative action as the Congress of the United States may take with respect thereto.

39 Stat. 1763 (1916) (emphasis added).

* * * *

The presidential Proclamation reserving Navassa Island for lighthouse purposes, coupled with the Coast Guard's practice of restricting access, and, for some years, denying access altogether, to the Island, as well as the Government's consistent claims of sole and exclusive ownership, reasonably and clearly indicated that the United States had revoked any outstanding rights or interests to "occupy" Navassa Island for the purpose of mining guano. Warren's predecessors in interest therefore had actual and constructive notice of the United States' claims to Navassa Island and its resources more than 12 years before Warren brought his suit to quiet title to the Island in his favor.

* * * *

Even if the Court had jurisdiction to hear the quiet title action, it is abundantly clear that the Guano Islands Act did not convey any fee ownership interest in the land or minerals to a discoverer. As the Supreme Court explained in *Duncan v. Navassa Phosphate*

Co., 137 U.S. 647, 34 L. Ed. 825, 11 S. Ct. 242 (1891), the interest conveyed under the Act was in the nature of a "usufruct" or license to mine guano that was terminable "at the pleasure of Congress." *Id.* at 652–53. "The whole right conferred upon the discoverer and his assigns is a license to occupy the island for the purpose of removing the guano." *Id.* at 651. The Act conveyed only a license that was revocable at will by the United States, and that revocation occurred when the President reserved Navassa Island for navigational purposes in 1916 pursuant to the 1913 congressional appropriation.

* * * *

Cross-references

Constitutionality of legislation requiring issuance of single official or diplomatic passport, **Chapter 1.B.1.a.**

Revocation of Passport of subject of federal arrest warrant, **Chapter 1.B.4.**

Case concerning Congressional delegation of power to the President, **Chapter 1.B.5.**

U.S. relationship with Taiwan and Hong Kong, **Chapter 2.C.2., 3.A.1., and Chapter 4.A.2.b. & B.2.**

Trade agreements as congressional-executive agreements, **Chapter 4.A.2.a.**

Claims for damages arising out of cooperative space activity, **Chapter 4.A.2.d.**

Customary international law superseding 1958 Convention on the Territorial Sea and the Contiguous Zone, **Chapter 4.B.3.b.**

Role of Senate conditions on ratification, **Chapter 4.B.4.c. & 6.a.(3)(ii).**

Case against United States dismissed on basis of U.S. sovereign immunity, **Chapter 8.B.1.**

Access of unrecognized government to U.S. courts, **Chapter 9.A.1.b.**

President's authority to deploy armed forces, **Chapter 18.A.5.**

Customary international law in ICJ nuclear weapons case, **Chapter 18.A.6.**

Presidential authority to protect intelligence sources, **Chapter 18.D.3.b.**

Chapter 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

The Department of State prepares and submits to Congress annual Country Reports on Human Rights Practices in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 ("FAA"), Pub. L. No. 87–195, 75 Stat. 424, as amended, and section 504 of the Trade Act of 1974 ("Trade Act"), Pub. L. No. 93–618, 88 Stat. 1978 (1975), as amended. The FAA requires the Secretary of State to transmit to the Speaker of the House of Representatives and the Senate Foreign Relations Committee, by February 25 of each year "a full and complete report regarding (1) the status of internationally recognized human rights, within the meaning of subsection (a)—(A) in countries that receive assistance under this part, and (B) in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act. . . ." The Trade Act requires "an annual report to Congress on the status of internationally recognized worker rights within each beneficiary developing country, including the finding of the Secretary of Labor with respect to the beneficiary country's implementation of its international commitments to eliminate the worst forms of child labor." These reports are often cited as the authoritative source for U.S. views on various aspects of human rights practice in other countries.

The Country Reports on Human Rights Practices cover internationally recognized individual, civil, and political and worker rights, as set forth in the Universal Declaration of Human Rights, and are available for the years 1999 through 2003 at *www.state.gov/g/drl/hr/c1470.htm*, and for the years 1993 through 1999 at *www.state.gov/www/global/human_rights/drl_reports.html*.

2. World Conference on Human Rights

On June 25, 1993, representatives of 171 states adopted by consensus the Vienna Declaration and Programme of Action of the World Conference on Human Rights, thus concluding the two-week World Conference on Human Rights (June 14–25 1993, Vienna, Austria) and presenting to the international community a common plan for the strengthening of human rights around the world. The approximately 7,000 participants at the Vienna Conference included government delegates, academics, representatives of treaty bodies and national institutions, and representatives of more than 800 non-governmental organizations ("NGOs"). The U.S. delegation was led by Under Secretary-designate for Global Affairs Tim Wirth and later by Assistant Secretary John Shattuck.

The Vienna Declaration reaffirmed the basic human rights principles that have evolved since World War II and recognized that "all human rights are universal, indivisible and interdependent and interrelated" and that "the lack of development may not be invoked to justify the abridgement of internationally recognized human rights." The Vienna Declaration also supported the creation of a Special Rapporteur on Violence against Women, and recommended the proclamation by the UN General Assembly of an international decade of the world's indigenous peoples.

Perhaps the most significant development in Vienna was the recommendation that the United Nations establish a High Commissioner for Human Rights. The UN General Assembly endorsed the Vienna Declaration on December

20, 1993, U.N. Doc. A/RES/48/121 (1994). On the same date, it created that position, with a mandate to promote and protect all human rights as laid forth in the Vienna Declaration. U.N. Doc. A/RES/48/141 (1994). Secretary of State Warren Christopher addressed the delegates of the World Conference on Human Rights on its opening day, as excerpted below.

The full text of Secretary Christopher's remarks are reprinted in 4 Dep't St. Dispatch No. 25 at 441–44 (June 21, 1993), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*; *see also http://dosfan.lib.uic.edu/ERC/briefing/dossec/1993/9306/930614dossec.html*.

---

* * * *

Democracy is the moral and strategic imperative for the 1990s. Democracy will build safeguards for human rights in every nation. Democracy is the best way to advance lasting peace and prosperity in the world.

In this post-Cold War era, we are at a new moment. Our agenda for freedom must embrace every prisoner of conscience, every victim of torture, every individual denied basic human rights. It must also encompass the democratic movements that have changed the political map of our globe.

The great new focus of our agenda for freedom is this: expanding, consolidating and defending democratic progress around the world. It is democracy that establishes the civil institutions that replace the power of oppressive regimes. Democracy is the best means not just to gain—but to guarantee—human rights.

In the battle for democracy and human rights, words matter, but what we do matters much more. What all of our citizens and governments do in the days ahead will count far more than any discussions held or documents produced here.

I cannot predict the outcome of this Conference. But I can tell you this: The worldwide movement for democracy and human rights will prevail. My delegation will support the forces of freedom—of tolerance, of respect for the rights of the individual—not only in the next few weeks in Vienna, but every day in

the conduct of our foreign policy throughout the world. The United States will never join those who would undermine the Universal Declaration and the movement toward democracy and human rights.

* * * *

Today, on behalf of the United States, I officially present to the world community an ambitious action plan that represents our commitment to pursue human rights, regardless of the outcome of this Conference. This plan will build on the UN's capacity to practice preventive diplomacy, safeguard human rights, and assist fledgling democracies. We seek to strengthen the UN Human Rights Center and its advisory and rapporteurial functions. We support the establishment of a UN High Commissioner for Human Rights.

* * * *

The United States will also act to integrate our concerns over the inhumane treatment of women into the global human rights agenda. We will press for the appointment of a UN Special Rapporteur on Violence Against Women. We will also urge the UN to sharpen the focus and strengthen the coordination of its women's rights activities.

* * * *

My country will pursue human rights in our bilateral relations with all governments—large and small, developed and developing. America's commitment to human rights is global, just as the UN Declaration is universal.

As we advance these goals, American foreign policy will both reflect our fundamental values and promote our national interests. It must take into account our national security and economic needs at the same time that we pursue democracy and human rights. We will maintain our ties with our allies and friends. We will act to deter aggressors. And we will cooperate with like-minded nations to ensure the survival of freedom when it is threatened.

The United States will promote democracy and protect our security. We must do both—and we will.

3. Human Rights and Foreign Policy

On April 19, 1994, John Shattuck, Assistant Secretary of State for Human Rights and Humanitarian Affairs, testified before the Senate Appropriations Subcommittee on Foreign Operations. *Foreign Operations, Export Financing, and Related Programs Appropriations, FY95: Hearing Before the Senate Committee on Appropriations*, 103rd Cong. 635–687 (1994) (statement of John H. Shattuck, Dept. of State, Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs). Mr. Shattuck summarized the State Department's democracy and human rights agenda and noted nine areas in which the United States made the promotion of democracy and human rights a major part of its foreign policy agenda, as excerpted below.

* * * *

First, we are working with other countries to build new institutions of human rights accountability.

We have led the effort to create a war crimes tribunal for the former Yugoslavia and we are seeking a similar institution for Iraq. We have participated in the establishment and implementation of a truth commission in El Salvador and are working with others to explore a similar institution in Guatemala. And we are funding a wide range of programs to improve the administration of justice in many countries.

Second, as you indicate, Mr. Chairman, we are linking trade and economic relations to human rights, we believe in many ways for the first time, including of course the conditioning of aid and trade on human rights improvements, and I will go over a few of the specifics in one moment.

Third, this administration's foreign policy proceeds from the recognition that economic development, political development, human rights protection, and democracy protection must be seen as a whole. We have now an interagency working group on democracy and human rights policy, which I will chair, and will bring greater focus and coordination to our work in this entire

integrated area, as will the reorganization and expansion of my bureau as the new bureau of democracy, human rights and labor.

Fourth, we are working to build or strengthen multilateral institutions like the Commission for Security Cooperation in Europe, the Organization of American States, as well as the U.N., to address racial, ethnic, and religious conflict, institutions that can work to defuse conflicts before they lead to gross human rights violations.

Fifth, we are integrating for the first time women's rights into all aspects of our human rights policy. We have in recent months cast a spotlight on trafficking in child prostitution in Thailand. We have seen, too, that systematic rape as a tool of so-called ethnic cleansing can be defined as genocide under the genocide convention. We have endorsed ratification of the Convention on the Elimination of All Forms of Discrimination Against Women. We've helped lead the effort to establish a U.N. special rapporteur on violence against women, and woven women's issues throughout our annual country reports.

Sixth, we are working to meet U.S. international human rights obligations by pressing for the immediate ratification of two important human rights treaties, the convention on racial discrimination and the Women's Convention. We have also expedited a review of the Rights of the Child Convention and the American Convention on Human Rights. And we are playing a lead role—and I might note you, Mr. Chairman, are playing the leading roll—in efforts to develop an international moratorium on the export of land mines, in keeping with a recent U.N. General Assembly resolution, and to establish permanent international control mechanisms to address this devastating global problem.

Seventh, we are working to strengthen the United Nations human rights machinery. We led the effort in the General Assembly to create a U.N. high commissioner on human rights and the war crimes tribunal for the former Yugoslavia. We are seeking greater resources for U.N. human rights center activities, including advisory services, the special rapporteur system and the fund for victims of torture. And we are working with other countries to streamline and improve the functioning of the U.N. Human Rights Convention.

Eighth, we are supporting those brave men and women around the world who are the shock troops and leaders of the global movement for human rights and democracy, and are operating in nongovernmental organizations in many very difficult circumstances.

Finally, we are tightening the focus and coordination of our programs to promote democracy and human rights abroad. The interagency working group will serve as an important venue for the exchange of information on program plans to apply U.S. government resources for the greatest impact and efficiency and to avoid overlap.

* * * *

In the field of criminal justice, which is the focus of so many human rights problems, we are working in four areas: investigative techniques, prosecution and defense, judicial performance, and prison improvements and reform. What is needed and achievable will vary, of course, from country to country. In this work the State Department takes the lead, and we cooperate closely with AID, the Department of Justice, our embassies, NGOs, and the cooperating governments themselves in developing programs that will meet a country's needs and be effective.

Let me give you a few very brief examples of the kinds of programs that we're talking about: Rule of law programs in Egypt, conducted through a $2.8 million grant to provide training and technical assistance to the Egyptian judiciary as well as a judicial training system run by USIA; support in Russia for the reintroduction of jury trials through a program of training exchanges with the Russian Legal Academy; and the development in Central Asia of a rule of law project for the region designed to help those societies reform their Soviet-style legal codes and programs.

* * * *

4. Human Rights and the Lessons of the Holocaust

Ambassador Madeleine K. Albright, U.S. Permanent Representative to the United Nations, addressed the Symposium

on Human Rights and the Lessons of the Holocaust at the University of Connecticut's Thomas J. Dodd Research Center on October 17, 1995. Ambassador Albright discussed the U.S. approach to human rights and international law, including UN peacekeeping and democracy promotion efforts, U.S. support of UN human rights bodies, the establishment of the international criminal tribunals for Rwanda and the former Yugoslavia, and U.S. policy on women's and children's rights as articulated by First Lady Hillary Clinton at the Fourth World Conference on Women in Beijing (*see* C.2.c. below).

The full text of Secretary Albright's speech, excerpted below, is available at *http://dosfan.lib.uic.edu/ERC/democracy/releases_statements/951017.html*.

---

* * * *

. . . [A] discussion of international law and human rights is timely. We observe this year the fiftieth anniversary of the end of World War II, the founding of the United Nations and the beginning of the Nuremberg trials. Like the leaders of a half century ago, we have been witnesses to seismic political change. Like them, we have inherited an unsettled world, beset by squabbles, unsatisfied ambitions and new dangers. Like them, we have a responsibility to build the institutions and strategies that will ensure security and defend freedom in a new and transformed era.

Because we live in a country that is democratic, trade-oriented, respectful of the law and possessed of a powerful military whose personnel are precious to us, we will do better and feel safer in an environment where our values are widely shared, markets are open, military clashes are constrained and those who run roughshod over the rights of others are brought to heel.

The United Nations is one means we use to create and sustain such an environment. And one of our top priorities at the UN is to build mechanisms that will contribute on a long-term basis to human rights and peace.

Accordingly, we were the prime movers behind the successful effort to establish a UN High Commissioner for Human Rights.

We have worked to increase the budget and effectiveness of the UN Human Rights Center. We have decided to seek Senate consent to the ratification of two important human rights agreements—the Convention Prohibiting All Forms of Discrimination Against Women and the Convention on the Rights of the Child. We are principal supporters of the UN Voluntary Fund to aid the victims of torture. And we have worked hard to maintain the integrity and increase the application of one of the noble documents in human history—the Universal Declaration of Human Rights.

Eleanor Roosevelt, a great First Lady of the United States, had a prominent role in drafting that Declaration. Americans have grounds for pride that, last month in Beijing, our current First Lady eloquently reaffirmed our nation's commitment to it.

. . . Hillary Clinton has been an advocate for women's rights and children's rights all her adult life. No one should have been surprised by the message she delivered in Beijing.

That message was simple, but powerful:

Violence against women must stop;

Girls should be valued equally with boys;

Women should have equal access to education, health care and the levers of economic and political power;

Family responsibilities should be shared; and

Freedom of expression is a prerequisite to human rights, which include women's rights.

Although much was made of the venue, the fact is that both the First Lady's speech and the one I made the next day would have conveyed this same message if the Conference had been held in Malawi, Uzbekistan or Staten Island. Ours was a universal message, directed not at China, in particular, but at all countries.

The UN's Women's Conference produced a strong consensus document that reflects our support for enabling women to participate as equals in the political and economic life of every society. That consensus will serve as a standard towards which each government should now strive, spurred on by the network of nongovernmental organizations that was so effective and so central to the discussions in Beijing.

* * * *

On a related matter, we have worked steadily with the UN and with other countries to make UN peace operations more effective and successful. The end of the Cold War made UN peacekeeping both more possible and more necessary. As a result, the number and complexity of operations expanded dramatically. Although there were successes, serious problems arose in coordinating the military and humanitarian responses to complex emergencies; resources were not always allocated efficiently; and mandates were not always realistic.

There are some now, on Capitol Hill and elsewhere, who would respond to these shortcomings by killing UN peacekeeping altogether. If this destructive view should prevail, and peacekeepers are withdrawn, we could expect wider war in the Balkans, higher tensions in tinderbox regions such as Cyprus and the Middle East, a renewed threat to democracy in Haiti and a further series of humanitarian disasters in Africa.

These consequences are not acceptable. UN peacekeeping should not be killed; it should be strengthened. We are working with others to increase training, improve management, reform procurement, provide better coordination and see that the lessons of past successes and failures are learned. We believe a special effort is needed to sharpen the UN's capacity to respond rapidly to a crisis. Discipline is required in establishing the scope and mandate of new operations. And realism is essential in assessing what the UN can and cannot do.

UN peacekeeping cannot produce a perfect world, but it does contribute to an environment that is less violent, more stable and more democratic than it otherwise would be. It provides the President with an option between unilateral action and standing aside when emergencies arise. And it is an important tool for the enforcement of international standards and law.

Another such tool is economic sanctions. Since the end of the Persian Gulf War, strict economic and weapons sanctions have been in place against Iraq. Their purpose is to prevent that country from once again developing weapons of mass destruction or threatening its neighbors with aggression.

The American position is that Iraq must comply, in full, with all relevant UN Security Council resolutions before the Council

should consider easing or lifting the sanctions regime. We do not wish to inflict pain on the population of Iraq. But so far, Saddam Hussein has turned down proposals that would allow him to sell oil to buy humanitarian supplies. His regime also continues to waste huge sums building palaces and lavish infrastructure projects that benefit a very few. Meanwhile, Iraq's compliance with the Security Council resolutions remains sporadic, selective, and incomplete.

The United States believes that the burden of proof should be on Iraq to demonstrate its peaceful intentions and that only a policy of firmness has a realistic chance of altering Iraqi behavior for the better. Saddam Hussein's complaints about the unfairness of all this reminds me of the story about the schoolboy who came home with his face damaged and his clothes torn. When his mother asked him how the fight started, he said: "It started when the other guy hit me back."

Libya also is the subject of sanctions, because of its refusal to hand over for trial the individuals indicted for the bombing of PAN AM 103 in 1988. Since that time, Libya has proposed a variety of schemes for a trial; unfortunately, none of these ideas meet the standard set by the Security Council, which is a trial either in the United Kingdom or the United States. We have pushed hard to maintain sanctions to keep the heat on the Qadhafi regime, and we would prefer stronger ones, including an oil embargo, if the Libyans remain intransigent.

Haiti, like Iraq before Operation Desert Storm, illustrates both the importance of sanctions as a sign of international resolve, and their insufficiency, at times; in obtaining the results we want. For three years, the Council and the Organization of American States pursued a peaceful and just end to the Haitian crisis. The international community tried condemnation, persuasion, isolation and negotiation. At Governors Island, the military's leader signed an agreement that would have allowed the restoration of the democratically-elected government, but then refused to implement it. Sanctions were imposed, suspended, re-imposed and finally strengthened. The illegitimate leaders were given every opportunity to leave.

The decision to seek Council support for the restoration of democratic rule to Haiti by force if necessary reflected the

extraordinary set of circumstances that existed: including the blatant illegitimacy of the de facto leaders; the brutal repression; the violation of a UN-brokered agreement; the risk of renewed attempts at flight by desperate people aboard unseaworthy vessels; the expulsion of human rights monitors; the insufficiency of sanctions; and the existence of strong support regionally and overseas for decisive action.

* * * *

In addition to peacekeeping and sanctions, a third tool used by the UN to enforce international law flows directly from the precedent of Nuremberg—the *ad hoc* tribunal for war crimes and other violations of international humanitarian law. There are two such tribunals—for Rwanda and former Yugoslavia. The United States has done much to establish, organize, finance and assist these tribunals, and I am pleased that we have had strong backing from many in Congress including Senator Chris Dodd and Representative Sam Gejdenson.

* * * *

There are those who ridicule the effort to prosecute those responsible for such crimes; those who say that assembling the physical evidence, apprehending suspects and obtaining credible testimony will be too difficult, too time-consuming, too expensive. But the Administration does not believe the difficulty of the tribunals' work should bar the attempt. Just because we cannot guarantee everything does not mean we should do nothing.

More than 20 indictments already have been handed down by the Yugoslav tribunal and 200 alleged perpetrators of the Rwanda genocide are under investigation. Governments will be obliged to hand over for trial those indicted who are within their jurisdiction. The tribunals are empowered to request the Security Council to take enforcement action against any government that fails to do so. The indicted, themselves, will face the choice of standing trial or becoming international pariahs, trapped within the borders of their own lands, subject to immediate arrest should they leave.

The United States agrees with the tribunals' prosecutor, Judge Goldstone, that suspects should be pursued regardless of rank,

position, or stature. There is not, and there should never be, a statute of limitations on the force and effect of the tribunals' indictments.

Further, we do not accept the view that the killings in Rwanda and the Balkans can simply be shrugged off as the inevitable side-effects of ethnic conflict. How could we? We remember that Adolf Hitler once defended his plan to kill Jews by asking the rhetorical question: "Who, after all, remembers the Armenians?" And we recall the words written in 1940 by the poet and essayist Archibald MacLeish:

> Murder is not absolved of immorality by committing murder. Murder is absolved of immorality by bringing men to think that murder is not evil. This only the perversion of the mind can bring about. And the perversion of the mind is only possible when those who should be heard in its defense are silent. . . .

Establishing the truth about what happened in Rwanda and the Balkans is essential not only to justice, but to peace. Responsibility for the atrocities committed does not rest with the Serbs or Hutus or any other people as a group; it rests with the individuals who ordered and committed the crimes. And true reconciliation will not be possible in these societies until the perception of collective guilt is expunged and personasibility is assigned.

I should point out, in addition, that those who suggested that indictment of Bosnian Serb leaders would make it impossible to negotiate peace have been proven wrong. Instead, the indictments have contributed to divisions within that leadership, thereby weakening the hardest liners and making progress towards peace easier to achieve.

Delivering international justice is a job governments alone cannot always do. Institutions like the Dodd Research Center can play a vital role by helping to inform and shape public opinion, and by drawing historical connections between the tasks we face and those confronted by our predecessors.

The legal profession is also tested. The American Bar Association's Coalition for International Justice is one example of

how lawyers have mobilized to support the war crimes tribunals. Some of those most involved are children of participants in the Nuremberg and Tokyo prosecutions. The new generation has not dropped the baton.

* * * *

Today, we are called upon to develop a new framework for protecting our territory, our people and our interests. In devising that framework, we will build on the firm foundation provided by the UN Charter and other sources of international law. We will seek to extend the sway of civil society; to codify new standards; and to summon the will to enforce with greater consistency and effectiveness standards long established.

* * * *

5. Prohibition on Assistance to Certain Security Forces

Beginning with fiscal year 1997, statutory language prohibited provision of certain assistance to "any unit of the security forces of a foreign country if the Secretary of State has credible evidence to believe such unit has committed gross violations of human rights, unless the Secretary determines and reports to [Congress] that the government of such country is taking steps to bring the responsible members of the security forces unit to justice." Foreign Operations, Export Financing, and Related Programs Appropriations Act, FY 1997 ("FOAA"), as contained in Omnibus Consolidated Appropriations Act, FY 1997, Pub. L. No. 104–208, 110 Stat. 3009 (1996). As originally enacted, the language applied only to appropriations to carry out international narcotics control programs funded by the FOAA. For fiscal year 1998, nearly identical language was made applicable to all funds made available by the FOAA. FOAA, FY 1998, § 570, Pub. L. No. 105–118, 111 Stat. 2386 (1997). That provision, which has been repeated in the annual FOAA since that time, also required the Secretary of State "to promptly inform the foreign government" of the basis for any withholding pursuant to this section and "to the

maximum extent practicable, assist the foreign government in taking effective measures to bring the responsible members of the security forces to justice."

6. Interagency Working Group on Human Rights Treaties

On December 10, 1998, President Clinton signed Executive Order 13107, which affirmed the United States' commitment to respect and implement its obligations under ratified human rights treaties and established an Interagency Working Group on Human Rights Treaties for the purpose of providing guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters. 63 Fed. Reg. 68,991 (Dec. 15, 1998). The Executive Order is excerpted below.

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

Section 1. Implementation of Human Rights Obligations. (a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

(b) It shall also be the policy and practice of the Government of the United States to promote respect for international human rights, both in our relationships with all other countries and by

working with and strengthening the various international mechanisms for the promotion of human rights, including, *inter alia*, those of the United Nations, the International Labor Organization, and the Organization of American States.

Sec. 2. Responsibility of Executive Departments and Agencies. (a) All executive departments and agencies (as defined in 5 U.S.C. 101–105, including boards and commissions, and hereinafter referred to collectively as "agency" or "agencies") shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully. The head of each agency shall designate a single contact officer who will be responsible for overall coordination of the implementation of this order. Under this order, all such agencies shall retain their established institutional roles in the implementation, interpretation, and enforcement of Federal law and policy.

(b) The heads of agencies shall have lead responsibility, in coordination with other appropriate agencies, for questions concerning implementation of human rights obligations that fall within their respective operating and program responsibilities and authorities or, to the extent that matters do not fall within the operating and program responsibilities and authorities of any agency, that most closely relate to their general areas of concern.

Sec. 3. Human Rights Inquiries and Complaints. Each agency shall take lead responsibility, in coordination with other appropriate agencies, for responding to inquiries, requests for information, and complaints about violations of human rights obligations that fall within its areas of responsibility or, if the matter does not fall within its areas of responsibility, referring it to the appropriate agency for response.

Sec. 4. Interagency Working Group on Human Rights Treaties. (a) There is hereby established an Interagency Working Group on Human Rights Treaties for the purpose of providing guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters.

(b) The designee of the Assistant to the President for National Security Affairs shall chair the Interagency Working Group, which

shall consist of appropriate policy and legal representatives at the Assistant Secretary level from the Department of State, the Department of Justice, the Department of Labor, the Department of Defense, the Joint Chiefs of Staff, and other agencies as the chair deems appropriate. The principal members may designate alternates to attend meetings in their stead.

(c) The principal functions of the Interagency Working Group shall include:

(i) coordinating the interagency review of any significant issues concerning the implementation of this order and analysis and recommendations in connection with pursuing the ratification of human rights treaties, as such questions may from time to time arise;

(ii) coordinating the preparation of reports that are to be submitted by the United States in fulfillment of treaty obligations;

(iii) coordinating the responses of the United States Government to complaints against it concerning alleged human rights violations submitted to the United Nations, the Organization of American States, and other international organizations;

(iv) developing effective mechanisms to ensure that legislation proposed by the Administration is reviewed for conformity with international human rights obligations and that these obligations are taken into account in reviewing legislation under consideration by the Congress as well;

(v) developing recommended proposals and mechanisms for improving the monitoring of the actions by the various States, Commonwealths, and territories of the United States and, where appropriate, of Native Americans and Federally recognized Indian tribes, including the review of State, Commonwealth, and territorial laws for their conformity with relevant treaties, the provision of relevant information for reports and other monitoring purposes, and the promotion of effective remedial mechanisms;

(vi) developing plans for public outreach and education concerning the provisions of the ICCPR, CAT, CERD, and other relevant treaties, and human rights-related provisions of domestic law;

(vii) coordinating and directing an annual review of United States reservations, declarations, and understandings to human rights treaties, and matters as to which there have been nontrivial

complaints or allegations of inconsistency with or breach of international human rights obligations, in order to determine whether there should be consideration of any modification of relevant reservations, declarations, and understandings to human rights treaties, or United States practices or laws. The results and recommendations of this review shall be reviewed by the head of each participating agency;

(viii) making such other recommendations as it shall deem appropriate to the President, through the Assistant to the President for National Security Affairs, concerning United States adherence to or implementation of human rights treaties and related matters; and

(ix) coordinating such other significant tasks in connection with human rights treaties or international human rights institutions, including the Inter-American Commission on Human Rights and the Special Rapporteurs and complaints procedures established by the United Nations Human Rights Commission.

(d) The work of the Interagency Working Group shall not supplant the work of other interagency entities, including the President's Committee on the International Labor Organization, that address international human rights issues.

* * * *

B. UNIVERSAL DECLARATION OF HUMAN RIGHTS AND INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

1. Fiftieth Anniversary of the Universal Declaration of Human Rights

1998 marked the fiftieth anniversary of the Universal Declaration of Human Rights, adopted and proclaimed by United Nations General Assembly Resolution 217 A (III) on December 10, 1948 "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote

respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction." U.N. Doc. A/RES/3/217 (1948).

In an opinion editorial in the *Washington Times* on December 10, 1998, Secretary of State Madeleine K. Albright commented on the 50th anniversary of the Universal Declaration of Human Rights, as excerpted below.

Today, human rights activists and government officials will gather together in New York, Washington, Paris, and elsewhere to commemorate the fiftieth anniversary of one of the most significant events of this century. When the world proclaimed the Universal Declaration of Human Rights on December 10, 1948, it announced that freedom and the rule of law, rather than hatred and the rule of force, would serve as our guiding principles.

* * * *

In the United States, we honor the Declaration not just by celebrating its birthday but by embracing its principles. Eleanor Roosevelt, who played a crucial role in the Declaration's drafting, once said that human rights begin "in small places close to home . . . places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they will have little meaning anywhere." Americans take her admonition very seriously.

Thus our tradition of human rights advocacy in foreign policy is a reflection of our own practices. We seek to promote human rights overseas because we try to uphold them at home. We speak out about abuses, no matter where they occur. But we also establish institutions—like the U.S. Civil Rights Commission and the Equal Employment Opportunity Commission—to investigate and respond to potential human rights abuses inside the United States. We also cooperate with outside investigations—whether by non-governmental organizations like Amnesty International or

United Nations Special Rapporteurs—even when we disagree with their premises or their conclusions.

This two-track approach reflects both our commitment to the universality of human rights and our openness as a democratic society. We are proud of our political and judicial systems and welcome any examination. In contrast, the world's dictators deny human rights to their own citizens, persecute those who raise concerns through government channels, and refuse entry to outside investigators.

The Universal Declaration is nothing less than a blueprint for freedom. If its promise is ever to become a reality, each of us must make its principles a part of our own lives. As Eleanor Roosevelt said, "The destiny of human rights is in the hands of all our citizens in all our communities." Live the principles of the Universal Declaration and teach them to our children. Add your voice to that of a human rights organization. Get your church, temple, or mosque active in religious freedom issues. Find out what your union or company is doing to prevent child labor. Only then will our children and grandchildren live in a world where "all human beings are born free and equal in dignity and rights."

In remarks to the UN Commission on Human Rights in Geneva, Switzerland on March 25, 1998, Ambassador Bill Richardson, U.S. Permanent Representative to the United Nations, addressed specific challenges to the world at the time of the fiftieth anniversary, as excerpted below.

The full text of Ambassador Richardson's address is available at *www.state.gov/www/policy_remarks/1998/980325_richardson_rights.html*

* * * *

. . . [E]gregious abuses continue in many countries, and tremendous human rights challenges remain. To be sure, the political and economic context in which abuses occur has varied over time. However, our principles—and our obligation to insist on respect for the universal standards that inform the work of this body—remain constant.

In the former Yugoslavia where communist authorities once exerted tight controls over the civil and political affairs of their people, we now confront abuses in the context of ethnic and civil conflict. Not far from this conference hall, we have witnessed all too effective efforts to promote fear and hatred through the manipulation of ethnic politics.

Since the signing of the Dayton Peace Accords, a fragile peace has slowly begun to take hold in Bosnia, and the human rights violations of the past are giving way to a new spirit of reconciliation and the prospect of a more peaceful and stable future. The fragile progress, however, stands in contrast to the situation in Kosovo, where in recent weeks the conscience of the world has been outraged by reports of summary executions by Serbian police. There can be no justification for the shelling of villages, the burning of houses, and the murder of innocent men, women, and children, all of which we are seeing in Kosovo. We saw what can result from ethnic intolerance and violence earlier in this decade in the former Yugoslavia. The International community failed to respond effectively then. We must not repeat that mistake today.

The international community must not tolerate the brutal use of force as a means for solving domestic problems. We believe that the leaders of the former Republic of Yugoslavia must enter into a real dialogue on the future of Kosovo. Moreover, full and immediate access to Kosovo by representatives and rapporteurs of the Human Rights Commission is imperative.

Mr. Chairman, in recent years, the increasing incidence of civil conflict has elevated the importance of human rights monitors receiving access to troubled areas. Such monitors play a critical role in deterring abuses and establishing accountability. This is why the United States has strongly supported the efforts of UN monitors in central Africa and why we continue to urge the Government of the Congo to permit the UN Secretary General's Investigative Team to perform its mission.

The United States, along with the international community, has been outraged by the massacres of innocent civilians over the past year in Algeria. So-called Islamic terrorists are murdering thousands of innocent people. Women and children are not being spared from this unspeakable horror, with young women often

being taken hostage and held in cruel and inhumane captivity. The United States condemns these monstrous crimes. There are many allegations inside Algeria about the killings, and the paramount need is for a credible, independent verification of the facts. The United Nations must be willing and able to help Algeria meet its human rights obligations in the face of appalling terrorist atrocities.

We welcome the access that the Algerian Government is affording to international journalists, parliamentarians, and others. Broadening and deepening such cooperation would serve an important step forward. In our view, a visit to Algeria by the UN Special Rapporteur on Summary, Extrajudicial and Arbitrary Executions and by international NGO groups would be a positive step for improving transparency in Algeria. Algeria has made progress toward building a multiparty democracy, but many Algerians have yet to reject violence as a political tool. The best hope for Algeria's future is to include in a credible political process all those who renounce violence and embrace democratic norms.

Mr. Chairman, a third new human rights challenge is ensuring that civil and political rights—and human rights institutions that are critical to the development of any modern society—are no less a priority than the remarkable economic progress that many states have enjoyed. In this respect, there may be no more appropriate example than the case of China.

As I noted earlier, the question of universality applies to each and every human being, and the people of the People's Republic of China are no exception. Over the past year, China has engaged in a dialogue with the United States and others on the issue of human rights. Dialogue is an important first step, but let us be clear: It is no substitute for action. In particular, we have begun constructive discussions with Chinese officials about the rule of law, and we note Chinese efforts to implement legal reforms. But rule of law is more than rule by law. Law must be used impartially and effectively to guarantee and protect internationally-recognized human rights. The rule of law cannot be distorted by the needs of any political party, and no individual can act above the law itself.

The Government of China has announced it will accede to the International Covenant on Civil and Political Rights. We welcome

this step, which commits China to ending some of its serious human rights violations, and hope signature occurs soon. This commitment to meeting the provisions of the Covenant means that the Chinese will be voluntarily reporting, and permitting experts to examine, its practices. We regard this as an important step forward, and we will be watching closely to ensure that the process works effectively and that it produces genuine results.

Mr. Chairman, the Covenant that China is preparing to sign provides that all its citizens must have freedom of expression, and it prohibits arbitrary arrest or detention, torture or cruel and degrading punishment, and arbitrary or unlawful interference with family, home, or correspondence. The Covenant is clear in stating that minorities shall not be denied the right to their own culture, religion, or language. And, under provisions of the Covenant, China will be required to allow all its citizens freedom of expression, thought, conscience, and religion. Although these rights are fundamental elements of both the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, and although they are accepted standards throughout the world, they are still repeatedly violated throughout China. Citizens who publicly criticize the government, ruling party, or the leadership are subject to harassment, arrest and imprisonment.

There remain in China over 2,000 persons imprisoned for "counter-revolutionary offenses." We believe these cases should be reviewed, and that prisoners who have done nothing more than exercise their rights should be released. In this regard, we welcome the recent release of Wei Jingsheng and several other dissidents and hope these will be followed by further releases.

Beyond imprisonment for counter-revolution, thousands are detained without trial for up to three years in "re-education through labor camps." Despite laws to the contrary, torture or cruel and degrading punishment continues to occur. China's people do not enjoy the right to choose their leaders in free elections above the village level. Ethnic Tibetans live under social and political controls threatening Tibet's unique cultural, religious, and linguistic heritage. And the Chinese government restricts religious practices and, in many cases, threatens, intimidates, and detains members of unregistered churches.

We urge China to correct these abuses and to make its laws conform with the standards of the International Covenants. If it follows such a course, China, like other states, will find there is no inconsistency between its goal of social stability and ideal of liberty and freedom. On the contrary, the two are mutually reinforcing.

2. U.S. Ratification of International Covenant on Civil and Political Rights

The United States signed the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant") on October 5, 1977, and the Senate provided its advice and consent to ratification on April 2, 1992. International Covenant on Civil and Political Rights, U.N. Doc. A/RES/2200 (XXI) (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. The ICCPR entered into force for the United States on August 9, 1992.

The United States became party to the ICCPR subject to a number of reservations, understandings, and declarations, and a proviso, as excerpted below. *See* 138 CONG. REC. S4781 (daily ed., Apr. 2, 1992).

---

* * * *

I. The Senate's advice and consent is subject to the following reservations:

(1) That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age.

(3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or

punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the constitution of the United States.

(4) That because U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of Article 10 and paragraph 4 of Article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status—as those terms are used in article 2, paragraph 1 and article 26—to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based "solely" on the status of race, color, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in Articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either

the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to "exceptional circumstances" in paragraph 2 (a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3 (b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3 (e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

(5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial 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 take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

(3) That the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.

(4) That the United States declares that the right referred to in Article 47 may be exercised only in accordance with international law.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

On March 29, 1995, Conrad K. Harper, Legal Adviser of the Department of State, appeared before the UN Human Rights Committee at its 53rd session in support of the ICCPR, as part of the U.S. Government's presentation of its first implementation report under the Covenant. Among other topics, he addressed the reservations, understandings and

declarations that formed the basis for U.S. ratification of the Covenant. The full text of his statement, as excerpted below, is available at *www.state.gov/s/l/c8183.htm*. *See also* 89 Am. J. Int'l L. 589 (1995).

---

* * * *

Turning to the reservations, understandings and declarations . . . I want to emphasize the following points:

The United States has in fact accepted the obligations of the Covenant with very few exceptions and limitations. Taken as a whole, the group may seem large: there are 5 reservations, 5 understandings, and 4 declarations. A careful reading will demonstrate that each of these provisions is addressed to quite limited and specific issues and that each is in fact justified.

Existing U.S. law complies with the Covenant, taking into account the reservations and understandings. In fact, the Covenant essentially sets forth the individual rights and freedoms which are in fact enjoyed by all Americans under the Constitution of the United States, the Bill of Rights, federal law and the Constitutions and laws our 50 States, our territories and dependencies.

Speaking generally, most of the reservations, understandings and declarations can be grouped around three sets of issues; (a) how we intend to give effect to the Covenant as a matter of domestic law, (b) the fact that certain rights (such as freedom of speech) are given greater protection under our Constitution than under the Covenant, and (c) certain limited differences in approach to the criminal justice system.

We have taken no "general" reservations to Covenant. We have not, for example, subjected our adherence to unidentified provisions of the U.S. Constitution.

Finally, there exists an extensive body of law in the United States to protect and promote the rights articulated in the Covenant. We have discussed this body of law in considerable detail in our report. Through these provisions, the rights set forth in the Covenant are already reflected in existing U.S. law. For this reason, we did not propose special or separate implementing legislation.

Domestic Implementation

Non-Self-Executing: As a matter of domestic law, we have declared the substantive provisions of the Covenant to be "non-self-executing." This declaration is not a reservation and does not affect our international obligations under the Covenant. Rather, it means that the Covenant does not, by itself, create private rights enforceable in U.S. courts; that can only be achieved by federal legislation.

In point of fact, existing U.S. law already contains the rights set forth in the Covenant as well as numerous mechanisms by which those rights can be protected and asserted. In other words, although Covenant rights are not themselves directly actionable in U.S. courts, their analogues in domestic law can be and are fully adequate to the purposes of the Covenant. Since existing U.S. law complies with the Covenant on the basis on which we have ratified, and since U.S. law already permits redress and remedies for violations of those rights, we have not proposed new legislation directly implementing the Covenant.

Some have criticized our approach as reflecting a refusal to change our law to conform to the Covenant. I must say, Mr. Chairman, that the decision to make the treaty "non-self-executing" reflects a strong preference, both within the Administration and in the Senate, not to use the unicameral treaty power of the U.S. Constitution to effect direct changes in the domestic law of the United States. If the Congress, both House and Senate, desires to change existing domestic laws, it will do so by statute, in the customary legislative process. In fact, a number of non-governmental organizations have been working in the Congress for consideration of draft legislation to remove the need for a number of reservations and understandings.

Federal-State: Moreover, we have indicated that we shall carry out our obligations under the Covenant in a manner consistent with the federal nature of our form of government. Again, this is not a reservation and does not affect our international obligations under the Covenant, but rather concerns the steps to be taken domestically by the respective federal and state authorities.

Constitutional Protections

Freedom of Speech: In some instances Covenant provisions impinge upon fundamental rights protected by the U.S. Constitution. In particular, Article 20 would directly conflict with our constitutional guarantee of free speech by requiring the prohibition of propaganda for war and of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. We therefore took a clear and strong reservation to Article 20.

Similarly, the provisions of Article 19 permit certain restrictions on the fundamental right of freedom of opinion and expression which are not compatible with our Constitutional guarantees of free speech. We could not impose such restrictions and we have clearly stated our view that other states should do so only where absolutely necessary. In this instance, we insist on affording greater protections for individual rights than the Covenant requires.

Non-Discrimination and Equal Protection: The Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. Our law, like the law of most if not all countries, permits certain lawful distinctions to be made among individuals when those distinctions are, at minimum, rationally related to a legitimate government objective. We have stated our understanding that the non-discrimination provisions in the Covenant, which we accept, do not prevent such distinctions.

Criminal Justice Issues

Other Covenant provisions, while not touching on constitutional issues, vary from existing U.S. law in certain respects, requiring us to condition U.S. adherence either on a narrowly-tailored reservation or on a statement of our understanding of what the Covenant in fact requires. Most of these concern the working of our criminal justice system.

Capital Punishment: The most significant of these, and perhaps the most controversial, is our reservation to the prohibition in Article 6 against the imposition of the death penalty for crimes committed by persons below 18 years of age. U.S. law permits the

imposition of capital punishment for crimes committed by juvenile offenders aged 16 or 17. The execution of people for crimes committed while they were under the age of 16 has been ruled unconstitutional by the U.S. Supreme Court and does not occur.

We have also taken a reservation to Article 7, which makes clear that we do not accept the "death row phenomenon" as constituting "cruel, unusual or degrading treatment or punishment", as the European Court of Human Rights recently held.

We understand that capital punishment has been abolished or severely limited in many countries in the world. In the United States, there is a continuing debate over this issue, including dispute over provisions which permit courts to treat juveniles as adults in certain limited situations. Current U.S. law reflects the democratically-expressed will of the American people. Our Supreme Court has upheld its constitutionality. Capital punishment is not prohibited by the Covenant or, more generally, by international law.

Right to Compensation: The Covenant can be read to give everyone an absolute right in all situations to compensate for unlawful arrest or detention or miscarriage of justice. We believe the proper reading of this provision is that states are obliged to provide effective and enforceable mechanisms by which victims may seek and, where justified, obtain such compensation; moreover, the actual entitlement to compensation may be subject to reasonable requirements of domestic law. That is the situation under U.S. law. Accordingly, we have proposed an understanding to this effect.

The remainder of our reservations and understandings concern technical issues of the criminal justice system, which may be addressed most appropriately in the context of responses to your questions and comments. Before turning the floor over to my colleagues from the Department of Justice and the Department of the Interior, I want to make a few final observations.

First, the process of treaty ratification in the United States is an open one, and in the case of the Covenant it involved extensive consultation and coordination with the non-governmental community, including human rights advocates, academics and practitioners. As you know, the hearings of the Senate Foreign

Relations Committee were open, and a large number of non-governmental organizations testified and submitted written comments so that their views could be taken into account by the Senate.

Second, the preparation of our report to this Committee also involved many departments and agencies of the federal government as well as extensive consultations with the non-governmental human rights community. We actively solicited the comments and submissions of the NGOs as to the contents of the report, and while they were not directly involved in the drafting and editing, we continued an active dialogue through the preparation of the report.

Copies of the Covenant and the Report have been provided to each state Attorney General and to state bar associations, as a way of promoting awareness of the Covenant and of the rights it protects. We know that the Report—or portions of it—are already being used in a number of the many courses on human rights taught in universities and law schools around the country, and parts will likely be incorporated in new editions of textbooks in the field.

Finally, I can assure the Committee that we shall have a continuing review of how our responsibilities under the Covenant are implemented, of the need for maintaining our reservations, understandings and declarations in light of future developments, and of how future legislation comports with the Covenant.

* * * *

For further explanation of the U.S. reservations, understandings and declarations, *see* David P. Stewart, "U.S. Ratification of the Convention on Civil and Political Rights: The Significance of the Reservations, Understanding and Declarations," 14 Hum. Rts. L. J. (No. 3–4) 77–83 (Apr. 30, 1993).

3. Human Rights Committee General Comment 24

At its 52nd session on November 4, 1994, the UN Human Rights Committee, established under the ICCPR, adopted

General Comment 24 on issues relating to reservations made upon ratification or accession to the ICCPR or its optional protocols ("General Comment 24"). U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994). General Comment 24 asserted that virtually all reservations to the ICCPR are prohibited, that prohibited reservations are void, and that states that have entered prohibited reservations remain parties to the ICCPR without benefit of those reservations.

On March 13, 1995, Conrad K. Harper, Legal Adviser of the Department of State, provided the views of the United States with regard to General Comment 24, as set forth below in full.

There can be no serious question about the propriety of the Committee's concern about the possible effect of excessively broad reservations on the general protection and promotion of the rights reflected in the Covenant, nor any reasonable doubt regarding the general desirability of reservations that are specific, transparent and subject to review with an eye to withdrawal. General Comment 24, however, appears to go much too far.

1. Role of the Committee

The last sentence of paragraph 11 could be read to present the rather surprising assertion that it is contrary to the object and purpose of the Covenant not to accept the Committee's views on the interpretation of the Covenant. This would be a rather significant departure from the Covenant scheme, which does not impose on States Parties an obligation to give effect to the Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant. The drafters of the Covenant could have given the Committee this role but deliberately chose not to do so. In this respect, it is unnecessary for a State to reserve as to the Committee's power or interpretive competence since the Committee lacks the authority to render binding interpretations or judgments. The last sentence can, however, be read more naturally and narrowly in the context

of the paragraph as a whole, to assert simply that a reservation may not be taken to the reporting requirement. This narrower view would be consistent with the clear intention of the Convention.

In this regard, the analysis in paragraphs 16–20 is of considerable concern. Here the Committee appears to reject the established rules of interpretation of treaties as set forth in the Vienna Convention on the Law of Treaties and in customary international law. The Committee appears to dispense with the established procedures for determining the permissibility of reservations and to divest States Parties of any role in determining the meaning of the Covenant, which they drafted and joined and of the extent of their reciprocal treaty obligations. This is done, moreover, by simple fiat. It is deeply troubling that the Committee appears to have so little respect for established legal principle.

2. Acceptability of Reservations: Governing Legal Principles

The question of the status of the Committee's views is of some significance in light of the apparent lines of analysis concerning the permissibility of reservations in paragraphs 8–9. It is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot chose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations. The proposition that any reservation which contravenes a norm of customary international law is *per se* incompatible with the object and purpose of this or any other convention, however, is a much more significant and sweeping premise. It is, moreover, wholly unsupported by and is in fact contrary to international law. As recognized in the paragraph 10 analysis of non-derogable rights, an "object and purpose" analysis by its nature requires consideration of the particular treaty, right, and reservation in question.

With respect to the actual object and purpose of this Covenant, there appears to be a misunderstanding. The object and purpose was to protect human rights, with an understanding that there need not be immediate, universal implementation of all terms of the treaty. Paragraph 7 (which forms the basis for the analysis in

paragraph 8 and subsequently) seems to assert that each of the substantive articles reflects the Covenant's object and purpose—the unstated implication being that any reservation contravenes the object and purpose. Such a position would, of course, wholly mistake the question of the object and purpose of the Covenant insofar as it bears on the permissibility of reservations. In fact, a primary object and purpose of the Covenant was to secure the widest possible adherence, with the clear understanding that a relatively liberal regime on the permissibility of reservations should therefore be required.

3. Specific Reservations

The precise specification of what is contrary to customary international law, moreover, is a much more substantial question than indicated by the Comment. Even where a rule is generally established in customary international law, the exact contours and meaning of the customary law principle may need to be considered. Paragraph 8, however, asserts in a wholly conclusory fashion that a number of propositions are customary international law which, to speak bluntly, are not. It cannot be established on the basis of practice or other authority, for example, that the mere expression (albeit deplorable) of national, racial or religious hatred (unaccompanied by any overt action or preparation) is prohibited by customary international law. The Committee seems to be suggesting, moreover, that the reservations which a large number of States Parties have submitted to Article 20 are *per se* invalid. Similarly, while many are opposed to the death penalty in general and the juvenile death penalty in particular, the practice of States demonstrates that there is currently no blanket prohibition in customary international law. Such a cavalier approach to international law by itself would raise serious concerns about the methodology of the Committee as well as its authority.

Another point worthy of clarification is whether the Committee really intends that, in the many areas which it mentions in paragraphs 8–11, any reservation whatsoever is impermissible, or only those which wholly vitiate the right in question. At the end of paragraph 8, for example, it is suggested that reservations

to particular clauses of Article 14 may be acceptable, although no reservations could be taken to the article as a whole. Presumably, the same must also be true for many of the other subjects mentioned. For example, even where there is a reservation to Article 20, one would not expect such a reservation to apply to advocacy of racial hatred which constitutes incitement to murder or other crime.

4. Domestic Implementation

The discussion in paragraph 12, as it stands, is very likely to give rise to misunderstandings in at least two respects. First, it may be cited as an assertion that States Parties must allow suits in domestic courts based directly on the provisions of Covenant. Some countries do in fact have such a scheme of "self-executing" treaties. In other countries, however, existing domestic law already provides the substantive rights reflected in the Covenant as well as multiple possibilities for suit to enforce those rights. Where these existing rights and mechanisms are in fact adequate to the purposes of the Covenant, it seems most unlikely that the Committee intends to insist that the Covenant be directly actionable in court or that States must adopt legislation to implement the Covenant. As a general matter, deciding on the most appropriate means of domestic implementation of treaty obligations is, as indicated in Article 40, left to the international law and processes of each State Party.

Rather, the Committee is probably concerned about the case in which a State has joined the Covenant but lacks any means under its domestic law by which Covenant rights may be enforced. The State could even have similar constitutional guarantees which are simply ignored. Such an approach would not, of course, be consistent with the fundamental principle of *pacta sunt servanda*.

Second, the discussion in paragraph 12 might also be viewed in an overly sweeping fashion by some as critical of any reservation whatsoever which is made to conform to existing law. Of course, since this is the motive for a large majority of the reservations made by States in all cases, it is difficult to say that this is inappropriate in principle. Indeed, one might say that the more seriously a

State Party takes into account the necessity of providing strictly for domestic implementation of its international obligations, the more likely it is that some reservations may be taken along these lines. It appears that the comment is not intended to make such a criticism, but rather is aimed at the particular category of sweeping reservations which preserve complete freedom of action and render uncertain one's obligations as a whole, e.g., that the Covenant as a whole is subordinated to the full unspecified range of national law.

5. Effect of Invalidity of Reservations

It seems unlikely that one can misunderstand the concluding point of this General Comment, in paragraph 20, that reservations which the Committee deems invalid are simply void and severable, so that the State remains a party to the Covenant and bound by its provisions without benefit of the reservations. Since this conclusion is so completely at odds with established legal practice and principles and even the express and clear terms of adherence by many States, it would be welcome if some helpful clarification could be made.

C. DISCRIMINATION

1. Race

On September 28, 1966, the United States signed the International Convention on the Elimination of All Forms of Racial Discrimination, ("Race Discrimination Convention" or "Convention") G.A. Res. 2106 (XX), Annex, U.N. Doc. A/RES/2106 (XX) (1966), 660 U.N.T.S. 195, entered into force January 4, 1969. President Jimmy Carter transmitted the Convention to the Senate on February 23, 1978. In his letter of transmittal, President Carter stated:

> The Racial Discrimination Convention deals with a problem which in the past has been identified with the

> United States; ratification of this treaty will attest to our enormous progress in this field in recent decades and our commitment to ending racial discrimination.

See S. Treaty Doc. No. 95–18 (1978). However, despite several hearings during 1979, the Senate took no action with respect to the treaty.

On April 26, 1994, Acting Secretary of State Strobe Talbott wrote to the Senate Foreign Relations Committee ("SFRC") to convey the strong support of President William J. Clinton's Administration for the prompt ratification of the Convention. His letter enclosed a memorandum "analyzing the requirements of the Convention against relevant provisions of current U.S. law and explaining the reasoning behind each of the reservations, understandings and declarations." S. Exec. Rep. 103–29 (1994). Acting Secretary Talbott wrote in part:

> Contemporary U.S. domestic law provides strong protections against racial discrimination in all fields of public endeavor, as well as effective methods of redress and recourse for those who despite these protections nonetheless become victims of discriminatory acts or practices. Accordingly, as indicated in the enclosed analysis, subject to a few necessary reservations and understandings, the requirements of this treaty are consistent with existing U.S. law. Early ratification by the United States would, however, serve to underscore our national commitment to the international promotion of the fundamental values and principles reflected in this widely-accepted treaty.
>
> Even more importantly, U.S. ratification would enhance our ability to take effective steps within the international community to confront and combat the increasingly destructive discrimination which occurs against minorities around the world on national, racial and ethnic grounds. Ethnic animosity and hatred have become a tragically common feature of the post-Cold War political landscape, one which has strained the abilities of existing institutions to contain and control

and which increasingly calls for new approaches and new solutions to what are in many cases centuries-old animosities.

On June 24, 1994, the Senate gave its advice and consent to ratification with reservations, an understanding and a declaration as set forth below. *See* 140 CONG. REC. S7634 (daily ed. June 24, 1994).

---

* * * *

I. The Senate's advice and consent is subject to the following reservations:

(1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

(2) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in article 1 to fields of 'public life' reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs (1) (c) and (d) of article 2, article 3 and article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

(3) That with reference to article 22 of the Convention, before any dispute to which the United States is a party may be submitted

to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

II. The Senate's advice and consent is subject to the following understanding, which shall apply to the obligations of the United States under this Convention:

That the United States understands that this Convention 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 this Convention.

III. The Senate's advice and consent is subject to the following declaration:

That the United States declares that the provisions of the Convention are not self-executing.

On May 11, 1994, Conrad K. Harper, Legal Adviser of the Department of State, had testified before the Senate Foreign Relations Committee in support of the Convention, as excerpted below. The full text of Mr. Harper's testimony, *reprinted in* 5 Dep't St. Dispatch No. 22 at 354–57 (May 30, 1994), is available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

---

* * * *

The Clinton Administration is committed to eradicating race-based discrimination in our society and ensuring equal opportunity for all. Respect for human rights and individual dignity—regardless of racial or ethnic background—is a fundamental tenet of a just and civilized society.

Over the past century, we have made significant advances in the struggle for racial equality in this country. Our Constitution and laws establish important safeguards for ensuring that

individuals are not denied employment, housing, education, or other rights or benefits because of racial or ethnic animus. The principle of anti-discrimination is deeply embedded in our legal and social fabric.

But while we have made progress along the path to racial equality, we have more distance to travel. The Clinton Administration intends to make every effort to ensure that the goal of equal opportunity becomes ever more a reality. The International Convention on the Elimination of All Forms of Racial Discrimination is an important expression of this commitment.

The convention was signed by the United States in 1966 and transmitted to the Senate for its advice and consent to ratification in 1978. Apart from a hearing before the Senate Foreign Relations Committee in 1979, no further action has been taken. On behalf of the President, we urge the Senate Foreign Relations Committee to report favorably on this convention with a recommendation that the Senate give its advice and consent to prompt ratification. Ratification of this convention will send a clear signal of our commitment to eradicate unlawful racial and ethnic discrimination.

The convention—already ratified by more than 135 countries—creates an important standard that members of the international community must strive to meet. Although the fundamental rights set forth in this treaty already are recognized in U.S. laws, not all countries have codified the principle of equal protection in their legal systems or permit effective redress for acts of discrimination. By working collectively with other nations to eliminate unlawful discrimination based on race, color, descent, or national or ethnic origin, we shall promote respect for the rule of law and human rights abroad. This goal is particularly important in light of the extraordinary challenge to peace and security today resulting from racial tension and ethnic conflict.

Ratification of this convention will comport with our domestic laws. The substantive provisions of the convention embody, with only a few exceptions, the requirements of the Constitution and laws of the United States. Where necessary, we have proposed a reservation, understanding, or declaration to make clear that the scope of U.S. obligations under the convention is consonant with U.S. law. Although such qualifications are relatively few and do

not undermine in any way the central purpose or object of the convention, they clarify our legal standards and ensure that our acceptance of the convention is fully consistent with the U.S. Constitution and laws.

A detailed legal analysis of the treaty's requirements and their relationship to U.S. constitutional law as interpreted over time by U.S. courts was previously submitted to the committee under separate cover on April 26 by the Acting Secretary of State, Strobe Talbott. For the convenience of the committee, let me summarize the central provisions in the convention and then explain the relatively few reservations, understandings, and declarations we have submitted.

Central Provisions

Article 1. The convention is designed to forbid racial and ethnic discrimination in all aspects of public life. Article 1(1) defines "racial discrimination" as:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Although this definition is relatively broad, Article 1(2) and Article 1(3) impose certain limits. For instance, the convention does not apply to distinctions, exclusions, restrictions, or preferences made between citizens and non-citizens; nor does it affect legal provisions concerning acquisition of nationality and citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. Moreover, Article 1(4) explicitly exempts "special measures" taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection. As a result, the convention leaves undisturbed existing U.S. law regarding affirmative action programs. Article 2 requires states parties to take a series of

specified steps or measures to eliminate racial discrimination, including:

(a) Ensuring that all public authorities and institutions act in conformity with that basic obligation;

(b) Not sponsoring, defending, or supporting racial discrimination by any persons or organizations;

(c) Reviewing governmental policies and amending, rescinding, or nullifying discriminatory laws and regulations at all levels of political organization;

(d) Bringing to an end, by all appropriate means, racial discrimination by "any persons, group or organization;" and

(e) Encouraging, where appropriate, integrationalist multiracial organizations and movements.

Under Article 3, states parties condemn racial segregation and apartheid and agree to prevent, prohibit, and eradicate all such practices in territories under their jurisdiction. Article 4 requires states parties to condemn propaganda and organizations based on racial hatred or superiority. Under Article 5, states parties undertake to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law in the enjoyment of the rights—among others—to equal treatment before the courts and security of the person and protection against violence and bodily harm; political rights, including universal and equal suffrage, freedom of movement and residence, peaceful assembly and association, thought, conscience, religion, opinion, and expression; the rights to nationality, to marriage, to own and inherit property, to work, to form and join unions, and to housing, medical care, education, cultural activities, and access to public facilities.

Article 6 requires states parties to ensure everyone within their jurisdiction effective protection and remedies against acts of discrimination contrary to this convention, which violate human rights and fundamental freedoms, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Finally, under Article 7, states parties undertake to institute measures to combat prejudice and promote tolerance in the fields of teaching, education, culture, and training.

Articles 8 through 16. As an oversight mechanism, the convention establishes in Articles 8 through 16 a Committee on the Elimination of Racial Discrimination—an autonomous body of 18 experts of high moral standing and acknowledged impartiality who are elected by states parties to four-year terms. This committee considers detailed reports from states parties on the legislative, judicial, administrative, or other measures they have adopted or which give effect to the provisions of the convention. The first such report is due within one year of entry of the convention into force for the state concerned; supplementary reports are due thereafter every two years.

The committee also submits an annual report to the UN General Assembly. The committee generally meets twice a year, usually in New York or Geneva. Although it is not a court, it may hear complaints by one state party against another concerning non-compliance with convention requirements. Such disputes, if not settled by mutual agreement, may be resolved by the committee or, at its discretion, referred to a non-binding conciliation commission. To date, no such disputes have been brought.

States parties may, by declaration—on an optional basis—also recognize the competence of the committee to consider communications from individuals or groups claiming to be victims of a violation by that state of any of the rights set forth in the convention. The United States has not availed itself of this option. A state that makes such a declaration also may establish a national body to receive and consider such petitions from individuals within its jurisdiction on an initial basis; petitioners who fail to receive satisfaction from such a body within six months may communicate directly with the committee.

Both mechanisms—the individual and the state-to-state—are non-binding. The convention contains no provision for the referral of either state-to-state complaints or individual petitions from the committee to the International Court of Justice (ICJ). Article 22 of the convention does provide, however, that disputes between two or more parties with respect to the interpretation or application of the convention which are not settled by negotiation or other methods may be submitted to the ICJ at the request of either party.

Reservations, Understandings, And Declarations

As a general matter, the substantive provisions of the convention reflect the anti-discrimination principles inherent in our constitutional scheme. They require the United States to do what it already is legally obligated to do—eradicate unlawful racial or ethnic discrimination. Ratification of this convention will constitute an important expression of U.S. commitment to fulfill its legal obligation to ensure equality under law.

Nonetheless, while the convention generally comports with U.S. laws, certain provisions appear either to be inconsistent with current law or sufficiently ambiguous as to warrant additional clarification. As a result, we have proposed several reservations, declarations, and understandings to clarify the nature and scope of the obligations we shall undertake.

The most important of these is required by the First Amendment to our Constitution. Specifically, we have proposed a reservation regarding Article 4 of the convention, which, as noted above, requires states parties to condemn propaganda and organizations based on racial hatred or superiority. Article 4 requires states parties to:

(a) Make criminal the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, and acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin;

(b) Prohibit organizations and propaganda which promote and incite racial discrimination; and

(c) Forbid public authorities or institutions, national or local, from promoting or inciting racial discrimination.

As a matter of national policy, the U.S. Government has long condemned racial discrimination and has engaged in many activities designed to combat prejudices leading to racial discrimination and to promote tolerance and understanding among racial and ethnic groups. Such programs include those under the authority of Title VI of the Civil Rights Act of 1964, the Bilingual Education Act, the Mutual Educational and Cultural Exchange Act of 1961, the International Education Act, and the National Foundation on the Arts and Humanities Act of 1965.

Nonetheless, because the rights to free expression and association are fundamental values in our constitutional structure, any governmental restrictions on expressive activity must be viewed with suspicion and must survive the most stringent scrutiny. Although speech likely to cause imminent violence and certain forms of bias-related criminal conduct may be proscribed consistent with the First Amendment, the government generally may not impose regulations aimed at the content of expression. However objectionable certain opinions or ideas may be, the Constitution requires that such expression be constitutionally protected. As the Supreme Court consistently has recognized:

> The constitutional right of free expression is intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971).

Because Article 4 mandates the suppression and criminalization of certain expression because of its content and also implicates the freedom of association, we believe it is inconsistent with existing First Amendment principles. We thus have proposed a reservation indicating that the United States will not accept any obligation to restrict rights to free expression and association protected by the U.S. Constitution and laws. The text of this reservation is set forth at page 12 of the detailed legal analysis to which I referred earlier. Such a reservation will make clear that U.S. ratification of the convention is informed by and contingent upon existing constitutional norms.

The second reservation we have proposed pertains to private conduct. We are concerned that certain provisions in the convention might be interpreted as prohibiting conduct beyond the proper scope of governmental regulation under existing U.S. law. Our concerns are derived from the breadth of the definition of "racial discrimination" under Article 1(1); the obligation imposed on states

parties in Article 2(1)(d) to bring an end to all racial discrimination "by any persons, group or organization;" and the specific requirements of paragraphs 2(1)(c) and (d), Articles 3 and 5.

As explained in greater detail in our legal analysis, the Constitution and laws of the United States establish extensive protection against discrimination, including certain conduct by private actors. The "state action" requirement of the Fourteenth Amendment recognizes that in certain cases conduct by private individuals is actionable if such conduct is "fairly attributable" to the state. (*Lugar v. Edmonson*, 457 U.S. 922, 937 (1982)). Likewise, the federal civil rights statute, 42 U.S.C. § 1983, reaches conduct by individuals acting "under color of" state law. (*See West v. Atkins*, 487 U.S. 42 (1988)). In addition, the Thirteenth Amendment's prohibition against slavery and involuntary servitude encompasses private as well as governmental action. Congress may regulate private conduct not only through the Thirteenth Amendment but also through its Article I commerce and spending powers, as it did in passing Title II and Title VII of the 1964 Civil Rights Act, which, respectively, prohibit private entities from discriminating in public accommodations and employment. Further discussion of U.S. law regarding private conduct is included in our legal analysis at pp. 12–15.

The government's ability to proscribe certain private conduct is, however, not unlimited. Our constitutional framework recognizes that individual freedom and protection from governmental interference are vital to a free and democratic society. For this reason, some private conduct is not actionable—even if discriminatory—provided no nexus exists between individual and governmental action.

Exactly how far the drafters of the convention intended to sweep in regulating discriminatory conduct remains unclear. On the one hand, it could be argued that the reference to "public life" in the definition of "racial discrimination" in Article I limits the reach of the convention to conduct involving some measure of governmental involvement or "state action." On the other hand, the negotiating history of the convention is ambiguous on this point. Moreover, the committee appears to have adopted an expansive view of the convention, interpreting it to reach racial

discrimination perpetuated by any person or group against another. We cannot be sure, therefore, that the term "public life" carries with it the same limits on governmental regulation as is contemplated under U.S. law. Some forms of private individual or organizational conduct that currently are outside the permissible scope of governmental regulation in his country could well become actionable under the convention, thereby offending existing constitutional norms.

Because we wish to make clear that the obligations undertaken by the U.S. are limited by U.S. constitutional and statutory provisions, we have proposed a reservation indicating that:

> To the extent that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation . . . to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1)(c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States. The text of the reservation is included at pp. 14–15 in our legal analysis submitted to the committee. We believe such a measure is prudent and will ensure that the U.S. does not embrace any obligation it cannot appropriately assume.

The third reservation we have submitted concerns submission to the jurisdiction of the International Court of Justice. Such a reservation parallels those taken to the Genocide and Torture Conventions. Although this Administration strongly supports the use of international dispute-resolution mechanisms in appropriate cases, we believe it is prudent for the U.S. Government to retain the ability to decline to become involved in a case that may be brought by another country for frivolous or political reasons. In any case, the ICJ has played no practical role under this treaty. Indeed, to date, no case has been brought to the ICJ under this convention.

The primary mechanism for reviewing implementation of the convention is through consideration of reports submitted by states parties to the Committee on the Elimination of Racial Discrimination. The committee also provides a mechanism for resolution of state-to-state complaints. The United States plans to

submit to both mechanisms. Finally, there is ample opportunity in the United States to seek redress of alleged acts of discrimination.

In addition to these three reservations, we have proposed an understanding which expresses our view that with respect to implementation of the convention, the federal government will have responsibility over matters under its jurisdiction and that, otherwise, implementation shall be the responsibility of state and local governments. This is to make clear that ratification does not preempt state and local anti-discrimination initiatives. The understanding also makes clear that where states and localities have jurisdiction over such measures, the federal government will ensure compliance. We adopted a similar provision in ratifying the Covenant on Civil and Political Rights in 1992 and believe such an understanding is appropriate here.

Finally, we have submitted a proposed declaration indicating that the convention's provisions are not self-executing. Under Article VI, Clause 2 of the Constitution, duly ratified treaties become the supreme law of the land, equivalent to a federal statute. By making clear that this convention is not self-executing, we ensure that it does not create a new or independently enforceable private cause of action in U.S. courts. We have proposed and the Senate has concurred in the same approach to previous human rights treaties, such as the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1990) and the International Covenant on Civil and Political Rights (1992).

As was the case with the earlier treaties, existing U.S. law provides extensive protection and remedies against racial discrimination sufficient to satisfy the requirements of the present convention. In addition, federal, state, and local laws already provide a comprehensive basis for challenging discriminatory statutes, regulations, and other governmental actions in court, as well as certain forms of discriminatory conduct by private actors. There is thus no need for the establishment of additional causes of action to enforce the requirements of the convention. By adopting these proposed reservations, declarations, and understandings, we signify the seriousness with which the United States accepts the obligations the convention imposes. By being forthright about the legal constraints under which we operate and specific about our

obligations as we interpret them, we make clear that we shall meet the obligations we assume in a manner fully consistent with the Constitution and laws of the United States. Since the major thrust of the convention comports with U.S. law, the qualifications on U.S. ratification are few and do not undermine the central tenets or purposes of the convention.

Other Issues

I wish also to point out that in our extensive analysis of the convention's potential impact on our domestic law, we have identified other issues about which the Senate should be aware but which do not warrant inclusion in the Senate's resolution of advice or consent or in the instrument of ratification as specific reservations, understandings, or reservations. These issues relate to convention provisions regarding ethnic origin and descent; special measures, known as "affirmative action"; implementing legislation; provisions relating to discriminatory purpose and effect; territorial application; state-to-state complaints; individual petitions; and financial implications of ratification. Our analysis of each is set forth in the detailed legal memorandum which we hope will become part of the committee's report on the convention so that it will be readily accessible to interested parties.

Of these, perhaps the most noteworthy is Article 2(1)(c) of the convention, which requires states parties to:

> Take effective measures to review governmental, national and local policies which have the effect of creating or perpetuating racial discrimination. The provision also requires states parties to "amend, rescind or nullify any laws and regulations" that have such effects.

The negotiating history of the convention leaves unclear the precise scope of a state party's obligation under Article 2(1)(c). We believe, however, that the provision does not require the invalidation of every race-neutral law, regulation, or practice that causes some degree of adverse impact on racial groups. This conclusion is confirmed by the committee's recently adopted General Recommendation XIV which states that:

> In seeking to determine whether an action has an effect contrary to the convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national origin.

The committee's use of the term "unjustifiable disparate impact" indicates its view that the convention reaches only those race-neutral practices that both create statistically significant racial disparities and that are unnecessary. This view is consistent with the standards for proving disparate impact under Title VII, the Title VI implementing regulations, and the Fair Housing Act, as well as with the requirements for proving a violation of the Equal Protection Clause or of the federal civil rights statutes.

Conclusion

In sum, Mr. Chairman and members of the committee, the International Convention on the Elimination of All Forms of Racial Discrimination embodies the anti-discrimination principles animating U.S. law. U.S. ratification of this convention—long awaited by other countries—will be an important expression of our commitment to eradicate unlawful racial and ethnic discrimination and to ensure equal opportunity for all. By demonstrating our resolve to eliminate discrimination at home, we shall encourage respect for human rights and the rule of law abroad and, in so doing, join with other nations in building a fairer, more pluralistic, and, ultimately, more just environment for everyone.

2. Gender

a. Convention on the Elimination of All Forms of Discrimination Against Women

> On November 12, 1980, President Jimmy Carter transmitted the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW" or "Convention"), signed by the United States on July 17, 1980, to the Senate for

its advice and consent to ratification, with certain conditions. S. Treaty Doc. No. 96–53 (1980). The Senate has not taken action on the Convention.

On September 13, 1994, Secretary of State Warren Christopher wrote to the Senate Foreign Relations Committee to convey the strong support of President William J. Clinton's administration for the prompt ratification of CEDAW. Secretary Christopher wrote in part:

> Ratification of the Convention at this time would serve both to underscore our commitment to women's rights and to enhance our ability to protect and promote those rights internationally. With the Fourth World Conference on Women impending, it is in the U.S. interest to ratify this treaty promptly, since we are the only country in the Western Hemisphere which has not. In particular, participation by the United States in the work of the Committee on the Elimination of Discrimination Against Women, which oversees implementation of the treaty by States Parties, would provide an opportunity for the United States to play an even more active and effective role in the articulation and advancement of the principles of non-discrimination and equality for women around the world.

On September 27, 1994, Jamison S. Borek, Deputy Legal Adviser of the Department of State, testified before the SFRC in support of CEDAW, as excerpted below. Senate Resolution 237, submitted to the Senate on November 19, 1999, urged the ratification of the Convention, but the Senate took no action.

The full texts of Secretary Christopher's letter to the SFRC and Deputy Legal Adviser Borek's testimony before the SFRC are available in *Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the Senate Foreign Relations Committee*, 103rd Cong. (1994).

---

* * * *

. . . Ratification of this Convention will be an important expression of our shared commitment to the protection and promotion of the rights of women at home and abroad, just as the recent endorsement of the International Convention on the Elimination of Racial Discrimination evidenced our common goal of promoting respect for human rights and individual dignity—regardless of racial or ethnic background—as a fundamental tenet of a just and civilized society.

The Convention on the Elimination of All Forms of Discrimination Against Women was adopted by the United Nations General Assembly in December, 1979. The United States participated actively in its negotiation, voted in favor of its adoption, and signed it in July, 1980. President Carter transmitted the convention to the Senate for advice and consent to ratification in November of that same year. However, apart from a field hearing in Massachusetts chaired by Senator John Kerry in 1988, no further action was taken until this Committee held a hearing in August 1990, at which very strong support for ratification was voiced.

We believe it is time to ratify. As Secretary Christopher's September 13 letter to you indicates, Mr. Chairman, ratification of the Convention at this time will serve to underscore our commitment to women's rights and enhance our ability to protect and promote these rights internationally. By excluding ourselves from the process and dialogue which is centered on this treaty, we hamper our own efforts to work effectively with them in promoting women's rights around the globe.

Already ratified by some 136 countries, including virtually all of our democratic allies, the Convention creates an internationally agreed standard of non-discrimination. In this regard, the Treaty builds on the principle of non-discrimination contained in the 1948 Universal Declaration of Human Rights, the 1966 Covenant on Civil and Political Rights—a treaty to which the United States is already a party—and the 1967 UN Declaration on the Elimination of Discrimination Against Women.

Although widely accepted and proclaimed by states parties, the prohibition against gender-based discrimination has not in fact been effectively implemented in many countries, nor have they permitted effective redress for instances of discrimination.

Regrettably, discrimination against women continues to be pervasive around the world. United States ratification of this important human rights instrument would permit us to work collectively with other nations to help eliminate discrimination against women and generally to promote the rule of law and respect for human rights.

Ratification of this Convention on the basis we have proposed would also comport with our domestic laws. The substantive provisions of the Convention embody, with relatively few exceptions, principles already reflected in the constitution and laws of the United States. In those few areas where the Convention would impose an obligation or undertaking which is not contained in existing domestic law, we have proposed a reservation or understanding, as appropriate, to make clear that the scope of U.S. obligations under the Convention is consistent with U.S. law. These qualifications are relatively few and do not undermine the central object or purpose of the Convention. They serve, however, to clarify our legal undertakings and to ensure that our acceptance of the Convention is fully consistent with our Constitution and laws.

As a general matter, the substantive provisions of the Constitution and statutes of the United States already oblige us to do what the Convention requires: to eradicate unlawful discrimination based on gender and to promote equality of treatment and access for women in many different areas of our national life. Indeed . . . current federal law and practice are, in almost every area touched upon by the Convention, sufficient to satisfy its requirements. For that reason, no new implementing legislation is considered necessary to give effect to the Convention.

Nonetheless, while the Convention generally comports with U.S. laws, there are a few requirements which clearly go beyond existing law and to which we must therefore take a reservation. We have proposed four such reservations.

The first of these relates to private conduct. As was the case with the Convention on the Elimination of All Forms of Racial Discrimination, we are concerned that this Convention could be interpreted to prohibit conduct which lies beyond the proper scope of governmental regulation under existing United States law. These concerns stem principally from the breadth of the definition of "discrimination against women" under Article 1; the specific

obligations imposed on states parties under Article 2 to eliminate discrimination against women by "any person, organization or enterprise" and to abolish "customs and practices" which constitute discrimination against women; and the potentially broad reach of the general obligations imposed by Article 3. Similar concerns are raised by the reference to modification of "social and cultural patterns of conduct" in Article 5, the reference in Article 7 to participation in non-governmental organizations and associations, and the application of Article 13 to participation in recreational activities, sports and all aspects of cultural life.

. . . [T]he Constitutional prohibitions against gender discrimination generally apply only where there is sufficient governmental involvement so as to satisfy the "state action" requirement. Even those federal anti-discrimination statutes that apply to private conduct do not extend to all such conduct. For example, Title VII of the 1964 Civil Rights Act does not apply to private employers with fewer than 15 employees, religious institutions, or tax-exempt private clubs. Similarly, Title IX of the Education Act Amendments of 1972 does not apply to private institutions that receive no federal funds. Moreover, certain types of private institutions that do receive federal funds are exempted from the strictures of Title IX. Finally, religious organizations are generally not subject to gender discrimination laws.

For these reasons, it is appropriate to condition U.S. ratification upon a reservation, similar to the one approved earlier this year by this Committee in its consideration of the international Convention on the Elimination of All Forms of Racial Discrimination, which acknowledges the limitations imposed by the U.S. Constitution and laws upon the ability of the federal government to regulate private conduct. The text of that reservation is as follows:

> "The Constitution and laws of the United States establish extensive protections against discrimination, reaching all forms of governmental activity as well as significant areas of non-governmental activity. However, individual privacy and freedom from governmental interference in private conduct are also recognized as among the fundamental values of our free and democratic society. The United States

> understands that by its terms the Convention requires broad regulation of private conduct, in particular under Articles 2, 3 and 5. The United States does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States."

The second reservation concerns women in the military, and more specifically the assignment of women to units and positions directly involving combat. Although nothing in the Convention specifically refers to women in the military, Articles 2(f) and 7 are conceivably broad enough to be interpreted in such a fashion. U.S. law has periodically contained gender-based preferences and restrictions related to military service. Today, the principal statutory restriction (10 U.S.C. 6015) has been repealed and women are now permitted to volunteer for—and do in fact serve in—all of the armed services. Women attend the service academies without restriction and are increasingly represented at the senior levels of the commissioned and non-commissioned ranks and grades in all services.

In particular, women may serve without restriction in all non-combat units and in many but not all combat positions. However, the Department of Defense and the military services retain certain policies that preclude women from serving in units and positions whose mission requires routine engagement in direct combat on the ground. See e.g., P.L. 103–160, 542. We understand that further changes in military policy affecting women are to be established to take into account the costs of establishing necessary sleeping and privacy arrangements in some situations and other factors such as the physical requirements of some assignments.

This Administration fully supports continued efforts to afford women the broadest opportunities to serve in the military. However, to retain the required flexibility to address potential future changes of this nature, it is considered appropriate to condition ratification upon a reservation as follows:

> "Under current U.S. law and practice, women are permitted to volunteer for military service without restriction, and

> women in fact serve in all U.S. armed services, including in combat positions. However, the United States does not accept an obligation under the Convention to assign women to all military units and positions which may require engagement in direct combat."

The third reservation concerns equality of remuneration in the workplace. Under Article 11(l)(d), women are entitled to non-discrimination with respect to "equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work."

This provision reflects a potentially broad definition of the concept of equal pay for women, requiring equal compensation for jobs judged to be of comparable worth according to requisite knowledge, skill, effort and responsibility, and considering the working conditions under which the work is performed. The Convention nowhere uses the term "comparable worth," and a number of states parties have not adopted the "comparable worth" doctrine in their domestic law. It appears, however, that the committee established by the Convention takes a broader view than would comport with current U.S. law, and this view may find support in the negotiating history of the Convention.

Pay equity is an established principle in U.S. law and practice. The equal pay act of 1963 mandates equal pay for men and women who are performing jobs of equal skill, effort and responsibility under similar working conditions unless the pay differential is justified by one of four exceptions: seniority system, merit system, system based on the quality or quantity of production, or any factor other than sex. Courts have interpreted the act to mandate equal pay for "substantially similar" jobs; claims of unequal pay for comparable but unequal work are inapplicable under the statute. Moreover, the U.S. Supreme Court has recognized that Title VII reaches cases of wage disparity when jobs are not identical if the disparity is the result of intentional discrimination.

The Equal Employment Opportunity Commission has concluded, however, that the concept of comparable worth is not cognizable under Title VII, and the federal courts have consistently

rejected the concept of comparable worth. Accordingly, it is considered appropriate to condition ratification upon a reservation as follows:

> "U.S. law provides strong protections against gender discrimination in the area of remuneration, including the right to equal pay for equal work in jobs that are substantially similar. However, the United States does not accept any obligation under this Convention to enact legislation establishing the doctrine of comparable worth as that term is understood in U.S. practice."

Ratification of the Convention on that basis would not, of course, preclude the United States (or its constituent states) from adopting the legal doctrine of comparable worth in the future.

The fourth and final reservation concerns the provision of paid maternity leave. Article 11(2)(b) provides that states parties shall take appropriate measures "to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances."

Current U.S. law and practice provide for substantial maternity and parental leave benefits in many employment situations. The Pregnancy Discrimination Act, for example, prohibits employers from providing less-favorable treatment of pregnancy-related conditions in comparison to other conditions. The Family and Medical Leave Act of 1993 provides, among other things, that public and private sector employees who meet the statutory requirements may take up to twelve weeks of unpaid leave in any twelve-month period for the birth or adoption of a child, acquiring a foster child, the serious illness of a child, spouse or parent, or the serious illness of the employee. The FMLA requires covered employers to maintain group health benefits during the leave and to restore the employee to the same or an equivalent position (with equivalent pay and benefits) at the end of the eligible leave period. The FMLA also creates a commission on leave which is to study the impact on employers and employees of policies which provide temporary wage replacement during periods of family or medical leave.

However, no federal or state law now requires employers to provide paid leave or leave with comparable social benefits in

connection with pregnancy or childbirth. Nor does U.S. law require provision of "comparable social benefits" in lieu of paid maternity leave. However, the states of New York, New Jersey, California, Hawaii and Rhode Island, and the Commonwealth of Puerto Rico have temporary disability insurance laws that provide partial salary replacement for non-work related disabilities, including childbirth and pregnancy-related conditions.

Accordingly, ratification should be conditioned upon an express reservation to the requirements of Article 11(2)(b), as follows:

> "Current U.S. law contains substantial provisions for maternity leave in many employment situations but does not require paid maternity leave. Therefore, the United States does not accept an obligation under Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances."

Again, ratification of the Convention on that basis would not preclude the United States (or its constituent states) from adopting laws in the future which guarantee paid maternity leave or leave with comparable social benefits.

We have also proposed three interpretive understandings, to clarify the extent of U.S. undertakings under the Convention. The first of these concerns the question of federalism. . . . Nothing in U.S. law prohibits the federal government from committing its constituent units to the goal of nondiscrimination. Indeed, the Constitution of the United States does just that. However, it is not necessary to "federalize" such areas, or to take them out of the hands of the state and local governments, in order to ensure that the fundamental requirements of the Convention are respected and complied with at all levels of government within the United States. In some areas, it would be inappropriate to federalize. For example, state and local communities have always taken the lead in public education. Although the constitutional proscription against gender discrimination still applies, federal control over education, particularly in the areas of curricula, administration, programs of instruction, and the selection and content of library

resources, textbooks, and instructional materials, is expressly limited by statute. Measures to ensure fulfillment of the Convention in these areas will include activities that conform to these statutory limitations.

It is for this reason that the administration proposes to condition ratification of the Convention upon a "federalism" understanding similar to those previously approved by this committee and the full Senate in connection with the ratification of the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination:

> "The United States understands that this Convention 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 this Convention."

Second, we have included an understanding addressed to issues of freedom of speech, expression and assimilation. In contrast to the Convention on the Elimination of All Forms of Racial Discrimination, this Convention does not contain a specific provision barring discriminatory speech. It is therefore not necessary to include a reservation to protect first amendment rights. Nonetheless, some of the provisions of the Convention could be interpreted to implicate first amendment rights, and we believe it important to clarify for the record, domestically as well as internationally, that we do not accept any obligation which would impinge upon constitutionally protected rights of speech and association. Most importantly, we want to ensure that Article 5 is not construed as imposing obligations on states parties to take action against those who advocate "the idea of inferiority or the superiority of either of the sexes." Under U.S. law, the free speech guarantees of the first amendment generally permit individuals to disseminate such "ideas," however abhorrent they may be.

For this reason, the Administration proposes to clarify for the committee and all other states parties the limits imposed on governmental action in this regard by the U.S. Constitution, through adoption of the following understanding:

> "The Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 5, 7, 8 and 13, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States."

Finally, we have proposed an understanding related to free health care services, as addressed in Article 12. Article 12(l) requires states parties to take "all appropriate measures" to eliminate discrimination against women in the field of health care in order to assure equal access to health care services "including those related to family planning." Under Article 12(2), states parties must also ensure to women "appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

As a general matter, this provision poses no problems for the United States. The equal protection clause of the U.S. Constitution prohibits public institutions from discriminating against women with respect to access to health care, and in practice women do have equal access to such care, as well as to services specifically related to family planning and in connection with pregnancy, confinement or the post-natal period. Although not all health care institutions or providers (whether private or governmentally-funded) are required to, or do in fact, provide family planning information or services, a woman in the United States can obtain such services as readily as a man. In any event, Article 12(l) does not require the affirmative provision of family planning services generally, or of any specific service (such as contraceptive devices or abortion), but rather mandates equality of access.

The undertaking to provide "appropriate services in connection with pregnancy . . . granting free service where necessary" arguably imposes a greater burden. Again, this provision does not require the provision of any particular services, but leaves to each state party the decision of which services are "appropriate" in which circumstances, as well as the decision about whether and when it is "necessary" to make services freely available.

While federal law currently does not guarantee health care coverage and nutrition during pregnancy, and while state medicaid programs do not necessarily cover all pregnant women who cannot afford adequate insurance on their own, federal law does provide substantial assistance to pregnant women and infants. As you know, even wider coverage has been proposed as part of the Administration's health care proposal. We do not believe, however, that the Convention requires it. . . . [W]e believe that the current provisions of federal and state law and programs are legally adequate to satisfy the international legal obligations under this Treaty. Nonetheless, because federal programs may not guarantee the availability of funds to provide all needed services, we believe it is appropriate to assert the following understanding with respect to Article 12:

> "The United States understands that Article 12 permits states parties to determine which health care services are appropriate in connection with family planning, pregnancy, confinement and the post-natal period, as well as when the provision of free services is necessary, and does not mandate the provision of particular services on a cost-free basis."

Finally . . . we have proposed two declarations, both of which will be familiar to you because they reflect the same approach to issues we have addressed in earlier treaties. The first declares the provisions of this treaty to be "non-self-executing." The primary intent of such a declaration is to clarify that the treaty will not create a new or independently enforceable private cause of action in U.S. courts.

As was the case with previously considered human rights treaties, it is our considered view that existing U.S. law provides

extensive protections against gender-based discrimination and remedies sufficient to satisfy the requirements of the present Convention. Moreover, federal, state and local laws already provide a comprehensive basis for challenging discriminatory statutes, regulations and other governmental actions in court, as well as certain forms of discriminatory conduct by private actors.

Given the extensive protections already present in U.S. law, there is no discernible need for the establishment of additional causes of action or new avenues of litigation in order to enforce the essential requirements of the Convention. Declaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter of international law.

The second declaration concerns the Treaty's dispute settlement mechanism. Article 29(l) of this Convention provides for the referral of disputes between states parties concerning the interpretation or application of the Convention, if not settled by negotiation, first to arbitration and then to the International Court of Justice in conformity with the statute of the court. Article 29(2) provides that a state party may declare, at the time of signature, ratification or accession, that it does not consider itself bound by the provisions of Article 29(l).

Following the same approach to this issue as the Administration proposed in connection with the Convention on the Elimination of all Forms of Racial Discrimination, in which the Senate concurred, the Administration proposes to make the declaration contemplated by Article 29(2), declining to accept the Court's jurisdiction in all such cases and retaining the right to decide the question on a case-by-case basis. The Administration strongly supports the use of international dispute resolution mechanisms in appropriate cases, but continues to believe it is prudent for the United States government to retain the ability to decline participation in a case which may be brought by another country for frivolous or political reasons.

In fact, recourse to the International court of Justice is only an ancillary possibility for dispute resolution and has not played an important role in implementing this Treaty (indeed, no state has ever brought a claim to the Court under this Convention). Instead,

the principal oversight functions are performed by the Committee on the Elimination of Discrimination Against Women . . . and the United States fully accepts the competence of the Committee in that regard.

The Administration does not believe that making this declaration will significantly curtail the possibility of effective resolution of any disputes, should they arise, or undermine the oversight of implementation of the Treaty's provisions.

* * * *

[I]n concluding, I want to point out what the Convention does not do. I feel compelled to address this topic because, in preparing for this hearing, I reviewed the record of the Committee's 1990 hearing and was rather surprised at some of the claims made about the potential impact of the Convention on our laws and social fabric.

Most importantly, I think it should be clear that we are not talking about amending the U.S. Constitution or indeed changing U.S. law in any respect. In the past, some characterized the Convention as a vehicle for radical social engineering and legal innovation which would somehow impinge upon "the timeless legal and moral values" on which our nation was founded. This is not at all the case. The Convention is consistent with firmly rooted principles of equal treatment and opportunity which are already part of our heritage and tradition. . . . [F]or the most part our law is already in compliance. With the reservations which we propose, we do not see any need for additional legislation to implement the treaty.

Some have asserted that the Convention would interfere with the federal-state balance of power under the Constitution. Again, that is not in fact the case, and our "federalism" understanding is intended to make that as clear as possible. The Convention will not require the government to regulate inter-personal relationships, as a few have suggested. It will not destroy traditional family values. It will not subject women to the draft, should that institution ever need to be revived. Nor will it undermine the separation of church and state, or require churches and religious institutions to change their practices and beliefs, for example by admitting women to the clergy.

It will not require abortion on demand. Nothing in the Convention, and particularly nothing in Article 12, requires states parties to guarantee access to abortion. This Convention is "abortion neutral." Whether or not abortion should be considered an "appropriate service in connection with pregnancy" is left to each state party in its discretion.

The requirement in Article 16(l)(e) that states parties ensure men and women "the same rights to decide freely and responsibly on the number and spacing of their children" is not a mandate for coercive family planning; to the contrary, it is an obligation on the government not to interfere with the ability of women to make such personal, fundamental decisions but instead to accord them that freedom "on a basis of equality" with men. We already do that in this country.

* * * *

b. Trafficking in women

A memorandum from President William J. Clinton, released on International Women's Day, March 11, 1998, urged the Senate to provide its advice and consent to ratification of CEDAW, highlighted the Violence Against Women Act of 1994, Pub. L. No. 103–322, § 40503, 108 Stat. 1946 (1994), and urged greater U.S. efforts to prevent trafficking in women. The text of the memorandum is available at *www.clintonfoundation.org/legacy/031198-presidential-memo-on-combating-violence-against-women.htm*.

Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, testified on the problem of trafficking in women and children before the House Committee on International Relations on September 14, 1999. *Trafficking of Women and Children in the International Sex Trade: Hearing Before the House Comm. on International Relations*, 106th Cong. 8–13 (1999) (statement of Harold Hongju Koh, Assistant Secretary, Bureau of Democracy, Human Rights, and Labor).

On March 22, 1994, John Shattuck, Assistant Secretary of State for Democracy, Human Rights and Labor testified before the House of Representatives Foreign Affairs Subcommittee on International Security, International Organizations and Human Rights on the sexual exploitation of women and children, as excerpted below. *Human Rights Abuses Against Women: Hearing Before the House Comm. On Foreign Affairs*, 103rd Cong. 108–120 (1994) (statement of John H. Shattuck, Dept. of State, Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs).

---

* * * *

Because of U.S. prodding, violence against women is an increasing focus of UN human rights activity. A top priority is ensuring that the War Crimes Tribunal investigating the former Yugoslavia addresses the systematic rape of women as an instrument of ethnic cleansing. In Kenya, the U.S. has worked with and contributed funds for the UN High Commissioner for Refugees to combat the rape of Somali refugee women. The UNHCR program addressed several facets of the problem, from enhanced physical security to providing counseling to victims, to strengthening the capacity of the Kenyan police. There has subsequently been some improvement.

Trafficking in Women and Children

Child prostitution and the trafficking of women and children are not only abhorrent to the United States, they are a violation of fundamental human rights principles set forth in the International Covenant on Civil and Political Rights and the Convention on the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others. The 1993 Country Reports on Human Rights Practices, prepared by my Bureau, chronicle these activities in many countries, including Burma, Thailand, India, Bangladesh, and the Philippines. But this is not just a Third World problem: some of the women victimized by this practice are reportedly sent to Japan, Cyprus, Belgium, and other Western countries.

The 1993 report on Thailand offers this description of the trade:

> "The trend of trafficking in women from hill tribes and neighboring countries continued. Brothel operators reportedly favor such women because they are cheaper to buy and their inability to speak Thai makes them easier to control. In a widely publicized brothel raid in Ranong in July, 150 Burmese women were arrested by police as illegal immigrants and prostitutes. Many of the women claimed they were tricked into coming to Thailand by offers of employment. The women were kept locked in dormitory-style rooms, and many complained they were physically abused by the brothel operators if they refused to work as prostitutes. Because they are considered illegal immigrants, the women have no right to legal counsel or health care while imprisoned."

The picture that emerges from the State Department Human Rights Report and from the book produced by Human Rights Watch is of a desperate situation. Many of the women contract AIDS. Most are unable to ask for help because they cannot speak the local language, do not know where they are, fear the retribution of brothel owners, and, as illegal aliens, have few legal rights. Sadly, many women became involved in prostitution with the complicity of their families.

In Burma the problem is compounded by other egregious human rights violations. Many Burma women trafficked into prostitution come from areas of civil war where government soldiers have conducted a violent campaign against the civilian population. Many are afraid to go home. The Clinton Administration has recently conducted a review of our policy toward Burma. We are taking a more activist approach to encourage the restoration of a lawful, democratic government in that country—a government more likely to protect its people from the abuses described in the State Department and Asia Watch reports.

The primary responsibility for curbing the trafficking of women through Thailand and for protecting women from such abuses rests with the Government of Thailand. Prime Minister Chuan

has said that he is committed to addressing the problem of child prostitution in Thai society, and his government has taken some limited steps in that direction. Shortly after the Chuan government's election in September 1992, it declared that child prostitution would no longer be tolerated. The government spent months drafting legislation intended to stiffen penalties for brothel owners and procurers, especially those involving children. The draft bill would permit the punishment of men who patronize underage prostitutes. The draft version has been passed to the juridical council for review; once approved by the council, it will be submitted to Parliament. Unfortunately, the proposed legislative reform has not yet been matched by any serious effort to step up law enforcement actions against traffickers and brothel owners, who continue to operate largely with impunity.

In addition to legislation, the Chuan government is considering other steps to address the problem. In 1992–1993, welfare and occupational centers were set up to provide training for young people in the north, in an effort to remove incentives for entering prostitution and to rehabilitate prostitutes who return. The Thai government also hopes that the decision this year to extend compulsory education from six to nine years will deter some young girls from migrating to urban areas as prostitutes. In addition, the government has launched an educational campaign on social values designed to persuade parents not to sell their daughters into prostitution.

A U.S. Action Plan

Earlier this month I traveled to Thailand, to urge the Thai government to take more aggressive action to promote the welfare of women, including fighting against trafficking and child prostitution. I discussed these issues with the Deputy Prime Minister and with the Ministers of the Interior and Foreign Affairs. We discussed the new measures the government is taking, and I raised the urgent necessity of investigating and prosecuting offenders. We also discussed the health problems inherent in prostitution, particularly ways to prevent contraction of HIV. The Deputy Prime Minister assured me that women's issues were a high priority for

the Chuan government, not only in the area of trafficking and prostitution, but also in terms of promoting equal opportunity in the workplace. These issues, and related problems of workplace safety and child employment, are now firmly on our bilateral agenda with Thailand.

We are also addressing the problem programmatically, and I had an opportunity to review first-hand U.S. programs in Thailand. The Peace Corps sponsors an AIDS awareness program in brothels. USAID recently established an AIDS prevention program in Thailand, which provides AIDS education to both brothel workers and patrons, as well as helping prostitutes find alternative forms of employment. USAID also provides scholarships to keep high-risk girls in school. This year it is funding a study to see how young rural women with little education can find employment in the telecommunications industry as technicians—a heretofore male profession. In addition to these programs in Thailand, the State Department also provides nearly $1 million in assistance to Burmese refugees in the border area.

We are planning to take further steps, as well. Drawing on the findings of our 1993 human rights report we are considering how the development of additional diplomatic efforts and training programs to combat trafficking in women in Thailand and Burma. This is an area where NGOs and experts outside government can play an extremely valuable role. We welcome their ideas and will continue to draw on their expertise.

Beyond educational efforts, we urgently need to encourage countries in which trafficking of women and children goes on with impunity to enact new laws, and to enforce existing laws. A particular target of this stepped up law enforcement should be government officials who participate in or condone trafficking, as well as brothel owners and traffickers. Additional efforts must also be made to assist victims with counseling, health services, training, and alternative economic opportunities. The reason why child prostitution and trafficking continue to flourish in the face of legal prohibition is that the real offenders, the people who make money out of this traffic in women's bodies and lives, are not arrested. As the Human Rights Watch report indicates, arresting the women and girls does nothing to stop the practice. On the

contrary, fear of arrest is one of the factors that chains women to the brothels.

The trafficking of Burmese women and children into Thailand is just one manifestation of a problem that crosses geographic boundaries. As part of our new focus on this issue, the Clinton Administration is initiating several important actions to combat the problem worldwide:

As we open relations with Vietnam, we are including this issue in our human rights dialogue. In December 1993, all embassies were instructed to screen the human rights records of all candidates for U.S.-sponsored training and education. This includes military and police training, antinarcotics training, foreign faculty appointments to defense schools, USIA programs, and other U.S.-sponsored training. The State Department instructions to posts indicate this screening should cover involvement in the trafficking of women and children.

Human rights training is now being included in some IMET programs. The State Department is working with the Department of Defense to ensure that the rights of women are fully addressed as part of this training. The issue of trafficking is expressly addressed. Similar training of U.S. employees is equally important. My Bureau runs seminars on human rights for State Department officers assigned abroad, as well as for personnel from other agencies, including DOD and DEA. We regularly invite NGOs to address these classes and their input has been-invaluable.

The 1994 Country Reports will emphasize violations of women's human rights, with special attention to the role of government officials in the trafficking of women and children. Such information has not been sufficiently collected or reported in the past, and it is the key to the problem of lax law enforcement and impunity. Embassies have been asked to report more extensively on patterns of trafficking, so that we can trace both where the women are coming from and which countries they are being sent to.

There have been allegations that some of the women lured into prostitution are destined for the U.S. My Bureau is working with the Bureau of Consular Affairs on guidance to embassies regarding screening visa applicants. Under U.S. law, persons who are traveling to the U.S. to engage in prostitution and persons

who traffic in prostitutes are ineligible to receive U.S. visas. We will work with the Consular Affairs Bureau to develop methods that will help posts identify traffickers.

These are some of the new steps the U.S. can take on its own. However, we will also engage other countries in our efforts to attack the trafficking problem. In that regard, the U.S. will strongly urge that violations of women's human rights, including trafficking in women and children, be high on the agenda of the UN's Fourth World Conference on Women, to be held in Beijing in 1995. The U.S. will also urge that the newly created Special Rapporteur on Violence Against Women investigate this issue.

* * * *

c. Fourth World Conference on Women at Beijing

The United Nations Fourth World Conference on Women was held in Beijing from September 4 through 15, 1995. At the conclusion of the conference, the United States joined in adopting the Fourth World Conference on Women in Beijing Declaration ("Beijing Declaration"). The full text of the Beijing Declaration is available at *www.un.org/womenwatch/daw/beijing/platform/declar.htm.* In remarks to the Conference on September 5, 1995, First Lady Hillary Clinton enunciated the U.S. view on women's rights and gender equality, as excerpted below. The full text of Mrs. Clinton's remarks is available at *www.state.gov/s/l/c8183.htm.*

---

* * * *

The voices of this conference and of the women at Hairou must be heard loud and clear:

It is a violation of *human* rights when babies are denied food, or drowned, or suffocated, or their spines broken, simply because they are born girls.

It is a violation of *human* rights when women and girls are sold into the slavery of prostitution.

It is a violation of *human* rights when women are doused with gasoline, set on fire and burned to death because their marriage dowries are deemed too small.

It is a violation of *human* rights when individual women are raped in their own communities and when thousands of women are subjected to rape as a tactic or prize of war.

It is a violation of *human* rights when a leading cause of death worldwide among women ages 14 to 44 is the violence they are subjected to in their own homes.

It is a violation of *human* rights when young girls are brutalized by the painful and degrading practice of genital mutilation.

It is a violation of *human* rights when women are denied the right to plan their own families, and that includes being forced to have abortions or being sterilized against their will.

If there is one message that echoes forth from this conference, it is that human rights are women's rights . . . And women's rights are human rights.

* * * *

3. Religion

a. International Religious Freedom Act of 1998

On Oct. 27, 1998, Congress passed the International Religious Freedom Act ("IRFA"), 22 U.S.C. §§ 6401–6481, Pub. L. No. 105–292, 112 Stat. 2787, as excerpted below. IRFA mandated the establishment of an Office of International Religious Freedom within the Department of State, headed by an Ambassador-at-Large who acts as the principal advisor to the President and Secretary of State in matters concerning religious freedom abroad. It also mandated the establishment of the independent, bipartisan United States Commission on International Religious Freedom and a Special Adviser on International Religious Freedom at the National Security Council, and submission of an annual report to Congress on International Religious Freedom.

In 1999 Congress amended IRFA in Pub. L. No. 106–55, 113 Stat. 401, to make a technical correction referred to in the President's signing statement, excerpted below. The amendment clarified the conditions under which the President could take into account other substantial measures

that the United States had taken against a country in determining whether additional measures should be imposed on that country under IRFA.

* * * *

SEC. 102. REPORTS.

* * * *

(b) Annual Report on International Religious Freedom.
(1) . . . Each Annual Report shall contain the following:

(A) Status of religious freedom. A description of the status of religious freedom in each foreign country, including—
  (i) trends toward improvement in the respect and protection of the right to religious freedom and trends toward deterioration of such right;
  (ii) violations of religious freedom engaged in or tolerated by the government of that country; and
  (iii) particularly severe violations of religious freedom engaged in or tolerated by the government of that country.

(B) Violations of religious freedom. An assessment and description of the nature and extent of violations of religious freedom in each foreign country, including persecution of one religious group by another religious group, religious persecution by governmental and nongovernmental entities, persecution targeted at individuals or particular denominations or entire religions, the existence of government policies violating religious freedom, and the existence of government policies concerning—
  (i) limitations or prohibitions on, or lack of availability of, openly conducted, organized religious services outside of the premises of foreign diplomatic missions or consular posts; and
  (ii) the forced religious conversion of minor United States citizens who have been abducted or illegally removed from the United States, and the refusal to allow such citizens to be returned to the United States.

(C) United States policies. A description of United States actions and policies in support of religious freedom in each foreign country engaging in or tolerating violations of religious freedom, including a description of the measures an policies implemented during the preceding 12 months by the United States under titles I, IV, and V of this Act in opposition to violations of religious freedom and in support of international religious freedom.

* * * *

SEC. 402. PRESIDENTIAL ACTIONS IN RESPONSE TO PARTICULARLY SEVERE VIOLATIONS OF RELIGIOUS FREEDOM.

(a) Response to Particularly Severe Violations of Religious Freedom.
  (1) United States Policy—It shall be the policy of the United States—
    (A) to oppose particularly severe violations of religious freedom that are or have been engaged in or tolerated by the governments of foreign countries; and
    (B) to promote the right to freedom of religion in those countries through the actions described in subsection (c).
  (2) Requirement of Presidential Action—Whenever the President determines that the government of a foreign country has engaged in or tolerated particularly severe violations of religious freedom, the President shall oppose such violations and promote the right to religious freedom through one or more of the actions described in subsection (c).

(b) Designations of Countries of Particular Concern for Religious Freedom—
  (1) Annual Review—
    (A) In General—Not later than September 1 of each year, the President shall review the status of religious

freedom in each foreign country to determine whether the government of that country has engaged in or tolerated particularly severe violations of religious freedom in that country during the preceding 12 months or since the date of the last review of that country under this subparagraph, whichever period is longer. The President shall designate each country the government of which has engaged in or tolerated violations described in this subparagraph as a country of particular concern for religious freedom.

(c) Presidential Actions with Respect to Countries of Particular Concern for Religious Freedom—

(1) In general—Subject to paragraphs (2), (3), (4) and (5) [providing certain exceptions] with respect to each country of particular concern for religious freedom designated under subsection (b)(1)(A), the President shall, after the requirements of sections 403 [consultations with foreign governments and others] and 404 [report to Congress] have been satisfied, but not later than 90 days (or 180 days in case of a delay under paragraph (3)) after the date of designation of the country under that subsection, carry out one or more of the following actions under subparagraph (A) or subparagraph (B):

(A) Presidential Actions—One or more of the Presidential actions described in paragraphs (9) through (15) of section 405(a), as determined by the President.

(B) Commensurate Actions—Commensurate action in substitution to any action described in subparagraph (A).

(2) Substitution of Binding Agreements—

(A) In general—In lieu of carrying out action under paragraph (1), the President may conclude a binding agreement with the respective foreign government as described in section 405(c). The existence of a binding agreement under this paragraph with

a foreign government may be considered by the President prior to making any determination or taking any action under this title.

* * * *

The October 27, 1998 statement by President William J. Clinton upon signing IRFA into law is excerpted below. 34 WEEKLY COMP. PRES. DOC. 2149–50 (Nov. 2, 1998).

Today I have signed into law H.R. 2431, the "International Religious Freedom Act of 1998." My Administration is committed to promoting religious freedom worldwide, and I commend the Congress for passing legislation that will provide the executive branch with the flexibility needed to advance this effort.

The United States was founded on the right to worship freely and on respect for the right of others to worship as they believe. My Administration has made religious freedom a central element of U.S. foreign policy. When we promote religious freedom we also promote freedom of expression, conscience, and association, and other human rights. This Act is not directed against any one country or religious faith. Indeed, this Act will serve to promote the religious freedom of people of all backgrounds, whether Muslim, Christian, Jewish, Buddhist, Hindu, Taoist, or any other faith.

* * * *

Section 401 of this Act calls for the President to take diplomatic and other appropriate action with respect to any country that engages in or tolerates violations of religious freedom. This is consistent with my Administration's policy of protecting and promoting religious freedom vigorously throughout the world. We frequently raise religious freedom issues with other governments at the highest levels. I understand that such actions taken as a matter of policy are among the types of actions envisioned by section 401.

I commend the Congress for incorporating flexibility in the several provisions concerning the imposition of economic measures. Although I am concerned that such measures could result in

even greater pressures—and possibly reprisals—against minority religious communities that the bill is intended to help, I note that section 402 mandates these measures only in the most extreme and egregious cases of religious persecution. The imposition of economic measures or commensurate actions is required only when a country has engaged in systematic, ongoing, egregious violations of religious freedom accompanied by flagrant denials of the right to life, liberty, or the security of persons—such as torture, enforced and arbitrary disappearances, or arbitrary prolonged detention. I also note that section 405 allows me to choose from a range of measures, including some actions of limited duration.

The Act provides additional flexibility by allowing the President to waive the imposition of economic measures if violations cease, if a waiver would further the purpose of the Act, or if required by important national interests. Section 402(c) allows me to take into account other substantial measures that we have taken against a country, and which are still in effect, in determining whether additional measures should be imposed. I note, however, that a technical correction to section 402(c)(4) should be made to clarify the conditions applicable to this determination. My Administration has provided this technical correction to the Congress.

I regret, however, that certain other provisions of the Act lack this flexibility and infringe on the authority vested by the Constitution solely with the President. For example, section 403(b) directs the President to undertake negotiations with foreign governments for specified foreign policy purposes. It also requires certain communications between the President and the Congress concerning these negotiations. I shall treat the language of this provision as precatory and construe the provision in light of my constitutional responsibilities to conduct foreign affairs, including, where appropriate, the protection of diplomatic communications.

Section 107 requires that the Secretary of State grant U.S. citizens access to U.S. missions abroad for religious activities on a basis no less favorable than that for other nongovernmental activities unrelated to the conduct of the diplomatic mission. State Department policy already allows U.S. Government mission employees access to U.S. facilities for religious services in environments where such services are not available locally. The extension

of this practice to U.S. citizens who generally enjoy no privileges and immunities in the host state has the potential to create conflicts with host country laws and to impair the ability of U.S. missions to function effectively. Care also must be taken to ensure that this provision is implemented consistent with the First Amendment. Accordingly, I have asked the Department of State to prepare guidance to clarify the scope of this provision and the grounds on which mission premises are generally available to nongovernmental organizations.

Finally, I will interpret the Act's exception in section 405(d) concerning the provision of medicines, food, or other humanitarian assistance to apply to any loans, loan guarantees, extensions of credit, issuance of letters of credit, or other financing measures necessary or incidental to the sale of such goods. Additionally, I will interpret the license requirements in section 423 regarding specified items to apply only to countries of particular concern.

b. Annual Department of State report on religious freedom

Pursuant to the International Religious Freedom Act of 1998 ("IRFA"), the first annual Department of State report on international religious freedom was submitted on September 9, 1999. Robert A. Seiple, the first appointed Ambassador-at-Large for International Freedom, made the following statement to the Subcommittee on International Operations and Human Rights House Committee on International Relations on October 6, 1999.

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

---

* * * *

Each of the 194 Country Reports begins with a statement about applicable laws and outlines whether the country requires registration of religious groups. It then provides a demographic overview of the population by religious affiliation, outlines problems encountered by various religious groups, describes societal attitudes and finishes with an overview of U.S. policies.

The drafting process was similar to that used in preparing the Human Rights Reports. We worked diligently to include as much factual information as possible, relying not only on our other sources but also on material from experts in the academia, non-governmental organizations and the media. Our guiding principle was to ensure that all relevant information was assessed objectively, thoroughly and fairly as possible. We hope that Congress finds the report to be an objective and comprehensive resource.

The International Religious Freedom Act also requires that the President, or in this case his designee, the Secretary of State, review the status of religious freedom throughout the world in order to determine which countries should be designated as countries of particular concern. As the Chairman and the Committee Members know, we have delayed the designations in order to give the Secretary ample time to consider all the relevant data, as well as my own recommendations. She has been reading relevant parts of the report itself, which was not completed until September 8th. Designations must be based on those reports, as well as on the Country Reports on Human Rights Practices, and all other information available to us.

I am pleased to tell you that the Secretary has completed her review. We will shortly send to the Congress an official letter of notification in which we will detail the Secretary's decision with respect to any additional actions to be taken. While I am not prepared today to discuss those actions, I do wish to announce the countries that the Secretary intends to designate under the act as countries of particular concern. They are Burma, China, Iran, Iraq, and Sudan.

The Secretary also intends to identify the Taliban in Afghanistan, which we do not recognize as a government, and Serbia, which is not a country, as particularly severe violators of religious freedom. I will be happy to take your questions about the restrictions on the exercise of religious freedom in all of these areas.

I would also note that there are many other countries that our report discusses where religious freedoms appear to be suppressed. In some instances, like Saudi Arabia, those countries are beginning to take steps to address the problem. In some countries, such as North Korea, religious freedoms may be suppressed, but we lack the data to make an informed assessment. We will continue to

look at these cases and collect information so that, if a country merits designation under the act, we will so designate it in the future.

Let me turn briefly to the subject of U.S. actions to promote religious freedom abroad.

Secretary Albright has said that our commitment to religious liberty is even more than the expression of American ideals. It is a fundamental source of our strength in the world. The President, the Secretary of State and many senior U.S. officials have addressed the issue of freedom in venues throughout the world. Secretary Albright some time ago issued formal instructions to all U.S. diplomatic posts to give more attention to religious freedom both in reporting and in advocacy.

During the period covered by this report, all of 1998 and the first 6 months of 1999, the U.S. engaged in a variety of efforts to promote the right of religious freedom and to oppose violations of that right. As prescribed in the International Religious Freedom Act, the Executive Summary describes U.S. actions to actively promote religious freedom.

Drawing on the individual reports, it describes certain activities by U.S. Ambassadors, other embassy officials and other high-level U.S. officials, including the President, the Secretary, Members of Congress, as well as the activities of my own office.

Our staff has visited some 15 countries in the last several months, including China, Egypt, Vietnam, Uzbekistan, Serbia, Russia, Indonesia, Laos, Kazakhstan, Israel, Saudi Arabia, France, Germany, Austria, and Belgium. We have met with hundreds of officials, NGO's, human rights groups, religious organizations and journalists, here and abroad. I am delighted to report to you that our office has become a clearing house for people with information about religious persecution and discrimination and for the persecuted themselves. By fax, telephone, e-mail and direct visits they tell us their stories. We listen, record, and, when appropriate, we act.

At the very least, we believe we have created a process by which their stories can be verified and integrated into our annual report. With persistence and faith, perhaps our efforts will lead to a reduction in persecution and an increase in religious freedom.

Mr. Chairman, I have provided in my written statement a description of U.S. efforts in three countries, China, Uzbekistan, and Russia, where Congress has shown particular interest and in which we have expended considerable diplomatic effort. In China, our collective efforts on behalf of persecuted minorities, and I include Members of Congress in that collective, have been persistent and intense, but have unfortunately had little effect on the behavior of the Chinese Government. In Uzbekistan, our efforts have met with some success, although it certainly is too soon to discern long-term or systemic change for the better. In Russia, our interventions with the Russian government have apparently blunted the effects of a bad religion law.

* * * *

To protect freedom of religion is not simply to shield religious belief and worship. It is that, but it is more. When we defend religious freedom, we defend every human being who is viewed as an object or a product to be used or eliminated according to the purposes of those with power.

* * * *

D. CHILDREN

1. Convention on the Rights of the Child

The United States signed the Convention on the Rights of the Child on February 16, 1995. U.N. Doc. A/44/25 (1989), entered into force September 2, 1990. In remarks to the Plenary of the 54th Session of the UN General Assembly on the Tenth Anniversary of the Convention on the Rights of the Child on November 11, 1999, Ambassador Betty King, U.S. Representative on the Economic and Social Council, addressed the fact that the United States had not ratified the convention and described U.S. policies and actions supporting the rights of children. U.N. Doc. A/54/PV.52 (1999).

The full text of Ambassador King's statement is available at *www.un.int/usa/99_112.htm*.

* * * *

The year 1999 marks the tenth anniversary of the adoption of the Convention on the Rights of the Child. One of the top priorities of any nation should be the enhancement and protection of the rights of children. Children constitute one of the most vulnerable groups within the boundaries of any state. They are victims of violence, disease, malnutrition and sexual exploitation. They represent over fifty percent of the world's refugees, displaced persons, and conflict victims. They are often separated from their families, deprived of education, and too frequently, forcibly recruited by armed factions. Millions of children under the age of 15 around the world are employed full or part-time in what can be described as exploitative child labor. Children are at the mercy of the adults around them. They have little say so in their affairs. They cry out for help that is frequently not there.

The United States remains committed to the betterment of children nationally and internationally. As a nation, we place the highest priority on the well-being of children, not only at home, but around the world. Both our President and First Lady have spoken out on several occasions on the importance of improving the quality of life of children. Recently, President Clinton addressed the International Labor Organization in Geneva on this issue. . . . Our commitment to the protection of children's rights is unquestionable. We help children at risk through support for multilateral programs, NGOs and a wide variety of official bilateral assistance and diplomatic initiatives. We are major supporters of many UN programs that have a substantial focus on helping children, such as UNICEF, UNHCR, UNDP, and WFP, just to name a few. Bilaterally, the US Agency for International Development has been a major supporter of child health programs for *25* years. Today, more than 4 million child deaths are prevented annually due to critical life-saving health services provided by USAID.

And what about the heinous practice of trafficking in children? For thousands of children around the world it means bondage, rape, prostitution, and physical brutality. A year ago, President Clinton established a strategy, which focuses on prevention,

protection for victims and prosecution of traffickers. The world community must bond together to put an end to this despicable practice.

Although the United States has not ratified the Convention on the Rights of the Child, our actions to protect and defend children both at home and abroad clearly demonstrate our commitment to the welfare of children. The international community can remain assured that we, as a nation, stand ready to assist in any way we can to enhance and protect the human rights of children wherever they may be.

On October 27, 1999, Ambassador Sim Farar, U.S. Representative to the 54th General Assembly at the United Nations, addressed the Third Committee of the General Assembly on the subject "Promotion and Protection of the Rights of Children," summarizing U.S. policies and actions supporting the rights of children. U.N. Doc. A/C.3/54/SR.24 (1999).

The full text of Ambassador Farar's statement, excerpted below, is available at *www.un.int/usa/99_094.htm*.

---

* * * *

Mr. Chairman, we have worked arduously to improve the quality of life of our children. While we cannot say that we have come up with an answer to all of the problems that children face in our society today, we have, under President Clinton, passed several pieces of legislation such as the Family Medical Leave Act, the Multi-Ethnic Placement Act, the Children's Health Insurance Program, and the Adoption and Safe Families Act.

At the same time, the United States is very much concerned about the well being of children around the world. We are strong supporters of the recently adopted ILO convention on the Elimination of the Worst Forms of Child Labor. President Clinton spoke in June of this year before the ILO in Geneva—the first American President to do so. As the President indicated then, he has directed all federal agencies of the Unites States government to make absolutely sure that they are not buying any products made with

abusive child labor. The Department of Labor, in consultation with the Department of State, and Treasury, is preparing a list of products by country that would form the basis for the certification requirement. This list will be published shortly. President Clinton is a strong advocate of universal ratification of ILO convention 182 and has submitted it to the U.S. Senate for advice and consent to ratification. In Fiscal Year 1999, the United States increased its contribution to the ILO's International Program for the Elimination of Child Labor (IPEC) ten-fold, to about 30 million dollars, making the U.S. the largest contributor to the IPEC program. We are requesting an additional 30 million for Fiscal Year 2000, and the next four fiscal years.

Mr. Chairman, the United States is also deeply concerned about the heinous practice of trafficking in children. Every year some one to two million women and children are caught up in the snares of this practice, lured by the offer of good jobs and better working conditions. For children, the result, however, is all too often bondage, rape, prostitution and physical brutality. President Clinton established a strategy a year ago, which focuses on prevention, protection for victims, and prosecution of traffickers. The U.S. is working actively with other governments to pursue these policies.

We could not get very far, however . . . with any of these programs unless we work together towards improving the health of children around the world. The United States has supported child health programs for the last 25 years. Today, more than 4 million child deaths are prevented annually due to critical life-saving health services provided by the U.S. Agency for International Development.

. . . I would like to say a few words about children who are victims of war. We welcome the report of the Special Representative for Children in Armed Conflict, Mr. Olara Otunnu, and appreciate his commitment to protect all children affected by armed conflict. The United States strongly supported the Security Council resolution adopted in August of this year on "Children and Armed Conflict". As Ambassador Nancy Soderberg said before the Security Council at that time "We believe that it is time to exert pressure to implement the many existing norms to prevent further abuse and brutalization of children. We should not let our attention be

distracted by debates on the margin of the problem but focus on where the real abuses are—with children even younger than fifteen whose lives are totally distorted by their recruitment into armed conflict and brutality—becoming both perpetrators and victims." For those children, we ask the High Commissioner for Human Rights to look at ways in which the programs may be expanded to address the protection and rehabilitation of children caught up in the scourge of war.

* * * *

Mr. Chairman, in our efforts, we must not forget the plight of street children. An estimated 100 million children work or live on the streets of the developed and developing worlds. These children are frequently the innocent victims of national economic and political collapse or transition. The strategies of USAID's Displaced Children and Orphans Fund for addressing the needs of these children stress the primary importance of the family and community-based care and protection as the first line of defense. This year, Mr. Chairman, the Fund addressed a new category of vulnerable children: children with disabilities. Stigmatized by cultural values and religious beliefs, children with disabilities are often hidden in back rooms or are permanently placed in government institutions, displaced from communities and society. The Displaced Children and Orphans Fund is supporting community-based approaches to provide care and training in life-skills.

* * * *

. . . [W]e must band together to say that there are some things that we cannot and will not tolerate. I would like to close by repeating the words of President Clinton before the ILO this past June:

- We will not tolerate children being used in pornography and prostitution.
- We will not tolerate children in slavery or bondage.
- We will not tolerate children being forcibly recruited to serve in armed conflict.

- We will not tolerate young children risking their health and breaking their bodies in hazardous and dangerous working conditions.

* * * *

2. Convention on the Worst Forms of Child Labor

President William J. Clinton transmitted the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor ("Convention 182") to the Senate on August 5, 1999. *reprinted in* 38 I.L.M. 1207 (1999), entered into force Nov. 19, 2000. S. Treaty Doc. No. 106–5 (1999). President Clinton's letter of transmittal is provided below.

With a view to receiving the advice and consent of the Senate to ratification of the Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, adopted by the International Labor Conference at its 87th Session in Geneva on June 17, 1999, I transmit herewith a certified copy of that Convention. I transmit also for the Senate's information a certified copy of a recommendation (No. 190) on the same subject, adopted by the International Labor Conference on the same date, which amplifies some of the Convention's provisions. No action is called for on the recommendation.

The report of the Department of State, with a letter from the Secretary of Labor, concerning the Convention is enclosed.

As explained more fully in the enclosed letter from the Secretary of Labor, current United States law and practice satisfy the requirements of Convention No. 182. Ratification of this Convention, therefore, should not require the United States to alter in any way its law or practice in this field.

In the interest of clarifying the domestic application of the Convention, my Administration proposes that two understandings accompany U.S. ratification.

The proposed understandings are as follows:

> The United States understands that Article 3(d) of Convention 182 does not encompass situations in which children are employed by a parent or by a person standing in the place of a parent on a farm owned or operated by such parent or person.
>
> The United States understands that the term "basic education" in Article 7 of Convention 182 means primary education plus one year: eight or nine years of schooling based on curriculum and not age.

These understandings would have no effect on our international obligations under Convention No. 182. Convention No. 182 represents a true breakthrough for the children of the world. Ratification of this instrument will enhance the ability of the United States to provide global leadership in the effort to eliminate the worst forms of child labor. I recommend that the Senate give its advice and consent to the ratification of ILO Convention No. 182.

The Senate provided its advice and consent to ratification on November 5, 1999, with understandings and declarations, as excerpted below:

> (a) Understandings. . . . Children Working on Farms.—The United States understands that Article 3(d) of Convention 182 does not encompass situations in which children are employed by a parent or by a person standing in place of a parent on a farm owned or operated by such parent or person. . . .
>
> Basic Education.—The United States understands that the term "basic education" in Article 7 of Convention 182 means primary plus one year: eight or nine years of schooling, based on curriculum and not age.
>
> (b) Declaration. . . . Treaty Interpretation.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27,

> 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the State Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

The Senate's advice and consent was also subject to the following proviso, which was not included in the instrument of ratification deposited by the President:

> (c) Proviso. . . . Supremacy of the Constitution.—Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the Untied States as interpreted by the United States.

145 CONG. REC. S14226 (daily ed. Nov. 5, 1999).

E. DEVELOPMENT

1. Food Aid Convention 1999

The United States signed the Food Aid Convention 1999 on June 16, 1999, and President William J. Clinton transmitted the treaty to the Senate on October 13, 1999. S. Treaty Doc. No. 106–14 (1999). The Food Aid Convention 1999 replaced the Food Aid Convention 1995, S. Treaty Doc. No. 105–4 (1997).

Under the Food Aid Convention 1995, donors pledged to provide specified minimum tonnages of food aid, mainly as grain, annually to developing countries. The 1999 Convention continued the objective of contributing to world food security and improving the ability of the international community to respond to emergency food situations and other food needs of developing countries. It incorporated several new features with the objective of improving transportation and local agricultural development, and expanded the list of eligible products to include vitamins, edible oils, milk powder, and other nutritional supplements. The Department of State letter, dated September 2, 1999, submitting the Food Aid

Convention 1999 to the President for transmittal to the Senate is provided below.

The President: I have the honor to submit to you, with a view to transmission to the Senate for advice and consent to ratification, the Food Aid Convention 1999, which was open for signature at the United Nations Headquarters, New York, from May 1 through June 30, 1999. The Convention was signed by the United States on June 16, 1999.

The Food Aid Convention 1999 replaces the Food Aid Convention 1995, which expired June 30, 1999. The Food Aid Convention is one of two constituent instruments that constitute the International Grains Agreement, to which the United States is a party. (The second part—the Grains Trade Convention 1995—was recently extended for two years without amendment.) The Convention entered into force internationally on July 1 and will remain in force until June 30, 2002, unless extended further.

At the December 1996 World Trade Organization meeting in Singapore, Ministers charged the Food Aid Committee, the organization that administers the Food Aid Convention, with negotiating a new Convention to establish a level of food aid commitments that would cover as wide a range of donors and donative foodstuffs as possible, in order to meet the legitimate needs of developing countries. From February 1998 to April 1999, the United States and other governments party to the Food Aid Convention 1995 engaged in negotiations to draft this new Convention in a manner that reflected these objectives as well as the changing nature of food assistance.

The Food Aid Convention provides an international, donors-only forum to discuss food assistance. Under the Food Aid Convention 1999, donor members make minimum annual commitments which can be designated either by quantity or, pursuant to a new provision, the value of the food aid they will provide to developing countries. As did its predecessor, the Food Aid Convention 1999 commits the United States to donate or sell on concessional terms at least 2.5 million tons of food aid annually. All parties to the 1995 Convention—the United States, the

European Community (and its member states), Japan, Canada, Australia, Norway, Switzerland and Argentina—are already parties or intend to participate in the new Convention. Certain donors previously have purchased U.S. grains to meet their food aid pledges.

While the basic principles and objectives of the Food Aid Convention 1995 have not changed, there are several important innovations in the new Convention, including:

— broadening the list of eligible commodities beyond grains and legumes to include such critical food products as edible oils and milk powder;
— encouraging members to fortify their contributed food and to provide dietary supplements such as vitamins by counting these products toward a member's annual contribution;
— encouraging donors to provide food aid to difficult-to-reach destinations by permitting transport and other operational costs to be counted toward a member's contributions;
— promoting local agricultural development and markets in recipient countries; and
— improving information-sharing and coordination among members.

Among other benefits, these changes have made the Food Aid Convention 1999 a more flexible instrument, one that it is hoped will encourage new members and the provision of additional food aid. On July 2, 1999, the Food Aid Committee granted the United States (and certain other countries) an extension until June 30, 2000, to deposit its instrument of ratification to this Convention. As it has previously, the United States will provisionally apply the Food Aid Convention to ensure that there is an adequate supply of food aid, particularly as needed for emergencies.

The Secretary of Agriculture joins me in recommending that this Convention be transmitted to the Senate for its early and favorable consideration.

The Senate provided its advice and consent to ratification on September 20, 2000, with the following declarations:

> (a) Declarations. . . . (1) No Diversion.—United States contributions pursuant to this Convention shall not be diverted to government troops or security forces in countries which have been designated as state sponsors of terrorism by the Secretary of State. (2) Private Voluntary Organizations.—To the maximum feasible extent, distribution of United States contributions under this Convention should be accomplished through private voluntary organizations. (3) Treaty Interpretation.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the State Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

The Senate's advice and consent was also subject to the following proviso, which was not included in the instrument of ratification deposited by the President:

> (b) Proviso. . . . (1) Supremacy of the Constitution.—Nothing in the Convention requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.

146 CONG. REC. S8866 (daily ed. Sept. 20, 2000).

2. Horn of Africa Recovery and Food Security Act

In 1992 Congress enacted the Horn of Africa Recovery and Food Security Act ("Horn Act"), 102 Pub. L. No. 274, 106 Stat. 115, to "assure the people of the Horn of Africa the right to food and other basic necessities of life and to promote

peace and development in the region." *Id.* Specifically, the Horn Act concerned Ethiopia (and now Eritrea), Sudan, Somalia, and Djibouti. It contained a number of Congressional findings and policy statements regarding the causes of political and economic insecurity and instability in the Horn, and statements of United States policy to address the problems in each country. Section 6(f) of the act authorized the provision to Ethiopia, Somalia, and Sudan of assistance under Part I, Chapters 1 (Development Assistance) and 10 (Development Fund for Africa) of the Foreign Assistance Act of 1961, as amended, notwithstanding provisions of law which would otherwise restrict assistance to those countries. Section 6(e) required such assistance to be provided only through certain public international organizations or private and voluntary organizations as defined by § 496(e)(2) of the Foreign Assistance Act. At various points in time, these countries had been subject to restrictions on assistance, due to debt delinquency, overthrow of a democratically elected head of government by decree or military coup, or terrorism.

F. TORTURE

1. Ratification of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

On October 27, 1990, the Senate gave its advice and consent to ratification of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Torture Convention"), subject to certain reservations, understandings and declarations. 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990). U.N. Doc. A/RES/39/46 (1984), entered into force June 26, 1987. *See Digest 1989–1990* at 176–90; *I Cumulative Digest 1981–1988* at 823–52. On October 24, 1994, President William J. Clinton deposited the instrument of ratification with the United Nations, and the Torture Convention entered into force for the United States thirty days later.

2. Implementation of the Torture Convention

a. Extradition procedures in case alleging torture

On February 10, 1998, the United States filed a letter brief in the Ninth Circuit Court of Appeals in *In the Matter of the Extradition of Chee Fan Chen*, No. 97–15609, 1998 U.S. App. LEXIS 22125 (9th Cir. Sept. 4, 1998), appeal from D.C. No. MC-95-00140-LKK (E.D. Cal.), responding to a request for information concerning the extradition process that addressed applicability of the Torture Convention, as excerpted below.

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

---

* * * *

The Court asked the [U.S. Attorney] to respond to several questions, which are paraphrased as follows. Has the Secretary of State ever imposed conditions on an extradition? If so, has the Secretary ever sent a monitor to the requesting country to ensure that the conditions were complied with? Would the Secretary send a monitor if she were to impose conditions on an extradition? Does the Secretary follow some statute, regulation, guideline, or other policy or procedure in determining whether to extradite or to condition an extradition—especially in the face of allegations the requested person nay be subjected to inhumane treatment by the requesting state? What criteria does she consider? The Court asked Chen's counsel to address what significance, if any, must or should the Court attach to the Secretary's Country Report.

The [U.S. Attorney] has consulted with the Department of State and submits the following response to the Court's questions.

There is no statute or published regulation applicable to the Secretary's decision-making process in determining whether to sign an extradition warrant or whether to impose conditions on an extradition. Article 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), prohibits, among other things, the extradition of a person to a country where "there are substantial grounds for

believing that he would be in danger of being subjected to torture." Understandings included in the United States instrument of ratification of the treaty establish that the United States interprets this phrase to mean "if it is more likely than not that he would be tortured." The obligation imposed by the Convention with regard to extradition is vested with the Secretary of State as the United States official with ultimate responsibility for determining whether a fugitive will be extradited. Decisions on extradition are presented to the Secretary[1] only after a fugitive has been found extraditable by a United States judicial officer and given an opportunity to challenge the finding by seeking a writ of habeas corpus.

The Secretary of State has taken steps to ensure United States Government compliance with our obligation under the Torture Convention. All bureaus in the Department and all posts abroad have been advised that, in order to implement this obligation, the Secretary will consider in all extradition cases whether a person facing extradition "is more likely than not" to be tortured in the country requesting extradition. All Department bureaus and posts abroad have been requested to provide any information relevant to the issue of torture in a particular extradition case to the office of the Legal Adviser and the Bureau of Democracy, Human Rights and Labor.

In each case where allegations relating to torture are made or the issue is otherwise brought to the Department's attention, appropriate policy and legal offices review and analyze all available information relevant to the case in preparing a recommendation to the Secretary. If the person wanted for extradition has attempted to raise this issue during judicial proceedings, any relevant information provided to the court is reviewed. The fugitive, on his own or through counsel, and other interested parties may also submit additional written documentation to the Department of State for consideration in reaching the decision on extradition.

[1] Within the Department of State, the statutory authority to make decisions on signing of extradition warrants has been delegated only to the Deputy Secretary. Thus, all requests for surrender are submitted to the Secretary personally or to the Deputy Secretary. For ease of reference here, the term "Secretary" should be read to include the Deputy Secretary.

The review also considers other information available to the Department concerning judicial and penal conditions and practices of the requesting country, including the information contained in the State Department's annual Human Rights Reports, and the possible relevance of that information to the individual whose surrender is at issue.

The Human Rights Reports are the official State Department reports to Congress on human rights conditions in individual countries for a given year as mandated by law (sections 116(d) and 502(b) of the Foreign Assistance Act of 1961, as amended, and section 505(c) of the Trade Act of 1974, as amended).[2] The Bureau of Democracy, Human Rights and Labor, which drafts the Human Rights Reports and provides advisory opinions on asylum requests in deportation proceedings under section 207 of the Immigration and Nationality Act, is a key participant in this process.

Based on the resulting analysis of all relevant information, the Secretary may decide to surrender the fugitive to the requesting state, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions or after receiving assurances she deems appropriate. The Secretary has indeed reached a decision to sign a warrant in several cases only after receiving adequate assurances of humane treatment from the requesting state. Such assurances are sought and received where necessary regardless of whether the requesting state is a party to the Torture Convention. In situations where follow-up monitoring by the United States Government has been deemed necessary, that responsibility is generally carried out by the relevant United States embassy or consulate in the country to which the person is extradited. With rare exception, the Department has not found it necessary to send anyone from Washington for this purpose.

---

[2] The government contends this Court should consider the Human Rights Report in the same manner it should consider all other material presented regarding Chen's claim that his extradition should be denied based on humanitarian reasons: the Court should defer that inquiry to the Secretary of State under the well-settled rule of non-inquiry and should refuse to recognize the existence of a "humanitarian exception" to that rule.

Because the Secretary follows a principled decision-making process with appropriate concern for the treatment a requested person will receive if returned to a requesting country, this Court should not hesitate to rule that there is no "humanitarian exception" to the rule of non-inquiry.

In an unpublished disposition, *see Chen v. United States Marshal (in re Chen)*, 161 F.3d 11 (9th Cir. 1998), the Ninth Circuit affirmed the dismissal of Chen's habeas corpus petition, as excerpted below.

---

* * * *

There is little reason to expect Chen will face torture upon extradition. Chen cites several examples of official torture of pretrial detainees in Singapore, but nearly all of these involved either political prisoners or efforts to secure confessions. The crime with which Chen is charged was apolitical, and the facts are essentially admitted, making a confession (forced or otherwise) unnecessary.

Nor does Chen face a mandatory death sentence. Singapore law mandates the death penalty for those convicted of murder, *see* Singapore Penal Code § 302, but it also permits a variety of affirmative defenses to the charge of murder, including "grave and sudden provocation," "heat of passion," and self-defense, *see id.* § 300 (exceptions), and guarantees the basic elements of due process, including the right to counsel and the right to cross-examine adverse witnesses, *see* Singapore Crim. Proc.Code §§ 188, 195.

Singapore appears to depart further from United States jurisprudence in permitting a murder conviction if the defendant intentionally causes an injury "sufficient in the ordinary course of nature to cause death," even if neither death nor serious injury were intended. *See* Singapore Penal Code § 300(c). However, this reduced *mens rea* requirement—somewhat analogous to our doctrine of "implied malice"—is not so "antipathetic to [the] court's sense of decency," *see Gallina v. Fraser*, 278 F.2d 77, 79 (2nd Cir. 1960), as to invoke the humanitarian exception to the rule of non-inquiry.

Constitutional claims may be raised on habeas review of a finding of extraditability, *see In re Burt*, 737 F.2d. 1477, 1483–84 (7th Cir. 1984); *Plaster v. United States*, 720 F.2d 340, 348–49 (4th Cir. 1983); *see also Neely v. Henkel*, 180 U.S. 109, 122–23, 21 S.Ct. 302, 45 L.Ed. 448 (1901) (considering but denying extraditee's constitutional claims), but conduct of United States officials must be at issue, *see id.* Chen challenges anticipated mistreatment by Singaporean officials, but argues that the "participation by United States officials in the extradition constitutes joint action sufficient to trigger constitutional rights." In *Burt*, 737 F.2d at 1487, the Seventh Circuit acknowledged the possibility of such joint action analysis in exceptional extradition cases. However, if the entirely permissible conduct of the United States in detaining Chen and facilitating his extradition could alone bring Singapore's conduct within the scope of the Eighth Amendment, the rule of non-inquiry would be a dead letter in nearly every extradition case.

* * * *

b. Statutorily-required implementing regulations

In October 1998 the U.S. Congress enacted legislation declaring that:

> [i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

Foreign Affairs Reform and Restructuring Act of 1998 ("FARR Act"), § 2242(a), as contained in Division G of Title XXII of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, 112 Stat. 2681–822 (1998). The FARR Act also required "the heads of the appropriate agencies [to] prescribe regulations to implement the obligations of the United States under

Article 3 of the [Torture Convention], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." FARR Act, § 2242(b).

Subsection 2242(d) addressed the role of the judiciary, as follows:

> Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order or removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

Section 2242(c) provided that "[t]o the maximum extent consistent with the obligations of the United States under the [Torture] Convention . . . the regulations . . . shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act ["INA"] (8 U.S.C. 1231(b)(3)(B))." The INA provides certain exceptions to a prohibition on deportation to a country if an alien's life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. Regulations issued by the Department of Justice, Immigration and Naturalization Service, to implement the Torture Convention in deportation proceedings, discussed in (2), below, addressed the application of the INA provision.

Section 2242(e) provided that "[n]othing in this section shall be construed as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act."

(1) Department of State: Implementation in the context of extradition

(i) Promulgation of regulations

On February 26, 1999, the Department of State issued regulations, excerpted below, required by the FARR Act to address claims of torture in the context of extradition. 64 Fed. Reg. 9435 (Feb. 26, 1999), 22 C.F.R. pt. 95. As noted, the regulations recorded the process already in place in the Department of State.

---

* * * *

. . . This rule implements certain obligations in the context of extradition undertaken by the United States as party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Torture Convention"). Article 3 of the Torture Convention provides that no State party "shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Promulgation of the rule is required by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub.L.No. 105–277, which provides that, not later than 120 days after the date of enactment of that Act, "the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the [Torture Convention], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention."

Pursuant to sections 3184 and 3186 of Title 18 of the United States Criminal Code, the Secretary of State is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition. In order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention when making this determination, the Department considers, when appropriate, the question of whether a person facing extradition from the U.S. "is more likely than not" to be

tortured in the State requesting extradition. These regulations record the already existing procedures followed in this consideration.

* * * *

PART 95—IMPLEMENTATION OF TORTURE CONVENTION IN EXTRADITION CASES

Sec. 95.1. Definitions.

(a) Convention means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984, entered into force for the United States on November 10, 1994. Definitions provided below in paragraphs (b) and (c) of this section reflect the language of the Convention and understandings set forth in the United States instrument of ratification to the Convention.

(b) Torture means: (1) Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

(2) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;
(ii) The administration or application, or threatened administration or application, of mind altering substances or

other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) Noncompliance with applicable legal procedural standards does not per se constitute torture.

(4) This definition of torture applies only to acts directed against persons in the offender's custody or physical control.

(5) The term "acquiescence" as used in this definition requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(6) The term "lawful sanctions" as used in this definition includes judicially imposed sanctions and other enforcement actions authorized by law, provided that such sanctions or actions were not adopted in order to defeat the object and purpose of the Convention to prohibit torture.

(7) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment.

(c) Where there are substantial grounds for believing that [a fugitive] would be in danger of being subjected to torture means if it is more likely than not that the fugitive would be tortured.

(d) Secretary means Secretary of State and includes, for purposes of this rule, the Deputy Secretary of State, by delegation.

Sec. 95.2 Application.

(a) Article 3 of the Convention imposes on the parties certain obligations with respect to extradition. That Article provides as follows:

(1) No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds

for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

(b) Pursuant to sections 3184 and 3186 of Title 18 of the United States Criminal Code, the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition. In order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the Department considers the question of whether a person facing extradition from the U.S. "is more likely than not" to be tortured in the State requesting extradition when appropriate in making this determination.

Sec. 95.3 Procedures.

(a) Decisions on extradition are presented to the Secretary only after a fugitive has been found extraditable by a United States judicial officer. In each case where allegations relating to torture are made or the issue is otherwise brought to the Department's attention, appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant.

(b) Based on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.

Sec. 95.4 Review and construction.

Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review. Furthermore, pursuant to section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, Pub.L.No. 105–277, notwithstanding any other provision of law, no court

shall have jurisdiction to review these regulations, and nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242, or any other determination made with respect to the application of the policy set forth in section 2242(a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings.

* * * *

(ii) Response to inquiry concerning regulations

On April 28, 1999, David R. Andrews, Legal Adviser of the Department of State, responded to an inquiry concerning the regulations from the World Organization Against Torture USA. The response described the procedures in place for review of torture concerns in the context of extradition and explained that nothing in the Torture Convention required the U.S. obligations in the extradition context to be implemented by the judicial rather than the executive branch of the U.S. government.

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

---

* * * *

I am writing on behalf of the Secretary of State in response to your letter of April 12, 1999. You have raised several concerns related to the regulations recently promulgated by the Department of State concerning implementation of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Torture Convention") in extradition cases. I want to assure you that the Department is and has been fully implementing its obligation under the Torture Convention not to extradite a person to another State where he would be more likely than not to be tortured. As noted in the Federal Register, the

regulations, issued as required by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105–277), record procedures already in place. We are confident that these regulations and the procedures followed are in full compliance with the requirements of the Torture Convention.

As you are undoubtedly aware, the process of extradition from the United States is controlled by section 3181 *et. seq*. of Title 18 of the U.S. Criminal Code. Under those provisions, a person must first be found extraditable through a judicial proceeding. For a person found extraditable, sections 3184 and 3186 place the decision as to whether or not to extradite with the Secretary of State. Under the long-established "rule of non-inquiry," courts do not address issues raised concerning the treatment of fugitives on return to the country requesting their extradition, holding instead that such issues are reserved to the Secretary of State in making the final extradition decision. *See e.g.*, *Ahmad v. Wigen*, 910 F.2d 1063, 1064–66 (2d Cir. 1990).

In order to ensure compliance with our obligation under the Torture Convention, the Department has advised all bureaus in the Department and all posts abroad that the Secretary will consider whether a person facing extradition "is more likely than not" to be tortured in the country requesting extradition when appropriate in making an extradition decision. All Department bureaus and posts abroad have been requested to provide any information relevant to the issue of torture in a particular extradition case to the Office of the Legal Adviser and the Bureau of Democracy, Human Rights and Labor.

In each case where allegations relating to torture are made or the issue is otherwise brought to the Department's attention, appropriate offices review and analyze available information relevant to the case in preparing a recommendation to the Secretary. If the person wanted for extradition has attempted to raise this issue during judicial proceedings, any relevant information provided to the court is reviewed. The fugitive, on his own or through counsel, and other interested parties may also submit additional written documentation to the Department of State for consideration in reaching the decision on extradition. The review also considers other information available to the Department concerning judicial

and penal conditions and practices of the requesting country, including the information contained in the State Department's annual Country Reports on Human Rights Practices, and the possible relevance of that information to the individual whose surrender is at issue. The Bureau of Democracy, Human Rights and Labor, which edits the Country Reports and prepares them for delivery to Congress as well as providing advisory opinions on asylum requests and withholding of removal, is a key participant in this process.

Based on the resulting analysis of all relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions or after receiving assurances she deems appropriate. This range of options can only truly be exercised by the executive branch, through its foreign affairs function.

* * * *

You have also questioned the absence of an adjudication process on this issue and asked for clarification of the statement in section 95.4 of the Department's regulations that the Secretary's final decision is a matter of executive discretion not subject to judicial review. As discussed above, sections 3184 and 3186 clearly make this decision a matter of the Secretary's discretion. Nothing in the Torture Convention requires that the international obligation undertaken by the United States in the extradition context must be implemented by the judicial rather than the executive branch. Indeed, the Torture Convention was ratified by the United States on the understanding that it was not self-executing.

The recent enactment of section 2242 calling for promulgation of the regulations does not change this fact. It states that the international obligation under Article 3 of the Torture Convention "shall be the policy of the United States" and requires the issuance of regulations. In so doing, section 2242 explicitly provides that "no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review

claims raised under the Convention or this section, or any other determination made with respect to the application of the policy" (with an exception for cases under the Immigration and Nationality Act, not applicable to extradition). This is consistent with the judicially developed rule of non-inquiry.

Finally, because these regulations involve a foreign affairs function of the United States, they are exempt from the notice and comment requirement of 5 U.S.C. 553.

* * * *

(2) Immigration and Naturalization Service: Implementation in the context of deportation

On February 19, 1999, the Department of Justice, Immigration and Naturalization Service issued regulations concerning the Convention on Torture in the context of deportation as an interim rule, effective March 22, 1999. 64 Fed. Reg. 8478 (Feb. 19, 1999); corrected 64 Fed. Reg. 13,881 (Mar. 23, 1999), 8 C.F.R. pts 3, 103, 208, 235, 238, 240, 241, 253, and 507. The accompanying Supplementary Information statement described the regulations as excerpted below.

---

* * * *

. . . [Article 3 of the Convention Against Torture] is similar in some ways to Article 33 of the 1951 Convention relating to the Status of Refugees. The Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (hereinafter Refugee Convention). Article 33 provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion." The United States currently implements Article 33 of the Refugee Convention through the withholding of removal provision in section 241(b)(3) (formerly section 243(h)) of the Immigration and Nationality Act (INA or the Act). That provision, as interpreted

by the courts, requires the Attorney General to withhold an alien's removal to a country where it is more likely than not that the alien's life or freedom would be threatened on account of one of the five grounds mentioned above. *See INS v. Stevic*, 467 U.S. 407, 429–30 (1984).

However, there are some important differences between withholding of removal under section 241(b) (3) of the Act and Article 3 of the Convention Against Torture. First, several categories of individuals, including persons who assisted in Nazi persecution or engaged in genocide, persons who have persecuted others, persons who have been convicted of particularly serious crimes, persons who are believed to have committed serious non-political crimes before arriving in the United States, and persons who pose a danger to the security of the United States, are ineligible for withholding of removal. *See* INA section 241(b) (3) (B). Article 3 of the Convention Against Torture does not exclude such persons from its scope. Second, section 241(b) (3) applies only to aliens whose life or freedom would be threatened on account of race, religion, nationality, and membership in a particular social group or political opinion. Article 3 covers persons who fear torture that may not be motivated by one of those five grounds. Third, the definition of torture does not encompass all types of harm that might qualify as a threat to life or freedom. Thus, the coverage of Article 3 is different from that of section 241(b) (3): broader in some ways and narrower in others.

Until the October 21, 1998 legislation, there was no statutory provision to implement Article 3 of the Convention Against Torture in United States domestic law. When the United States Senate gave advice and consent to ratification of the Convention Against Torture, it made a declaration that Articles 1 through 16 were not self-executing. Recognizing, however, that ratification of the Convention represented a statement by the United States to the international community of its commitment to comply with the Convention's provisions to the extent permissible under the Constitution and existing federal statutes, the Department of Justice sought to conform its practices to the Convention by ensuring compliance with Article 3 in the case of aliens who are subject to removal from the United States.

In order to conform to the Convention before the enactment of implementing legislation, the Immigration and Naturalization Service (INS or Service) adopted a pre-regulatory administrative process to assess the applicability of Article 3 to individual cases in which an alien is subject to removal. Under this pre-regulatory administrative process, upon completion of deportation, exclusion, or removal proceedings and prior to execution of a final order of removal, the INS has considered whether removing an alien to a particular country is consistent with Article 3. If it is determined that the alien could not be removed to the country in question consistent with Article 3, the INS has used its existing discretionary authority to ensure that the alien is not removed to that country for so long as he or she is likely to be tortured there. *See* INA Sec. 103 (a); 8 CFR 2.1.

In formulating its pre-regulatory administrative process to conform to Article 3 in the context of the removal of aliens, the INS has been careful not to expand upon the protections that Article 3 grants. Only execution of an order of removal to a country where an alien is more likely than not to be tortured would violate the Convention. Therefore, the INS has not addressed the question of whether Article 3 prohibits removal in an individual case until there is a final administrative order of removal to a place where an alien claims that he or she would be tortured, and until all appeals, requests for review, or other administrative or judicial challenges to execution of that order have been resolved. This approach has allowed the INS to address the applicability of Article 3 to a case only when actually necessary to comply with the Convention. It has also allowed an individual alien to exhaust all avenues for pursuing any other more extensive benefit or protection for which he or she may be eligible before seeking the minimal guarantee provided by Article 3 that he or she will not be returned to a specific country where it is likely that he or she would be tortured. At the same time, this approach has allowed the INS, the agency responsible for executing removal orders, to ensure that no order is executed under circumstances that would violate the Convention.

* * * *

Structure of Rule

Generally, the rule creates two separate provisions for protection under Article 3 for aliens who would be tortured in the country of removal. The first provision establishes a new form of withholding of removal under Sec. 208.16(c). This type of protection is only available to aliens who are not barred from eligibility for withholding of removal under section 241(b) (3) (B) of the Act. The second provision, under Sec. 208.17(a), concerns aliens who would be tortured in the country of removal but who are subject to the bars contained in section 241(b)(3)(B) of the Act. These aliens may only be granted deferral of removal, a less permanent form of protection than withholding of removal and one that is more easily and quickly terminated if it becomes possible to remove the alien consistent with Article 3. Deferral of removal will be granted based on the withholding of removal application to an alien who is likely to be tortured in the country of removal but who is barred from withholding of removal. Section 208.17(d) sets out a special, streamlined procedure through which the INS may seek to terminate deferral of removal when appropriate.

Withholding of Removal Under the Convention Against Torture

Revised Sec. 208.16 (c) creates a new form of withholding of removal, which will be granted to an eligible alien in removal proceedings who establishes that he or she would be tortured in the proposed country of removal. This section references new Sec. 208.18 (a), which contains the definition of torture, and provides that this definition will be applied in all determinations about eligibility for this new form of withholding, or for deferral of removal.

An alien granted withholding under new Sec. 208.16(c) would be treated similarly to an alien granted withholding of removal under Sec. 208.16(b), the regulatory provision implementing section 241(b)(3) of the Act. The rule provides at Sec. 208.16(c)(2) that, in order to be eligible for withholding of removal under Article 3, an alien must establish that it is more likely than not that he or she would be tortured in the country in question. Imposition of

this burden of proof on the alien gives effect to one of the Senate understandings upon which ratification was conditioned, which provides that "the United States understands that the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'" The ratification history makes clear that this understanding was intended to ensure that the standard of proof for Article 3 would be the same standard as that for withholding of removal under section 241(b)(3) of the Act, then section 243(h) of the Act. *See*, *e.g.*, Convention Against Torture, submitted to the Senate, May 20, 1988, S. Treaty Doc. No. 100–20, at 6 (1988) (hereinafter S. Treaty Doc. No. 100–20).

* * * *

Deferral of Removal Under the Convention Against Torture

Although aliens who are barred from withholding of removal under Sec. 241(b) (3) (B) of the Act are not eligible for withholding under 208.16(c), the Article 3 implementing statute directs that any exclusion of these aliens from the protection of these regulations must be consistent with United States obligations under the Convention, subject to United States reservations, understandings, declarations, and provisos conditioning ratification. Section 2242(c) of the Foreign Affairs Reform and Restructuring Act of 1998. Article 3 prohibits returning any person to a country where he or she would be tortured, and contains no exceptions to this mandate. Nor do any of the United States reservations, understandings, declarations, or provisos contained in the Senate's resolution of ratification provide that the United States may exclude any person from Article 3's prohibition on return because of criminal or other activity or for any other reason. Indeed, the ratification history of the Convention Against Torture clearly indicates that the Executive Branch presented Article 3 to the Senate with the understanding that it "does not permit any discretion or provide for any exceptions * * *." Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations, 101st Cong., 18 (1990)

(statement of Mark Richard, Deputy Assistant Attorney General for the Criminal Division, DOJ).

Wherever possible, subsequent acts of Congress must be construed as consistent with treaty obligations. *See*, *e.g.*, Cook v. United States, 288 U.S. 102, 120 (1933) ("[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."). Here, Congress has not indicated an intent to modify the obligations imposed by Article 3. In fact, Congress has clearly expressed its intent that any exclusion of aliens described in section 241(b)(3)(B) of the Act from the protection of these regulations must be consistent with Article 3. The obligation not to return such an alien to a country where he or she would be tortured remains in effect. Thus, while this rule does not extend the advantages associated with a grant of withholding of removal to aliens barred under section 241(b)(3)(B) of the Act, it does ensure that they are not returned to a country where they would be tortured.

To this end, the rule creates a special provision under Sec. 208.17(a) for deferral of removal when an alien described in section 241(b)(3)(B) of the Act has been ordered removed to a country where it has been determined that he or she would be tortured. . . .

* * * *

Termination of Deferral of Removal

The most important distinction between withholding of removal and deferral of removal is the mode of termination. Section 208.17(d) will provide for a streamlined termination process for deferral of removal when it is no longer likely that an alien would be tortured in the country of removal.

Under existing regulations, withholding can only be terminated when the government moves to reopen the case, meets the standards for reopening, and meets its burden of proof to establish by a preponderance of the evidence that the alien is not eligible for withholding. The termination process for deferral of removal is designed to be much more accessible, so that deferral can be terminated quickly and efficiently when appropriate.

* * * *

Implementation of the Convention Against Torture

Section 208.18 sets out a number of provisions governing the implementation of the Convention Against Torture provisions. This section contains the definition of torture that will apply in both the withholding and deferral contexts, rules about the applicability of the new provisions, and a section clarifying that this rule does not expand the availability of judicial review to aliens who assert claims to protection under the Convention Against Torture.

* * * *

Cases in Which Diplomatic Assurances Are Considered

Section 208.18(c) sets out special procedures for cases in which the Secretary of State forwards to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured if returned there. In some cases, it may be possible for the United States to actually reduce the likelihood that an alien would be tortured in a particular country. The nature and reliability of such assurances, and any arrangements through which such assurances might be verified, would require careful evaluation before any decision could be reached about whether such assurances would allow an alien's removal to that country consistent with Article 3. This paragraph sets out special procedures under which the Attorney General, in consultation with the Secretary of State, will assume responsibility for assessing the adequacy of any such assurances in appropriate cases. Cases will be handled under this provision only if such assurances are actually forwarded to the Attorney General by the Secretary of State for consideration under this special process. It is anticipated that these cases will be rare.

In cases in which the Secretary has forwarded assurances under this provision, the procedures for administrative consideration of claims under the Convention Against Torture set out elsewhere in this rule will not apply. Further, the rule provides that the Attorney

General's authority to make determinations about the applicability of Article 3 in such a case may be exercised by the Deputy Attorney General or by the Commissioner, but may not be further delegated. Thus the rule ensures that cases involving the adequacy of diplomatic assurances forwarded to the Attorney General by the Secretary of State will receive consideration at senior levels within the Department of Justice, which is appropriate to the delicate nature of a diplomatic undertaking to ensure that an alien is not tortured in another country. Under § 208.17(f), these special procedures may also be invoked in appropriate cases for considering whether deferral of removal should be terminated.

c. Claimed reviewability of Secretary of State extradition decision

In 1998 the U.S. District Court for the Central District of California denied a petition for *habeas corpus* alleging that the extradition magistrate's order certifying extraditability violated Article 3 of the Torture Convention. *Cornejo-Barreto v. Seifert*, SA CV-97-00843-AHS (C.D. Cal. Oct. 7, 1998). The district court found that Article 3 is not self-executing and therefore "does not give Cornejo-Barreto rights which are enforceable in a judicial proceeding." The court also found that "the rule of non-inquiry in extradition cases has historically precluded United States courts from inquiring into the possible treatment of a fugitive, such as Cornejo-Barreto, if he is returned to Mexico."

Appeals from this and a second *habeas corpus* petition resulted in conflicting language in two Ninth Circuit opinions on the reviewability of the Secretary of State's decision to extradite in light of the FARR Act. *See* 219 F.3d 1004 (9th Cir. 2000) and 379 F.3d 1075 (9th Cir. 2004). In further developments, the Ninth Circuit sitting en banc dismissed the case as moot and vacated the 2004 opinion while leaving the 2000 opinion standing. 389 F.3d 1307 (9th Cir. 2004). As this volume went to press, the U.S.Government was endeavoring to change the outcome as to the two opinions. *See also Digest 2001* at 71–87.

* * * *

d. Submission of Initial Report to the Committee Against Torture

The United States submitted its Initial Report to the Committee Against Torture, pursuant to its obligation under Article 19 of the Torture Convention, on October 15, 1999. The full text of the report is available at *www.state.gov/www/global/human_rights/torture_index.html*. A briefing on the Initial Report, as excerpted below, was provided to the Committee Against Torture on October 15, 1999 by Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, and James E. Castello, Associate Deputy Attorney General, U.S. Department of Justice. The full text of the briefing is available at *www.state.gov/www/policy_remarks/1999/991015_koh_rpt_torture.html*.

---

* * * *

The right to be free from torture is an indelible element of the American experience. Our country was founded by people who sought refuge from severe governmental repression and persecution and who, as a consequence, insisted that a prohibition against the use of cruel or unusual punishment be placed into the Bill of Rights. As our report today notes, "Torture is [now] prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. In every instance, torture is a criminal offense. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture."

It would be a mistake, however, to regard opposition to torture as a uniquely American concept. Article 5 of the Universal Declaration of Human Rights provides that "[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or

punishment." Thus, the right to be free from torture is a universally recognized human right profoundly inter-linked with other human rights. For example, eliminating the use of torture not only reinforces individual dignity and physical health but also protects freedom of speech, expression, assembly, religion and the press. Likewise, making illegal the practice of securing criminal confessions through torture not only establishes and maintains the credibility of the judicial system but also protects the internationally recognized right of due process. For these reasons, no government can justify the use of torture or other cruel and unusual punishments as a means of policing or protecting its citizens.

Within the United States, as we fully acknowledge in this report, there continue to be areas of concern, contention and criticism. But we note that torture does not occur in the United States, except in aberrational situations and never as matter of policy. When it does, it constitutes a serious criminal offense, subjecting the perpetrators to prosecution and entitling the victims to various remedies, including rehabilitation and compensation. Any act falling within the Convention's definition of torture is clearly illegal and prosecutable everywhere in the country. We acknowledge areas where we must work harder because we believe the first step is to identify torture wherever it exists. We believe that this report is both comprehensive and candid. We have accurately and thoroughly exposed our strengths and failings and call upon other signatory states, as well as the entire international community, to do the same.

One of the cornerstones of our commitment to promoting human rights and ending torture is the Annual Country Reports on Human Rights, now in their 27th year. These reports, which we submit to Congress every February, examine how governments around the world adhere to international human rights standards as embodied in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other International Human Rights Standards. Every individual country report examines whether a country has committed torture or other cruel, inhuman and degrading treatment or punishment. It is a hallmark of our country reports that they openly report on torture wherever it occurs. Our

experience demonstrates that such honest reporting helps to curtail abusive practices in many countries.

At the UN Human Rights Commission each spring and at the UN General Assembly each fall, we support countries' specific resolutions that mention cases of torture and thematic resolutions that support the work of the UN Special Rapporteur on Torture. We urge all countries to cooperate fully with the Rapporteur, underscoring how vitally important it is that the Rapporteur be independent and have full access to human rights activists and abuse victims with full safeguards protecting these sources.

Moreover, where there is evidence of torture we demand an accounting. Torturers must be shown that they cannot act with impunity; and thus, for example, the U.S. took the lead in pushing for the formation of an international criminal tribunal on The Former Yugoslavia and Rwanda to bring to justice those responsible for torture and other crimes. We've worked very closely with the Tribunal for The Former Yugoslavia to document a wide array of human rights abuses, war crimes and crimes against humanity, including torture in Kosovo.

We are also seeking to establish mechanisms of accountability for the Khmer Rouge and the current regime in Iraq and we support the work of truth commissions the world over, including the Truth and Reconciliation Commission in South Africa, as well as those in Guatemala and El Salvador. Most recently, the U.S. supported the establishment by the UN of an international commission of inquiry to look into the tragic events which took place in East Timor in connection with the recent voting there.

* * * *

The Department of Justice also has established a working group dedicated to identifying and taking appropriate action—whether prosecution, extradition or deportation—against alleged torturers who have sought to use the U.S. to hide from responsibility for their crimes.

We also work to ensure that the U.S. military and police training do not benefit known human rights violators and that we do not sell U.S.-produced equipment to those who commit such abuses. The Administration's commitment to this principle was

reinforced by recent legislation requiring increased attention to the record of security force units receiving our assistance.

But this is not merely a matter of enforcing the law but, rather, one of Administration policy. We have worked hard to ensure that our embassies understand the new provisions of the Foreign Operations and DOD Appropriations Act and that each embassy has a plan in place to ensure that it will comply with the law.

* * * *

G. JUDICIAL PROCEDURE, PENALTIES AND RELATED ISSUES

1. Death Penalty

a. U.S. responses to UN bodies

Various United Nations bodies criticized the United States for its death penalty policies in the 1990s. The United States responded to these criticisms by assuring the international community that the United States and the individual constituent states guarantee due process and provide exhaustive appeals before capital punishment is carried out, and that U.S. policies and practice are consistent with its obligations under international law. Also, the United States expressed its view that in a democratic society, the criminal justice system, including the punishments prescribed for the most serious crimes, should reflect the will of the people, freely expressed and appropriately implemented. In the United States, the use of the death penalty is a decision left to democratically elected governments at the federal level and at the level of each individual state.

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Bruce Waly Ndiaye, visited the United States from September 21 to October 8, 1997, and submitted an addendum regarding his mission to the United States in his 1997 annual report to the UN Commission on Human Rights. U.N. Doc. E/CN.4/1998/68/Add.3 (1998). The Special Rapporteur's 1997 annual report and addendum regarding the

United States are available at *http://daccessdds.un.org/doc/UNDOC/GEN/G98/102/37/PDF/G9810237.pdf?OpenElement*.

The United States responded with disappointment to Special Rapporteur Ndiaye's report. The United States described the report as misleading and said that it failed to mention the exhaustive procedural protections in U.S. law that ensure the death penalty is not carried out in an arbitrary manner. The U.S. response also addressed important issues of treaty law, federalism, police brutality, and the death penalty as applied to juveniles and persons with mental disabilities.

On November 2, 1999, Ambassador Michael Southwick, Deputy Assistant Secretary of State, Bureau of Democracy, Human Rights and Labor, addressed the Third Committee of the General Assembly on the implementation of human rights instruments and the death penalty. The full text of Ambassador Southwick's statement, excerpted below, is available at *www.un.int/usa/99_101.htm*.

---

* * * *

We understand the sentiments that have motivated the opposition to the use of the death penalty around the world and especially in the United States. However, this view represents a significant departure from well-established international norms.

. . . [W]hile international law limits capital punishment to the most serious crimes and requires certain safeguards, most notably due process, existing international law does not prohibit capital punishment. Indeed, the International Covenant on Civil and Political Rights specifically recognizes the right of states that have not abolished capital punishment to impose it.

We believe . . . that in a democratic society, the criminal justice system, including the punishments prescribed for the most serious crimes, should reflect the will of the people freely expressed and appropriately implemented.

Within the United States, the important question of capital punishment is a subject of ongoing, passionate debate. At present, however, a majority of constituent states of the United States have chosen to retain the option of imposing the death penalty for the

most serious crimes. Even in those cases where capital punishment is finally imposed, it is imposed only after a lengthy appeal and judicial review process.

. . . [W]e recognize that many countries have abolished the death penalty under their domestic laws and that a number have accepted treaty obligations to that effect, and we respect those decisions. In the United States, however, our open and democratic processes have led to different results.

* * * *

b. Michael Domingues v. State of Nevada

This case arose from the 1993 brutal murder of Arjin Chanel Pechpo and her four-year-old son Jonathan Smith by sixteen-year-old Michael Domingues. Following a jury trial in Nevada, Domingues was convicted of first-degree murder, first-degree murder with a deadly weapon, burglary, and robbery with use of a deadly weapon and sentenced to death. The Supreme Court of Nevada affirmed the conviction. *Domingues v. State*, 917 P.2d 1364 (Nev. 1996). The U.S. Supreme Court denied Domingues' petition for a writ of certiorari. 519 U.S. 968 (1996).

Subsequently, Domingues filed a motion in state court for the correction of an illegal sentence, claiming that, because he was sixteen years old at the time of the murders, his execution would violate the ICCPR and customary international law. The state trial court denied the motion, and the Supreme Court of Nevada affirmed the lower court decision, concluding that the U.S. express reservation to Article 6(5) of the ICCPR "negates [petitioner's] claim that he was illegally sentenced." *Domingues v. State*, 961 P.2d 1279 (Nev. 1998). Thereafter, Domingues again petitioned the Supreme Court for a writ of certiorari.

In October 1999 the United States filed an amicus brief urging the Supreme Court to deny the petition for writ of certiorari. In the brief, the United States argued that imposing capital punishment on a minor did not violate U.S. obligations under the ICCPR, customary international law, or a *jus cogens*

peremptory norm of international law. The brief explained further that article 6(5) provides that "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." U.S. ratification of the Covenant, however, was conditioned on a declaration that the ICCPR was not self-executing and a reservation to Article 6(5):

> The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

138 CONG. REC. S4781 (daily ed., Apr. 2, 1992). The Supreme Court denied the petition for certiorari. *Domingues v. Nevada*, 528 U.S. 963 (1999).

The full text of the U.S. brief opposing the grant of certiorari, excerpted below, is available at *www.usdoj.gov/osg/briefs/1999/2pet/6invit/98-8327.pet.ami.inv.html*. *See also Digest 2001* at 303–04.

---

* * * *

Petitioner contends that his death sentence for murder must be set aside because he was 16 years old when he committed the offense. Petitioner has not argued that the Constitution prohibits the capital punishment of a 16-year-old offender. Cf. Stanford v. Kentucky, 492 U.S. 361 (1989) (rejecting Eighth Amendment challenge to imposition of capital punishment against 16-year-old offender). Rather, petitioner makes three claims based on sources of international law. First, he contends that his sentence violates Article 6(5) of the ICCPR, which prohibits the imposition of capital punishment on an offender who was under 18 years old at the time of his crime. Second, he argues that a rule of customary international law bars the death penalty for 16-year-old offenders, and that principle preempts the application of Nevada's death

penalty statute to his case. Third, he contends that the prohibition under customary international law against the death penalty for 16-year-old offenders has risen to the level of a jus cogens or peremptory norm, from which no derogation is permitted under international law. In our view, petitioner has identified no issue of law that merits this Court's review in this case, nor any basis for relief from the judgment of the Nevada Supreme Court.

1. Petitioner first contends that his death sentence contravenes Article 6(5) of the ICCPR. . . .

a. Petitioner first argues (Pet. 5–6, 20–23) that the Senate's reservation to Article 6(5) is invalid under the United States Constitution because, under separation of powers principles, the Senate may not give its selective consent to treaty provisions negotiated by the President. Petitioner argues that a Senate reservation to part of a treaty that the President submits to the Senate for its advice and consent is akin to a presidential line-item veto of congressional legislation, which this Court held unconstitutional in Clinton v. City of New York, 524 U.S. 417 (1998). That argument is flawed for several reasons.

First, the separation of powers claim advanced by petitioner is not presented in this case. Petitioner overlooks that the reservation to Article 6(5) did not originate in the Senate. Rather, that reservation was submitted to the Senate by the President as part of the President's request for the Senate's advice and consent to the ICCPR, and was adopted by the Senate without change. *See* pp. 1–2, *supra*. Accordingly, the Senate in no sense vetoed or modified any part of the treaty submitted to it by the President for advice and consent. Rather, it gave its consent to the treaty in the precise form submitted to it by the President.

Second, the Senate has the constitutional authority to reserve its consent to part of a treaty negotiated by the President. 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." U.S. Const. Art. II, § 2, Cl. 2. The President "make[s]" a treaty after the Senate has provided its advice and consent, not before that advice and consent process, when the treaty is negotiated. If the President objects to reservations imposed by the Senate as a condition to its

consent to a treaty that the President has negotiated, then the President need not accept the Senate's partial consent to the treaty. The President may decline to deposit an instrument of ratification to the treaty and thereby decline to "make" the treaty. *See* Restatement (Third) of the Law of the Foreign Relations of the United States § 303 cmt. d (1987) (Restatement); *see also Id.* § 303 rep. note 3 (noting President Taft's refusal to make arbitration treaties after Senate demanded unwelcome reservations). If, however, the President agrees to the Senate's reservations and "make[s]" the treaty after the Senate has attached reservations to its consent (as was the case with the ICCPR, *see* pp. 2–3, *supra*), then those reservations become part of the treaty insofar as the treaty is to be applied in United States courts. *Id.* § 314.

Unlike the Presidential line-item veto invalidated in Clinton v. City of New York, *supra*, the Senate's practice of attaching reservations to its consent to treaties also has an extensive historical pedigree, dating to at least the Jay Treaty of 1794 between the United States and Great Britain. *See* Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, 8 Stat. 116. Moreover, although this Court has never squarely decided whether the Senate may attach reservations to its consent to a treaty, the Court has noted that practice on several occasions without indicating any disapproval or questioning of its validity. (fn. omitted). Accordingly, the United States' reservation to Article 6(5) of the ICCPR is valid as a matter of United States constitutional law.

b. Petitioner also argues that, even if the Senate's reservation to Article 6(5) is valid as matter of United States constitutional law, it is not valid as a matter of the international law of treaties, and so the United States must be deemed to have accepted all of Article 6(5) without reservation, including the prohibition against capital punishment for offenders under 18 years of age. Petitioner does not challenge generally the authority of the United States under international law to reserve ratification to parts of treaties. Indeed, reservation is a well-established feature of treaty law and practice by which a state may decline to accept certain provisions of a treaty. *See* Vienna Convention on the Law of Treaties (Vienna Convention), May 23, 1969, art. 2(1)(d), 1155 U.N.T.S. 332, 333, 8 I.L.M. 679, 681; (fn. omitted) *see also* Restatement § 313. Rather,

petitioner argues that the reservation to Article 6(5) is invalid because the ICCPR elsewhere makes Article 6(5) nonderogable in times of emergency (Pet. 23–24), and because the reservation is alleged to be incompatible with the object and purpose of the ICCPR (Pet. 25–26).

Even if there were merit to those arguments as a matter of international treaty law, that would not mean that Article 6(5) should be enforced by a domestic court in the face of the United States' reservation. A reservation in which the President and the Senate have concurred is controlling as a matter of domestic law, and prevents the provision of the treaty to which the reservation was taken from being part of the "Treat[y] made * * * under the authority of the United States" that would bind the States under the Supremacy Clause. U.S. Const. Art. VI, Cl. 2. The President, with the concurrence of the Senate, has the constitutional authority to "make" treaties, and the courts have no authority to add provisions to treaties that were not adopted by the other Branches. *See* The Amiable Isabella, 19 U.S. (Wheat.) 1, 71 (1821). If other nations are dissatisfied with the reservations attached by the United States to its ratification of a treaty, they may present a diplomatic protest or may decline to recognize themselves as being in treaty relations with the United States, but that is a matter between states and not for judicial resolution. Accordingly, where the United States has ratified a treaty subject to a reservation exempting it from a particular provision of the treaty, the courts may not give effect to the provision to which reservation is made on the ground that the reservation violates international law. Cf. Head Money Cases, 112 U.S. 580, 598–599 (1884) (if Congress enacts a statute that is inconsistent with a prior treaty, courts must give effect to the statute rather than the treaty).

In any event, petitioner's challenges to the validity of the reservation fall wide of the mark. Petitioner argues that the reservation to Article 6(5) is invalid under the law of treaties because it is contrary to the "object and purpose" of the ICCPR. *See* Vienna Convention, art. 19(c); Restatement § 313(1)(c). Of the 149 states that are parties to the ICCPR, 11 have objected to the United States' reservation to Article 6(5), and nine of the 11 have objected on the ground that the reservation violated the

ICCPR's object and purpose. *See* Multilateral Treaties Deposited with the Secretary-General: Status as at 31 Dec. 1994, U.N. Doc. ST/LG/SER.E/13 (1995). Not one of the states that lodged an objection stated that, because of the United States' reservation, it does not recognize the ICCPR as being in force between itself and the United States. State practice therefore supports the conclusion that the United States' reservation to Article 6(5) is valid as a matter of treaty law. *See* Vienna Convention, art. 20(4)(b) (objection by a contracting state to another state's reservation to part of a treaty does not prevent the treaty from entering into force unless such an intention "is definitely expressed by the objecting State"). (fn. omitted)

Petitioner also argues that, because the ICCPR makes Article 6(5) nonderogable in times of emergency, *see* ICCPR art. 4(2), Article 6(5) must be so fundamental to the treaty that no reservation may be taken to it. There is no necessary correlation under the ICCPR, however, between the nonderogability of a right and its importance or centrality to the treaty. Several rights of profound importance, such as the right against arbitrary arrest and detention (protected by Article 9(1)) and the right to be informed of the nature of criminal charges brought against one (protected by Article 14(3)(a)), are not made nonderogable under the ICCPR. If the parties to the Covenant had intended to prohibit reservations to Article 6(5), they could have so provided explicitly, as authorized by Article 19(b) of the Vienna Convention, rather than doing so obliquely (as petitioner argues) by making the article nonderogable in times of national emergency. Accordingly, as a matter of treaty law, the United States' reservation to Article 6(5) is valid and effective.

* * * *

2. Petitioner also contends (Pet. 11–17) that customary international law prohibits Nevada from imposing capital punishment on one who was 16 years old at the time of his offense. This case, however, does not present an appropriate vehicle for this Court's review of that issue. In addition, petitioner's claim cannot in any event proceed past the threshold, in light of actions by the United States Government in international fora objecting to the

asserted rule of customary international law on which petitioner relies.

a. Customary international law has been defined as "international law result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2). In a case involving customary international law, this Court stated:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.

The Paquete Habana, 175 U.S. 677, 700 (1900).

In *The Paquete Habana*, the Court was articulating a rule of decision in a subject area—the adjudication of prizes—in which federal courts traditionally devised rules of decision in a common law manner. The Court had no occasion to determine the circumstances in which customary international law alone might, in an area within the usual purview of the States (here, criminal punishment), preempt a state statute that is not otherwise subject to attack as conflicting with the responsibilities of the National Government or a source of federal law (such as a federal statute or constitutional provision, or a rule of federal common law emanating from the constitutional structure of the Nation). Nor has the Court had occasion to consider that question since *The Paquete Habana* was decided.[6] Such a claim raises numerous issues

---

[6] Although petitioner argues that this Court has decided that customary international law is federal law that preempts contrary state law, *see* Pet. 11 n.6, 12, the decisions on which he relies do not reach that far. In *Banco*

of considerable difficulty and complexity, with potentially far-reaching significance.[7]

This case does not present an appropriate vehicle for the Court to address those issues, for several reasons. First, the record compiled in the lower courts contains no probative materials concerning the development of customary international law in this area. Cf. Restatement § 113 cmt. c & rep. note 1 (noting that courts have adopted practice of receiving evidence on questions of international law). Thus, there is no record to which this Court might refer to determine whether state practice (at least outside the United States) has reached a consensus that capital punishment should not be imposed on 16-year-old offenders, and (perhaps more important) whether such a consensus, if it exists, reflects

---

National de Cuba v. Sabbatino, 376 U.S. 398, 425–426 (1964), the Court held that the scope of the act of state doctrine must be determined as a matter of federal law in light of the Constitution's entrustment of foreign relations to the national government, but the Court also observed that the act of state doctrine is not compelled by international law, *see Id.* at 427. In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court held invalid a state statute regulating the disposition of intestate property to foreign nations on the ground that its application would interfere with the national government's exclusive conduct of foreign relations; *see also Clark v. Allen*, 331 U.S. 503, 516–517 (1947) (rejecting similar claim of preemption on facts of that case). *Missouri v. Holland*, 252 U.S. 416 (1920), upheld a treaty against a Tenth Amendment challenge, and *Kansas v. Colorado*, 206 U.S. 46, 95–98 (1907), recognized the applicability of a form of federal common law, borrowing principles of international law where appropriate, to resolve water disputes between States of the Union.

[7] For example, to determine whether the application of Nevada's death penalty statute to a 16-year-old offender is preempted by customary international law, the Court would likely have to decide whether the legal principle relied on by petitioner has developed with sufficient clarity and obtained sufficient consensus internationally to become a rule of customary international law; whether customary international law, when invoked in domestic courts, is properly understood as federal common law that preempts state law through the Supremacy Clause, U.S. Const. Art. VI, Cl. 2; and whether domestic courts should apply a principle of customary international law to preempt state law when the President and the Senate have entered a reservation to a treaty provision that addresses the same subject, or whether that reservation constitutes a "controlling act" under *The Paquete Habana*, *supra*, preventing the application in domestic courts of the rule of customary intentional law invoked by petitioner.

a sense of legal obligation (*opinio juris*) on the part of states that international law prohibits capital punishment for 16-year-old offenders, rather than a mere convergence of state practice on the subject. "It is often difficult to determine when that transformation [from mere customary state practice to legal obligation] has taken place." Restatement § 102 cmt. c. In view of the significance of reaching a conclusion that customary international law preempts application of a state statute, this Court should not reach such a conclusion without a record that fully supports the proposition relied on by a party that seeks to establish that customary international law preempts state law.

Second, perhaps reflecting the fact that the record has not been developed on this point, the Nevada Supreme Court did not discuss customary international law at all in the opinion below. Nor has any other state supreme court or federal court of appeals addressed the precise issues presented by the petition. On issues of such potentially far-reaching significance, this Court would benefit from the reasoned decisions of lower courts, and should not address those questions in the first instance.

b. In addition, in light of actions taken by the political Branches of the United States Government objecting to the asserted rule of customary international law relied on by petitioner, petitioner's claim does not warrant this Court's review. Given that the Executive Branch has primary responsibility for conducting the foreign relations of the United States, the courts should defer to the position of the Executive Branch as to whether a rule of customary international law is presently binding on the United States in its relations with other Nations, just as they give great weight to the Executive Branch's interpretation of a treaty. Cf. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 119 S. Ct. 662, 671 (1999); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–185 (1982).

The United States has in the past taken the position in international fora that customary international law does not prohibit the execution of 16-year-old offenders.[8] The United States

[8] When the United States Government was called upon by the Inter-American Commission on Human Rights to defend the legality of capital

has also persistently objected to the development and application of such a principle. The latter point is dispositive here of petitioner's claim based on customary international law, for "[c]ustomary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm, * * * just as a state that is not party to an international agreement is not bound by the terms of that agreement." Siderman de Blake v. Argentina, 965 F.2d 699, 715 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); accord Restatement § 102 cmt. d ("[I]n principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.").

In 1986 the United States Government stated in a case before the Inter-American Commission on Human Rights that it objected to the application of any rule of customary international law that would proscribe the application of capital punishment to persons who were under 18 at the time of their offenses.[9] In addition, as discussed above, the United States formally entered a reservation to

---

punishment for offenders under 18 years old, it argued that no norm of customary international law had developed barring the execution of offenders under 18 years old. *See* Memorandum of the United States to the Inter-Am. Comm'n on Human Rights in Case 9647 (James Terry Roach and Jay Pinkerton) 14–17 (July 15, 1986); In re Roach, Case 9647, 38(g)–(h) (Inter.-Am. C.H.R. 1987) (summarizing position of United States). We have lodged with the Clerk copies of the United States' submissions in the Roach and Pinkerton case as well as the decision of the Inter-American Commission on Human Rights in that case.

[9] *See* Memorandum of the United States to the Inter-Am. Comm'n on Human Rights in Case 9647, *supra*, at 17–19. The Inter-American Commission on Human Rights agreed with the United States in that case that a "customary rule * * * does not bind States which protest the norm," In re Roach, *supra*, 52, and stated that, "[s]ince the United States has protested the norm, it would not be applicable to the United States should it be held to exist," *Id.* 54. The Commission also agreed with the United States that there did not at that time exist a norm of customary international law establishing 18 to be the minimum age for the death penalty, although it suggested that such a norm was "emerging," *Id.* 60. The Commission stated that a binding jus cogens principle of international law had developed prohibiting the

Article 6(5) of the ICCPR on that precise question, and that reservation remains in force. Nor (with one narrow exception not applicable here) has the United States heretofore accepted other obligations under international instruments that would preclude the imposition of capital punishment on 16-year-old offenders.[10] The United States' persistent objections to the asserted norm of customary international law relied on by petitioner refutes his contention that that norm now operates within the United States to prevent the State of Nevada from applying its capital punishment statute to petitioner.

The Convention on the Rights of the Child also contains a prohibition against the death penalty for persons who were under 18 at the time of their offenses. *See* Convention on the Rights of the Child, Nov. 20, 1989, art. 37(a), G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/44/49, 28 I.L.M. 1448, 1470. The United States has not at this point ratified the Convention on the Rights of the Child. Further, in the course of the negotiation of that Convention, the United States stated that it would agree to the adoption by consensus of the provision against capital punishment for juvenile offenders only on the condition that the United States retained the right to enter a reservation to the provision, should it decide to ratify the Convention. *See* Commission on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, 45th Sess., 2 Mar. 1989, at 101, U.N. Doc. E/CN.4/1989/48.

---

execution of children, but it noted that the existence of such a principle did not resolve the case before it, because of the absence of uniform practice concerning the appropriate age of majority. *See Id.* 55–60.

[10] The American Convention on Human Rights proscribes (among other things) the death penalty for 16- and 17-year-old offenders. *See* American Convention on Human Rights, Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 123, 125, 9 I.L.M. 673, 676. The United States has not, however, become a party to the American Convention. Furthermore, at the final drafting conference of the American Convention, the United States urged the deletion of the prohibition on execution of those under 18 years old. *See* United States: Report of the Delegation to the Inter-American Specialized Conference on Human Rights, 9 I.L.M. 710 (Apr. 22, 1970). In 1978, President Carter proposed that the Senate consider a reservation to American Convention's provisions regarding capital punishment in the event of an eventual ratification. S. Exec. Docs., *supra*, at XVII, XVIII.

The United States has ratified the Fourth Geneva Convention, which prohibits imposition of the death penalty against a national of another country held during time of war who was under 18 when he committed the offense. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 3560, 75 U.N.T.S. 286, 330. That exception to the United States' policy of opposing treaty provisions and the application of a rule of customary international law barring capital punishment for offenders under 18 years of age does not vitiate the United States' status as a persistent objector. The Fourth Geneva Convention addresses only the specific case of foreign nationals held during time of war, and does not address the imposition of capital punishment by a country on one of its own citizens, such as petitioner.

3. Finally, petitioner contends (Pet. 18–20) that his execution is prohibited by a jus cogens norm of international law. A jus cogens norm, also known as a "peremptory norm," has been described as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Vienna Convention, art. 53; *see also* Restatement § 102 rep. note 6. The precise nature and scope of the concept of jus cogens remains uncertain in international law.[11] For present purposes, however, the important point about jus cogens as that concept has been developed by some courts and commentators—which distinguishes it fundamentally from customary international law as discussed above (pp. 14–18, *supra*)—is that the binding nature of a jus cogens norm does not depend on the consent of a state. *See* Siderman, 965 F.2d at 715.

In order to hold that there is a jus cogens principle that preempts the application of Nevada's death penalty statute to petitioner, the Court would have to decide that the asserted legal

[11] The very few decisions in United States courts that have addressed the concept of jus cogens norms have described them as "universal and fundamental rights" that include "principles and rules concerning the basic rights of the human person." *See*, *e.g.*, Siderman, 965 F.2d at 715. It has been suggested that jus cogens norms include prohibitions against slavery and genocide. See *Id.* at 716–717; Restatement § 702 rep. note 11.

prohibition against capital punishment for 16-year-old offenders has similar force under international law to the prohibitions that are commonly cited as jus cogens, such as those against slavery and genocide; that this Court should recognize such a jus cogens norm that is binding on the United States in the international community, despite the United States' persistent objection to the asserted legal obligation up to this point in international fora; and that domestic courts must give effect to that norm to preempt the application of a state criminal statute, notwithstanding the contrary intentions of the political Branches (including the reservation to a treaty to which the United States is a party).

Such contentions, if accepted by this Court, would obviously have profound significance. For the reasons we have given above in discussing petitioner's claim based on customary international law, we submit this case does not present an appropriate vehicle for addressing those far-reaching contentions. Neither the record nor the decision below illuminates in any way the question whether a jus cogens norm against capital punishment for 16-year-old offenders has developed. Nor is there any conflict among lower courts on the question; indeed, we are not aware of any lower court decision that has addressed the question. In addition, there is no other source of decisional law (such as decisions of the International Court of Justice) that this Court might find helpful in resolving the question whether the execution of a 16-year-old offender violates a jus cogens norm. Given the considerable uncertainty as to how it might be ascertained whether a principle of international law has attained the status of jus cogens, *see* Restatement § 102 rep. note 6; *Id.* § 702 rep. note 11, we submit that this case does not present an appropriate occasion for the Court to make such a determination in the first instance.

Moreover, the suggestion that the courts, by declaring that the asserted jus cogens norm exists and applies here, should in effect override the judgment of the political Branches that the United States should not be bound by an international legal prohibition against the execution of 16-year-old offenders plainly raises serious separation of powers concerns. In other contexts touching on foreign relations and international law, the courts have declined to substitute their judgment for that of the political Branches; for

example, the courts have not applied the provisions of a treaty that have been abrogated by an Act of Congress (*see* The Head Money Cases, *supra*) or rules of customary international law that have been rejected by the controlling acts of the political Branches (*see* Restatement § 115 rep. note 3). Similarly, we submit, there is no occasion for this Court to consider recognizing and giving preemptive force to the purported jus cogens norm relied on by petitioner, in light of the absence of decisional authority regarding the existence of such a peremptory norm and the persistent objection by the United States, through the political Branches, to a prohibition against the execution of 16-year-old offenders including in a formal treaty reservation.

2. 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." *Id*. Since 1980 the ATS 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). During the 1990s there was 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, 775 (D.C. Cir. 1984) (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 also upheld jurisdiction under the ATS 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"), Pub. L. No. 102–256, 106 Stat. 73, 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 was frequently initiated under both statutes and hence judicial opinions often discuss the two together.

a. Scope

During the 1990s, U.S. courts rendered a number of significant decisions under the ATS and the TVPA. Individually and collectively, these decisions addressed a wide range of issues relevant to the scope and interpretation of these statutes.

Some courts held that in addition to establishing jurisdiction, the ATS "creates a cause of action for violation of specific, universal and obligatory human rights standards which confer fundamental rights upon all people vis-à-vis their own governments." *See, e.g.*, *Hilao v. Estate of Marcos (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). *See also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424, 439 (D.N.J. 1999), *cert. denied*, 519 U.S. 830 (1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993).

In *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995), *cert. denied,* 516 U.S. 1047 (1996), depositors of a failed international bank brought a class action against seventy-seven people, firms, and a foreign country, alleging *inter alia* violations of RICO and the Alien Tort Statute. The district court dismissed, and plaintiffs appealed. The Ninth Circuit Court of Appeals held *inter alia* that substantive claims of fraud, breach of fiduciary duty, and misappropriation of funds were

not breaches of "the law of nations" for purposes of the ATS. *Id*. at 1418.

State Action Requirement

A related issue is whether, under the ATS, only state actors can be held liable for violations of international law. Here again, courts reached differing results. *See In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). In contrast, *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424 (D.N.J. 1999), held that certain forms of conduct violated the law of nations whether undertaken by persons acting under the auspices of a state or only as private individuals ("No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law.") *Id.* at 445.

In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996), the U.S. Court of Appeals for the Second Circuit held that under the ATS state action is not required for all international torts. This case involved an action against a non-state defendant (the purported head-of-state of the Republica Srpska) for alleged acts of genocide, torture, and other violations of international law. The district court had granted the defendant's motion to dismiss on grounds that it lacked jurisdiction under the ATS to redress acts of torture by private individuals and that the TVPA did not authorize it to adjudicate acts not committed under the laws or authority of a foreign nation. The United States filed a Statement of Interest asserting that the judgment of dismissal by the district court should be vacated *inter alia* because the district court erred in ruling that plaintiffs could not pursue such claims because Karadzic was not a "state actor." Excerpts from the Second Circuit opinion follow.

---

* * * *

Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. § 1350 (1988), enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. The pending appeals pose additional significant issues as to the scope of the Alien Tort Act: whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action; and whether a person, otherwise liable for a violation of the law of nations, is immune from service of process because he is present in the United States as an invitee of the United Nations.

These issues arise on appeals by two groups of plaintiffs-appellants from the November 19, 1994, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge), dismissing, for lack of subject-matter jurisdiction, their suits against defendant-appellee Radovan Karadzic, President of the self-proclaimed Bosnian-Serb republic of "Srpska." *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y.1994) ("Doe"). For the reasons set forth below, we hold that subject-matter jurisdiction exists, that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor, and that he is not immune from service of process. We therefore reverse and remand.

* * * *

. . . [The District] Court concluded that "acts committed by non-state actors do not violate the law of nations," *Id.* at 739. Finding that "[t]he current Bosnian-Serb warring military faction does not constitute a recognized state," *Id.* at 741, and that "the members of Karadzic's faction do not act under the color of any

recognized state law," *Id.*, the Court concluded that "the acts alleged in the instant action[s], while grossly repugnant, cannot be remedied through [the Alien Tort Act]," *Id.* at 740–41. The Court did not consider the plaintiffs' alternative claim that Karadzic acted under color of law by acting in concert with the Serbian Republic of the former Yugoslavia, a recognized nation.

The District Judge also found that the apparent absence of state action barred plaintiffs' claims under the Torture Victim Act, which expressly requires that an individual defendant act "under actual or apparent authority, or color of law, of any foreign nation," Torture Victim Act § 2(a). With respect to plaintiffs' further claims that the law of nations, as incorporated into federal common law, gives rise to an implied cause of action over which the Court would have jurisdiction pursuant to section 1331, the Judge found that the law of nations does not give rise to implied rights of action absent specific Congressional authorization, and that, in any event, such an implied right of action would not lie in the absence of state action. Finally, having dismissed all of plaintiffs' federal claims, the Court declined to exercise supplemental jurisdiction over their state-law claims.

Discussion

Though the District Court dismissed for lack of subject-matter jurisdiction, the parties have briefed not only that issue but also the threshold issues of personal jurisdiction and justiciability under the political question doctrine. Karadzic urges us to affirm on any one of these three grounds. We consider each in turn.

I. Subject-Matter Jurisdiction

Appellants allege three statutory bases for the subject-matter jurisdiction of the District Court—the Alien Tort Act, the Torture Victim Act, and the general federal-question jurisdictional statute.

A. The Alien Tort Act

* * * *

3. The State Action Requirement for International Law Violations

In dismissing plaintiffs' complaints for lack of subject-matter jurisdiction, the District Court concluded that the alleged violations required state action and that the "Bosnian-Serb entity" headed by Karadzic does not meet the definition of a state. *Doe*, 866 F. Supp. at 741 n. 12. Appellants contend that they are entitled to prove that Srpska satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadzic acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia.

(a) *Definition of a state in international law*. The definition of a state is well established in international law:

> Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities. Restatement (Third) § 201; accord *Klinghoffer*, 937 F.2d at 47; *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir.1988); *see also Texas v. White*, 74 U.S. (7 Wall.) 700, 720, 19 L.Ed. 227 (1868). "[A]ny government, however violent and wrongful in its origin, must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation." *Ford v. Surget*, 97 U.S. (7 Otto) 594, 620, 24 L.Ed. 1018 (1878) (Clifford, J., concurring).

Although the Restatement's definition of statehood requires the capacity to engage in formal relations with other states, it does not require recognition by other states. See Restatement (Third) § 202 cmt. b ("An entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states."). Recognized states enjoy certain privileges and immunities relevant to judicial proceedings, *see, e.g., Pfizer Inc. v. India*, 434 U.S. 308, 318–20, 98 S.Ct. 584, 590–91, 54 L.Ed.2d 563 (1978) (diversity jurisdiction); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408–12, 84 S.Ct. 923, 929–32, 11 L.Ed.2d 804

(1964) (access to U.S. courts); *Lafontant*, 844 F. Supp. at 131 (head-of-state immunity), but an unrecognized state is not a juridical nullity. Our courts have regularly given effect to the "state" action of unrecognized states. *See, e.g., United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101–03, 22 L.Ed. 816 (1875) (seceding states in Civil War); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 9–12, 19 L.Ed. 361 (1868) (same); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir.1970), cert. denied, 403 U.S. 905, 91 S.Ct. 2205, 29 L.Ed.2d 680 (1971) (post-World War II East Germany).

The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. See Restatement (Third) §§ 207, 702. It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

Appellants' allegations entitle them to prove that Karadzic's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.

(b) Acting in concert with a foreign state. Appellants also sufficiently alleged that Karadzic acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed. The "color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction

under the Alien Tort Act. *See Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal.1987), reconsideration granted in part on other grounds, 694 F. Supp. 707 (N.D. Cal.1988). 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. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753–54, 73 L.Ed.2d 482 (1982). The appellants are entitled to prove their allegations that Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid.

* * * *

III. Justiciability

We recognize that cases of this nature might pose special questions concerning the judiciary's proper role when adjudication might have implications in the conduct of this nation's foreign relations. 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. *See First National Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767, 92 S.Ct. 1808, 1813, 32 L.Ed.2d 466 (1972). We therefore proceed to consider whether, even though the jurisdictional threshold is satisfied in the pending cases, other considerations relevant to justiciability weigh against permitting the suits to proceed.

Two nonjurisdictional, prudential doctrines reflect the judiciary's concerns regarding separation of powers: the political question doctrine and the act of state doctrine. It is the " 'constitutional' underpinnings" of these doctrines that influenced the concurring opinions of Judge Robb and Judge Bork in *Tel-Oren*. Although we too recognize the potentially detrimental effects of judicial action in cases of this nature, we do not embrace the rather categorical views as to the inappropriateness of judicial action urged by Judges Robb and Bork. Not every case "touching foreign relations" is nonjusticiable, *see Baker v. Carr*, 369 U.S.

186, 211, 82 S.Ct. 691, 707, 7 L.Ed.2d 663 (1962); *Lamont v. Woods*, 948 F.2d 825, 831–32 (2d Cir.1991), and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.

Karadzic maintains that these suits were properly dismissed because they present nonjusticiable political questions. We disagree. Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions. "[T]he doctrine 'is one of "political questions," not one of "political cases."' " *Klinghoffer*, 937 F.2d at 49 (quoting *Baker*, 369 U.S. at 217, 82 S.Ct. at 710).

A nonjusticiable political question would ordinarily involve one or more of the following factors: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. at 710; *see also Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994).

With respect to the first three factors, we have noted in a similar context involving a tort suit against the PLO that "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary." *Klinghoffer*, 937 F.2d at 49. Although the present actions are not based on the common law of torts, as was *Klinghoffer*, our decision in *Filartiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for

adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch. *See Nixon v. United States*, 506 U.S. 224, 227–29, 113 S.Ct. 732, 735, 122 L.Ed.2d 1 (1993).

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. Disputes implicating foreign policy concerns have the potential to raise political question issues, although, as the Supreme Court has wisely cautioned, "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.' " *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229–30, 106 S.Ct. 2860, 2865–66, 92 L.Ed.2d 166 (1986) (quoting *Baker*, 369 U.S. at 211, 82 S.Ct. at 706–07).

The act of state doctrine, under which courts generally refrain from judging the acts of a foreign state within its territory, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804; *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), might be implicated in some cases arising under section 1350. However, as in *Filartiga*, 630 F.2d at 889, we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state.

In the pending appeal, we need have no concern that interference with important governmental interests warrants rejection of appellants' claims. After commencing their action against Karadzic, attorneys for the plaintiffs in *Doe* wrote to the Secretary of State to oppose reported attempts by Karadzic to be granted immunity from suit in the United States; a copy of plaintiffs' complaint was attached to the letter. Far from intervening in the case to urge rejection of the suit on the ground that it presented political

questions, the Department responded with a letter indicating that Karadzic was not immune from suit as an invitee of the United Nations. *See* Habib Letter, *supra*. [(fn. omitted)] After oral argument in the pending appeals, this Court wrote to the Attorney General to inquire whether the United States wished to offer any further views concerning any of the issues raised. In a "Statement of Interest," signed by the Solicitor General and the State Department's Legal Adviser, the United States has expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits: "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them." Statement of Interest of the United States at 3. Though even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication, the Government's reply to our inquiry reinforces our view that adjudication may properly proceed.

As to the act of state doctrine, the doctrine was not asserted in the District Court and is not before us on this appeal. *See Filártiga*, 630 F.2d at 889. Moreover, the appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state. Finally, as noted, we think it would be a rare case in which the act of state doctrine precluded suit under section 1350. *Banco Nacional* was careful to recognize the doctrine "in the absence of . . . unambiguous agreement regarding controlling legal principles," 376 U.S. at 428, 84 S.Ct. at 940, such as exist in the pending litigation, and applied the doctrine only in a context—expropriation of an alien's property—in which world opinion was sharply divided, *see Id*. at 428–30, 84 S.Ct. at 940–41.

Finally, we note that at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. Though the Statement of the United States suggests the general importance of considering the doctrine of *forum non conveniens,* it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims, even if circumstances concerning the location of

witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum.

* * * *

b. Liability for participation in human rights abuses

Iwanowa v. Ford Motor Company, 67 F. Supp. 2d 424 (D.N.J. 1999) involved a class action on behalf of persons who performed forced labor for Ford Werke in Germany between 1941 and 1945 under inhuman conditions and without compensation. In sustaining the complaint against a motion to dismiss, the district court held that plaintiffs had sufficiently described the "close cooperation" between defendants and Nazi officials and pled sufficient facts to allege that the defendants had acted as agents of the state "under color of Nazi law." This constituted an allegation that defendants were *de facto* state actors and the court held that defendants were therefore liable under the ATS. The *Iwanowa* case became moot when the German government and various German companies signed an agreement in December 1999 to settle Nazi-era forced labor claims.

See also Hilao v. Estate of Marcos, 103 F.3d 767, 776 (9th Cir.1996) (affirming district court's jury instruction allowing foreign leader to be held liable upon finding that he "directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance' "); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D.Mass 1995) (former Guatemalan Minister of Defense could be held liable for compensatory and punitive damages for acts of torture, disappearance, summary execution and arbitrary detention committed by members of the military forces under his command); *Doe v. Unocal Corp*., 963 F. Supp. 880, 890–91 (C.D. Cal. 1997) (corporate defendants could be held liable for conspiring with state actors to violate the international human rights of the plaintiffs, including through torture, slavery and slave trading); *Eastman Kodak v. Kalvin and Carballo*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (holding that a private person

can be held liable under the ATS for her complicity in bringing about the prolonged arbitrary detention of an individual by foreign governmental authorities—amounting to a "calculated, extortionate imprisonment"—in life threatening circumstances in order to coerce that individual's corporate employer into settlement of a business dispute).

c. Violations of the law of nations

Courts have also had to resolve the meaning of the statutory phrase "tort only in violation of the law of nations." In *Filartiga*, torture was determined to fall within this language. In *Xuncax*, the defendant was held to have violated international law by summary execution or "disappearance" of plaintiffs' relatives and by torture, arbitrary detention, and cruel, inhuman, and degrading treatment. The use of unpaid, forced labor under inhuman conditions during World War II was held in *Iwanowa* to have violated established norms of customary international law.

In *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), *aff'd* 197 F.3d 161 (5th Cir. 1999), an Indonesian citizen had brought an action against several domestic U.S. corporations that were conducting mining activities in the Republic of Indonesia. The complaint alleged environmental abuses, human rights violations, and genocide under both the Alien Tort Statute and the Torture Victim Protection Act. The district court dismissed the complaint *inter alia* because Freeport's alleged environmental practices did not appear to have violated the law of nations. It acknowledged that the ATS may be applicable to international environmental torts, citing *Aquinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996), and *Amlon Metals, Inc. v. FMC Corp.* 775 F. Supp. 668, 670 (S.D.N.Y. 1991), but held that the alleged violation must be definable, obligatory rather than hortatory, and universally condemned. *Beanal*, 969 F. Supp. at 370. The relevant norm of customary international law should satisfy a number of requirements: no state condones the act in question and there is a recognizable "universal" consensus

of prohibition against it; there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; and the prohibition against it is non-derogable and therefore binding at all times upon all actors. The court of appeals affirmed, holding *inter alia* that treaties and agreements which did not contain articulable environmental standards were insufficient sources of international law to form the basis of international environmental law claim under ATS, and cautioning that federal courts should exercise "extreme caution" when adjudicating environmental claims under international law, to insure that environmental policies of the United States do not displace environmental policies of other governments. The court of appeals also ruled that the ATS "applies only to shockingly egregious violations of universally recognized principles of international law." *Beanal*, 197 F.3d at 167.

d. Procedural issues

(1) Failure to exhaust local remedies

In *Xuncax* the Superior Court held that the TVPA requirement that plaintiff exhaust adequate and available remedies in the place where the conduct giving rise to the claim occurred did not create a prohibitively stringent condition precedent but must be read against the ordinary doctrinal background that exhaustion of remedies in a foreign forum was generally not required when foreign remedies were unobtainable, ineffective, inadequate, or obviously futile. 886 F. Supp. at 178.

In *JAMA v. INS*, 22 F.Supp.2d 353, 364 (D.N.J. 1998), in which certain asylum seekers sued the INS and others for abuse allegedly suffered in a detention facility operated under contract with the INS, the district court said that there is "no absolute preclusion" of international law claims under the ATS merely because remedies under domestic law were available for the same alleged harm. The court saw no reason why plaintiffs could not seek relief on alternative grounds.

(2) Statute of limitations

In *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424 (D.N.J. 1999), claimant sued a German manufacturer of motor vehicles and its American parent, seeking compensation and damages for forced labor in the manufacturer's factory, imposed during World War II. The district court, in dismissing the complaint, held *inter alia* that: the ten-year statute of limitations in the TVPA should apply to this ATS action and that the Paris Reparations Treaty had tolled that statute of limitations on claims against German defendants until superseded by the London Debt Agreement in 1991; but that the statute of limitations had run on claims against the U.S. parent corporation. *Id*. at 462–63.

e. Non-justiciability

(1) Political question

In *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424 (D.N.J. 1999), the district court dismissed plaintiffs' forced labor claims arising out of World War II because they raised non-justiciable political questions. Noting that the political question doctrine had its genesis not only in the concept of the separation of powers "but also of the limitation of the judiciary as a judicial body," the court stated that the judiciary should refrain from adjudicating questions of foreign policy for a number of prudential reasons: (1) the relevant materials in a case involving foreign policy would likely come from a multitude of sources, including U.S. and foreign sources, which might be voluminous and thus, potentially unmanageable for individual courts to handle; (2) there was a distinct possibility that the parties might not be able to compile all of the relevant information, thus making any attempt to justify a ruling on the merits of an issue that will affect the nation difficult and imprudent; (3) courts could not predict the international consequences flowing from a decision on the

merits; (4) there might not be any standards for courts to apply in issuing a decision on the merits; and (5) courts addressing questions of foreign policy were faced with the task of reviewing initial determinations made by the political branches of government, determinations which were constitutionally committed to those branches. *Id*. at 484.

The court determined that as an issue affecting U.S. relations with the international community, war reparations fell within the domain of the political branches and were therefore not subject to judicial review. It noted that the executive branch had always taken the position that claims arising out of World War II must be resolved through government-to-government negotiations. "Courts may not pass judgment upon the political negotiations of the executive branch and the international community. Such intrusion into the realm of foreign policy would undermine the executive branch's sole discretion in the field of international relations. *See Curtiss-Wright*, 299 U.S. at 320, 57 S.Ct. 216." 67 F. Supp.2d at 487. *See also Karadzic, supra*.

(2) Act of state

In *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997), plaintiffs sought to hold defendant oil companies liable for human rights abuses in Burma, including forced relocation and forced labor, which had allegedly occurred in conjunction with the construction of a natural gas pipeline by defendants' joint venture under contract to the Burmese State Law and Order Restoration Council ("SLORC"). Plaintiffs asserted that the companies had agreed that SLORC, acting as an agent for the joint venture, would clear forest, level ground, and provide labor, materials and security for the pipeline project, and in fact subsidized SLORC activities in the region. They further asserted that defendants knew or should have known that SLORC had a history of human rights abuses in violation of customary international law. On the oil company's motion to dismiss, the district court held, *inter alia*, that the act of state doctrine did not preclude consideration of claims based

on alleged human rights abuses by Burmese government but did preclude claims based on expropriation of property in Burma by Burmese government.

Regarding alleged human rights violations, the court discounted the "prudential concerns" which it said were embodied in the act of state doctrine. "Because nations do not, and cannot under international law, claim a right to torture or enslave their own citizens, a finding that a nation has committed such acts, particularly where, as here, that finding comports with the prior conclusions of the coordinate branches of government, should have no detrimental effect on the policies underlying the act of state doctrine. Accordingly, the act of state doctrine does not preclude this court from considering claims that are based on legal principles about which the international community has reached unambiguous agreement." *Id.* at 894–95. *See also Karadzic, supra.*

H. LABOR

1. Convention Concerning Discrimination (Employment and Occupation) (ILO No. 111)

President William J. Clinton transmitted the ILO Convention Concerning Discrimination (Employment and Occupation) to the Senate on May 18, 1998. S. Treaty Doc. No. 105–45 (1998). The text of the President's letter of transmittal is reprinted below. The Senate has not provided its advice and consent to ratification.

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a certified copy of the Convention (No. 111) Concerning Discrimination (Employment and Occupation), adopted by the International Labor Conference at its 42nd Session in Geneva on June 25, 1958. Also transmitted is the report of the Department of State, with a letter dated January 6, 1997,

from then Secretary of Labor Robert Reich, concerning the Convention. This Convention obligates ratifying countries to declare and pursue a national policy aimed at eliminating discrimination with respect to employment and occupation. As explained more fully in the letter from Secretary Reich, U.S. law and practice fully comport with its provisions.

In the interest of clarifying the domestic application of the Convention, my Administration proposes that two understandings accompany U.S. ratification. The proposed understandings are as follows:

> The United States understands the meaning and scope of Convention No. 111 in light of the relevant conclusions and practice of the Committee of Experts on the Application of Conventions and Recommendations which have been adopted prior to the date of U.S. ratification. The Committee's conclusions and practice are, in any event, not legally binding on the United States and have no force and effect on courts in the United States.
>
> The United States understands that the federal nondiscrimination policy of equal pay for substantially equal work meets the requirements of Convention 111. The United States further understands that Convention 111 does not require or establish the doctrine of comparable worth with respect to compensation as that term is understood under United States law and practice.

These understandings would have no effect on our international obligations under Convention No. 111.

Ratification of this Convention would be consistent with our policy of seeking to adhere to additional international labor instruments as a means both of ensuring that our domestic labor standards meet international requirements, and of enhancing our ability to call other governments to account for failing to fulfill their obligations under International Labor Organization (ILO) conventions. I recommend that the Senate give its advice and consent to the ratification of ILO Convention No. 111.

2. Convention Concerning the Abolition of Forced Labor (ILO No. 105)

The Convention Concerning the Abolition of Forced Labor (ILO No. 105), 320 U.N.T.S. 291, entered into force Jan. 17, 1959, was initially transmitted to the Senate on July 22, 1963, *see* S. Exec. Doc. K, 88-11. By message dated February 19, 1991, President George H.W. Bush urged the Senate to give advice and consent to this treaty. S. Treaty Doc. No. 102–3 (1991). The text of the President's Letter of Transmittal is reprinted below, with excerpts from the accompanying letter from the Department of State to the President recommending that ILO Convention No. 105 be transmitted to the Senate, also included in S. Treaty Doc. No. 102–3.

Upon favorable recommendation by the Senate Foreign Relations Committee, *see* S. Exec. Rep. No. 102–7 (1991), the Senate provided its advice and consent to ratification on May 14, 1991, with the following understandings and declarations:

(a) The United States understands the meaning and scope of Convention No. 105, having taken into account the conclusions and practice of the Committee of Experts on the Application of Conventions and Recommendations existing prior to ratification, which conclusions and practice, in any event, are not legally binding on the United States and have no force and effect on courts in the United States; and

(b) The United States understands that Convention No. 105 does not limit the contempt powers of courts under Federal and State law.

137 CONG. REC. S5728 (daily ed. May 14, 1991).

The Convention (No. 105) Concerning the Abolition of Forced Labor, adopted by the International Labor Conference at Geneva on June 25, 1957, was transmitted to the Senate by President Kennedy on July 22, 1963, with a view to receiving advice and

consent to ratification. Although hearings were held in 1967 by the Committee on Foreign Relations, the Senate has not acted further on the Convention.

Now, 23 years later, I urge the Senate to consider anew this important Convention and to grant its advice and consent to ratification. Given the length of time that has elapsed, I enclose a new report from the Secretary of State concerning the Convention.

The report of the Secretary of State also contains the texts of two proposed understandings. As explained more fully in the accompanying letter from the Secretary of Labor, the law and practice of the United States fully conform to all obligations contained in the Convention (a copy of the Convention is included as an enclosure to this letter). Ratification of this Convention, therefore, would not require the United States to alter in any way its law or practice in this field. However, to remove the possibility that certain ambiguities might arise after ratification, it is proposed that ratification of the Convention be made subject to these understandings.

Ratification by the United States of selected Conventions of the International Labor Organization (ILO) enhances our ability to take other governments to task for failing to comply with ILO instruments they have ratified. In part for this reason, the Senate has in recent years given its advice and consent to the ratification of ILO Conventions 144, 147, and 160. I accordingly recommend that the Senate also give its advice and consent to the ratification of ILO Convention 105.

LETTER OF SUBMITTAL

* * * *

Convention 105 is a non-self-executing treaty. As such, it cannot be enforced directly through the courts, which are constrained instead to apply U.S. domestic law implementing the terms of the Convention. Because existing domestic law fully conforms to the requirements of the Convention, no additional implementing legislation is required.

While United States law and practice are fully consistent with the requirements of the Convention, two understandings have been

proposed to remove the possibility that certain ambiguities might arise after ratification. They are:

(1) The United States understands the meaning and scope of Convention No. 105, having taken into account the conclusions and practice of the Committee of Experts on the Application of Conventions and Recommendations existing prior to ratification, which conclusions and practice, in any event, are not legally binding on the United States and have no force and effect on courts in the United States.
(2) The United States understands that Convention No. 105 does not limit the contempt powers of courts under Federal and State law.

I am pleased to join with the Secretary of Labor in recommending that you urge the Senate to renew its consideration of Convention 105, a step which is consistent with our policy of support for and active participation in the work of the ILO. Given the lapse of time since the Senate last considered the Convention, it is recommended that you send the enclosed, new message to the Senate with a view to receiving advice and consent to ratification of the Convention, subject to the understanding set out above.

3. Convention Concerning Safety and Health in Mines (ILO No. 176)

President William J. Clinton transmitted the Convention Concerning Safety and Health in Mines (ILO No. 176), 2029 U.N.T.S. 209, entered into force June 5, 1998, to the Senate on September 9, 1999. S. Treaty Doc. No. 106–8 (1999). The text of an accompanying letter from the Secretary of Labor Alexis M. Herman to the Secretary of State recommending that ILO Convention No. 176 be submitted to the President for transmittal to the Senate is excerpted below and is also included in S. Treaty Doc. No. 106–8. The Senate Foreign Relations Committee reported favorably on September 5, 2000, S. Exec. Rep. No. 106–16, and the Senate provided its

advice and consent to ratification on September 20, 2000, with several understandings and declarations but no reservations. 146 CONG. REC. S8866 (daily ed. Sept. 20, 2000).

DEAR SECRETARY ALBRIGHT: I am writing to request that you submit to the President, for transmittal to the Senate with a request for advice and consent to U.S. ratification, Convention No. 176 concerning Safety and Health in Mines, adopted by the International Labor Conference at its 82nd Session on June 22, 1995.

Convention No. 176 obligates ratifying states, in consultation with employers' and workers' organizations, to formulate, carry out and periodically review a coherent policy on safety and health in mines, and to develop national laws and regulations to ensure implementation of the Convention's provisions. Steps to be taken include supervision and inspection of mines and maintenance of procedures for reporting and investigating accidents and occupational diseases. The Convention applies to all mines, both surface and underground sites. In regard to preventive and protective measures at the mine, the instrument sets forth the responsibilities of employers and the rights and duties of workers and their representatives.

As Chairman of the President's Committee on the ILO, I have been presented with the report of our Tripartite Advisory Panel on International Labor Standards (TAPILS) with the Panel's conclusions that there are no legal impediments to U.S. ratification of Convention No. 176.

TAPILS undertook an extensive review of Convention No. 176 which included a detailed examination of the precise meaning and obligations of the Convention and of how U.S. law and practice comport with its provisions. A tripartite working group from the Panel also met and corresponded with experts from the International Labor Office in Geneva, Switzerland, to ensure that the ILO shared TAPILS' assessment that the U.S. is in full compliance with the Convention.

Having reviewed TAPILS' legal findings, the President's Committee has unanimously agreed to recommend that the President

transmit Convention No. 176 to the Senate with a request for advice and consent to ratification.

I am enclosing the TAPILS report along with a detailed statement of how U.S. law and practice comport with the Convention. The law and practice statement was also prepared under TAPILS' guidance.

I and the other members of the President's Committee believe that ratification of Convention No. 176 will be an important step in terms of U.S. participation in the ILO. I hope that Senate consideration can be requested as expeditiously as possible.

4. The ILO Declaration on Fundamental Principles and Rights at Work

The ILO adopted the Declaration on Fundamental Principles and Rights at Work on June 18, 1998. This ILO Declaration is not a treaty or convention but rather a political commitment made by the ILO and its member states to "respect, promote and realize" the following principles that are the subject of certain ILO conventions "recognized as fundamental both inside and outside the [ILO]": "freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation." The ILO helps countries, employers, and workers realize the Declaration's objectives through various technical cooperation projects, and publishes an Annual Review and a Global Report. More information on the Declaration and ILO efforts to advance its goals is available at *www.ilo.org/public/english/standards/decl/about/index.htm*.

5. China Prison Labor

During the 1990s the United States on several occasions expressed its opposition to the widespread employment of forced prison labor in China. State Department Deputy

Spokesman Richard Boucher responded to a question concerning forced labor in China during a September 16, 1991, press briefing by saying: "We have informed the Chinese Government of our insistence that no products of prison labor be imported to the United States. We have received a firm commitment from China to prevent the sale of prison labor products to the United States." *See http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1991/9109/135.html*.

The United States implemented its policy regarding prison labor in China by the August 7, 1992, Memorandum of Understanding on Prohibiting Import and Export Trade in Prison Labor Products ("Prison Labor MOU") signed at Washington, DC between the United States and China. 3 Dep't St. Dispatch No. 33 at 660 (Aug. 17, 1992), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*. The Prison Labor MOU provided:

1. Upon the request of one Party, and based on specific information provided by that Party, the other Party will promptly investigate companies, enterprises or units suspected of violating relevant regulations and laws, and will immediately report the results of such investigations to the other.
2. Upon the request of one Party, responsible officials or experts of relevant departments of both Parties will meet under mutually convenient circumstances to exchange information on the enforcement of relevant laws and regulations and to examine and report on compliance with relevant regulations and laws by their respective companies, enterprises, or units.
3. Upon request, each Party will furnish to the other Party available evidence and information regarding suspected violations of relevant laws and regulations in a form admissible in judicial or administrative proceedings of the other Party. Moreover, at the request of one Party, the other Party will preserve the confidentiality of the furnished evidence, except when used in judicial or administrative proceedings.

4. In order to resolve specific outstanding cases related to the subject matter of this Memorandum of Understanding, each Party will, upon request of the other Party, promptly arrange and facilitate visits by responsible officials of the other party's diplomatic mission to its respective companies, enterprises or units.

The lack of specific verification procedures was the major difficulty in implementing the Prison Labor MOU. A Statement of Cooperation ("SOC") was therefore negotiated and signed at Beijing by the United States and China on March 14, 1994. The established specialized procedures and guidelines were as follows:

> First, when one side provides the other side a request, based on specific information, to conduct investigation of suspected exports of prison labor products destined for the United States, the receiving side will provide the requesting side a comprehensive investigative report within 60 days of the receipt of said written request. At the same time, the requesting side will provide a concluding evaluation of the receiving side's investigative report within 60 days of receipt of the report.
>
> Second, if the United States government, in order to resolve specific outstanding cases, requests a visit to a suspected facility, the Chinese government will, in conformity with Chinese laws and regulations and in accordance with the [Prison Labor] MOU, arrange for responsible United States diplomatic mission officials to visit the suspected facility within 60 days of the receipt of a written request.
>
> Third, the United States government will submit a report indicating the results of the visit to the Chinese government within 60 days of a visit by diplomatic officials to a suspected facility.
>
> Fourth, in cases where the U.S. government presents new or previously unknown information on suspected exports of prison labor products destined for the U.S. regarding a suspected facility that was already visited, the

Chinese government will organize new investigations and notify the U.S. side. If necessary, it can also be arranged for the U.S. side to again visit that suspected facility.

Fifth, when the Chinese government organizes the investigation of a suspected facility and the U.S. side is allowed to visit the suspected facility, the U.S. side will provide related information conducive to the investigation. In order to accomplish the purpose of the visit, the Chinese side will, in accordance with its laws and regulations, provide an opportunity to consult relevant records and materials on-site and arrange visits to necessary areas of the facility. The U.S. side agrees to protect relevant proprietary information of customers of the facility consistent with the relevant terms of the Prison Labor MOU.

Sixth, both sides agree that arrangements for U.S. diplomats to visit suspected facilities, in principle, will proceed after the visit to a previous suspected facility is completely ended and a report indicating the results of the visit is submitted.

I. INDIGENOUS PEOPLE

1. Draft Inter-American Declaration on the Rights of Indigenous Peoples

The Inter-American Commission on Human Rights ("IACHR") of the Organization of American States ("OAS") approved the Draft American Declaration on the Rights of Indigenous Peoples ("1997 Draft") on February 26, 1997, at its 95th regular session. The United States continued to participate in negotiations on the 1997 Draft, which was first discussed in OAS meetings in 1999.

On December 19, 1996, the United States submitted general comments on an earlier draft approved by the IACHR at its session of September 18, 1995. U.S. concerns included the distinction between rights and goals, the distinction between collective versus individual rights, and applicable

law. The United States suggested that a number of the rights in the draft should have been recast as statements of aspiration or goals, and that references to "peoples" were confusing, given that international law generally protects the rights of individuals as opposed to groups.

In a letter to Ambassador Jorge Taiana, Executive Secretary of the IACHR, dated December 16, 1997, Acting U.S. Representative Ronald D. Godard set forth U.S. concerns with the 1997 Draft. Mr. Godard's letter reiterated the comments made in the U.S. submission of December 19, 1996, and expressed concern over the lack of clarity of the scope of the convention which could be interpreted as according indigenous status to nonindigenous groups. Additionally, Mr. Godard noted that the 1997 Draft proposed a series of rights not recognized under international law, including the right to freely determine political status and freely pursue economic, social, spiritual and cultural development.

The full text of the comments made in the U.S. submission of December 19, 1996, which Mr. Godard reiterated in his letter, excerpted below, is available at *www.state.gov/sl/c8381.htm*.

---

* * * *

The Government of the United States of America notes that the IACHR made only minor revisions to the text in its most recent revision of the draft Inter-American Declaration on the Rights of Indigenous Peoples. We wish to reiterate the comments made in our December 19, 1996 submission.

In this letter we wish to focus on a major concern that has an impact on our position with respect to virtually all of the articles in the draft declaration. This is the lack of clarity with respect to the scope and application of the draft declaration. The current version of the draft text uses the term "indigenous peoples" throughout but does not contain a definition of the term "indigenous." The draft declaration instead states in Article I(1) that "the declaration applies to indigenous peoples as well as

peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws." Additionally, draft Article I(2) states that "self-identification as indigenous shall be regarded as a fundamental criteria for determining the peoples to which the provisions of this declaration apply."

This would not be a problem if the draft declaration merely restated existing principles of international law. For example, under Article 27 of the International Covenant on Civil and Political Rights, all persons belonging to ethnic, religious or linguistic minorities (which often will include the indigenous in particular states) are entitled to enjoy all human rights, including "the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." By comparison, the declaration proposes a series of additional rights for indigenous groups not currently recognized by international law, including under draft Article XV, the right to freely determine their political status and freely pursue their economic, social, spiritual, and cultural development. (fn. omitted)

In the United States more than 550 Indian tribes are recognized as possessing an inherent right of autonomy in their internal affairs, which derives from their original sovereignty. Thus, tribes, like domestic states, function as governments within the overall political framework of the United States.(fn. omitted) However, other groups in the United States have self-identified as "indigenous," including armed militia and "hate" groups that advocate racism as well as groups seeking to take advantage of the rights, services, and benefits accorded by the United States government to Indian tribes. We cannot accept the application of the draft declaration to such groups for both constitutional and practical reasons. Therefore, we will actively oppose inclusion of language such as that appearing in Articles I(1) and (2) which could be interpreted as according indigenous status to nonindigenous groups.

To delineate the proper scope of this declaration, the United States proposed including a *substantive* definition of the term "indigenous" in the draft declaration. The proposed definition,

which derived from a United States Supreme Court case (Montoya v. U.S., 180 U.S. 261, 266 (1901), defining indigenous groups as:

> those groups that (1) are composed of descendants of persons who inhabited a geographic area prior to the sovereignty of the present State or any direct predecessor to the present State; (2) historically exercised sovereignty or attributes of sovereignty; and (3) continue to maintain a distinct community with its own government institutions. (fn. omitted)

A second option is for the draft declaration to incorporate a *procedural* definition. Such a definition would require States to establish a public and transparent process for determining which groups are indigenous. The United States looks forward to working with other governments with a goal of clarifying the scope of the term "indigenous."

The United States strongly supports adoption of a declaration that recognizes indigenous rights, promotes the elimination of discrimination based on indigenous origin, and fosters an appreciation for and understanding of the value of indigenous cultures and institutions. A clarification of the scope of the declaration will hasten the day when such protections are a reality.

2. Draft UN Declaration of the Rights of Indigenous Peoples

At its 11th session, in July 1993, the UN Working Group on Indigenous Populations, a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights, agreed on a final text for the Draft UN Declaration on the Rights of Indigenous Peoples ("1993 Draft"). Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). The 1993 Draft is currently under review by the inter-sessional Working Group of the Commission on Human Rights on the Draft Declaration on the Rights of Indigenous Peoples.

The full text of the 1993 Draft is available at *www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument*.

Michael J. Dennis, the U.S. Alternate Head of Delegation to the Working Group on the Draft Declaration on the Rights of Indigenous Peoples, presented a General Comment and a Statement on Standard of Review, as excerpted below, to the Working Group in Geneva, Switzerland at its meeting from November 23 to 30, 1995. The full texts of the U.S. General Comment and Statement on Standard of Review are available at *www.state.gov/s/l/c8183.htm*.

General Comment

* * * *

My government welcomes the opportunity to participate in this working group's consideration of the "United Nations Draft Declaration on the Rights of Indigenous Peoples." The United States hopes that the ultimate adoption of a declaration will succeed in focusing attention on the need to protect indigenous rights, fight discrimination based on indigenous origin wherever it occurs, and foster appreciation for, and understanding of, the value of indigenous traditions, cultures, and institutions.

Establishment of the Working Group

The U.S. Government strongly supported the establishment of this working group. We appreciate the efforts of the Working Group on Indigenous People in preparing the draft declaration. This draft provides a point of departure for the work that lies ahead.

USG Commitment On Indigenous Rights

The U.S. Government remains deeply committed to promoting and protecting indigenous rights throughout the United States, as well as throughout the world. Under the United States Constitution, indigenous individuals and groups are guaranteed protection of

their vested property rights and of their basic individual rights, including their right to freely associate, engage in religious practices and maintain distinct social and cultural identities.

We want to build a new partnership with our own indigenous communities, a relationship based on recognition of indigenous culture and strengthened through consultation. U.S. policy continues to support the tribal governments of federally recognized American Indian tribes and Alaska Native villages. Relations between the United States and these tribes have been conducted on a government-to-government basis.

Participation of Indigenous Organizations

The United States fought hard during the UNHRC to ensure that indigenous organizations not in consultative status with the Economic and Social Council, including tribal governments, would have an opportunity to contribute to the negotiation. Consensus was achieved on a procedure that will allow "relevant organizations of indigenous people" to apply to participate in the process. Indigenous contributions to the process will be vital to a successful outcome. We are very concerned that not all organizations wishing to participate have been accredited; we hope that the NGO committee will remedy that situation very soon.

The United States stands ready to work in partnership with tribal governments and U.N. members to make the declaration a reality. The wrongs and abuses committed against "First Americans" in U.S. history, and continuing discrimination around the world based on indigenous origin, demand no less.

My Government is committed to working with other governments to ensure a strong and useful declaration that recognizes the rights of indigenous people, and the communities to which they belong. It should go without saying that these rights are universal. We are also committed to promoting dialogue and cooperation between governments and indigenous communities. As President Clinton stated in a recent letter to indigenous communities in the United States, "working together, we can usher in a new era of understanding, cooperation, and respect, leading the way to a bright future for all of our people."

* * * *

United States Statement on Standard of Review

* * * *

. . . The starting point in assessing the current draft text of the WGIP is GA Resolution 41/120, which sets agreed guidelines for new human rights standard setting. The General Assembly there agreed that new human rights instruments should:

> "(a) Be consistent with the existing body of international human rights law;
> (b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
> (c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
> (d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
> (e) Attract broad international support."

Elements of the present text need substantial revision to meet these tests.

1. Consistency with Human Rights Law. The new declaration should build upon, and be consistent with, the principles established in basic human rights instruments such as the Universal Declaration, the Covenants, and the 1992 Declaration on the Rights of Persons Belonging to Linguistic Minorities.

Within this framework of existing principles, the focus should be to (1) affirm that persons belonging to indigenous groups are entitled to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality under the law; (2) make clear their right to preserve and develop their identity and culture, free from threats of involuntary assimilation; and (3) describe steps governments should take to achieve these ends.

In large measure the draft declaration meets these objectives. But it also includes much that is not a reasonable evolution from existing human rights law.

For example, the document refers extensively to the "rights of indigenous peoples," many of which are in fact statements of social or political goals. They are not recognized as rights in existing international instruments, nor in state practice. Accordingly, the pervasive use of the language of "rights" is both inaccurate and misleading. It tends to diminish the credibility of the Declaration and to lessen the likelihood of its broad acceptance.

It should also not be necessary to convert aspirations or objectives into "rights" in order to draw attention to them. Rather, the term "rights" should be reserved in the declaration for those duties that governments owe their people, the breach of which generally gives rise to a legally enforceable remedy.

2. Precision, Clarity, and Practicability of Rights and Obligations. The existing text has considerable repetition. Important ideas are repeated in different formulations in many paragraphs. Such overlap must be eliminated to avoid ambiguity in interpretation and inconsistency of application.

The draft also tends to group together important but unrelated ideas in single paragraphs. For clarity, key ideas should be stated separately. More important, some key provisions are written in general and imprecise language. It often would be impossible to ascertain whether particular conduct by a State would or would not satisfy the principles enunciated in the Declaration. Much greater precision is required.

3. Attract Broad International Support. The Declaration must seek to build upon existing international law. At the end of the day, the Declaration's influence will be directly related to its ability to enlist the support of key states—notably those with significant indigenous populations—and to shape their conduct. As the text now reads, a number of its formulations will discourage, not encourage, such support. One way to help ensure that the declaration would receive broad international support would be to include a provision in the declaration recognizing that different governments and indigenous populations may take different approaches to the problems the declaration is designed to address. The Declaration should make clear that these governments and indigenous persons have flexibility in interpreting its provisions.

* * * *

J. RULE OF LAW AND DEMOCRACY PROMOTION

1. Rule of Law

On October 29, 1998, Secretary of State Madeleine K. Albright addressed the University of Washington School of Law on rule of law issues. Secretary Albright discussed a range of issues, including corporate responsibility, terrorism, international criminal tribunals and the promotion of human rights and democracy. 9 Dep't St. Dispatch No. 10 at 6–9 (Nov. 1998), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

2. Assistance Programs

During the 1990s, the United States implemented several assistance programs to facilitate the promotion of democracy and the rule of law worldwide. The Education for Development and Democracy Initiative ("EDDI") was established to strengthen educational systems and democratization principles and fortify and extend vital development partnerships between the United States and Africa. A full description of EDDI and its activities and goals is available at *www.eddionline.org/index.html*.

Also in Africa, the Great Lakes Justice Initiative ("GLJI") sought to promote the rule of law in the Great Lakes region, which includes Rwanda, Burundi and the Democratic Republic of the Congo. GLJI is a multi-donor effort, involving other bilateral donors and multilateral organizations, as well as public-private partnerships, other professional associations, foundations, and NGOs. A full description of GLJI and its activities and goals is available at *www.usaid.gov/pubs/bj2001/afr/glji/*.

With respect to the former Soviet Union, President George H. W. Bush signed the Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992 ("Freedom Support Act") on October 24, 1992. Pub.

L. No. 102–511, 106 Stat. 3320, 22 U.S.C. § 5811 et seq. The Freedom Support Act authorized a range of programs to support free market and democratic reforms in Russia, Ukraine, Armenia, and the other states of the former Soviet Union. The White House Office of the Press Secretary released a fact sheet regarding the act on April 1, 1992, available at *www.fas.org/spp/starwars/offdocs/b920401.htm*. President Bush's Statement on signing the Freedom Support Act, excerpted below, is available at *http://bushlibrary.tamu.edu/research/papers/1992/92102407.html*.

---

* * * *

I am proud that the United States has this historic opportunity to support democracy and free markets in this crucially important part of the world. While it is clear to all that the future of the new independent states of the former Soviet Union is in their own hands, passage of the FREEDOM Support Act demonstrates the commitment of the United States to support this endeavor.

Once again, the American people have united to advance the cause of freedom, to win the peace, to help transform former enemies into peaceful partners. This democratic peace will be built on the solid foundations of political and economic freedom in Russia and the other independent states. We must continue to support reformers in Russia, Ukraine, Armenia, and the other new states.

I am pleased that the bill draws our private sector, as never before, into the delivery of technical assistance to Russia and the other new states. Various provisions of this bill will call upon the specialized skills and expertise of the U.S. private sector. S. 2532 will provide support for the trade and investment activities of U.S. companies to help lay the economic and commercial foundations upon which the new democracies will rest. This is an investment in our future as well as theirs.

The IMF quota increase will ensure that the IMF has adequate resources to promote free markets in the former Soviet Union and elsewhere throughout the world. By contributing to a more prosperous world economy, the IMF will expand markets for U.S. exporters and increase jobs for American workers.

This bill will allow us to provide humanitarian assistance during the upcoming winter; to support democratic reforms and free market systems; to encourage trade and investment; to support the development of food distribution systems; to assist in health and human services programs; to help overcome problems in energy, civilian nuclear reactor safety, transportation, and telecommunications; to assist in dealing with dire environmental problems in the region; and to establish a broad range of people-to-people exchanges designed to bury forever the distrust and misunderstanding that characterized our previous relations with the former Soviet Union.

The bill also provides additional resources and authorities to support efforts to destroy nuclear and other weapons, and to convert to peaceful purposes the facilities that produce these weapons.

We undertake these programs of assistance out of a commitment to increased security for ourselves, our allies, and the peoples of the new independent states. These programs will enhance our security through demilitarization and humanitarian and technical assistance. A number of provisions in the bill, however, raise constitutional concerns. Some provisions purport to direct me or my delegates with respect to U.S. participation in international institutions. Under our constitutional system, the President alone is responsible for such matters. I therefore will treat such provisions as advisory.

Furthermore, the bill could interfere with my supervisory power over the executive branch by giving a subordinate official in the Department of State the authority to resolve certain interagency disputes and by regulating how other agencies handle license applications by the National Aeronautics and Space Administration. I will interpret these provisions in the light of my constitutional responsibilities.

The bill also authorizes the creation of supposedly nongovernmental entities—the Democracy Corps and a foundation that will conduct scientific activities and exchanges—that would be subject to Government direction, established to carry out Government policies, and largely dependent on Government funding. As I have said before, entities that are neither clearly governmental nor clearly private undermine the principles of separation of powers and

political accountability. In determining whether to exercise the authority granted by this bill, I will consider, and I direct the Director of the National Science Foundation to consider, whether these entities can be established and operate in conformity with those principles.

I also note a concern with the provision under which Freedom of Information Act litigation involving the Democracy Corps would be the "responsibility" of the Agency for International Development. This responsibility should not be understood in any way to detract from the Attorney General's plenary litigating authority. Therefore, I direct the Agency for International Development to refer all such matters to the Attorney General consistent with his current authority.

* * * *

Cross-references

Asylum and refugee issues, **Chapter 1.D.**

Consular notification in death penalty cases: complaints to the Inter-American Commission on Human Rights and the International Court of Justice and Advisory Opinion of the Inter-American Court of Human Rights concerning consular notification in death penalty cases, **Chapter 2.A.1.d.(2) & (3).**

War crimes, crimes against humanity and genocide, **Chapter 3.B.2.**

International criminal tribunals, **Chapter 3.C.**

Amendments to charter of Organization of American States, **Chapter 7.**

Alien Tort Statute claim by Panamanian businesses against U.S., **Chapter 8.B.1.**

Claims under FSIA and others affected by head of state, diplomatic, and consular immunities and related issues, **Chapter 10.**

Most-favored-nation status for China, **Chapter 11.B.4.g.(2).**

Sustainable development, **Chapter 13.A.1.**

Chapter 7

International Organizations

A. ORGANIZATION OF AMERICAN STATES

1. Headquarters Agreement

On September 21, 1992, President George H.W. Bush transmitted the Organization of American States ("OAS")-United States Headquarters Agreement to the Senate for its advice and consent to ratification. S. Treaty Doc. No. 102–40 (1992). The Senate gave its advice and consent to ratification on October 6, 1994, 140 CONG. REC. S14467 (Oct. 6, 1994), and the agreement entered into force on November 17, 1994.

The OAS has maintained headquarters in Washington, D.C. since its origins in 1890, but until 1994 it had no formal agreement with the United States. The Headquarters Agreement codified and set forth in detail the arrangements governing the status of the OAS and its activities in the United States. The September 12, 1992, letter from Acting Secretary of State Arnold Kanter submitting the agreement to the President for transmittal to the Senate is set forth in full below.

THE PRESIDENT: I have the honor to submit to you the Headquarters Agreement between the Government of the United States of America and the Organization of American States ("the Agreement"), signed at Washington on May 14, 1992. I

recommend that the Agreement be submitted to the Senate for its advice and consent to approval. The Agreement sets forth the rights and obligations of the Organization of American States ("OAS") and the United States with respect to the OAS headquarters which has been located in Washington for over a century. The OAS has long urged negotiation of a OAS headquarters in the United States. Approval of the Agreement will not only put the status of the OAS in the United States on a clear legal footing, but will be seen as an important symbol of our political commitment to and respect for the Organization.

Many of the provisions of the Agreement elaborate and codify existing arrangements; others clarify matters on which practice was scarce or inconsistent. In a few instances, existing arrangements will be modified. A brief summary of the Agreement's terms follows.

The Agreement provides that the OAS and its General Secretariat shall have legal personality, and affords the OAS the right to hold currency of any kind, with the limitation that the OAS is obligated to pay due regard to the currency laws and regulations of the United States. The Agreement confirms the inviolability of the premises and the archives of the OAS, and provides that all OAS property is immune from judicial attachment.

The Agreement also confirms the exclusive jurisdiction of the OAS with regard to employment disputes. This is consistent with our reading of relevant judicial precedent and the well-recognized need for international organizations to manage their own employment systems. It sets forth the required contents of the OAS "Official Travel Document", which will be accepted by United States authorities as a valid document for international travel. The rights and obligations of the OAS with respect to procurement and use of communications facilities are also defined to ensure appropriate coordination and notification in the event the OAS finds it necessary to use non-commercial communications facilities or facilities which normally require licensing.

The Agreement affords the OAS full immunity from judicial process, thus going beyond the usual United States practice of affording restrictive immunity. In exchange, however, the Agreement requires that the OAS "make provision for appropriate

modes of settlement of those disputes for which jurisdiction would exist against a foreign government under the Foreign Sovereign Immunities Act." In the absence of an agreed mechanism for resolving a particular dispute, the appropriate mode of dispute settlement would be binding arbitration. As the OAS generally includes an arbitration clause in its commercial contracts, this arrangement to a large extent reflects the current situation. The Agreement also sets forth special expedited procedures applicable to small claims.

Under the Agreement, the OAS is assured against being dispossessed of the premises that constitute the headquarters, and entitled to be supplied on equitable terms with public services. The rights and obligations of the United States and the OAS should the OAS move its headquarters or cease to use the buildings for specified official purposes are covered as well. The Agreement specifies the law applicable and the authority of the Parties within the headquarters.

The Agreement provides full diplomatic immunity for a limited number of high level positions, including that of the Secretary General. Such immunity does not attach when the position is filled by a U.S. national. With the exception of these high level officials, OAS officials will continue to have immunity only for acts performed in their official capacity and falling within their official functions. All non-U.S. national officials are, however, granted an exemption from taxation, whether by local, state or federal authorities, on salaries and benefits paid to them by the OAS. This will change the current situation which does not require exemption from state and local taxes. The Agreement also provides immunity for acts of experts in their official capacity and for extension of certain facilities to them.

The Agreement further specifies that privileges and immunities granted to officials and experts are granted in the interest of the OAS and not for the personal benefit of the individuals themselves. The Secretary General has the right and the duty to waive the immunity where such immunity would impede the course of justice and it can be waived without prejudice to the interests of the OAS. The Agreement also provides that the OAS must make appropriate provision for settlement of disputes against officials

where they enjoy immunity and the immunity has not been waived by the Secretary General. The Permanent Council can waive the immunity of the Secretary General.

The Agreement makes clear that where the interests of the OAS in the presence of a particular official or other individual in the United States cannot be reconciled with the security interests or the immigration laws of the United States, United States security interests and laws take precedence.

Disputes between the Parties regarding the interpretation or application of the Agreement which cannot be resolved by an agreed mode of settlement will be referred to a panel of three arbitrators for a final decision.

By agreement of the Secretary of State, the Secretary General and the executive director of the entity involved, the Agreement can be extended to other entities in the OAS system which meet certain criteria and which are not dependent upon the OAS General Secretariat for permanent secretariat services. This creates the possibility that the Agreement could be extended to the Inter-American Defense Board, the Pan American Health Organization and other similar entities in the OAS system.

No implementing legislation is required for the United States to perform its obligations under the Agreement. As a treaty, the Agreement will override federal, state and local law with respect to privileges, immunities and exemptions to the extent such laws are inconsistent with its provisions. The provisions of the Agreement are not inconsistent with U.S. immigration laws, which will provide the basis for meeting the commitments established by the Agreement for the admission of aliens.

* * * *

2. Amendments to OAS Charter

On June 20, 1994, Ambassador Harriet C. Babbit, U.S. Permanent Representative to the Organization of American States, deposited on behalf of the U.S. Government the instrument of ratification to two protocols to the Charter of the Organization of American States, signed at Bogota

April 30, 1948 (2 UST 2394; 119 UNTS 3): (1) the Protocol of Washington, adopted on December 14, 1992, by the Sixteenth Special Session of the General Assembly of the Organization of American States and signed by the United States on January 23, 1993, and (2) the Protocol of Managua, adopted by the Nineteenth Special Session of the OAS General Assembly on June 10, 1993, and signed that day by the United States. The U.S. Senate had given its advice and consent to ratification of the Protocols on May 17, 1994. 140 CONG. REC. S5852 (May 17, 1994).

The Charter amendments of the Protocol of Washington incorporate a procedure for suspending the right of a Member State to participate in OAS policy bodies when its democratically constituted government has been overthrown by force and also address the situation of extreme poverty in the hemisphere. The Protocol of Managua contains structural amendments to consolidate and streamline the institutional mechanisms through which the OAS renders technical cooperation to member states.

Excerpts from a report to the President on the two Protocols from the Department of State, dated December 29, 1993, subsequently transmitted to the Senate by President Clinton on January 26, 1994, appear below. *See* S. Treaty Doc. No. 103–22 (1994).

---

* * * *

The United States has consistently supported amending the OAS Charter to strengthen the OAS's capacity to respond to coups. The provisions of the "Protocol of Washington" reflect practical steps that can be taken within the OAS framework that will contribute to policy goals of the United States, of supporting democratic regimes internationally, and of strengthening the multilateral means toward that end.

Upon entering into force, the "Protocol of Washington" would provide for either the suspension, or the lifting of a suspension, of a Member of the Organization whose democratically constituted government has been overthrown by force. Such suspension would

not entail expulsion of any OAS Member State. The United States supports the consensus view that suspension should be a last resort, invoked only after other options—diplomatic, political, and economic—have been attempted without success, and that even after suspension, efforts by the OAS should be undertaken to help restore representative democracy in the affected country.

The amendments would add eradication of extreme poverty to the list of seven essential purposes of the Organization of American States now listed in the Charter and would also give prominence to the issue of extreme poverty in other pertinent sections of the Charter. The record of the Conference makes clear that there was no intent to create a legal obligation upon any Member State to eliminate extreme poverty.

With a view to giving further effect to the "Protocol of Washington", the Sixteenth Special General Assembly also instructed the OAS Permanent Council to consider further amendments to the OAS Charter. . . .

At the Nineteenth Special General Assembly held in Managua on June 10, 1993, the "Protocol of Managua", comprising additional amendments to the OAS Charter, was adopted and opened for signature. Upon entry into force, the Protocol would amend the Charter, as amended, by consolidating the existing Chapters XIII and XIV into a new Chapter XIII creating a single Inter-American Council for Integral Development to replace the existing Inter-American Economic and Social Council (CIES) and the Inter-American Council for Education, Science and Culture (CIECC).

The proposed institutional restructuring of the Charter will address important programs and administrative concerns by streamlining the process by which technical cooperation can be effectively delivered to Member States. . . .

In effect, these Charter amendments are tantamount to a fundamental redefinition by OAS Member States of a regional approach to development problems in the hemisphere. The new Council for Integral Development is envisioned as the forum in which discussion and debate of nonpolitical concerns of the hemisphere can take place even at the Ministerial level. At the same time, the Council will ensure that those technical assistance

projects that are chosen and executed will be responsive to the economic, social and technical cooperation problems which countries in the region have identified.

* * * *

No legislation would be needed for the United States to implement the Protocols. By their nature the Protocols would have effect principally in the internal operations of an international organization. Appropriate consultations on these matters have been held with staff members of the House and Senate committees concerned with OAS matters. . . .

* * * *

The Senate Committee on Foreign Relations reported favorably on the Protocols and recommended that the Senate give its advice and consent to their ratification. S. Exec. Rep. No. 103–28, (1994). An excerpt from the Committee report appears below.

---

* * * *

The Protocol of Washington strengthens the ability of the Organization of American States to respond multilaterally to coups and to support democratic regimes in the region. In recent years, no region has made more progress in democratization and liberalization [than] have Latin America and the Caribbean. By 1991, only one country in this region—Cuba—was not led by a democratic government.

In that year, however, this process of democratization was dealt a severe blow by the military overthrow of Haiti's democratically elected President, Father Jean-Bertrand Aristide. This coup, and the conditions of oppression and flagrant human rights violations which have followed, have highlighted the need for stronger institutional capabilities on the part of the OAS to respond to such threats to democracy and stability.

The amendment to the OAS Charter called for in the Protocol of Washington represents an appropriate method by which the [M]ember States can punish and deter the use of force to overthrow

a democratic government. Democracy is the most important principle underlying the Organization of American States. . . .

The Protocol of Managua builds on the antipoverty provisions of the Protocol of Washington by streamlining the process by which technical assistance is provided by the OAS to [M]ember States. Together, the two protocols represent a positive and significant change in the way the OAS approaches development problems.

Poverty is one of the most serious problems affecting Latin America, and the committee welcomes this strengthened commitment by the OAS to issues of fighting poverty and developing regional economies.

B. UNITED NATIONS

1. Treatment of Israel in the United Nations

On July 14, 1999, C. David Welch, Assistant Secretary of State for International Organizations, appeared before the House International Relations Committee to present the Administration's views on the treatment of Israel at the United Nations.

The full text of the testimony is available at *www.state.gov/www/policy_remarks/1999/990714_welch_un-israel.html.*

* * * *

The treatment of Israel in the United Nations and its affiliated organizations has too often been driven by a desire by some UN members to gain short-term political or rhetorical advantage rather than by the obligation shared by all members to employ the UN system to advance its Charter purposes: the maintenance of international peace and security and the development of friendly relations among nations. The U.S. has consistently opposed efforts in the UN and its organizations that seek to isolate Israel, to subject it to unbalanced or unwarranted criticism, or to interpose the UN in issues reserved for negotiations between the parties in

the Middle East. This commitment by all parts of the U.S. government extends back to the founding of the State of Israel and is unwavering.

The United States has always enjoyed the closest cooperation with the Israeli Mission in New York. We have not hesitated to employ our veto in the Security Council when necessary to oppose resolutions that would be damaging to Israel or to the search for peace in the region. In the General Assembly, we have consistently voted against actions that stigmatize Israel and have strongly encouraged other UN members to do likewise. Despite our sustained efforts in this regard, we often find ourselves standing alone or with only a few others on these votes. We continue to assert our positions on these issues and seek ways to expand our ability to influence other delegations.

Let me now turn my attention to specific issues of concern regarding Israel's treatment at the United Nations.

Israel has been effectively denied membership in a regional group. This exclusion prevents Israel from participating fully and effectively in the United Nations. This Administration, like many before it, opposes this prejudice and has worked hard to reverse this injustice. As an interim measure, we have supported Israel's admittance to the Western European and Others Group (WEOG). Most members of the European Union continue to oppose inclusion of Israel in the WEOG. We continue to press the Europeans and report to the Congress on these and other actions in support of Israel's admittance to a regional group.

Primarily because it has been denied regional group membership, Israel is also precluded from membership in other UN bodies —including the Security Council—and is consequently unable to participate fully in their deliberations and decisions. We have made numerous efforts in Washington, New York, and in capitals to reverse this anomaly and allow Israel to contribute fully to the community of nations. Exclusion of Israel from the UN's regional groups and other organizations denies Israel its due as a sovereign UN member, including the opportunity to participate in the full range of international activities conducted at the UN; and it denies the rest of the world the benefits that could flow from Israel's contributions.

Each year, the UN General Assembly adopts a number of resolutions related to the situation in the Middle East. These perennial resolutions (on the Syrian Golan, the Question of Palestine, Israeli Settlements, Palestinian Right to Self-Determination, and Israeli Practices)—some of whose very titles are evidence of their lack of balance—do nothing to advance the search for a just, lasting, and comprehensive peace in the region. Several of these resolutions attempt to address Israeli-Palestinian permanent status issues that must be reserved for the negotiations between the parties themselves. Others advocate language or activities incompatible with the basic principles guiding the search for peace or call for the expenditure of resources which could be utilized in better ways to improve the lives of the Palestinian people. Accordingly, the U.S. opposes these resolutions each year. We continue to work vigorously to convince other nations to join us in rejecting these misguided and counterproductive efforts. We will continue to do so forcefully at this year's General Assembly.

At this year's General Assembly, we intend to propose again a "positive" resolution on the Middle East taking note of the increased likelihood of peace between Israel and its neighbors. The absence of such a resolution in the last two General Assemblies has been an unfortunate manifestation of the down-turn in the peace process. Renewing the positive resolution can be a step toward establishing a voice for the General Assembly that helps, rather than hinders, the search for peace.

In February 1999, the UN General Assembly's Tenth Emergency Special Session recommended that the High Contracting Parties to the Fourth Geneva Convention meet in Geneva on July 15 to discuss enforcement of the Convention with regard to Israeli settlement activities. The U.S. voted against this resolution. We have worked strenuously in the days since its adoption—up to and including today—to cancel or delay this ill-conceived conference. We strongly oppose convening this conference on legal and policy grounds. We have conveyed these objections to a number of other governments at the highest levels. President Clinton has raised this issue personally with the presidents of Switzerland and France. Secretary Albright has had a number of conversations with her counterpart ministers to underscore the

approaches we have made in capitals and with other UN delegations. We have also addressed this issue with senior Palestinian and other Arab leaders. We informed Switzerland (in its role as depositary of the Convention) and others that the U.S. would not attend the conference. Australia did likewise. Other countries have expressed their concerns about convening the conference so soon after the formation of the new Israeli government. We continue to believe that convening the conference is a very serious mistake.

In addition to our concern about its negative impact on the peace process, we have serious legal concerns that have not been adequately addressed. The Fourth Geneva Convention contains no provision for an enforcement meeting of the High Contracting Parties. Nor do any of the other treaties of this regime contemplate such an enforcement mechanism.

The Convention does contain provisions to address questions of enforcement (e.g., Article 12 conciliation procedure, Article 149 enquiry procedure), but these do not entail highly public meetings of the High Contracting Parties. The idea of permitting meetings of the High Contracting Parties to address specific questions of application of these rules was raised (by the Arab group) and rejected during the negotiations leading to the adoption of Protocol I Additional of 1977 to the 1949 Geneva Conventions. The negotiating record demonstrates clearly that the High Contracting Parties discussed and rejected precisely this sort of conference.

We also raised concerns about the use of UN funds to offset some of the costs associated with convening this conference. We are continuing our dialogue with senior Secretariat officials to try and ensure that no UN funds are so expended.

* * * *

Finally, I would like briefly to address the issue of General Assembly resolutions 181 and 194. The Administration has made its position very clear on these resolutions. The only basis for the Israeli-Palestinian negotiation are the terms of reference defined in Madrid and the Oslo agreement, UN Security Council resolutions 242 and 338, and the principle of land for peace. The differences between the Israelis and the Palestinians can only be settled through negotiations.

The United Nations is an organization that mirrors its membership. In the General Assembly, positions adopted or actions taken with the concurrence of a majority of the membership do not always reflect U.S. national policy. On many matters of concern to Israel, the current UN membership often takes action despite the opposing votes of both the U.S. and Israel.

I would like to distinguish the treatment accorded Israel by the UN organization (the Secretary General and his staff) from that accorded by the member states of the United Nations. The former has been and continues to be correct and respectful, as it should be to every UN member.

Israel has experienced both positive and negative treatment over the years from the UN membership. Indeed, the United Nations had an important role in the establishment of the State of Israel. On occasion, the U.S. has been able to employ the United Nations to further our objectives in the peace process as well as help Israel lessen its isolation and more effectively engage in the international arena. We can report a measure of success—such as the repeal of the "Zionism equals racism" resolution—over the UN's history, despite the most recent experiences.

2. Syrian Golan Resolution in the General Assembly

On November 30, 1999, Ambassador A. Peter Burleigh, Deputy U.S. Representative to the United Nations, explained the U.S. vote against a resolution titled "Syrian Golan" in the UN General Assembly. U.N. Doc. A/RES/54/38 (2000). This resolution, *inter alia*, declared that Israel had "failed to comply with" a 1981 Security Council resolution and determined "that the continued occupation of Syrian Golan and its de facto annexation constitute a stumbling block in the way of a just, comprehensive and lasting peace in the region."

The full text of Ambassador Burleigh's remarks can be found at *www.state.gov/www/policy_remarks/1999/991130_burleigh_un.html*.

* * * *

The United States continues to support a just, comprehensive, and lasting peace in the Middle East. We will do everything we can to assist the parties to reach a negotiated agreement which will resolve their differences. Mr. President, the situation in the Middle East has changed significantly since the last General Assembly. The Sharm el Sheikh Memorandum sets out a timetable for future progress in the peace process. Progress has already been made. The safe passage route between Gaza and the West Bank is operating, the Gaza seaport has been approved, further redeployments have been carried out, additional prisoners have been released and the parties have begun talks on a framework agreement for permanent status.

Despite these positive developments in the peace process, negotiations on the text of a resolution supporting the process were unsuccessful. My government regrets that the General Assembly has thus been deprived of the opportunity to take official notice of the progress already made and express its support and encouragement at this historic attempt to resolve the longstanding Arab-Israeli dispute through peaceful negotiations. . . . My government would like to express its gratitude to the co-sponsors of the resolution on the Middle East peace process, Russia and Norway, for their tireless and dedicated efforts to reach agreement on a text.

Mr. President, the resolution entitled "Syrian Golan," like so many of the other resolutions dealing with the Arab-Israeli dispute, seeks to interject the General Assembly into negotiations. Syria and Israel have both publicly supported the principle of a negotiating process to resolve their differences and resolutions such as this do not contribute to that goal.

The United States will abstain on the resolution on Jerusalem, consistent with our belief that the future of Jerusalem should be decided through permanent status negotiations.

3. Status of the Palestinian Observer Mission

On July 7, 1998, the United Nations General Assembly passed Resolution 52/250 upgrading the status of the Palestinian

observer mission, allowing it to co-sponsor resolutions on Middle East issues, to take part in the Assembly's general debate after the last inscribed member state, and to exercise a right of reply. The United States voted against this resolution. U.N. Doc. A/RES/52/250 (1998). Ambassador Bill Richardson, in an explanation provided before the vote explained the United States position that passage of the resolution would not contribute to, and could undermine, the peace process in the Middle East.

The full text of Ambassador Richardson's statement is available in U.N. Doc. A/52/PV.89, at 2.

* * * *

We have no doubt that most members of this Assembly are sincere supporters of the peace process in the Middle East. They want to see that process moving forward again and are frustrated by the fact that there has been a prolonged impasse. So are we. They want to encourage the parties to make rapid progress on the basis of agreements already achieved. They want to see these negotiations result, at long last, in an agreement that would lead to accelerated negotiations on permanent status. The United States strongly endorses this aim as well. No one has been more energetic in the pursuit of an agreement than we. The fact remains, however, that by taking this action the General Assembly will have made it more difficult to accomplish this objective. Focusing on symbols likely to divide, rather than on steps to promote cooperation, will lead us nowhere. Supporting unilateral gestures which will raise suspicion and mistrust between negotiating partners will not take us closer to our goal.

If this draft resolution is adopted, it will undermine our efforts to get the peace process back on track and will hurt everyone's interests, including those it is most intended to help. Exchanging momentum towards real progress on the ground for symbolic progress in this Hall does not strike us as a good bargain.

Moreover, if this draft resolution is adopted, it could also set a precedent. By overturning decades of practice and precedent in the General Assembly governing the participation of non-members

and observers, others who do not enjoy full member status in the United Nations may well press their own claims for enhanced status. This would have serious repercussions for political relations among Member States and would have a deleterious effect on the orderly conduct of United Nations business.

* * * *

4. Security Council Resolution Regarding Libya's Support for Terrorism

On November 30, 1999, Ronald Neumann, Deputy Assistant Secretary of State, Bureau of Near Eastern Affairs, spoke before the Middle East Institute on Libyan compliance with Security Council Resolutions related to the downing of Pan Am flight 103 over Lockerbie, Scotland, on December 21, 1998.

The full text of Mr. Neumann's remarks is available at *www.state.gov/www/policy_remarks/1999/991130_neumann_libya.html.*

---

* * * *

I have not yet addressed the topic that may be of greatest interest to this audience, the future of U.S.-Libyan relations. Until the surrender of the Pan Am 103 suspects for trial, any change in U.S.-Libyan relations was unimaginable. While change can now be imagined, it is not necessarily a near-term likelihood.

The chief current goal of the U.S. Government with respect to Libya is full compliance with the remaining Security Council requirements. These requirements are payment of appropriate compensation, cooperation with the Pan Am 103 investigation and trial, acceptance of the responsibility for the actions of its officials, and a renunciation and an end to support of terrorism and terrorist groups. If Libya complies fully with all these requirements, it will have met the demands of the Security Council.

We have said consistently that Libya can and should comply with these requirements. This remains true. On the other hand,

U.S. unilateral sanctions were imposed in response to Libya's support for terrorism before the international sanctions came into being. Any consideration of lifting U.S. sanctions before Libya has complied with international demands would be premature.

While U.S. sanctions were imposed because of concerns about Libyan support for terrorism, there have been other sources of contention in U.S.-Libyan relations over the past 3 decades, including Libyan efforts to obtain missiles and weapons of mass destruction. Indeed, Libya continues to pursue programs for the acquisition of WMD and missiles which would threaten U.S. interests, and we continue active efforts to impede them. We continue to want Libya to find a way to address these concerns. For example, if Libya joined the Chemical Weapons Convention, that would be a welcome step toward answering the international community's concerns regarding Libya's WMD programs, and a further signal of Libyan willingness to establish positive relations with other nations.

That said, Libya is not Iraq. We do not seek to maintain sanctions until there is a change of regime in Tripoli. We have seen definite changes in Libya's behavior, specifically declining support for terrorism and increasing support for peace processes in the Middle East and Africa. We hope such changes signal Libya's willingness to behave as a responsible member of the international community.

We would welcome a Libya that complied with all aspects of all UN Security Council resolution conditions, that refrained from the use of terror or support for terrorist groups to pursue its agenda, that abjured weapons of mass destruction, and that helped to bring about peaceful resolutions to regional conflicts.

C. NORTH ATLANTIC TREATY ORGANIZATION ("NATO")

On February 11, 1998, President Clinton transmitted to the Senate the Protocols on the North Atlantic Treaty of 1949 on the accession of Poland, Hungary, and the Czech Republic, signed December 16, 1997, at NATO Headquarters, Brussels, Belgium. The President's letter requested the advice and

consent of the Senate to ratification and transmitted for the Senate's information the report of the Secretary of State dated February 9, 1998, submitting the protocols to the President, excerpted below. *See* S. Treaty Doc. No. 105–36. The NATO-Russia Founding Act on Mutual Relations, Cooperation and Security Building, signed May 27, 1997, and discussed in the excerpt below, was signed May 27, 1997, *reprinted in* 36 I.L.M. 1006 (July 1997). *See also* 92 Am. J. Int'l L. 491, 494 (1998).

---

* * * *

THE PRESIDENT: I have the honor to submit to you, with a view to its transmission to the Senate for advice and consent to ratification, Protocols to the North Atlantic Treaty of 1949 on the accession of Poland, Hungary, and the Czech Republic. These protocols were opened for signature at Brussels on December 16, 1997, and were signed on behalf of the United States of America and the other parties to the North Atlantic Treaty.

Adding Poland, Hungary, and the Czech Republic to the NATO Alliance will contribute materially to the national security of the United States. It will advance the efforts we have undertaken with our allies and partners to build an undivided, democratic, and peaceful Europe, which in turn reduces threats to our own national interests. It will strengthen the stability of a region that helped spawn this century's world wars and the Cold War, which we prosecuted at a cost of trillions of dollars and hundreds of thousands of American lives. It will give us capable new allies willing and able to defend our common interests. It will demonstrate continuing American engagement and leadership in transatlantic affairs.

The addition of these three states to NATO is a central element of our transatlantic strategy. This strategy aims to strengthen the favorable security environment in the region created by the seminal events of the past decade: the end of the Cold War, the collapse of the Warsaw Pact, the dissolution of the Soviet Union itself, the rise in its place of a democratic Russia and other newly independent states, the establishment of market democracies throughout Central Europe, the peaceful reunification of Germany, and the conclusion

of agreements to reduce and stabilize conventional and nuclear armaments throughout the region.

These transforming events reduce the likelihood of large-scale aggression in Europe, but also present a host of new challenges and dangers. Threats stemming from the proliferation of weapons of mass destruction and conflicts fueled by ethnic or religious tensions, such as in Bosnia, loom immediately. Over the longer term, Europe could face the possibility of renewed aggression or threats to its interests. Europe's new democracies must be more fully integrated into the transatlantic region's security, economic, and political institutions in order to prevent the erosion of recent democratic gains and the possibility of conflict.

All these require continuing American engagement in the region's security affairs and changes in European and transatlantic security institutions. To this end, we have strengthened the role of the Organization for Security and Cooperation in Europe, opened the Organization for Economic Cooperation and Development to new members, pursued the adaptation of the Treaty on Conventional Forces in Europe, worked closely with the European Union and urged its enlargement, supported democratic and market reforms in Russia, Ukraine, and the other newly independent states, and pursued initiatives with states in the region, such as the Charter of Partnership signed with the three Baltic states on January 16.

NATO's unique attributes—an unrivaled military capability, an integrated command structure, and a primary focus on the collective defense of its members—require that this Alliance remain the keystone of our involvement in the transatlantic region's security affairs. Those attributes made NATO a principal instrument of our successful effort to defend the territory and values of the North American and European democracies during the Cold War, and made NATO history's most successful Alliance.

Since then, the Alliance has repeatedly demonstrated its continuing utility and competence. NATO's success in stopping the war in Bosnia underscores its military effectiveness. NATO's completion last December of a thorough reform of its command structure, reducing the number of commands from 65 to 20, testifies to the premium it places on operational coherence. The addition of new members from Central Europe, along with other

adaptations in the Alliance's operations and command structure, will further strengthen NATO's effectiveness, protect more of Europe from future threats, and bolster the development of a Europe whole and free. Specifically, the addition of these three democracies to the Alliance will increase the security of the United States in four ways.

First, it will reduce the prospect of threats to Europe's security, such as those we have seen throughout this century, which could harm American interests and potentially involve American forces. Integrating Central European states into NATO will reduce the chances of conflict by ensuring that such states pursue cooperative rather than competitive security policies. It also will help deter potential threats to this region from materializing. These include the dangers posed by the proliferation of weapons of mass destruction and the means for their delivery. NATO's enlargement can also help address the possibility, although we see it as unlikely, that Russia's democratic transition could fail and that Russia could resume the threatening behavior of the Soviet period. By engaging Russia and enlarging NATO, we will give Russia every incentive to deepen its commitment to democracy and peaceful integration with the rest of Europe, while foreclosing more destructive alternatives.

Second, adding Poland, Hungary, and the Czech Republic to NATO will make the Alliance stronger and better able to address Europe's security challenges. These states will add approximately 200,000 troops to the Alliance, a commitment to common values and political goals, and a willingness to contribute to the security of the surrounding region, as they have demonstrated through their contribution of over 1,000 troops to the mission in Bosnia. The military and strategic assets of these states will improve NATO's ability to carry out what is and will remain its core mission, collective defense, as well as its other missions.

Third, the process of adding new states to NATO bolsters stability and democratic trends in Central Europe. Partly in order to improve their prospects for membership, states in the region have settled border and ethnic disputes with neighboring states, strengthened civilian control of their militaries, and broadened protections for ethnic and religious minorities. Such actions help

to prevent conflicts in the region that could adversely affect American security and economic interests.

Fourth, NATO's enlargement, with other elements of our transatlantic strategy, advances European integration and moves the continent beyond its forced division of the past half century. The perpetuation of Europe's Cold War dividing line would be both destabilizing the morally indefensible. To help erase that line, NATO launched the Partnership for Peace program with 27 non-NATO states, opened its doors to new members, inaugurated a constructive relationship with Russia through the NATO-Russian Founding Act, signed a new charter with Ukraine, and created the Euro-Atlantic Partnership Council.

These Protocols propose to add Poland, Hungary, and the Czech Republic to NATO as full members, with all privileges and responsibilities that apply to current allies. The core commitment to these three states will be embodied in the existing text of the North Atlantic Treaty of 1949, including the central collective defense provision in Article 5, which has proved its reliability across the decades of the Treaty's existence. Article 5 represents our country's solemn commitment to the security of the other allies, but the Treaty reserves to each NATO member, including the United States, decisions about what specific actions to take should a NATO member be attacked, and fully preserves Congress' Constitutional role in decisions regarding the use of force. During the Fall of 1997, NATO's military authorities concluded the Alliance would be able to meet the Article 5 and other security assurances to the new states from their first day of NATO membership.

The decision to enlarge NATO's membership results from intensive analysis of the implications of this initiative and the qualifications of the three states now proposed for admission. At the Brussels summit in January 1994, NATO declared that the Alliance remained open to membership for other European states, and created the Partnership for Peace program in part to help prepare interested states for possible membership. The Alliance's September 1995 Study on NATO Enlargement set out the rationale and process for adding new members. At its Madrid summit in July 1997, the Alliance invited Poland, Hungary, and the Czech

Republic to begin the process of accession, and declared its determination to keep the door open for other states interested in joining NATO. Between September and November of 1997, NATO held four rounds of accession talks in Brussels with Poland, and five each with Hungary and the Czech Republic. These discussions examined in detail the three states' military capabilities, their willingness to contribute forces to NATO activities, and their readiness to accept the political and legal obligations of NATO membership. These discussions were based in part on Defense Planning Questionnaire responses completed by each of the three states; these questionnaires are NATO's standard instrument for obtaining information on the military contributions of member states.

During the accession talks, the three states accepted NATO's broad approach to security and defense, as outlined in its Strategic Concept and subsequent Alliance statements. They confirmed their intention to participate fully in NATO's military structure and collective defense planning and, for the purpose of taking part in the full range of Alliance missions, to commit the bulk of their armed forces to the Alliance. They accepted the need for standardization and interoperability as part of the foundation for multinationality and flexibility. They expressed their readiness to accept the nuclear element of NATO's strategy and policy and the Alliance's nuclear posture. They accepted NATO's restrictions and procedures for the handling of sensitive information. They also recognized and accepted that the Alliance rests upon a commonality of views, based on the principle of consensus in decision making, and expressed a readiness to contribute to attaining such consensus. Finally, they agreed to assume shares of NATO's common-funded budgets that cumulatively constitute slightly over four percent of the total.

On November 10, 12, and 17, 1997, respectively, the Czech Prime Minister, Polish Foreign Minister, and Hungarian Foreign Minister wrote to NATO Secretary General Javier Solana to confirm that, on the basis of the completed accession talks, their states desired to join the North Atlantic Treaty Organization and were willing to accept in full all the obligations and commitments pertaining to their membership. At NATO's Ministerial on

December 16 in Brussels, I joined all fifteen other NATO ministers in agreeing to make these states full members, subject to the ratification of member governments.

Article 10 of the North Atlantic Treaty states that the Alliance may add "any other European state in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area." It was on that basis that the Alliance added Greece and Turkey in 1952, the Federal Republic of Germany in 1955, and Spain in 1982. The unanimity of NATO leaders in welcoming Poland, Hungary, and the Czech Republic into the Alliance reflects the qualifications of each of these states and a confidence that each of them will, in fact, make meaningful contributions to transatlantic security.

* * * *

The addition of these three states to the Alliance is part of a strategy to improve not only their security and that of current NATO members, but also all other states of Europe, including the Russian Federation. It is the intent of the United States, and of NATO, to avoid any destabilizing redivision of the European continent, and instead to promote its progressive integration. The Alliance declared at its Madrid summit that it will leave the door open for the addition of other new members in the future, and that it will review this process at its next summit, which will be held in Washington in April 1999. It is encouraging that states that aspire to NATO membership, but have not yet been invited to join the Alliance, nonetheless welcomed the series of enlargement decisions at Madrid, the creation of the Euro-Atlantic Partnership Council, and similar steps as beneficial to their own security.

The NATO-Russia Founding Act, signed in May of 1997, has special importance in this regard. The Founding Act opened the way to a new and constructive relationship between the Alliance and Russia. It therefore complements the efforts of individual allies to see a democratic, peaceful Russia integrated into the community of European nations and security structures. To that end, the Founding Act created a new forum, the Permanent Joint Council, which allows NATO and Russia to pursue security issues of mutual interest. The Council first convened at the Ministerial level on

September 26 in New York, met among Defense Ministers in Brussels on December 2, and again among Foreign Ministers on December 17.

The Founding Act, the Permanent Joint Council, the integration of Russian forces in the mission in Bosnia, and other actions by NATO stand as evidence to the Russian people that the Alliance's enlargement in no way will threaten Russia's security, but rather will enhance it by deepening democratic stability in Europe. The Founding Act and Permanent Joint Council advance Russia's cooperation with NATO and integration in European affairs, but they also safeguard NATO's freedom of action and the integrity of its decisionmaking. The Founding Act places no restrictions on NATO's ability to respond to the security environment as its own members see fit. Similarly, the Permanent Joint Council has no power to direct or veto actions by the North Atlantic Council, which remains NATO's supreme decisionmaking body. Moreover, all actions within the Permanent Joint Council must proceed by consensus, which provides the United States and each other NATO member with an effective veto over proposed points of discussion or action. The Ministerial meetings of the Permanent Joint Council to date demonstrates that it can be a useful forum for advancing relations with Russia, and that it will not adversely affect NATO's progress on internal issues such as the Alliance's enlargement. NATO's enlargement and related adaptations, which will enhance the security of its members and partners, also will entail financial costs to the United States and our allies over the coming years. At the Madrid summit in July 1997, NATO's leaders commissioned a study of the military requirements of the Alliance's enlargement, and of the resource implications of meeting those requirements. The declaration from that summit expressed the confidence of NATO's leaders that "Alliance costs associated with the integration of new members will be manageable and . . . the resources necessary to meet those costs will be provided." The studies completed by the Alliance this past Fall confirm this view. They estimate that the addition of these three members will require approximately $1.5 billion in expenditures from NATO's common-funded military budgets over the next 10 years. The United States currently provides about one quarter of these common-funded budgets and will

continue to do so after the addition of the new states. Thus the additional costs to the United States of adding these three states to the Alliance is estimated to be about $400 million over the next ten years. Adding other states to NATO in the future likely will entail costs as well, although it is not possible to estimate these without knowing which states might be invited and when.

* * * *

The Protocols to the Treaty of 1949 for each of the three states are identical in structure and composed of three Articles. Article I provides that once the Protocol has entered into force, the Secretary General of NATO shall extend an invitation to the named state to accede to the North Atlantic Treaty, and that, in accordance with Article 10 of the Treaty, the state shall become a party to the Treaty on the date it deposits its instrument of accession with the Government of the United States of America. Article II provides that the Protocol shall enter into force when each of the parties to the North Atlantic Treaty has notified the Government of the United States of America of its acceptance of the Protocol. Article III provides for the equal authenticity of the English and French texts, and for deposit of the Protocol in the archives of the Government of the United States of America, the depository state for North Atlantic Treaty purposes. The addition of these three states to the Alliance, along with the other elements of our transatlantic strategy, will enable NATO to help accomplish for Europe's east what it has accomplished for Europe's west over the past half century. It will safeguard our own country's vital interests in Europe's well-being, and help ensure that aggression, conflict, and repression do not once again visit that continent as they have too often, and at terrible cost, throughout our lifetimes. I therefore convey these protocols to you with high expectations that their ratification will further strengthen the peace and security of the transatlantic region well into the approaching century.

On March 6, 1998, the Senate gave its advice and consent to ratification, with nine declarations and six conditions. 144 CONG. REC. S4217 (May 4, 1998). The Protocols entered into force on December 4, 1998. On May 21, 1998, President

Clinton provided the following certification on conditions related to the operation of NATO. 34 WEEKLY COMP. PRES. DOC. 940 (May 25, 1998). *See* further discussion of conditions on ratification in Chapter 4.B.4.c.

TO THE SENATE OF THE UNITED STATES :
In accordance with the resolution of advice and consent to the ratification of the Protocols to the North Atlantic Treaty of 1949 on the Accession of Poland, Hungary, and the Czech Republic, adopted by the Senate of the United States on April 30, 1998, I hereby certify to the Senate that;

In connection with Condition (2), (i) the inclusion of Poland, Hungary, and the Czech Republic in NATO will not have the effect of increasing the overall percentage share of the United States in the common budgets of NATO; (ii) the United States is under no commitment to subsidize the national expenses necessary for Poland, Hungary, or the Czech Republic to meet its NATO Commitments; and (iii) the inclusion of Poland, Hungary, and the Czech Republic in NATO does not detract from the ability of the United States to meet or to fund its military requirements outside the North Atlantic area; and

In connection with Condition (3), (A) the NATO-Russia Founding Act and the Permanent Joint Council do not provide the Russian Federation with a veto over NATO policy; (B) the NATO-Russia Founding Act and the Permanent Joint Council do not provide the Russian Federation any role in the North Atlantic Council or NATO decision-making including (i) any decision NATO makes on an internal matter; or (ii) the manner in which NATO organizes itself, conducts its business, or plans, prepares for, or conducts any mission that affects one or more of its members, such as collective defense, as stated under Article V of the North Atlantic Treaty; and (C) in discussions in the Permanent Joint Council (i) the Permanent Joint Council will not be a forum in which NATO's basic strategy, doctrine, or readiness is negotiated with the Russian

Federation, and NATO will not use the Permanent Joint Council as a substitute for formal arms control negotiations such as the adaptation of the Treaty on Conventional Armed Forces in Europe, done at Paris on November 19, 1990; (ii) any discussion with the Russian Federation of NATO doctrine will be for explanatory, not decision-making purposes; (iii) any explanation described in the preceding clause will not extend to a level of detail that could in any way compromise the effectiveness of NATO's military forces, and any such explanation will be offered only after NATO has first met its policies on issues affecting internal matters; (iv) NATO will not discuss any agenda item with the Russian Federation prior to agreeing to a NATO position within the North Atlantic Council on that agenda item; and (v) the Permanent Joint Council will not be used to make any decision on NATO doctrine, strategy, or readiness.

D. INTERNATIONAL MARITIME ORGANIZATION

On October 1, 1996, President William J. Clinton transmitted to the Senate for advice and consent to ratification amendments to the Convention on the International Maritime Organization, signed at Geneva, March 6, 1948, 9 UST 621 ("the IMO Convention"). *See* S. Treaty Doc. No. 104–36. The amendments were adopted on November 7, 1991, and November 4, 1993, by the Assembly of the International Maritime Organization ("IMO") at its seventeenth and eighteenth sessions. The Senate gave advice and consent on June 26, 1998, and the 1993 amendments entered into force for the United States on November 7, 2002. The 1991 amendments are not in force. The excerpt below from the President's transmittal describes the amendments.

---

* * * *

The United States is the world's largest user of international shipping. These amendments strengthen the International Maritime

Organization's capability to facilitate international maritime traffic and to carry out its activities in developing strong maritime safety and environmental protection standards and regulations. The IMO's policies and maritime standards largely reflect our own. The United States pays less than 5 percent of the assessed contributions to the IMO.

The 1991 amendments institutionalize the Facilitation Committee as one of the IMO's standing committees. The Facilitation Committee was created to streamline the procedures for the arrival, stay and departure of ships, cargo and persons in international ports. This committee effectively contributes to greater efficiencies and profits for the U.S. maritime sector, while assisting U.S. law enforcement agencies' efforts to combat narcotics trafficking and the threat of maritime terrorism.

The 1993 amendments increase the size of the IMO governing Council from 32 to 40 members. The United States has always been a member of the IMO governing Council. Increasing the Council from 32 to 40 Member States will ensure a more adequate representation of the interests of the more than 150 Member States in vital maritime safety and environmental protection efforts worldwide.

The 1991 amendments institutionalize the Facilitation Committee as one of the IMO's main committees. The 1993 amendments increase the size of the Council from 32 to 40 members, thereby affording a broader representation of the increased membership in the IMO's continuing administrative body.

Support for these amendments will contribute to the demonstrated interest of the United States in facilitating cooperation among maritime nations. To that end, I urge that the Senate give early and favorable consideration to these amendments and give its advice and consent to their acceptance.

Cross-references

ILC Draft Articles on State Responsibility, **Chapter 8.A.10.**
Role and structure of Committee on International Cooperation in the Peaceful Uses of Outer Space, **Chapter 12.B.1.a.**

Chapter 8

International Claims and State Responsibility

A. GOVERNMENT-TO-GOVERNMENT CLAIMS

1. Holocaust-related Claims

a. Tripartite Gold Commission

On September 27, 1946, the United States, France, and the United Kingdom established the Tripartite Commission for the Restitution of Monetary Gold ("Tripartite [Gold] Commission" or "TGC") to implement Part III of the Agreement on Reparation signed in Paris on January 14, 1946.

The Tripartite Commission issued its final report on September 3, 1998, which described the TGC's purpose and status as follows:

> [Part III] of the Agreement, entitled "Restitution of Monetary Gold" . . . provided that all the monetary gold found in Germany by the Allied Forces, and any monetary gold recovered from third countries to which it was transferred from Germany should be pooled for distribution as restitution to claimant countries in proportion to their respective losses of gold through looting or wrongful removal to Germany. The Governments of the United States of America, France and the United Kingdom were to receive claims and distribute the gold.

* * * *

> For the sake of convenience, the Tripartite Commission was established in Brussels. . . . The status of the Tripartite Commission as an international organization attracting privileges and immunities in respect of its official functions was recognized in Belgian law on 1 August 1952; this law being retroactive to 27 September 1946 . . . The Commissioners and the Secretary General . . . were also specifically accorded the appropriate privileges and immunities.

The Final Report, Tripartite Commission for the Restitution of Monetary Gold, Brussels (Sept. 3, 1998), available at *www.state.gov/s/l/c8183.htm*.

A preliminary distribution of 80 percent of the gold was made in the period from October 1947 to November 1950 to Austria, Belgium, Czechoslovakia, Italy, Luxembourg, the Netherlands and Yugoslavia. Following the 1958 adjudication of all claims submitted to it (except Czechoslovakia's), the TGC made a "quasi-final" distribution of gold, largely completed in 1959. Subsequent distributions to the Netherlands, Poland, and Czechoslovakia were made in 1973, 1976, and 1982, respectively. The last claim under these procedures was paid on October 29, 1996, when Albania received its combined preliminary and quasi-final shares, as discussed in the Final Report.

Work of the TGC after 1996 addressing claims on the residual gold pool is described in excerpts below from the final report. The full text of the final report is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

22. In the summer of 1996, as an end to the Tripartite Commission's work was in sight, an upsurge in public interest in the question of looted gold and other assets belonging to victims of the Nazi regime focused attention on the fact that there would remain in the gold pool about five and a half tons of gold after Albania had received its preliminary and quasi-final distribution. Some Jewish organizations sought to have this residual gold pool

donated in large part to these organizations to help finance activities for the benefit of victims of the Nazi regime or their descendants. They argued that some of the gold was not monetary but had been looted from individuals.

23. The British and U.S. Governments undertook research into their official archives, many of which had been available to the public for some years. While this research was carried out, the final distribution of the gold pool was delayed. The results of the Governments' researches revealed that an unquantifiable but small amount of non-monetary gold might inadvertently have been placed in the gold pool. The Nazis often resmelted gold to conceal its origin.

24. At an enlarged meeting of the Tripartite Commission on 27 June 1997, in which representatives from capitals took part, it was agreed that the Tripartite Commission should launch the final distribution by informing the claimant Governments by diplomatic Note of the amount of gold due to them in the final distribution and that the Tripartite Commission was ready to proceed. Simultaneously, the three Governments would inform the claimant Governments by diplomatic Note of the findings of the British and U.S. researches and suggest that they might wish to consider placing all or some of their final share in a fund being established to aid needy victims of Nazi persecutions. This exercise took place in early August when the Chairman and Secretary General of the Tripartite Commission called together the diplomatic representatives in Brussels of the claimant countries (with the exception of those of the successor states to the former Yugoslavia) and handed over copies of the diplomatic Notes referred to above.

* * * *

The Governments of France, the United Kingdom, and the United States announced the formal closure of the TGC on September 9, 1998, as excerpted below. 9 Dep't St. Dispatch 24 (Oct. 1998), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html; see also www.state.gov/www/regions/eur/980909_gold_dissolution.html*.

---

* * * *

3. With one exception, all distributions from the gold pool have now been concluded and waivers of claims have been received from each of the recipient countries. A small remaining share of gold and currency allocated to the successor states of the former Yugoslavia has not yet been distributed, but will be held by the three Governments pending agreement among those successor states on its disposition. The Commission has delivered a final report on its work to the three Governments, which have in turn arranged for its delivery to each of the parties to the Paris Agreement. Accordingly, the Commission's work is now completed, and its archives have been transferred to Paris, and will be made available to the public.

4. The Tripartite Commission was able to meet about 64% of the validated claims on the gold pool. . . .

5. In the view of the three Governments, it is appropriate under the circumstances that prevail today—over 50 years after the conclusion of the Paris Agreement—to consider the process of collecting gold for the gold pool complete. At the same time, the three Governments remain mindful of the possibility that additional Nazi-looted gold could yet come to light. The three Governments envisage that any such gold would be handled in a manner consistent with the Paris process.

* * * *

b. Overview of U.S. actions

On September 14, 1999, Stuart E. Eizenstat, then Deputy Treasury Secretary, testified before the House Banking Committee on Holocaust-related issues in which the United States was involved. *World War II Assets of Holocaust Victims: Hearing Before the House Comm. on Banking and Financial Services,* 106th Cong. 5–17, 99–125 (1999) (statement of Stuart E. Eizenstat, Deputy Secretary, Department of Treasury). Excerpts below from his testimony summarize major developments in this area during the 1990s.

Additional documents relating to U.S. involvement in holocaust issues are available at *www.state.gov/www/regions/*

eur/holocausthp.html. See B.4. below concerning litigation mentioned in Mr. Eizenstat's testimony.

---

* * * *

The effort to bring a measure of justice to Holocaust survivors and their families did not begin with this Administration or this Congress. It has been a consistent part of U.S. policy for half a century.

* * * *

More recently, in 1990, as part of our agreement to the reunification of Germany, the U.S. asked for and received assurances that the German restitution and compensation programs would be extended to victims living in East Germany who, under the policies of the former German Democratic Republic, had until then been denied adequate compensation. In 1996–97, the U.S. Government was directly involved in encouraging the German government to extend the program to victims living in the Russian Federation, Poland, Belarus and the Ukraine who had been "double victims" of both Nazism and Communism.

The U.S. Government has also concluded its own bilateral agreements on this subject. One, concluded in 1992, covered claims for property located in East Germany confiscated by the GDR from U.S. citizens. Additional agreements for one-time payments to U.S. citizens interned during the War in concentration camps were also negotiated.

All of these property restitution and compensation programs, while significant, were not sufficiently comprehensive and thus left gaps. What we have been doing is trying to close these gaps.

* * * *

The International Community

In attempting to achieve justice for Holocaust survivors and their families, we have been joined by many nations. In 1997 the London Gold Conference brought together 42 countries, seeking to uncover the full implications of the Nazi plundering of gold during World War II. At that conference, the international

community created a Nazi Persecutee Relief Fund with assets of $61 million, much of which was contributed by nations in the form of gold. The fund is an international effort with contributions from 18 countries. Managed by the British Government, with the account held by the Federal Reserve Bank of New York, the Nazi Persecutee Relief Fund channels money precisely to provide basic relief to survivors of Nazi persecution. Each country can target its contribution. With respect to the U.S. pledge to provide $25 million to the Fund, for example, for the first FY 1998 tranche of $4 million, we chose to spend the money providing support to the neediest "double victims" (of both Nazism and Communism) abroad, and selected a proposal by the Conference on Jewish Material Claims Against Germany, an organization representing 23 Jewish NGOs globally, to administer it. The Claims Conference, using its expertise in this field and its pre-existing contacts with local aid networks in Eastern Europe and the former Soviet Union, is currently bringing needed food, medicine and clothing to Holocaust survivors in Ukraine, Belarus, Moldova, and the Baltics. We look forward to working with Congress as we select projects for the FY1999 contribution and as we seek to obtain funding for the FY 2000 final balance of the U.S. pledge.

In 1998, the international community again met, this time at our invitation in Washington, to deal with other assets stolen during the Holocaust and never returned, among them art, insurance, and communal property. This groundbreaking conference set us on our current path, which I shall detail later. Also in 1998, the International Commission on Holocaust Era Insurance Claims was established under the Chairmanship of former Secretary of State Eagleburger, to honor unpaid insurance claims and create a humanitarian fund for victims. In short, we have seen in the last few years an sharp increase in activity, reflecting a notable international consensus to achieve a measure of justice for Nazi victims of the 20th century, so that we can enter the 21st century with a clearer conscience.

Slave and Forced Labor

* * * *

Our current involvement in this issue dates to the Fall of 1998, when I was asked by the German government to help find a resolution between class action claimants who had filed suit in U.S. courts for wages and damages arising from slave and forced labor during the Nazi era and 16 defendant German corporations. The German companies, recognizing their moral responsibility for the behavior of private companies during the Nazi era, proposed to establish a foundation which would provide payment to those who were forced to work for private industry as well as those who were victims of other actions during the Nazi era in which German companies participated. The German government, in support of its companies, has proposed to establish a government foundation, which would compensate many others who were forced to work for the Nazi state who might not be covered by the private sector foundation.

* * * *

There are two main reasons why we support resolving these claims through a negotiated settlement rather than trial. First, the age of the survivors—now averaging around 80 years—necessitates an expeditious solution. Second, the number of victims who would be covered by the two German foundations would be much greater than those covered by the lawsuits pending in United States Courts. Thus, justice will be better served if agreement can be reached to establish the German foundations, rather than put Holocaust victims at risk in uncertain and lengthy litigation.

* * * *

Insurance

On insurance, efforts to provide rapid and fair resolution of claims have intensified. The International Commission on Holocaust Era Insurance Claims, created in November 1998, has been charged with establishing a just process that will expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust. Under the very able leadership of former Secretary of State Lawrence Eagleburger, the Commission has achieved significant progress in creating a claims-based process to pay outstanding insurance claims in the lifetimes of Holocaust survivors. The International

Commission includes five leading European insurance companies, representatives of international Jewish survivor and other Jewish organizations, U.S. and European insurance regulators, and the State of Israel. Under Chairman Eagleburger, a fact-based effort to resolve Holocaust insurance claims promptly and fairly is being negotiated. The objective is to provide expeditious resolution of insurance claims without resorting to lengthy litigation that would delay payment to survivors.

* * * *

We continue to believe that the International Commission is the best vehicle for resolving Holocaust-era insurance claims and have great confidence in Chairman Eagleburger's leadership. We commend the five insurers that have voluntarily agreed to join the International Commission—Allianz, Generali, AXA, Zurich, and Winterthur. These companies' commitment to the Commission, demonstrated by the $90 million escrow fund established at the beginning of the process, and their willingness to negotiate on these difficult issues, has helped make possible the progress to date. We call on all insurance companies that hold policies from the Holocaust era to participate in this process. And we call upon all of our states to give those companies participating in this process a safe harbor from regulatory action as they complete the claims process and begin making payments.

Art

Mr. Chairman, I would now like to turn to an issue with which you have great experience and to which you made a significant contribution when you chaired that portion of the Washington Conference on Holocaust-Era Assets dedicated to stolen art. Significant initial progress has been made to restitute art that was confiscated by the Nazis during World War II. The 44 nations participating in the Washington Conference reached consensus on a set of eleven principles relating to Nazi-confiscated art that envision a massive cooperative effort to trace the current location of this art, publicize this information so that pre-War owners can come forward, and reconcile competing claims of ownership to produce just and fair solutions. The Conference specifically urged

nations to encourage the use of alternative dispute resolution mechanisms instead of lengthy court proceedings to accomplish our mutual goals more quickly. Since the Conference last December, there have been many positive developments in this area [in steps taken to return individual works of art.]

* * * *

In the United States, the guidelines of the American Association of Museum Directors, similar to the Principles of the Washington Conference, which call upon museums to research their holdings to see if there are any works with a Nazi-World War II provenance, are in the process of implementation. So far, the Association reports that no museum has reported finding such a work. If any are found, the guidelines call upon museums to publicize that fact, so that pre-War owners and their heirs can come forward and a just and fair solution can be worked out between them and the museum.

* * * *

Communal and Private Property

In the area of property restitution, there has been slow but steady progress in the countries of eastern and central Europe during the past few months. Much remains to be done, however. As these countries seek to join western political and economic institutions, it is important that they adopt laws and practices on property which are consistent with international standards. It is toward that objective that we have been working since I started my activities as U.S. Special Envoy on Property Restitution in eastern and central Europe in 1995. I have visited all of the involved countries at least once to urge the adoption of equitable, transparent and non-discriminatory laws and practices. Officials at all levels of the executive branch have followed up my initiatives, as have many Members of Congress in their meetings with foreign government officials both here and abroad.

* * * *

Swiss Bank Settlement

In August of 1998, a settlement was arrived at in principle in which our government played a significant part. Under it, two

Swiss banks, who were defendants in a class action brought in the Federal District Court in New York alleging they had failed to return dormant bank accounts to the heirs of account holders who died in the Holocaust would settle the suit with a payment of $1.2 billion. Since that time, the parties, the court and a court-appointed special master have been engaged in the lengthy procedures required under class action settlements. The notification process is still underway. A fairness hearing is scheduled for the end of November, after which a distribution plan must be drawn up for comment and subsequent presentation to the court for approval. The earliest date for commencement of distribution is the late spring of next year. While all involved in the case are proceeding conscientiously to conclude it, this shows the drawbacks of this type of litigation when members of the class are of advanced years. We have benefited from this experience in working on the Foundation solution to the slave/forced labor issue, where all involved intend that distribution will be delayed no longer than six months after final agreement.

Presidential Advisory Commission

Last year, the Congress unanimously passed legislation sponsored by you, Mr. Chairman, creating the Presidential Advisory Commission on Holocaust Assets in the United States, on which I serve and on whose behalf I can speak. The Commission is composed of 21 members, including 8 members of Congress and is chaired by Edgar Bronfman, who has dedicated years to this cause.

The Commission is hard at work fulfilling the mandate given to it by the Congress: to conduct original research into what happened to the assets of Holocaust victims, including art and cultural objects, gold, and other financial instruments, that passed into the possession or control of the U.S. Federal government, including the Federal Reserve. The Commission will then deliver a report to the President and Congress with the facts it has found and its policy recommendations. Similar historical commissions have been established in 17 other countries.

* * * *

Education and Remembrance

Perhaps the most significant achievement of the Washington Conference on Holocaust-Era Assets was the encouragement it gave to the cause of Holocaust education. . . . That is why the President pledged the U.S. to be a founding member of an international task force to promote Holocaust education worldwide. In addition to the United States, members of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research include France, Germany, Israel, Italy, the Netherlands, Poland, Sweden and the United Kingdom. Israel currently chairs the task force.

* * * *

c. 1995 Nazi persecution claims agreement

In March 1995, German Chancellor Kohl wrote President Clinton to offer an agreement of the kind Germany had concluded with many European countries, in order to compensate Hugo Princz (of Highland Park, New Jersey) and comparable U.S. nationals who were victims of Nazi persecution. On September 19, 1995, U.S. Ambassador to Germany Charles E. Redman and German Foreign Office State Secretary Dr. Hans-Friedrich von Ploetz signed in Bonn the Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution, *reprinted in* 35 I.L.M. 193 (1996). The agreement, excerpted below, covered persons, including Mr. Princz, who were U.S. nationals at the time they were subjected to measures of Nazi persecution and suffered loss of liberty or damage to body or health as a result. An exchange of notes dated September 19, 1995, between Ambassador Redman and Secretary von Ploetz established that "[a]ny payment by the Government of the Federal Republic of Germany under this Agreement will be only for the benefit of United States nationals who were victims of National

Socialist measures of persecution by reason of their race, their faith or their ideology." *Id.* The agreement did not cover persons who were subjected to forced labor while not being detained in a concentration camp. For subsequent settlement concerning forced labor claims, *see Digest 2000* at 446–50.

The funds provided by Germany pursuant to Article 2 of the agreement were distributed by the Department of State under the authority of 22 U.S.C. § 2668a to persons of whom the Department was aware, who were U.S. citizens at the time the persecution occurred, and who had not received payments from compensation programs funded by the German Government.

The agreement also provided for further negotiations after two years to provide compensation on the same basis to any additional American citizens who met the agreement's criteria. The Foreign Claims Settlement Commission ("FCSC") was authorized to receive any further cases identified under Article 2.2 and to determine whether they fell within the agreement. As described by the FCSC:

> Legislation passed in early 1996 authorized the Commission to receive and adjudicate cases of additional claimants, a process which it completed in March 1998. Following further negotiations, the German Government paid to the United States in June 1999 an additional lump sum of 34.5 million Deutschmarks (about $18 million) in final settlement of any and all claims of United States citizens against Germany for Nazi persecution in concentration camps, whether or not they were adjudicated by the Commission. The Department of the Treasury . . . completed the process of distributing the settlement fund to the claimants previously found eligible for awards.

See www.usdoj.gov/fcsc. *See also* discussion of Mr. Princz's earlier unsuccessful effort to sue Germany for damages in U.S. courts, *Princz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994), discussed in Chapter 10.A.2.b.(1).

Article 1

This Agreement shall settle compensation claims by certain United States nationals who suffered loss of liberty or damage to body or health as a result of National Socialist measures of persecution conducted directly against them. This Agreement shall cover only the claims of persons who, at the time of their persecution, were already nationals of the United States of America and who have to date received no compensation from the Federal Republic of Germany. This Agreement shall, inter alia, not cover persons who were subjected to forced labor alone while not being detained in a concentration camp as victims of National Socialist measures of persecution.

Article 2

1. For the prompt settlement of known cases of compensation claims covered by Article 1, the Government of the Federal Republic of Germany shall pay to the Government of the United States of America three million Deutsche Marks within 30 days of the entry into force of this Agreement.

2. For any possible further cases not known at the present moment, both Governments intend to negotiate two years after the entry into force of this Agreement, an additional lump sum payment based on the same criteria as set forth in Article 1 and derived on the same basis as the amount under paragraph 1.

Article 3

The distribution of the amounts referred to in Article 2 to the individual beneficiaries shall be left to the discretion of the Government of the United States of America.

Article 4

1. Upon payment of the amount referred to in paragraph 1 of Article 2, the Government of the United States of America declares all compensation claims against the Federal Republic of Germany by the United States nationals benefiting under that paragraph for

damage within the meaning of Article 1 suffered by those nationals to be finally settled.

2. Upon payment of the amount referred to in paragraph 2 of Article 2, the Government of the United States of America declares all compensation claims against the Federal Republic of Germany by United States nationals for damage within the meaning of Article 1 to be finally settled.

3. A United States national shall benefit from a payment under this Agreement only if that national executes a waiver of all compensation claims within the meaning of Article 1 against the Federal Republic of Germany and against its nationals (including natural and juridical persons). At the request of the Government of the Federal Republic of Germany, the Government of the United States of America shall transmit such waivers to the Government of the Federal Republic of Germany.

* * * *

d. U.S. historical study

The U.S. research referred to in the TGC final report discussed in A.1.a. *supra,* was released by the Department of State in May 1997. Preliminary Study on U.S. and Allied Efforts To Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II, prepared by William Z. Slany, Historian of the Department of State, and coordinated by Ambassador Eizenstat, then Under Secretary of Commerce for International Trade and Special Envoy of the Department of State on Property Restitution in Central and Eastern Europe. In an introduction to the report, Ambassador Eizenstat described its contents as set forth below.

This report addresses a vital but relatively neglected dimension of the history of the Second World War and its aftermath, one that became the focus of intense political, diplomatic and media attention over the last year. It is a study of the past with implications for the future.

The report documents one of the greatest thefts by a government in history: the confiscation by Nazi Germany of an estimated $580 million of central bank gold—around $5.6 billion in today's values—along with indeterminate amounts in other assets during World War II. These goods were stolen from governments and civilians in the countries Germany overran and from Jewish and non-Jewish victims of the Nazis alike, including Jews murdered in extermination camps, from whom everything was taken down to the gold fillings of their teeth.

Our mandate from the President in preparing this report was to describe, to the fullest extent possible, U.S. and Allied efforts to recover and restore this gold and other assets stolen by Nazi Germany, and to use other German assets for the reconstruction of postwar Europe. It also touches on the initially valiant, but ultimately inadequate, steps taken by the United States and the Allies to make assets available for assistance to stateless victims of Nazi atrocities. It is in the context of this mandate that the report catalogues the role of neutral countries, whose acceptance of the stolen gold in exchange for critically important goods and raw materials helped sustain the Nazi regime and prolong its war effort. This role continued, despite several warnings by the Allies, even long past the time when these countries had any legitimate reason to fear German invasion.

* * * *

On the issue of what was referred to as "non-monetary" gold, the introduction concluded:

> The Reichsbank or its agents smelted gold taken from concentration camp internees, persecutees and other civilians, and turned it into ingots. There is clear evidence that these ingots were incorporated into Germany's official gold reserves, along with the gold confiscated from central banks of the countries the Third Reich occupied . . . [and that] a small portion of the gold that entered Switzerland and Italy included non-monetary gold from individual civilians in occupied countries and from concentration camp victims or others killed before they even reached the camps.

The report is available at *www.state.gov/www/regions/eur/rpt_9705_ng_links.html*.

In June 1998 the United States released a supplement to the preliminary study. U.S. and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury, coordinated by Stuart E. Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs, prepared by William Slany, Historian of the Department of State, available at *www.state.gov/www/regions/eur/rpt_9806_ng_links.html*.

The Foreword to the 1998 supplement explained U.S. efforts as follows:

> This supplementary report, like our preliminary study completed in May 1997, reflects a solemn commitment by the United States to confront the largely hidden history of Holocaust-related assets after five decades of neglect. We have pursued this goal on twin tracks: first, we have made accessible a massive body of documents and conducted research to fill in the historical record on the role of the U.S. Government and other governments during and after World War II; second, in consultation with governments and non-governmental organizations (NGOs) on both sides of the Atlantic, we have pushed ahead with a series of diplomatic initiatives to ensure that the completion of this historical record is coupled with an attempt to do justice, however belatedly, in order to honor the memory of the victims and to lift the lives of the survivors of the Holocaust.

In a briefing on release of the supplementary report, Mr. Eizenstat described its findings as set forth below. Mr. Eizenstat's briefing is also available at *www.state.gov/www/regions/eur/rpt_9806_ng_links.html*.

---

* * * *

Our most significant finding in our May 1997 study regarding the financing of the war was the overall movement of looted gold from occupied countries and individual victims flowing to and through Switzerland—primarily the Swiss National Bank—from Germany, and used by Germany to pay for its wartime imports. The Swiss National Bank must have known that some portion of the gold it was receiving from the Reichsbank was looted from occupied countries, due to the public knowledge about the low level of the Reichsbank's gold reserves and repeated warnings from the Allies. The gold received by the Swiss National Bank from the Reichsbank included some which was stolen from Holocaust victims and smelted into disguised gold bars; although there is no evidence that the Swiss National Bank knew of this latter fact.

These findings were confirmed by the bold and probing gold report just released by Switzerland's Bergier Commission on May 25, 1998, that even exceeded our own estimates of the amount of general and looted gold transferred by Germany to the Swiss National Bank. The Bergier Commission also specifically indicated that there was no longer any doubt that the governing board of the Swiss National Bank was informed at an early point in time that the gold they were handling was looted gold taken from other countries. Indeed, the Bergier Report goes even further and indicates—and I quote—"that attentive citizens could read in the Swiss press exactly where the gold which the Reichsbank was circulating came from." This is the kind of hard-hitting and objective analysis we have come to expect from Professor Bergier.

Our first report focused on how Nazi Germany financed its war effort. Switzerland figured prominently because our focus was on looted gold and the key role that that gold played in the German war effort. Today's report focuses on the equally important issue of the uses to which that looted gold was put—the ability of the Nazis to use Swiss francs they obtained in exchange for the gold they looted to purchase critical war materials from the other neutral countries necessary to sustain the war effort: Argentina, Portugal, Spain, Sweden, and Turkey.

By illuminating the trade as well as the financing side of the equation, our two reports together provide a seamless web, a comprehensive and integrated view of the important part the wartime

neutrals cumulatively played in the structure of the German war economy. We have focused on the factors which shaped their neutrality and their trading links with both the Axis and the Allies as well as on their handling of looted assets, essentially gold.

* * * *

A third major and new finding involved Nazi gold itself—new materials which have come to our attention since our first report. Let me summarize these as follows. First, we've arrived at new figures of looted gold. Our first report estimated that Switzerland received as much as $414 million—or about $3.5 billion in today's total—of looted and non-looted gold from Nazi Germany, of which we estimated $185 million to $289 million in those dollars were looted. These figures were increased by the recently-released Swiss Bergier Report, which estimated that some $440 million in total gold went to Switzerland—about $4 billion—of which $316 million, or $2.7 billion to $2.8 billion, was looted. These figures taken together—ours and the Swiss figures—now give us a higher and more definitive range of the total of looted and non-looted gold that flowed through Switzerland.

A second new finding with respect to gold is that presented in the separate annex [Annex I] prepared by the US Justice Department's Office of Special Investigations. Their work here is really quite pioneering and quite remarkable. New sources recently came to light that provided additional information about the infamous Melmer account at the Reichsbank, named after Bruno Melmer, the SS officer who was responsible for taking materials, possessions from concentration camp victims and others at killing centers and depositing them in an SS account in the Reichsbank. These new sources provide the most detailed data currently available for the valuable amounts of gold in the SS Melmer account, and yield an estimate of the total value of this gold markedly higher than previous estimates—indeed, two times the estimates in our initial report and in the Bergier Report.

* * * *

As to the funding of the Tripartite Gold Commission, the Foreword to the Supplementary Report concluded:

> . . . [T]he postwar negotiations that the United States, Britain, and France conducted with the wartime neutrals were protracted and failed to meet fully their original goals: restitution of the looted gold and the liquidation of German external assets to fund the reconstruction of postwar occupied Europe and to provide relief for Jewish and other non-repatriable refugees. This resulted from the intransigence of the neutrals after the War, dissension within Allied ranks, and competing priorities stemming from the onset of the Cold War. Less than $20 million ($14.9 million from Sweden alone) of the up to $240 million in looted gold acquired by the wartime neutrals, apart from Switzerland, was returned to the Tripartite Gold Commission to meet the claims from the central banks of 15 countries.

e. Nazi Persecutee Relief Fund

The 1997 U.S. preliminary report and similar reports prepared by other governments provided the basis for an international conference on Nazi gold, held in London in December 1997. The London Gold Conference, noted in A.2. *supra*, addressed the questions of establishing how much gold was stolen, where it went, and how final issues should be resolved.

Representatives of the governments attending the conference agreed to establish the International Fund for Needy Victims of Nazi Persecution for Holocaust survivors and their heirs, known as the Nazi Persecutee Relief Fund. The Fund was to be used largely to assist the "double victims" of both Nazism and Communism in Central and Eastern Europe. At that time, the United States made an initial pledge of $4 million for the fund. As noted in Ambassador Eizenstat's testimony, on February 13, 1998, President William J. Clinton signed into law the Holocaust Victims Redress Act, Pub. L. No. 105–158 (1998), providing $25 million for the Nazi Persecutee Fund and an additional $5 million for associated archival research. *See also* Under Secretary Stuart Eizenstat,

Closing Plenary Statement at the London Conference on Nazi Gold, December 4, 1997, available at *www.state.gov/www/policy_remarks/971204_eizen_nazigold.html*.

f. 1998 Washington Conference; Principles on Nazi-confiscated art

In remarks delivered at the close of the London Gold Conference, Ambassador Eizenstat noted, among other things, that "while the London conference has appropriately focused on gold, we began also to focus today on other assets—including real property, securities, bonds, insurance, and artworks." Closing Plenary Statement at the London Conference on Nazi Gold, December 4, 1997, available at *www.state.gov/s/l/c8183.htm*. He announced that the U.S. Holocaust Museum in Washington, D.C. was prepared to host a conference on these issues in the coming year.

The Washington Conference on Holocaust-Era Assets was held from November 30 through December 3, 1998. At its conclusion, the Conference issued the Principles on Nazi-confiscated art to address the treatment and disposition of artwork stolen by the Nazis, available at *www.state.gov/www/regions/eur/981203_heac_art_princ.html*. The proceedings of the Conference are available at *www.state.gov/www/regions/eur/wash_conf_material.html*.

---

* * * *

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.

II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.

III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
IV. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
VI. Efforts should be made to establish a central registry of such information.
VII. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
VIII. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
IX. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.
X. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
XI. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

* * * *

At the close of the conference, Ambassador Eizenstat, then Under Secretary of State for Economic and Business Affairs, emphasized U.S. support for the principles adopted.

Ambassador Eizenstat's remarks, excerpted below, are available at *www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_art.html*.

* * * *

The first three principles envision a massive cooperative effort to trace this art. We call upon museums to search the provenance of their holdings; on governments to open up their World War II and related archives to private researchers; for commercial galleries and auction houses to seek information, document, and make available what information they have. It is important to locate what was confiscated. It is equally important to know what was not confiscated, or what was restituted to the pre-war owners. The taint of "stolen art" should not be applied to works that do not deserve it.

Researchers in Switzerland, Austria, the Netherlands, and France are at work today tracing the provenance of artworks in their national collections. The international auction houses have redoubled their provenance investigations. Non-governmental organizations have launched projects to find lost art and help survivors and their families in the painful task of remembering what they owned and when and how it was seized. The guidelines issued by the American Association of Art Museum Directors and the Museum Directors Conference of the United Kingdom call for institutions to research their collections and make them available as well to outside researchers. All these practices are consistent with these principles. More and more nations are adopting them.

The fourth principle deals with gaps and ambiguities in the provenance of works. The vast displacement of art, the destruction of many records, and the furtive nature of the international market during the War mean there must be some leeway in establishing provenance. Where there is no bill of sale, a diary entry or an insurance listing might be acceptable evidence of pre-war ownership. If a work is not on a Nazi confiscation list, it may be in the archive records of the Monuments and Fine Arts Commission or the secret inventories of the French Resistance, or in other archival collections. Conversely, there may be circumstantial evidence that works were not stolen but sold at market, or restituted to families and subsequently sold. Provenance work is not easy. But I can say from experience that neither was it easy to trace the movement of

Nazi gold. Some said it would be impossible. Yet in 2 years of hard work we were able to do it, as was the Swiss Bergier Commission.

The next three principles—numbers 5, 6, and 7—deal with publicizing the information and encouraging resolution of the issues. They include circulating photos of the art and information about it everywhere in the world, through the traditional media and on the new electronic media. Maximum publicity will tell survivors and their families if their art still exists. It will also tell the international art community if questions still exist about a given work. I applaud the Government of France for its initiative in displaying on the Internet a portion of the unclaimed art restituted to France by the Allied military authorities-the so-called MNR collection. An impressive number of other nations and non-governmental organizations are also preparing databases and their own web sites.

* * * *

To illustrate the eighth principle, that solutions should be flexible and just, I commend to you the recent settlement of the disputed ownership of a painting by Degas, "Landscape With Smokestack." The claimant family produced a fairly clear record of ownership. The owner had paid full value with no knowledge of the wartime provenance. Both were in a position to wage a legal battle that could have gone on for years. Instead, they settled on partial payment for the family and donation of the work to the Art Institute of Chicago, where the public could enjoy it and a label accompanying the work acknowledged both parties. Art claims do not have to be winner-take-all propositions, which produce prolonged struggles in the courts, and drain the resources of both parties. In an atmosphere of good will, a wide range of solutions is there to be found.

And there are additional opportunities when the original owner is found to have died without heirs, the subject of the ninth principle. The art could be sold with the proceeds going to victims of the Holocaust and Jewish communities around the world. Or it could be displayed in museums and identified in ways that educate the public about the cultural losses of the Holocaust.

The tenth principle states that to ensure objectivity and to enhance public confidence in their work, national commissions in this field should have members from outside the government, such as art experts, historians and representatives of communities which were victims of the Holocaust and, where appropriate, distinguished persons from other countries.

The final principle—which I suggest today for the first time—speaks to the need to give the other principles vitality. Nations should take specific measures to apply these principles so they can more quickly accomplish our mutual goals. For example, they should strive to develop internal processes, making use of alternative dispute resolution mechanisms, to restitute looted property.

While the proceedings of the conference will be published shortly, they will remain open until the end of the millennium so that nations may submit reports on the progress they have made to put these principles into effect.

* * * *

g. International Commission on Holocaust-Era Insurance Claims

In a Memorandum of Understanding of August 25, 1998, European insurance companies, U.S. insurance regulatory authorities, and Jewish and survivor organizations agreed "that a just process shall be established that will expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust." Specifically, they agreed to establish an International Commission ("IC") and to "actively and voluntarily pursue the goal of resolving insurance claims of Holocaust victims through the IC." The full text of the memorandum, which provided further agreement on the process to be followed by the IC, is available at *www.icheic.org/pdf/ICHEIC_MOU.PDF*.

On October 21, 1998, the U.S. Department of State's Office of the Spokesman issued a press statement supporting the IC, as excerpted below.

The full text of the press statement is available at *http://secretary.state.gov/www/briefings/statements/1998/ps981021.html*.

---

* * * *

Under Secretary of State Stuart E. Eizenstat today commended the insurance companies, survivor organizations and governments that have agreed to work with the National Association of Insurance Commissioners (NAIC) on the International Commission on Holocaust-era insurance claims. . . .

> "We share fully the goals of the National Association of Insurance Commissioners, the World Jewish Congress, the Conference on Jewish Material Claims, and the insurance companies that have joined this process. We have been impressed with the cooperative spirit with which all the participants on the International Commission have approached this critical issue. This Commission, launched by the NAIC, represents a coordinated effort among several groups to resolve Holocaust-era claims promptly and equitably through a voluntary process."

The International Commission (IC) is having its first meeting today in New York City. The composition of the International Commission is balanced: six European and six American representatives, headed by a Chairman acceptable to all Commission members. Decisions will be made by consensus. The IC has a provision for observers from the European Commission, the Jewish community and the State Department. Under Secretary Eizenstat, who will be the State Department observer on the IC, designated J.D. Bindenagel to represent him, as appropriate. . . .

* * * *

h. Washington Conference on Holocaust-Era Assets

In May 1999 the Washington Conference on Holocaust-Era Assets met in Washington, D.C. At its conclusion,

on May 20, 1999, Under Secretary of State Eizenstat provided a briefing, excerpted below. The full text of his remarks is available at *www.state.gov/www/policy_remarks/1999/990520_eisenstat_heac.html.*

* * * *

At the Washington conference, government delegations from 44 countries, together with representatives of NGOs, art museums, art dealers and auction houses reached consensus on what has now become known as the Washington Conference Principles on Nazi Confiscated Art. These principles would guide the purchase, sale, exhibition and international exchange of artwork and they envision a massive cooperative effort to trace this art, publicize the information and reconcile competing claims of ownership to produce just and fair results.

Many governments have now taken huge steps in light of the Washington Conference Principles. Some of the highlights include—and you'll see more details in the background paper—Austria is continuing the task of adjudicating numerous claims to artwork and their national collection to return any that are shown to have been looted by the Nazis; a collection of artwork was recently returned to the Rothschild family by the Austrian Government and will be auctioned by Christie's of London on July 8. In France, French Government action is underway to find and return Nazi confiscated art. They have some 2,000 looted pieces which are now being displayed, and last month France returned to the Rosenberg family a Monet which had been included in the Boston Museum of Fine Arts' late Monet exhibition. In Russia, a new NGO has been proposed to research Soviet archives; and while the new federal law is under challenge in the Russian Constitutional Court, research continues into archival holdings and art lost from the former Soviet Union is being catalogued.

Here in the U.S., the Association of Art Museum Directors recently reaffirmed its guidelines for dealing with Holocaust-era art which had served as a starting point for our draft of what later became the Washington Conference Principles. I met recently with Christie's and got a very good report about what major

auction houses are doing in terms of additional research into the provenance of art.

The Council of Europe has also gotten involved since our conference, and as a result of our conference. Their cultural committee recently held a hearing on art where our State Department coordinator for Holocaust issues and director of the Washington Conference, J.D. Bindenagel, presented our views on these principles. As a result, the Council of Europe is now considering a proposal for all member states of the Council of Europe, which is based in Strasburg, to implement the Washington principles into their own national laws. We've encouraged the Austrian Government and the Council of Europe to consider hosting a meeting on Nazi confiscated art in the Spring of 2000. There's much additional work on art that is going on that you'll see in the background paper.

Second, the Presidential Advisory Commission on Holocaust Assets in the U.S . . . is building on and continuing the work begun by the interagency working group that produced our 1997 and 1998 reports, as well as the 1998 Washington Conference. . . .

The issue of Holocaust-era insurance claims was one of the most complex and difficult challenges facing the Washington Conference. The establishment of the International Commission on Holocaust-era insurance claims, chaired by former Secretary of State Larry Eagleburger, is a particularly encouraging development because it offers an efficient and effective means of advancing the swift and just resolution of this issue. . . .

* * * *

France joined the Commission soon after it was formed at the last meeting. The Polish Government joined and contributed to the Commission's successful claims decision process. Commission Chairman Eagleburger recently met with Czech President Havel, whose government will be joining at the next meeting. And in the private sector, there are companies, whether they are subject to Europe's regulatory jurisdiction or not, who are considering their participation also in this Commission.

In light of these developments, sanctions against companies participating in the Eagleburger Commission would gravely

undermine the Commission's work, to the ultimate disadvantage of Holocaust survivors. We appeal very strongly to all the insurance commissioners in all 50 states to recognize the importance of a safe harbor for all of those insurers who are actively working—and there are now five—within the commission, with more coming—as I've mentioned, the Polish and other insurers.

It would be a detriment to keeping those already in the Commission working in a cooperative way, opening their archives; and it would be a further detriment to the encouragement of additional companies to come into the Commission if companies were still subject to sanctions even if they're participating actively and cooperatively in the Commission's work.

On communal property, the Washington Conference was the first inter-governmental conference to address the restitution of communal property in any detail with the participation of NGOs. . . .

* * * *

And last and most current, forced and slave labor. This is an issue not on the agenda at the Washington Conference, but which has since become the focus of our efforts in recent months. At my invitation and that of Minister Bodo Hombach, the Minister of the German Chancellery, we held an all-day discussion on May 12 with some 80 representatives of eight governments, about a foundation initiative of German enterprises. The initiative aims at material relief for forced and slave laborers and other victims of Nazi persecution that involved German industry. The foundation initiative envisions the creation of a future fund as well. The participants discussed the essential problem of legal closure for the German companies, which is the *sine qua non* to make this initiative work.

The goal of this important initiative is to provide victims with payments through a cooperative, fair, and non-bureaucratic arrangement without regard to nationality or religion. In this connection, Minister Hombach and I expressed our understanding of the concern of German enterprises to achieve legal closure with respect to current and future lawsuits.

Gathering the affected parties together on May 12 was a significant accomplishment; it had all the actors necessary—plaintiffs' attorneys, defendants' attorneys, NGOs and governments. Hence the commitment to meeting in working groups, which resulted in moving the process toward closure and making recommendations within 90 days.

* * * *

QUESTION: What is the current status of sanctions relating to the insurance issues? Could you just bring us up to date on that?

UNDER SECRETARY EIZENSTAT: Yes. A number of states have passed potential sanctions laws—California, Florida, New York—which have in them provisions that would defer sanctions on those insurers that are participating in the international commission.

There is a certain restlessness, which I understand, on the part of some insurers and other political leaders—California, for example—insurance commissioners—to make sure that the International Insurance Commission is proceeding promptly. It is; it is doing yeoman's work. And it would be enormously counterproductive if in California, or other states, this safe harbor were to be removed. This is a really critical issue for the continued participation of insurance companies from Europe, and our ability to get additional insurers involved. I know that some people, like State Senator Hayden, have expressed some concerns. We share their sense of urgency, but again sanctions would be very counterproductive and not justified, given the progress which Secretary Eagleburger's commission has now made—particularly with the May 6 agreement in London.

QUESTION: What do you mean by safe harbor?

UNDER SECRETARY EIZENSTAT: In other words, that if you're participating in the work of the Commission, you should not be subject to de-licensing in the state for failure to pay Holocaust era claims.

2. United States-Chile: Commission Established Under Disputes Treaty

On January 11, 1992, an award was issued by the commission established under the 1914 Treaty for the Settlement of Disputes That May Occur Between the United States and Chile, convened pursuant to an agreement between the two countries dated June 11, 1990, *reprinted in* 31 I.L.M. 1 (1992). The case considered by the commission involved the deaths of former Chilean Ambassador to the United States Orlando Letelier and American citizen Ronni Moffitt, and the injuries sustained by Michael Moffitt, in a September 21, 1976, car-bombing incident in Washington, D.C. The background of the case and the measures taken by the United States in response to the failure of Chile to extradite, prosecute, or seriously investigate the alleged perpetrators of the murders, three ex-officials of the Chilean Directorate of National Intelligence, are set forth in Digest 1978 at 851–55, Digest 1979 at 50–52 and Digest 1980 at 33–35. See also 83 Am. J. Int'l. L. 352 (1989).

The 1990 agreement, set forth in the award, provided that "[w]ithout admitting liability, the Government of Chile, in order to facilitate the normalization of relations, is willing to make an ex gratia payment . . . to the Government of the United States of America, to be received on behalf of the families of the victims." The governments agreed that "the amount of the ex gratia payment should be equal to that which would be due if liability were established." *See Digest 1989–1990* at 537–41. The commission determined that the amount of compensation to be paid to all claimants totaled $2,611,892, including allocations for loss of support, moral damages, health expenses, and other expenses incurred. Excerpts from the award below provide the general criteria the commission used to establish the amount of payment. *See also* 86 Am. J. Int'l L. 347 (1992).

---

* * * *

19. Before proceeding to a precise determination of the payments to be made to the members of the Letelier and Moffit families individually mentioned below, the Commission believes it advisable to indicate the general criteria that it has taken into consideration in setting the amount of those payments.

20. It is necessary to remember, first of all, that according to paragraph 4 of the Compromis, the Commission is to determine the amount of the ex gratia payment to be made by the Government of Chile in conformity with the applicable principles of international law, as though liability were established.

21. In this regard, the judgment handed down by the Permanent Court of International Justice in the Chorzow Factory case (Chorzow Factory, P.C.I.J. (ser. A) No. 17) cited by the United States and Chile in their respective written presentations, may be taken as enunciating a general rule. The pertinent portion of this judgment reads verbatim as follows: "(R)eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

22. The Commission has also kept in mind the need to apply the same rules to the members of the families of Orlando Letelier and of Ronni Moffitt, with no differentiation whatever by reason of their nationality.

23. It should be pointed out that the Commission has followed the same criteria in examining the situation of each of the beneficiaries of these payments. In each of these cases, the Commission has examined the loss of financial support and services and the material and moral damages suffered by each of the claimant family members. The Commission has also examined the appropriateness of the expenses claimed in each case.

24. In respect of interest the Commission has considered that since compensation for the above elements has been expressed at present value it is unnecessary to provide for the payment of interest.

* * * *

3. U.S.-Germany: Settlement of Property Claims

On May 13, 1992, the United States and the Federal Republic of Germany signed an "Agreement Concerning the Settlement of Certain Property Claims." This Agreement provided for payment of compensation by the Federal Republic to the United States for claims of nationals of the United States (including natural and juridical persons) against the former German Democratic Republic ("GDR") arising from any nationalization, expropriation, intervention or other special measures directed against property of U.S. nationals before October 18, 1976.

The 1992 Agreement established a settlement amount of $190 million for claims that had been awarded by the U.S. Foreign Claims Settlement Commission ("FCSC"), and provided an option under which claimants could elect to forgo their share of the settlement amount and, instead, to pursue their claims through a property claims program then in effect in Germany. The claims at issue had been adjudicated by the FCSC during the period 1978 to 1981, under the German Democratic Republic Claims Program established on October 18, 1976, pursuant to Pub. L. No. 94–542, 90 Stat. 2509, 22 U.S.C. §§ 1644–1644m. In 1981 the FCSC stated that it had issued favorable awards on 1,899 claims (out of 3,898 adjudicated) for a total principal amount of $77,880,352.69. The FCSC also awarded claimants interest, calculated at a 6% simple annual rate from the date on which the property had been taken. *See II Cumulative Digest 1981–1988* at 2350–60 and 86 Am. J. Int'l L. 792 (1992).

On May 29, 1992, Assistant Legal Adviser Ronald J. Bettauer sent a letter of notification to claimants providing information on procedures for obtaining compensation pursuant to the settlement agreement and alerting those who wished to receive a portion of the settlement amount that they could not accept compensation or returned property under the claims program currently in effect in Germany. The letter also noted that claimants attempting to recover

under both programs would be subject to suit by the Department of Justice. *See* 86 Am. J. Int'l L. 795 (1992).

4. United States-Mexico: Request for Espousal

On November 8, 1993, a complaint on behalf of 848 named individuals and "all other individuals similarly situated but at present unknown" was submitted to the Department of State. The claims were based on certain property takings claims of Mexican nationals and their descendants against the United States that were settled by Mexico and the United States in the Convention for the Adjustment and Settlement of Certain Outstanding Claims, signed at Washington November 19, 1941, entered into force April 2, 1942 (the "1941 Convention"). In the complaint, claimants argued that the 1941 settlement constituted a separate illegal taking and requested that the United States espouse this new claim against Mexico. Excerpts below from a letter dated January 11, 1994, from Ronald Bettauer, Assistant Legal Adviser for International Claims and Investment Disputes, U.S. Department of State, explain the inability of the United States to espouse such claims.

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

---

* * * *

Under international law and longstanding practice, the United States may only present to another government the claim of one of its nationals if several requirements have been satisfied. First, the claim must be continuously owned, from the time the claim arises, by a United States national. Second, the claimant must exhaust all available legal remedies in the country against which the claim is brought. Third, the act complained of must constitute a violation of international norms of state responsibility attributable to the government of the country.

These requirements are not satisfied in this case. First, although the descendants of the original claimants may now be United States

citizens, all these claims were originally claims of Mexican nationals. Although you have argued that the settlement of the claims by Mexico in 1941 constitutes a separate taking, the underlying claims themselves arose at the time of the initial alleged taking. As such, the international law requirement that a claim be continuously owned by a United States national before the United States Government may present it to another country has not been, and cannot be, met in these land grant cases. Second, although you have referred in the petition to "extensive negotiations" and the presentation to the Mexican Government of a petition and certain documentation, it does not appear that the claimants have exhausted available legal remedies in Mexico. There is no evidence, for instance, that you have filed any legal action in Mexican courts and pursued it through the Mexican legal system.

Finally, contrary to the central premise of your petition, Mexico's failure to pay compensation for claims settled by it under the 1941 Convention does not constitute a violation of that Convention. As the enclosed memorandum notes, and as the United States has consistently explained, the 1941 Convention did not obligate either country to compensate the original owners of the claims. Any such obligation as might exist would arise under domestic law. While under no international legal obligation to do so, the United States enacted legislation under which the original owners of the claims asserted by the United States were compensated for their losses. Mexico did not choose to do the same. However, as the 1941 Convention does not create an obligation to compensate the original owners of the claims, it cannot be said that Mexico has failed to live up to its obligations under that treaty.

Insofar as there appears to be no basis for the United States Government to present these claims against the Government of Mexico, it would not be appropriate to refer them to the Foreign Claims Settlement Commission.

* * * *

5. United States-Albania: Claims Settlement Agreement

A Memorandum of Understanding signed at Washington, D.C., March 15, 1991, reestablished diplomatic relations

between the United States and Albania. *See* Chapter 9.A.2.a. Article IV of the Memorandum of Understanding provided for negotiations, upon the request of either government, for the prompt settlement of claims and other financial and property matters that remained unresolved between them.

In 1992 the FCSC requested registration of claims against Albania "for losses resulting from uncompensated nationalization, expropriation, confiscation, or other taking of real property and other property rights and interests by the Albanian regime which took power at the end of World War II." 57 Fed. Reg. 4067 (Feb. 3, 1992). As noted in the Federal Register notice, the registration of the claim would not constitute the filing of a formal claim against Albania, but failure to file would reduce information available for future settlement negotiations.

On July 16, 1993, Ronald J. Bettauer, Assistant Legal Adviser for International Claims and Investment Disputes, issued a notice informing persons with claims that Albania had enacted two laws concerning the return of expropriated or confiscated properties in Albania, excerpted below. The full text is available at 88 Am. J. Int'l L. 93 (1994).

---

* * * *

Claims concerning agricultural properties.

The Law on Compensation in Value to Former Owners of Agricultural Land, Law No. 7699, entered into force on May 15, 1993. This law recognizes the right of former owners to ownership of agricultural land for purposes of compensation. The law covers natural and juridical persons who owned land at the time of the issuance of the Law on Agrarian Reform (Law 108, August 29, 1945) or the legal heirs of such persons. Agricultural land refers to all land in Albania designated as agricultural land, including olive groves, orchards, vineyards and lands which were regarded as agricultural in 1945. Under Law No. 7699, former owners or heirs who received agricultural land under Law No. 7501 of July 19, 1991, may receive compensation in value for the difference

between the area of agricultural land they originally owned and the area returned to them.

* * * *

Compensation will be provided through state bonds denominated in leks, which will be payable before December 31, 1999, and which will be transferable and saleable. After December 31, 1999, for a 5-year period compensation can also be provided in leks. The bonds will be guaranteed and may be used before the redemption date to purchase state property.

Claims for compensation must be presented to the State Committee for the Compensation of Property in the relevant district within one year after the date of entry into force of the law, i.e., by May 15, 1994.

The law does not cover properties belonging to the former king and to foreign or joint companies. In addition, certain persons may not benefit from compensation under the law, including former collaborators of the Nazi-Fascist occupiers for properties acquired during the occupation, former Communist party and government officials for properties acquired as a result of the abuse of official position as provided by court decision, and persons convicted of massive appropriations of the wealth of the people.

Claims concerning non-agricultural properties.

The Law on the Return and Compensation for Property of Former Owners, Law No. 7698, which covers property (in the form of lots, buildings and anything permanently connected with them, such as residential buildings, factories, workshops, shops, stores and any other type of building) within municipal limits, entered into force on May 15, 1993. The law does not cover properties which fall within the purview of the Law on Compensation in Value for Owners of Agricultural Land.

Under Law No. [7698], the right to ownership is recognized, and all properties that exist in the form of unoccupied lots or unchanged buildings shall be returned to their former owners or their heirs, with some exceptions. Other properties may also be returned, under a complex system of restitution and compensation, depending on the type of property, its current status and

use. For example, the availability and amount of restitution or compensation may depend on factors such as use of the property or buildings (whether in public or private use), whether the building or lot is used for purposes for which it was expropriated, whether full compensation was received at the time of expropriation, whether properties have been transferred to third parties (in which case payment of rent may be required), whether improvements have been made by the state or the owner (in which case co-ownership or payments may be required), and whether permanent or temporary construction has been undertaken on lots. The law provides for co-ownership and payment of rents (at specified rates) in certain circumstances.

* * * *

The law states that a State Committee for the return of property to former owners or for providing compensation has been created in the Council of Ministers for the purpose of certifying claims of former owners that are not otherwise resolved in the law.

* * * *

The United States has begun discussions with Albania for a claims settlement agreement. However, it is not yet clear whether or when such an agreement may be concluded. Any agreement would likely cover only claims for property which was owned by United States nationals at the time of expropriation by Albania. In addition, dual United States-Albanian nationals will be included only if those nationals are domiciled in the United States currently or for at least half the period of time between the taking of their property in Albania and the date [of] entry into force of the agreement. Claimants who wish to pursue restitution or compensation for their property in Albania may wish to proceed to file claims for compensation with the required authorities in Albania.

* * * *

On March 10, 1995, the United States and Albania reached agreement on a $2 million lump sum settlement of claims. Agreement Between the Government of the United States of America and the Government of the Republic of

Albania on the Settlement of Certain Outstanding Claims. The agreement settled the claims of United States nationals against Albania arising from expropriation or other measures affecting property as well as the claims of Albanian nationals against the United States. As defined in an agreed minute to the agreement, the term "United States nationals" would include dual United States—Albanian nationals "only if those nationals are domiciled in the United States currently or for at least half the period of time between when the property was taken and the date of entry into force of the agreement."

Albania agreed to pay the United States $2 million simultaneously with the release of gold to Albania by the Tripartite Gold Commission, discussed in A.1. *supra*. The agreement entered into force on April 18, 1995, after the parties notified each other that the necessary domestic requirements had been fulfilled. The text of the agreement, excerpted below, is available at 34 I.L.M. 597 (1995).

---

* * * *

Article 1
The claims settled pursuant to this agreement are:

(a) the claims of United States nationals (including natural and juridical persons) against Albania arising from any nationalization, expropriation, intervention, and other taking of, or measures affecting, property of nationals of the United States prior to the date of this agreement; and
(b) the claims of nationals of Albania (including natural and juridical persons) against the United States prior to the date of this agreement.

* * * *

Article 3
1. Upon entry into force of this agreement, the United States shall inform the Tripartite Commission for the Restitution of Monetary Gold of its readiness to consent to the release to the Government of Albania, in accordance with the procedures referred to in

paragraph 2, of the appropriate amount of gold under Part III of the Agreement of Reparation of January 14, 1946 and the practices and procedures of the Tripartite Gold Commission. The parties understand that release of the gold to Albania requires the consent not only of the United States Government, but also of the Governments of France and the United Kingdom.
2. Simultaneously with the release to Albania of the gold referred to in paragraph 1, Albania shall pay to the United States the settlement amount. Procedures for the simultaneous release and payment will be agreed by the two parties.

Article 4
The United States shall be exclusively responsible for the distribution of the settlement amount referred to in article 2, to United States nationals for their claims as specified in article 1, in accordance with U.S. law.

Article 5
Albania shall afford United States nationals (including natural and juridical persons) with claims not settled by this agreement the same rights as it affords Albanian nationals under the laws of Albania to pursue and receive compensation, restitution, or any other local remedy available under its domestic restitution or compensation procedures.

* * * *

6. U.S.-Cambodia: Settlement of Property Claims

On October 6, 1994, representatives of the U.S. Government and of the Royal Cambodian Government, meeting in Washington, signed the Agreement Concerning the Settlement of Certain Property Claims, *reprinted in* 34 I.L.M. 600 (1995); *see also* 57 Fed. Reg. 9052 (Mar. 16, 1992). The agreement required U.S. nationals to report claims against the Government of Cambodia or any Cambodian government entity. Under the agreement, Cambodia agreed to pay the sum of $6 million in full and final settlement of claims of

the United States and its nationals, arising from expropriation or other measures directed against property at the time of the fall of the Lon Nol government in 1975.

The claims covered were described as follows in Article 1 of the agreement:

> (a) the claims of the United States and of nationals of the United States (including natural and juridical persons) against Cambodia arising from the nationalization, expropriation, or taking of, or other measures directed against, properties, rights, and interests of the United States and its nationals prior to the entry into force of this agreement; and
> (b) the claims of Cambodia and of nationals of Cambodia (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 Cambodia or Cambodian nationals prior to the entry into force of this agreement.

Article 2, which fixed the settlement amount, also addressed in paragraph 3 the use and treatment of blocked assets:

> Cambodia agrees that the settlement amount shall be paid out of assets of the former Government of the Khmer Republic that are blocked in the United States on the date of the entry into force of this agreement. The United States agrees to unblock all such assets within thirty days of entry into force of this agreement, after payment of the settlement amount out of such assets. The United States agrees to unblock, at the same time, assets of nationals of Cambodia.

* * * *

Article 3 guaranteed that this agreement constituted "a full and final settlement and discharge of the claims covered by this agreement." *See* 59 Fed. Reg. 60,558 (Nov. 25, 1994).

7. U.S.-Vietnam: Settlement Agreements

On January 28, 1995, in Hanoi, Vietnam, representatives of the Government of the United States and of the Government of the Socialist Republic of Vietnam signed the Agreement Concerning the Settlement of Certain Property Claims ("Claims Settlement Agreement"), *reprinted in* 34 I.L.M. 685 (1995), and the related Agreement Concerning the Transfer of Diplomatic Properties ("Diplomatic Property Agreement").

a. Claims Settlement Agreement

The claims settled by the agreement with Vietnam arose at the time of the fall of the former Republic of Vietnam. Under the Claims Settlement Agreement, Vietnam agreed to pay the sum of $208,510,481 (the "settlement amount") to the United States, and the United States agreed to unblock all assets of Vietnam, as well as of its nationals. Of the $208,510,481 that Vietnam agreed to pay the United States, $203,504,248 was devoted to satisfaction of claims that had been adjudicated by the U.S. Foreign Claims Settlement Commission under title VII of the International Claims Settlement Act, 22 U.S.C. §§ 1645–16450. The remaining $5,006,233 was devoted to the satisfaction of subrogated claims of the Overseas Private Investment Corporation for payments on investment insurance. On January 28, 1995, the United States and Vietnam also concluded an agreement and amendment concerning the transfer of diplomatic properties.

The Claims Settlement Agreement constituted full and final settlement of claims of each government and its nationals against the other government arising from expropriation or other measures directed against property. The claims agreement did not cover debt. Vietnam agreed to reschedule debt to the United States under the auspices of the Paris Club group of creditor countries. *See* 89 Am. J. Int'l L. 366 (1995).

Articles 1 and 3 of the Claims Settlement Agreement described the claims covered and the effect of the settlement, as set forth below.

Article I
The claims covered by this agreement are:

a) the claims of the United States and of nationals of the United States (including natural and juridical persons) against Vietnam arising from the nationalization, expropriation, or taking of, or other measures directed against, properties, rights, and interests of the United States or United States nationals prior to the entry into force of this agreement;
b) the claims of Vietnam and of 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.

* * * *

Article 3.
1. Upon payment of the settlement amount, this agreement shall constitute a full and final settlement and discharge of the claims covered by this agreement, and thereafter neither government shall present to the other, on its behalf or on behalf of another, any claim covered by this agreement.
2. Any title to, or right or interest of any kind in, properties included in claims covered by this agreement shall be transferred by operation of this agreement to the government against which the claim had been made upon payment of the settlement amount.
3. If any claim covered by this agreement is presented directly by a national of one country to the government of the other, that government will refer it to the government of the national who presented the claim.

Article 2 of the Claims Settlement Agreement set out the settlement amount in paragraph 1, and specified in paragraph 2 that the United States was to be exclusively responsible for its distribution. Under paragraph 3, the United States agreed to unblock Vietnam's assets within thirty days after entry into force of the agreement (i.e., upon its signature, as provided in Article 4), or of the Agreement Concerning the Transfer of Diplomatic Properties, whichever was later. Vietnam agreed that the settlement amount was to be "paid simultaneously out of such assets." The United States also agreed to unblock at the same time assets of nationals of Vietnam. *See* 60 Fed. Reg. 12,885 (March 9, 1995).

b. Diplomatic Property Agreement

The United States and Vietnam initialed the Diplomatic Property Agreement on December 14, 1994, and signed it on January 28, 1995. A statement issued by the Department of State on January 27, 1995, indicated, among other things, that the signing of that agreement would resolve remaining diplomatic property issues "thereby clearing the way for opening liaison offices in Washington and Hanoi." 6 Dep't St. Dispatch 6 at 84 (Feb. 6,1995), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*. *See* discussion in Chapter 9.A.2.j.

The Diplomatic Property Agreement set out in its preamble that the Government of the United States ("USA") was the legal and rightful owner of twenty-two properties in the Socialist Republic of Vietnam ("SRV"), including two in Hanoi, one in Hue, and nineteen in Ho Chi Minh City (formerly Saigon). The preamble also provided that the SRV was the legal and rightful owner of a single property at 2251 R Street, N.W., Washington, D.C. (the former embassy of the Republic of South Vietnam), and that both the United States and the SRV then had custody and control of the other's properties. The preamble noted that both the United States and the Socialist Republic of Vietnam wanted to resolve

property issues "in a fair, equitable and expeditious manner and establish liaison offices in Hanoi and Washington . . . [and] recognize that it is in the best interest of the parties for the SRV to return the USA's Properties or provide functional and value equivalent properties and to permit the establishment, maintenance, operation and support of a liaison office in Hanoi . . . [and] for the USA to return to the SRV its R Street Property and permit the establishment, maintenance, operation and support of a liaison office in Washington, D.C."

Recognizing that a fund was needed "to ensure that adequate financial resources are available to compensate the USA for those Properties the SRV cannot return and for which the USA agrees to accept financial compensation," the parties agreed in section I of the agreement to resolve real property issues within one year from the date of signing the agreement on the basis of terms and conditions acceptable to both Governments as set forth in section II of the agreement. Section II addressed further specifics of the transfer arrangements, and included an agreement by the SRV to provide a site for a U.S. diplomatic compound in Hanoi for a term of 99 years. *See also* 89 Am. J. Int'l L. 366 (1995).

8. Iran-U.S. Claims Tribunal

On November 4, 1979, Iranian militants seized the U.S. Embassy in Tehran, holding diplomatic and consular personnel and other persons seized as hostages. *See Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 3, 12. On January 19, 1981, the United States and Iran entered into an international executive agreement embodied in two declarations of the Government of Algeria, known as the Algiers Accords. Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States ("General Declaration") and Declaration

of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"). 20 I.L.M. 223 (1981). The Algiers Accords brought about the release of the American hostages and established the Iran-U.S. Claims Tribunal ("Tribunal") at The Hague, the Netherlands, to resolve existing disputes between the two countries and their nationals.

Under the Algiers Accords, the United States released the vast majority of Iran's frozen assets and transferred them directly to Iran or to various accounts to pay outstanding claims. The claims addressed by the Tribunal included claims of U.S. nationals against the Government of Iran, and government-to-government claims between the United States and Iran. *See III Cumulative Digest 1981–88* at 3189–3245, subsequent annual *Digests*, and *www.iusct.org*.

a. Settlement agreement: Claim 4 of Case B/1

The Ministry of National Defense of the Islamic Republic of Iran filed claims against the United States on November 18, 1981, that sought, *inter alia*, the return of certain military equipment originally sold to Iran under contracts as part of the U.S. Foreign Military Sales program. *See III Cumulative Digest 1981–88* at 3220–24.

One category of the property ("Claim 4") consisted of a large quantity of diverse repair and return items that had been sent to the United States for repair, calibration or modification under FMS contracts providing for such services. The other category consisted of five major items and related parts: a renovated submarine, an F-14 fighter aircraft, an AH–1J helicopter, a Bell 214A helicopter, and a Hawk Air Defense System, all still in the United States for purposes of testing, training, or resale at the time of the seizure of the American Embassy in Tehran on November 4, 1979, and President Carter's subsequent blocking on November 14, 1979, of all Iranian property in the United States.

In a partial award issued August 31, 1988, the Tribunal dismissed the Iranian request for the return of the items but ruled that the United States must compensate Iran for their "full value" as of March 26, 1981. (Under Tribunal jurisprudence, "full value" means "fair market value.") On March 26, 1981, the United States had informed Iran, through Algeria, that the United States was unable to license the export of Iranian military equipment located in the United States—because of the Arms Export Control Act and regulations thereunder—but that it was willing to compensate Iran for its value (by selling the items and depositing the proceeds to Iran's credit in the Foreign Military Sales Trust Fund).

In February 1991 the two governments reached agreement on the total settlement amount for Claim 4, subject to confirmation by the Government of Iran. The original understanding was that the agreed sum would be used to the extent necessary to satisfy the requirement under the Claims Settlement Agreement that Iran maintain the Security Account at a minimum level of $500 million until all arbitral awards against Iran have been satisfied. Iran and the United States ultimately agreed that the settlement amount would be paid directly to Iran, following replenishment of the Security Account from the proceeds of oil sales by Iran to U.S. companies. The proceeds of oil sales fell short of providing full replenishment and, in November 1991, the Government of Iran agreed that part of the settlement payment—$18 million—could be used as necessary for replenishment.

On November 26, 1991, agents for the United States and the Government of Iran signed an agreement in which the United States agreed to pay $278 million, including $18 million into the Security Account to restore its balance to the $500 million minimum. On December 2, 1991, upon the joint request of the parties, the Tribunal accepted the Settlement Agreement in accordance with Article 34, paragraph 1 of its Rules, and issued an arbitral award on agreed terms in accordance with Article 34, paragraph 1 of

its rules. Islamic Republic of Iran v. United States, 27 Iran-U.S. Cl. Trib. Rep. 282 (1991). *See also* 86 Am. J. Int'l L. 352 (1992).

Key articles of the settlement agreement are set forth below.

---

* * * *

Article III

Upon the Tribunal's issuance of an Award on Agreed Terms and in contemplation of the undertakings [to pay] in Articles I and II, the United States and Iran shall cause, without delay and with prejudice, all proceedings on, or in relation to the subject matter of Case No. B1 (Claim 4) or capable of arising from it in the Tribunal and in all courts, fora, or before any authority or administrative bodies to be dismissed, withdrawn and terminated, and shall be barred from instituting and/or continuing with any such proceedings before the Tribunal or any other forum, authority or administrative body whatsoever, including but not limited to any court in the United States or Iran. If the items forming the subject matter of Case No. B1 (Claim 4) have been put in issue in other proceedings including, but not limited to, Case No. B1 (Claims 2, 3, and 6), B61 and A15 (II:A and II:B), they are subject to the provisions of this Article.

Article IV

1. In consideration of the covenants, premises, and other agreements contained herein, upon the Tribunal's issuance of an Award on Agreed Terms and in contemplation of the undertakings in Articles I and II, the United States and Iran shall release and forever discharge each other, their affiliates, agencies and instrumentalities, from any claims, rights, interests, and obligations, past, present or future (including in Cases No. B1 (Claims 2, 3 and 6), B61 and A15 (II:A and II:B)), which have been raised, may in the future be raised, or could have been raised in connection with disputes, differences, claims and matters stated in, related to, arising from,

or capable of arising from the subject matter of Case No. B1 (Claim 4).

2. Should any claims be pending or filed by a third party in any court or forum against any of the Parties hereto based on any assignment or transfer of rights of any kind from one of the Parties hereto in relation to Case No. B1 (Claim 4), the Party who has effected or caused such assignment or transfer of rights shall be exclusively liable to such third party.

* * * *

b. Interpretative decision in Case A/27

On February 25, 1993, the Government of Iran filed Case A/27, alleging that the United States breached its obligations under the Algiers Accords by not enforcing Tribunal awards. Iran based its allegations on U.S. courts' refusal to enforce the Tribunal's Partial Award in *Avco Corporation v. Iran Aircraft Indus.*, 19 Iran-U.S. Cl. Trib. Rep. 200 (1988). Iran also pointed to an alleged undue delay by the U.S. courts in enforcing the Tribunal's Award in *Gould Marketing Inc. v. Ministry of Defense of the Islamic Republic of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 272 (1984). As compensation for the alleged breach by the United States, Iran sought over $5 million in damages. The United States denied any liability, arguing that its obligations under the Algiers Accords were satisfied by its maintenance of domestic judicial procedures through which Iran could satisfy Tribunal awards in its favor. The United States further argued that Tribunal awards would be enforced in accordance with U.S. laws, as provided by the Algiers Accords

On the 27 and 28 of February 1996, the Tribunal held a hearing in the Peace Palace at The Hague. On June 5, 1998, the Tribunal issued its decision. Award No. 586-A27-FT. The text of the Tribunal's findings is set forth below. The full text of the award is available at *www.iusct.org/awards/award-586-a27-ft-eng.pdf.*

---

* * * *

THE TRIBUNAL DETERMINES AS FOLLOWS:

a. By virtue of the refusal by the United States Court of Appeals for the Second Circuit to enforce the Avco award, the United States has violated its obligation under the Algiers Declarations to ensure that a valid award of the Tribunal be treated as final and binding, valid, and enforceable in the jurisdiction of the United States.

b. Consequently, the United States is obligated to pay Iran the sum of Five Million Forty-Two Thousand Four Hundred Eighty-One United States Dollars and Sixty-Five Cents (U.S.$5,042,481.65), plus simple interest at the annual rate of 5 percent (365-day basis) from 24 November 1992 up to and including the date of payment of this award.

c. Iran's claim related to the reimbursement of the legal expenses it incurred in pursuing the enforcement of the award in Avco before the Second Circuit and Iran's claim related to the total amount of arbitration costs awarded to Iran by the Tribunal in twenty-four awards are both dismissed.

c. Partial award settling certain bank claims and Iran Air ICJ case

On February 22, 1996, Department of State Spokesman Nicholas Burns announced that the Tribunal had issued a partial award based on the settlement by the United States and Iran of claims in two fora. Iran-United States Claims Tribunal Partial Award Containing Settlement Agreements on the Iranian Bank Claims against the United States and on the International Court of Justice Case Concerning the Aerial Incident of July 3, 1988, dated February 22, 1996, *reprinted in* 35 I.L.M. 556 (1996).* *See also* 90 Am. J. Int'l L. 278 (1996).

---

* The General Agreement on the Settlement of Certain I.C.J. and Tribunal Cases (*reprinted in* 35 I.L.M. 566); the Settlement Agreement on the Case Concerning the Aerial Incident of 3 July 1988 ("ICJ Settlement Agreement") (*reprinted in* 35 I.L.M. 572), and the Settlement Agreement on Certain Claims before the Iran-U.S. Claims Tribunal ("Tribunal Settlement Agreement") (*reprinted in* 35 I.L.M. 593) were all entered into on February 9, 1996.

The ICJ case was also dismissed on February 22, 1996, by order of the ICJ. Order in Case Concerning the Aerial Incident of July 3, 1988, *reprinted in* 35 I.L.M. 556 (1996)

The settled claims, both brought by Iran against the United States, were:

(1) Iran's claims against the United States concerning certain banking matters, filed before the Iran-United States Claims Tribunal as part of Claim A/15, in which the United States agreed to pay $70 million. (Iran filed case A/15 against the United States on October 25, 1982, arguing *inter alia* that the United States breached its obligations under the Algiers Accords by failing to terminate certain litigation in U.S. courts. This settlement resolved Claim C of Case A/15, which involved standby letters of credit issued in favor of U.S. claimants against Iran). *See* 90 Am. J. Int'l L. 278 (1996).

(2) *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States)* filed in the International Court of Justice ("ICJ"), concerning the downing of Iran Air Flight 655, in which the United States agreed to make *ex gratia* payments in the amount of $61.8 million. In that case, the U.S.S. *Vincennes*, during a surface engagement with Iranian gunboats in the Persian Gulf, shot down an unidentified aircraft after repeated, unsuccessful efforts to establish contact with it, believing that the *Vincennes* was in danger of being attacked by an Iranian military aircraft. After it was shot down, the aircraft was identified as a civilian airliner. Of the 290 persons killed in the downing of Flight 655, 248 were Iranians, whose names are listed in Annex 1 to the ICJ Settlement Agreement. The ICJ Settlement Agreement sets out the terms and conditions for distribution of *ex gratia* compensation to the heirs and legatees of the victims. For further discussion of the case, *see Digest 1989–1990,* at 211–17; *II Cumulative Digest 1981–1988* at 2340–49; 83 Am. J. Int'l L. 912 (1989). A Department of State fact sheet summarizing the agreements' principal features is excerpted below, and *reprinted in* 35 I.L.M. 553 (1996).

---

* * * *

The survivors of each victim of the Iran Air shootdown will be paid $300,000 (for wage-earning victims) or $150,000 (for non-wage-earning victims). For this purpose, $61.8 million will be deposited with the Union Bank of Switzerland in Zurich in an account jointly held by the New York Federal Reserve Bank, acting as fiscal agent of the United States, and Bank Markazi, the central bank of Iran. Payments will be made out of this account upon joint payment instruction by the Swiss Embassy in Tehran (acting on our behalf, after consulting with the Department of State with respect to each payment) and the Iranian Bureau of International Legal Services. If additional funds are required, we agree to replenish the account. If there are excess funds or eight years elapse from the date the account is opened, any funds left in the account, including interest earned on the funds, will be returned to the United States.

There is an additional $70 million in the settlement package. Of this, $15 million is to be deposited in the Security Account established as a part of the 1981 Algiers Accords. This Security Account is held at [N.V. Settlement Bank of the Netherlands, a subsidiary of De Nederlandsche Bank in Amsterdam] to pay American claimants who receive Tribunal awards. The remaining $55 million will be deposited in an account at the New York Federal Reserve Bank. Funds can be drawn from this account only (1) for deposits into the Security Account used to pay Tribunal awards to American claimants or for payment of Iran's share of the operating expenses of the Tribunal or (2) to pay debts incurred before the date of the settlement and owed by Iranian banks to U.S. nationals. A debt must have been held by a U.S. national at the time it was incurred and at the time it is presented for payment, and any assignment of the debt must have been before the date of the settlement.

The United States and Iran have reached settlements of legal proceedings in The Hague several times since the Tribunal was established in 1981. These settlements are entered into when the United States believes they are justified on a legal and technical basis, and have no political significance. The bank claims at issue involve Iranian charges that the United States Government did not return appropriate funds from certain bank accounts after the

hostage crisis and that the United States took actions that prevented payment of certain letters of credit. In one of the matters covered by the settlement, the Tribunal had found certain U.S. regulations concerning standby letters of credit were not permitted under the Algiers Accords.

With respect to the Iran Air shootdown, immediately after the incident President Reagan offered compensation, on an ex gratia (voluntary) basis, to the families of the victims who died. When Iran brought its case in the ICJ, such payments to Iranian survivors became impossible, but we proceeded to make payments to non-Iranian survivors. With the dismissal of the ICJ case, the United States is finally in a position to carry out its long-standing offer to provide ex gratia compensation.

* * * *

d. Alleged interference in Iranian political arena: Case A/30

On August 12, 1996, the Islamic Republic of Iran filed a Statement of Claim in the Tribunal against the United States. In this claim, No. A/30, Iran alleged that the United States passed legislation in 1996 authorizing a covert action program against Iran, and that this, in conjunction with the extensive economic sanctions against Iran, interfered in Iran's internal affairs and thus violated U.S. commitments under the Algiers Accords.

On August 8, 1997, the United States filed its Statement of Defense. The full text of the statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

The Government of Iran, which has a long record of using terrorism and lethal force as an instrument of state policy, is seeking a ruling from the Tribunal that the United States has violated the Algiers Accords by intervening in Iran's internal affairs and enacting economic sanctions against it. Iran asserts that the United States has violated two obligations under the Algiers Accords: the pledge

in Paragraph 1 of the General Declaration that it is and will be the policy of the United States not to intervene in Iran's internal affairs, and the requirement in Paragraph 10 of the General Declaration to revoke all trade sanctions imposed in response to Iran's seizing the U.S. Embassy and taking 52 American hostages on November 4, 1979.

This Statement of Defense will show that Iran's claim that the United States has violated the Algiers Accords is utterly without foundation. It will demonstrate that the United States has fully complied with its obligations, and that Iran presents no evidence or legal authority to support its sweeping claims to the contrary. It will demonstrate that Paragraphs 1 and 10 were never intended to insulate Iran from economic measures taken for reasons unrelated to the events addressed in the Algiers Accords. It will also establish that Iran's attempts to bring its claim under customary international law, the Treaty of Amity, and the United Nations Charter are patently without merit. It will go on to show that under general principles of international law, Iran's own unlawful international activities preclude it from bringing its claims. Finally, this Statement of Defense will demonstrate that Iran does not present a case for interim measures. Iran's claim should be rejected.

* * * *

e. Dual nationality in the context of the Iran-U.S. Claims Tribunal

The issue of the dual nationality of claimants has been raised as a jurisdictional concern throughout the Tribunal claims process. *See III Cumulative Digest 1981–1988* at 3264–69. Case A/18 had established in 1984 that when a claimant has dual citizenship, the nationality that was the "dominant and effective" nationality would determine the jurisdictional issues. *Islamic Republic of Iran v. United States* (Case A/18), 5 Iran-U.S. Cl. Trib. Rep. 251 (1984). The A/18 decision also stated:

> To this conclusion the Tribunal adds an important caveat. In cases where the Tribunal finds jurisdiction based upon

> a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.

See id. at 265–66.

In Case No. 298, decided January 22, 1993, Chamber Two determined in an interlocutory award that one of the three claimants in the case, Alan Saghi, was a national of both the United States and Iran. *James M. Saghi v. Iran*, 29 Iran-U.S. Cl. Trib. Rep. 20 (1993). It then reviewed the evidence in Case 298 in light of the A/18 standard, concluding that Allan Saghi's U.S. nationality was the dominant one for the purposes of this case. As to the "A/18 caveat," Chamber Two concluded:

> The caveat is evidently intended to apply to claims by dual nationals for benefits limited by relevant and applicable Iranian law to persons who were nationals solely of Iran. However, as indicated by Chamber Two when it referred to other conduct that could justify refusal of an award in their favor . . . , the equitable principle expressed by this rule can, in principle, have a broader application. Even when a dual national's claim relates to benefits not limited by law to Iranian nationals, the Tribunal may still apply the caveat when the evidence compels the conclusion that the dual national has abused his dual nationality in such a way that he should not be allowed to recover on his claim.

f. Litigation resulting from small claims settlement between Iran and the United States

The Claims Settlement Agreement executed as part of the Algiers Accords provided that "[c]laims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the Tribunal . . . in the case of claims of less than $250,000, by the Government of such national." As a result, the United States assumed authority

to prosecute all such claims ("small claims") before the Tribunal on behalf of U.S. claimants.

In 1990 the United States and Iran reached an agreement to settle not only those claims filed with the Tribunal, but also small claims submitted to the State Department that had not been filed with the Tribunal. In return for Iran's payment to the United States of $105,000,000, the settlement agreement provided for the transfer to Iran (by quitclaim) of all property interests underlying those claims. On June 22, 1990, the Tribunal ratified the settlement agreement and issued an award on agreed terms. On June 28, 1990, the State Department referred the small claims to the Foreign Claims Settlement Commission for final evaluation and determination of award amounts, as provided under Title V, Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99–93, 99 Stat. 405, 437 (50 U.S.C. § 1701 note ("Iran Claims Settlement")); *see also* 22 U.S.C. §§ 1622, 1623 (1994). *III Cumulative Digest 1981–1988* at 3214; and *Digest 1989–1990* at 230–37.

In 1995 a group of 18 U.S. citizens with claims against Iran that were settled under the small claims settlement agreement brought a case against the United States for the alleged taking of their property through the settlement. On September 18, 1996, the U. S. Court of Federal Claims granted summary judgment on behalf of the United States, finding that no taking of the plaintiffs' property had occurred. *Abrahim-Youri v. United States*, 36 Fed. Cl. 482 (1996). The U.S. Court of Appeals for the Federal Circuit affirmed, holding that the government's act of espousing nationals' claims and settling claims for full principal but for less than full amount of claimed interest was not a compensable taking. 139 F.3d 1462 (Fed. Cir. 1997). Excerpts from the opinion and from the concurring opinion of Circuit Judge Clevenger are set forth below (footnotes omitted).

---

* * * *

In *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)*, the Supreme Court stated that the range of interests that qualify for protection as "property" under the Fifth Amendment are defined by existing rules or understandings that stem from an independent source such as state law. *Id. at 1030.* In that case the Court was considering the extent to which a regulatory imposition could prohibit development of the plaintiff's real estate. The Court held that background principles, there the state's basic nuisance law, defined the scope of the property right; if the reach of the regulation was coincident with the scope of the state's power to control nuisances, a power that inhered in all land titles, then no compensation would be due. Id.

By like token, it does not strain Lucas beyond its intended purpose to recognize that a similar principle may apply to "property" that arises through consensual international transactions as it does to property interests created by domestic law. Certain sticks in the bundle of rights that are property are subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights. As the trial court correctly observed, those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity.

Here, though the choses in action were extinguished, the Government provided an alternative tailored to the circumstances which produced a result as favorable to plaintiffs as could reasonably be expected. Plaintiffs have not shown that they sustained losses that were avoidable under the circumstances. Nor have they shown that those engaged in international transactions with Iran could not have anticipated the need for government intervention. A history of such interventions can been seen in Meade and Gray. A compensable taking has not been established; the fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States.

* * * *

9. United Nations Compensation Commission

a. Establishment and funding

As discussed in Chapter 18.A.2.a., on April 3, 1991, the UN Security Council, acting under chapter VII, passed Resolution 687 to memorialize Iraq's obligations and commitments at the time of the cease-fire to the Gulf War. In Section E of Resolution 687, excerpted below, the Security Council decided to create a fund to pay compensation for losses, damage and injury resulting directly from Iraq's invasion and occupation of Kuwait.

---

* * * *

[The Security Council]

16. Reaffirms that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait;

17. Decides that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and demands that Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt;

18. Decides also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund;

19. Directs the Secretary-General to develop and present to the Security Council for decision, no later than thirty days following the adoption of the present resolution, recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18 above and for a programme to implement the decisions in paragraphs 16, 17 and 18 above, including: administration of the fund; mechanisms for determining the appropriate level of Iraq's contribution to the fund based on

a percentage of the value of the exports of petroleum and petroleum products from Iraq not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy; arrangements for ensuring that payments are made to the fund; the process by which funds will be allocated and claims paid; appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's liability as specified in paragraph 16 above; and the composition of the Commission designated above;

* * * *

On May 2, 1991, UN Secretary-General Javier Pèrez de Cuèllar presented his report and recommendations to the Security Council pursuant to the provisions of Part E of Resolution 687. The report proposed a compensation commission that would take the form of a claims resolution facility to verify and evaluate the expected claims and administer the payment of compensation. The report also recommended that the commission should function under the authority of the Security Council and that it should be comprised of a Governing Council, panels of commissioners and a secretariat. *See www.unog.ch/uncc/introduc.htm.*

The Security Council adopted Resolution 692 on May 20, 1991, in which it accepted certain of the Secretary-General's recommendations and established the UN Compensation Commission as a subsidiary organ of the UN Security Council, to be located at the UN Office in Geneva, and the UN Compensation Fund. Resolution 692 also directed the Governing Council to proceed to implement the provisions of Section E, "taking into account" the other recommendations in the Secretary General's report, and requested all states and international organizations to cooperate with the decisions of the Governing Council in such implementation.

On August 15, 1991, the Security Council adopted Resolution 706, S/RES/706 (1991), permitting the import by UN member states of oil products originating from Iraq for a six-month period, up to a value of $1.6 billion for certain purposes, and Resolution 705, S/RES/705 (1991), deciding that the compensation to be paid by Iraq through the UNCC should "not exceed thirty percent of the annual value of its exports of petroleum and petroleum products." When Iraq failed to take advantage of Resolution 706, the Security Council arranged for the UNCC to draw limited funds from the Working Capital Fund of the United Nations from reimbursable voluntary contributions from governments. *See www.unog.ch/uncc/introduc.htm*. On October 2, 1992, the Security Council issued Resolution 778, S/RES/778 (1992), requesting UN Member States to temporarily transfer to a UN escrow account up to $200 million apiece in Iraqi oil proceeds paid after the imposition of UN sanctions on Iraq. The escrowed funds were used in part to fund the activities of the UNCC. *See C*hapter 16.A.5.b.(1).

In December 1996, the "oil-for-food" procedure envisaged in Resolution 986, S/RES/986 (1995) was finally launched and the UNCC began to receive a percentage of the proceeds of Iraq's oil sales, thereby permitting it to continue its operations uninterrupted and to begin to make regular compensation payments to successful claimants. *See* discussion of the oil-for-food program in Chapter 16.A.5.b.

b. Claims categories and procedures

The UNCC accepted the claims of individuals, corporations, and governments. These claims were submitted by the governments involved or by international organizations, for those individuals who were not in a position to have their claims filed by a government. The Governing Council designated six categories of claims:

Category A claims were for people who fled Kuwait at the time of, or as a result of, the Iraqi invasion. These claims,

payable in fixed amounts, were mostly for departure costs and losses, including injuries incurred as a result of the departure from Kuwait.

Category B claims, also payable in fixed amounts, were for personal injury losses and costs, including claims for serious personal injuries such as death.

Category C claims were for other individual losses or costs up to $100,000 in value.

Category D claims were for individual losses that were for amounts greater than $100,000.

Category E claims were claims brought by corporations, and Category F claims were those brought by governments and international organizations.

The Governing Counsel established deadlines for the filing of the various categories of claims. The deadline of January 1, 1995, was set for the filing of all claims for individuals (categories A-D). Category E and F claims were to be filed by January 1, 1996, with the exception of environmental claims in Category F, which had to be filed before February 1, 1997. *See www.unog.ch/uncc/theclaims.htm*.

On September 10, 1991, the Office of the Legal Adviser, Department of State, issued Public Notice 148 providing background information concerning the UNCC and the criteria established for individual claims. This notice was distributed along with the first decision of the Governing Council, entitled the "Criteria for Expedited Processing of Urgent Claims,"

See 86 Am. J. Int'l L. 113 (1992).

---

* * * *

United Nations Security Council Resolution 687, adopted on April 3, 1991, reaffirms Iraq's liability under international law for any direct loss, damage or injury to foreign governments, nationals and corporations, as a result of its unlawful invasion and occupation of Kuwait. Resolution 687 further creates a fund to pay compensation for such claims out of Iraqi oil revenues and

establishes the Compensation Commission to administer the fund and pay claims.

In accordance with United Nations Security Council Resolution 692, the Compensation Commission has three organs: (1) a Governing Council composed of the 15 members of the Security Council; (2) an Executive Secretary appointed by the U.N. Secretary General, with a staff of administrators and experts; and (3) a series of Commissioners (to provide technical advice and process claims) to be appointed by the Governing Council.

The first session of the Governing Council took place in Geneva from July 23–August 2.

The Council elected a President (Ambassador [Philippe J.] Berg of Belgium), adopted simple rules, and approved criteria for the expedited processing of the first categories of claims. (The text of the criteria is set forth below.) The U.N. Secretary General also appointed a senior Peruvian diplomat (Carlos Alzamora) as Executive Secretary. Additionally, a series of experts is being appointed to provide advice until Commissioners can be selected.

The criteria adopted by the Governing Council concern individuals who suffered personal losses during the Iraqi invasion and occupation of Kuwait. Governments may submit consolidated claims for up to $100,000 per person on behalf of their nationals and (in their discretion) residents. It is expected that these claims will be reviewed on an expedited basis by Commissioners, who will make recommendations to the Governing Council on the total amount to be paid to each Government. Each Government will then allocate these sums to its claimants.

The criteria also state that compensation will not be provided for attorneys' fees or other expenses for claims preparation. Moreover, any compensation, whether in funds or in kind, already received from any source will be deducted from the total amount of losses suffered. Special fixed payments of $2,500 per person are available, without the need to document the actual amount of loss, with respect to persons who departed the area, or who suffered serious personal injury or the death of a close family member. If a claim is made for $2,500 for departure without proof of loss, the individual is not eligible to claim additional departure losses

later. However, making a claim for this amount for death or serious injury will not prevent further claims for additional amounts.

The criteria further state that governments are encouraged to submit claims for both categories within six months from the date on which the Executive Secretary circulates to Governments the appropriate claims forms. We expect the Governing Council to produce the claims forms within the next two months.

After the claims forms are established, the United States Government will collect, consolidate and submit them to the Compensation Commission. Claims forms will be distributed to all individuals who have reported claims against Iraq to the Department of Treasury, pursuant to its census of claims. (See 56 F.R. 5636, February 11, 1991.)

The Governing Council has stated its intent to establish as promptly as possible criteria for additional categories of claims to permit consolidated submissions by Governments for all losses covered by Security Council Resolution 687 (including losses by individuals in excess of $100,000, business losses, and environmental damage and loss of natural resources).

* * * *

c. Filing procedures

On December 23, 1991, the Department of State announced that the UNCC had approved and circulated the forms to be used by individuals to file their claims for losses up to $100,000, *i.e.* Category C claims. (Forms for other types of claims were to be available at a later date.) Key provisions of the announcement are included below. *See* 3 Dep't St. Dispatch 1 at 3 (Jan. 1, 1992) available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*; 57 Fed. Reg. 421 (Jan. 6, 1992). *See also* 86 Am. J. Int'l L. 346 (1992).

---

* * * *

Fixed amounts may be claimed for departure ($2,500 or $4,000, depending on whether the claimant is filing additional claims),

serious personal injury ($2,500), and the death of a spouse, child, or parent ($2,500) without documentation of the amount of loss. Where adequate documentation is available, claimants may claim compensation in any amount up to $100,000. Individuals whose losses exceed $100,000 can file for the first $100,000 now and claim the rest at a later stage.

. . . [A]ny compensation, whether in cash or in kind, received from any source will be deducted from the total amount of losses suffered. . . . The Department will submit the claims of U.S. citizens and, as authorized by the claims criteria adopted by the Governing Council of the Compensation Commission, will be prepared to consider submitting claims of residents of the United States.

As of July 1, 1992, the Commission will begin processing claims submitted by governments up to that date. . . .

* * * *

d. UNCC decisions

The UNCC proceeded to adopt decisions further refining the claims process. Among these were UNCC Decision 3, adopted October 23, 1991, pursuant to paragraph 6 of the UNCC's Criteria for Processing Urgent Claims. Decision 3 provided definitions and approaches to personal injury and mental suffering claims. Such claims were to be processed prior to the claims of corporations or governments. For the full text see, *www.unog.ch/uncc/decision/dec_03.pdf*.

Decision 9, issued March 6, 1992, addressed the compensation for business losses and defined types of damages and valuation. This decision was meant to address the various concerns surrounding the Category "E" claims, including the possibility for double claiming for compensation as an individual and as a business entity. The decision further emphasized the importance of seeking compensation from all of the available sources before resorting to filing a UNCC claim. For the full text, *see www.unog.ch/uncc/decision/dec_09.pdf*.

Decision 11, issued June 26, 1992, addressed the eligibility of members of the Allied Coalition's armed forces to seek

compensation from the compensation fund. The decision denied compensation to these individuals unless three qualifications were met:

> (a) the compensation is awarded in accordance with the general criteria already adopted; and
> (b) they were prisoners of war as a consequence of their involvement in Coalition military operations against Iraq in response to its unlawful invasion and occupation of Kuwait; and
> (c) the loss or injury resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949).

For the full text, *see www.unog.ch/uncc/decision/dec_11.pdf.*

On March 23, 1994, in response to the realization that even if the claims were reimbursed on a pro rata basis, there would not be enough money in the compensation fund to satisfy all of the claims at once, the UNCC issued Decision 17. This decision reaffirmed the prioritization of the claims by category, and established that the individual injury claims in Category A, B, and C would be processed according to the date filed. These claims were to receive compensation from the fund prior to the other categories of claims. In the event of a shortfall of funds at any given time, awards would be paid on a pro rata basis until fully paid. The text of the decision is available at *www.unog.ch/uncc/decision/dec_17.pdf.*

10. International Law Commission Draft Articles on State Responsibility

In 1947 the General Assembly of the United Nations established the International Law Commission ("ILC"). Under the ILC Statute, the Commission "shall have for its object the promotion of the progressive development of international law and its codification" G.A. Res. 174 (II), U.N. GAOR, 2d Sess., Res. at 296, U.N. Doc. A/519 (1947). One of the first topics for the ILC to address was the issue of State responsibility, an undertaking that occasioned protracted

debates and negotiations over the exact responsibilities that should be included in its draft articles on this topic. In 1996, the ILC completed a full draft of its Articles on State Responsibility. In December 1997 the United States submitted comments regarding the draft articles, excerpted below. The U.S. comments urged the ILC to "focus on developing a clear set of legal principles well-anchored in customary international law. . . ."

In August 2001 the ILC published its Draft Articles on the Responsibility of States for Internationally Wrongful Acts, ILC 53d Report, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), available at *www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.* The UN General Assembly took note of these articles on January 28, 2002. G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/RES/56/83 (2002).

The full text of the U.S. comments, dated December 22, 1997, and excerpted below (most footnotes omitted) is available at *www.state.gov/s/l/c8183.htm.*

---

* * * *

The United States agrees with the Commission that a statement of the law of state responsibility must provide guidance to states with respect to the following questions: When does an act of a state entail international responsibility? What actions are attributable to the state? What consequences flow from a state's violation of its international responsibility? Customary international law provides answers to these questions, but the Commission has in many instances not codified such norms but rather proposed new substantive rules. In particular, the sections on countermeasures, crimes, dispute settlement, and state injury contain provisions that are not supported by customary international law.

Therefore, these comments first address the following areas of the draft, which, in the U.S. view, contain the most serious difficulties:

* Countermeasures: While we welcome the recognition that countermeasures play an important role in the regime of state

responsibility, we believe that the draft articles contain unsupported restrictions on their use.

* International Crimes: The United States strongly opposes the inclusion of distinctions between delicts and so-called "state crimes," for which there is no support under customary international law and which undermine the effectiveness of the state responsibility regime as a whole.

* Reparation: While many of the points in the section on reparation reflect customary international law, other provisions contain qualifications that undermine the well-established principle of "full reparation."

* Dispute Settlement: Because of certain flaws in the dispute settlement procedure, we urge that Part Three be made optional.

* Standing and Injury: Important elements of article 40's definition of an injured state lack support under customary international law and would lead to undesirable consequences.

The above-mentioned comments are followed by a discussion of other topics, including attribution of acts to a state; the relationship of the articles to the United Nations Charter; temporal aspects of breach; and assistance in the commission of a wrongful act by another state.

Because the articles would be used by states, tribunals and individuals, it is important that they be effective, practical, and sound, which certain elements of the current draft are not. We urge the Commission to focus on developing a clear set of legal principles well-anchored in customary international law and free from excessive detail and unsubstantiated concepts.

I. Countermeasures

International law generally permits countermeasures in order to bring about the compliance of a wrongdoing state with its international obligations. The limits on countermeasures are far from clear, though there is general consensus that principles of proportionality and necessity apply. In this section, the United States recommends that the Commission (1) clarify the definition of countermeasures, (2) substantially revise the dispute settlement

provisions pertaining to countermeasures, (3) recast the rule of proportionality, and (4) delete or substantially revise the prohibitions on countermeasures.

1. Draft Article 30

We support draft article 30's reflection of the settled view that countermeasures "have a place in any legal regime of State responsibility." See G. Arangio-Ruiz (Special Rapporteur), *Fifth Report on State Responsibility*, U.N. Doc. A/CN.4/453 (May 12, 1993), para. 36. The article acknowledges that an otherwise unlawful act loses its unlawful character when it "constitutes a measure legitimate under international law" in response to a prior unlawful act. We agree that draft article 30 concerns only acts of a state that are otherwise "not in conformity with an obligation of that State towards another State". See Draft Article 30. Thus, the scope of draft article 30 does not extend to the entire range of responsive actions by states, such as measures of retorsion, actions that might be termed "unfriendly" but that do not violate international obligations. . . .

Similarly, we do not understand draft article 30 to alter or otherwise affect the rights and obligations of states under the Vienna Convention on the Law of Treaties and the customary international law of treaties. The International Court of Justice recently has drawn an even sharper distinction with respect to treaty law and state responsibility, stating that "these two branches of international law obviously have a scope that is distinct." *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), 25 September 1997, at para. 47 [hereinafter *Gabcikovo-Nagymaros Case*]. A state may have a range of alternatives available under the law of treaties in response to a breach by another state of a provision of a treaty in force between the two states. The treaty may provide for specific responses, such as dispute settlement procedures or other measures. A state may also be entitled to reciprocal measures, which are outside article 30's definition of countermeasures. Article 30 should not be read as precluding states from taking measures designed to maintain "the condition of reciprocity in the law of treaties." See, e.g., E. Zoller, *Peaceful Unilateral Remedies* 18 (1984).

In this connection, it bears noting that draft article 37 on *lex specialis* states that "the provisions of this Part [Two] do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act." The United States strongly supports the principle of draft article 37 and believes that it should also apply to Part I of the draft. For instance, two states could devise an agreement where one of the circumstances precluding wrongfulness would not apply even where, in similar circumstances, the draft articles would indeed apply. Or parties could arrive at an agreement whereby each waives the rule of exhaustion of local remedies, even where that rule would normally apply under draft article 22.

2. Limitations on Countermeasures

The United States agrees that under customary international law an injured state takes countermeasures "in order to induce [the wrongdoing State] to comply with its obligations." See Draft Article 47(1). See also *Case Concerning the Air Services Agreement of March 27, 1946 Between the United States of America and France*, 18 R:I.A.A. 417, 443 (1978) [hereinafter *Air Services Case*] (stating that an injured state "is entitled . . . to affirm its rights through 'counter-measures' "). In addition, we agree that counter-measures under customary international law are governed by principles of necessity and proportionality. Chapter III as a whole, however, unacceptably limits the use and purposes of counter-measures by imposing restrictions not supported under customary international law.

a. Mandatory Dispute Settlement Provisions

Under customary international law, a demand for cessation or reparation should precede the imposition of countermeasures. See, e.g., *Gabcikovo-Nagymaros Case* at para. 84 ("the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it"); *Air Services Case* at 420. Article 48, however, goes beyond customary international law in two significant respects.

(i) Prior Negotiation

Article 48, in conjunction with draft article 54, requires an injured state to seek negotiations before taking countermeasures.

However, customary international law does not require an injured state to seek negotiations prior to taking countermeasures, nor does it prohibit the taking of countermeasures during negotiations. The Air Services Case Tribunal, for instance, noted that it "does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations . . ." *Air Services Case* at 445. The requirement for prior negotiations may prejudice an injured state's position by enabling a wrongdoing state to compel negotiations that delay the imposition of countermeasures and permit it to avoid its international responsibility.

The draft treats this problem by providing an exception from the prior-negotiation requirement for "interim measures of protection which are necessary to preserve [the injured state's] rights." Draft Article 48(1). This exception is vague and may lead to contradictory conclusions by states seeking to apply it. In particular, the draft does not indicate whether interim measures of protection would, like countermeasures, be unlawful absent the precipitating wrongful act. If not, then it would be unnecessary to enunciate a principle of interim measures. However, if interim measures fall within the definition of draft article 30 but short of "full-scale countermeasures," Commentaries at 311, it is unclear how in concrete circumstances the term might be applied.

Rather than opening the section on countermeasures to disputes over the meaning of interim measures, the draft should reflect the fundamental customary rule that countermeasures are permissible prior to and during negotiations. We would therefore urge the Commission to clarify draft article 48 by stating that countermeasures are permissible as a means to induce such compliance prior to and during negotiations.

(ii) Compulsory Arbitration

Article 48(2) contains two flaws with respect to the draft's system of arbitration. First, it states that "an injured State taking countermeasures shall fulfill the obligations in relation to dispute settlement arising under Part III . . ." This refers to draft article 58(2), which states that where the dispute involves the taking of countermeasures by the injured state, "the State against which they are taken is entitled at any time unilaterally to submit the

dispute to an arbitral tribunal" constituted under the articles. Compulsory arbitration of this sort is not supported by customary international law, would be unworkable in practice, and would establish a novel system whereby an injured state may be compelled to arbitrate a dispute. There is no basis in international law or policy for subjecting the injured state to such a requirement when it pursues countermeasures in response to a wrongful act of another state. Indeed, this compulsory system is in contrast to draft article 58(1), which states that the parties may submit other disputes under the articles to arbitration "by agreement." We think that this creates a serious imbalance in the treatment of injured and wrongdoing states. In addition to extending the period during which a wrongdoing state may remain in breach of its obligations, this system imposes on the injured state the high cost of arbitrating the dispute. Draft article 60 exacerbates the problem of delay by providing for ICJ review. We believe that this system of compulsory arbitration would impose an unacceptable cost on injured states that must resort to countermeasures.

In addition, draft article 48(2) states that "an injured state taking countermeasures shall fulfill" the obligations under article 58(2) "or any other binding dispute settlement procedure in force" for the parties. We understand that article 48(2) merely seeks to preserve other existing mechanisms in force between the parties. See Commentaries at 312–13. However, to the extent that article 48(2) may be read as imposing additional requirements, the article lacks support under customary international law. For instance, article 48(2) should not be misinterpreted as constituting consent to resort to dispute settlement procedures where the existing procedure requires mutual consent. Such an outcome would be unacceptable. Further, draft article 48(3)'s requirement that countermeasures be suspended while dispute settlement mechanisms are "being implemented in good faith" is vague and may lead to further delay and abuse by the wrongdoing state.

Article 48 as a whole should, at the least, be placed in an optional dispute settlement protocol. As a mandatory system of conditions, it is without foundation under customary international law and undermines the ability of states to affirm their rights by countermeasures.

b. The Rule of Proportionality

The United States agrees with the Commission that under customary international law a rule of proportionality applies to the exercise of countermeasures. See, e.g., Memorial and Reply of the United States in the *Air Services Case*, excerpted in M. Nash, *1978 Digest of U.S. Practice in International Law* 768, 776. International law does not, however, provide clear guidance with respect to how states and tribunals should measure proportionality. One school states that the countermeasure must be related to the degree of inducement necessary to satisfy the original debt, R. Phillimore, 3 *Commentaries upon International Law* 16 (1885), or "the amount of compulsion necessary to get reparation", H. Lauterpacht, 2 *Oppenheim's International Law* 141 (1952). See Commentaries at 316–17, footnotes 130 and 132. Elsewhere, it is stated that the countermeasure must be compared "to the act motivating them," *Naulilaa Case*, 2 R.I.A.A. 1011, 1028 (Portugal v. Germany) (1928). See also *Air Services Case* at 443 (the countermeasure requires "some degree of equivalence with the alleged breach"). We agree that, in some circumstances, the countermeasure must be related to the principle implicated by the international wrong. Similarly, the wrongful act may illustrate what kind of measure might be effective to bring the wrongdoing state into compliance with its obligations.

Draft article 49 evaluates the proportionality of a countermeasure by accounting for "the degree of gravity of the internationally wrongful act and the effects thereof on the injured State." We believe that this formulation gives undue emphasis to the "gravity" of the antecedent violation as the measure of proportionality. In the U.S. view, draft article 49 should reflect both trends identified above with respect to proportionality. Proportionality means principally that countermeasures should be tailored to induce the wrongdoer to meet its obligations under international law, and that steps taken toward that end should not escalate but rather serve to resolve the dispute. A conception of proportionality that focuses on a vague concept of "gravity" of the wrongful act reflects only one aspect of customary international law. As Professor Zoller has written, proportionality is not confined to relating the breach to the countermeasure but rather to "put

into relationship the purpose aimed at, return of the status quo ante, and the devices resorted to in order to bring about that return." Zoller at 135. See also Elagab at 45. Cf. Commentaries at 319.[7]

Because countermeasures are principally exercised to bring a return to the status quo ante, a rule of proportionality should weigh the aims served by the countermeasure in addition to the importance of the principle implicated by the antecedent wrongful act. In addition, the Commentaries explain article 49's formulation, "shall not be out of proportion," by stating that "a countermeasure which is *disproportionate, no matter what the extent*, should be prohibited to avoid giving the injured State a degree of leeway that might lead to abuse." Commentaries at 319 (emphasis added). The United States believes that this interpretation does not accord with customary practice. See, e.g., *Naulilaa Case* at 1028 (countermeasures are "excessive" where they "are out of all proportion to the act motivating them"); *Air Services Case* at 444 (measures taken by the United States "did not appear to be *clearly disproportionate*"). Proportionality is a matter of approximation, not precision, and requires neither identity nor exact equivalency in judging the lawfulness of a countermeasure. Customary law recognizes that, in some circumstances, a degree of response greater than the precipitating wrong may be appropriate to bring the wrongdoing state into compliance with its obligations. The United States believes this interpretation should be reflected in the text of draft article 49.

c. Prohibited Countermeasures

The United States believes that article 50's prohibitions on the resort to countermeasures do not in all cases reflect customary international law and may serve to magnify rather than resolve

[7] Relating the countermeasure to the aims to be achieved, whether cessation or reparation, differs from the requirement of draft article 47(1) that the countermeasure be necessary. The requirement of necessity aims at the initial decision to resort to countermeasures; it asks, is the resort to countermeasures necessary? See Commentaries at 307. By contrast, the rule of proportionality asks whether the precise measure chosen by the injured state is necessary to induce the wrongdoing state to meet its obligations.

disputes. First, article 50 would prohibit categories of countermeasures without regard to the precipitating wrongful act. However, article 49's rule of proportionality generally would limit the range of permissible countermeasures and would, in most circumstances, preclude resort to the measures enumerated in article 50. To that extent, draft article 50 is unnecessary. Second, draft article 50 may add layers of substantive rules to existing regimes without clarifying either the specific rules or the law of state responsibility. Thus, the duplication of rules in areas such as diplomatic and consular relations and human rights may complicate disputes rather than facilitate their resolution.

Third, the section relies on vague language that would amplify the areas of dispute. For instance, draft article 50(b) disallows the use of "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act." What is "extreme"? What measures fall under the rubric of "economic or political coercion"? What kinds of economic or political measures would "endanger the territorial integrity or political independence" of a State? Cf. Elagab at 191–196. These are subjectively adduced criteria for which no supporting state practice is cited. Similarly, draft article 50(d) refers to "any conduct which derogates from basic human rights," without defining derogation or "basic" human rights. The language of article 50(d) provides only limited guidance, for there are very few areas of consensus, if any, as to what constitutes "basic human rights". Article 50(e) similarly does not provide useful guidance in determining whether a countermeasure would be permissible. Just as there is little agreement with respect to "basic" human rights and political and economic "coercion," the content of peremptory norms is difficult to determine outside the areas of genocide, slavery, and torture.

* * * *

III. Reparation and Compensation

While the draft articles restate the customary obligation to provide reparation, they also create several significant loopholes

that might be exploited by wrongdoing states to avoid the requirement of "full reparation" identified in draft article 42(1).

1. The Principle of Reparation

Draft article 42(1) appears to state correctly that a wrongdoing state is under an obligation to provide "full reparation" to an injured state, in addition to ceasing unlawful conduct as required by customary law and set forth in draft article 41. Nonetheless, the Commission has provided two potentially significant exceptions from the general principle of full reparation.

First, subparagraph two of article 42 provides vaguely for an "accounting" of "the negligence or the willful act or omission" of the injured state or national "which contributed to the damage." It is unclear whether this subsection intends to impose a concept of contributory negligence, which under a common law approach night completely negate the responsibility of the wrongdoer, see, e.g., Dobbs, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury* 256 (2d ed. 1993), or whether it foresees some partial deviation from the "full reparation" standard. Draft article 42(2) could be read as incorporating a contributory fault standard, allowing a wrongdoing state to avoid its obligation to provide reparation simply by positing the negligence of the injured state. Such a standard, we suspect, would be unacceptable to most states, as it is to the United States.

The commentary to paragraph 2 suggests that the drafters may have intended to express a comparative fault principle. See Commentaries at 278 ("to hold the author State liable for reparation of all of the injury would be neither equitable nor in conformity with the proper application of the causal link theory"). The United States appreciates the difficulties posed by the circumstance where an injured state or national bears some responsibility for the extent of his damages. However, the concept of comparative fault is neither established in the international law of state responsibility nor clearly explicated in article 42(2). Cf. id. footnote 160. More important, comparative fault introduces an imprecise concept susceptible to abuse by wrongdoing states who might argue that the principle of comparative fault should be applied to relieve them of responsibility to provide reparation.

The second loophole is created by article 42(3). It states, without support in customary international law, that reparation shall never "result in depriving the population of a State of its own means of subsistence." Draft Article 42(3). While there may arise extreme cases where a claim for prompt reparation could lead to serious social instability, the language of article 42(3) could provide a legal and rhetorical basis for a wrongdoing state to seek to avoid any duty to provide reparation even where it has the means to do so. The draft article provides too subjective a formula, opening too many avenues for abuse. The Commentaries suggest that "some members disagreed with the inclusion of paragraph 3." See Commentaries at 279. The United States agrees with the objectors; the inclusion of article 42(3) in the draft articles is unacceptable.

2. Restitution in Kind

Restitution in kind has long been an important remedy in international law and plays a singular role in the cases where a wrongdoing state has illegally seized territory or historically or culturally valuable property. See, e.g., *Chorzow Factory Case* at 47; *Case Concerning Temple of Preah Vihar* (Cambodia v. Thailand), 1962 I.C.J. 6, 36–37. Still, compensation appears to be the preferred and practical form of reparation in state practice and international case law. See, e.g., Brownlie at 211 ("it is also clear that in practice specific restitution is exceptional") (emphasis in original).

Draft article 43 nonetheless provides two exceptions which the Commission might usefully clarify. Article 43(c) provides that restitution in kind may "not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation." This exception may enable states to avoid the duty to provide restitution in kind in appropriate circumstances. To the extent that the phrase "a burden out of all proportion" is left undefined, this exception would undermine the useful principle that restitution is preferred in some circumstances.

Article 43(d) precludes restitution where it would "seriously, jeopardize the political independence or economic stability" of

the wrongdoing state. Such broad terms, left undefined and without an established basis in international practice, provide nothing to injured states but give hope to wrongdoing states seeking to avoid providing an appropriate remedy. In particular, the draft does not explain just what "serious" jeopardy might include. While subsection (d) may have relatively limited practical effect given the priority of compensation over restitution in practice, the inclusion of broad concepts providing for the avoidance of responsibility is likely to have effects beyond the narrow provision of article 43. The United States urges the Commission to delete the provision.

3. Compensation

Draft article 44 states the long-established principle reflected in customary international law and innumerable bilateral and multilateral agreements that a wrongdoing state must provide compensation to the extent that restitution in integrum is not provided. The principle was stated clearly by the Permanent Court of International Justice in the *Chorzow Factory Case*, where it noted that the appropriate remedy is "restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear." . . .

Nonetheless, paragraph two of draft article 44 provides an unacceptable qualification to the requirement of "any economically assessable damage" by stating that interest "may" be covered. The special rapporteur recognized that both state practice and the literature "seem[] to be in support of awarding interest in addition to the principal amount of compensation." G. Arangio-Ruiz (Special Rapporteur), *Second Report on State Responsibility*, U.N. Doc. A/CN.4/425, at 57–59 (June 9, 1989). The suggestion of the draft article itself, however, is that interest is not required. This suggestion goes counter not only to the overwhelming majority of case law on the subject but also undermines the "full reparation" principle. Numerous instances of international practice support the provision of interest. See, e.g., *S.S. Wimbledon Case,* 1923 P.C.I.J. (ser. A) No. 1, at 15, 33; *Chorzow Factory Case* at 47; *Illinois Central Railroad Co. v. United Mexican States,* 4 R.I.A.A. 134, 137 (Dec. 6, 1926). The most significant and contemporary reflection of customary law concerning compensation may be found

in the holdings of the Iran-United States Claims Tribunal, which has consistently awarded interest as "an integral part of the 'claim' which it has a duty to decide." . . . Similarly, the United Nations Compensation Commission, responsible for assessing damage and distributing awards for claims arising out of Iraq's invasion of Kuwait, decided that "interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award." . . . The few contrary decisions do not undermine the near universal acceptance in international practice and arbitration of the necessity of the provision of interest in the award.

The Commission should close this loophole by stating that compensation "shall include interest," a proposition that expresses clearly and correctly the content of the law and practice of states. In the absence of this revision to draft article 44(2), the United States believes that article 44 will not reflect the customary law on compensation but would, in fact, be a step backward in the international law on reparation.

* * * *

IV. Dispute Settlement

Part Three of the draft articles recognizes that negotiation (article 54), good offices and mediation (article 55), and conciliation (article 56) all play an important role in international dispute settlement. However, the articles go further by making the resort to such tools binding at the request of any state party to a dispute (though the recommendations of the Conciliation Commission may not be binding, participation by both parties seems to be required).

While the attempt to advance the cause of peaceful settlement of disputes is laudable, we see several serious problems in the framework set forth in the draft articles. Most important, to the extent that the draft articles compel resort to such modes of dispute settlement, this framework does not reflect customary international law. Indeed, such a system is unlikely to find widespread acceptance among states. Further, a mechanism designed to meet all possible disputes would not meet the very real differences that arise under the law of state responsibility. Thus, this system likely will be

ineffective in resolving many disputes. Finally, such procedures, especially relating to the conciliation process, are slow and expensive, imposing possibly long delays and high costs. Rather than requiring such a procedure, the draft should allow states, upon mutual agreement, to resort to such mechanisms.

The provision of an arbitral tribunal under draft article 58(1), to which parties may "by agreement" submit their disputes, is unexceptional but unnecessary for the draft articles to function effectively. If, for instance, states are willing to agree to submit their dispute to an international tribunal, they may establish such a tribunal on their own accord or with the assistance of a third party (a disinterested state or international organization, for instance). The United States would support an optional set of dispute settlement procedures for states to follow if it would help them to resolve disputes. See discussion above at § 2(a) (dispute settlement provisions for countermeasures).

Draft article 60's provision of an appellate function to the International Court of Justice—couched as a challenge to the "validity of an arbitral award"—would likely discourage states from signing on to the compulsory system of the draft articles. Together with the strict limitations on countermeasures, a challenge to an arbitral body's decision would extend the period during which a state must await reparation for a wrongdoing state's violation. As it relates to countermeasures, Part Three suggests that a wrongdoing state might remain in breach of its obligations and yet require a variety of steps, culminating perhaps years after the original wrongdoing in a challenged arbitration and a proceeding before the ICJ. Aside from being a highly complex aspect of law enforcement, this sets up an inefficient system which will impose excessive costs on injured states.

The United States believes that the long-term credibility of a code of state responsibility would be undermined by linking it to a mandatory system of dispute settlement that imposes potentially high costs on states, is ignored by states or, even worse, is seen as unbalanced in its treatment of wrongdoing and injured states. The dispute settlement provisions should be deleted in favor of a single nonbinding provision that encourages states to negotiate a resolution of their disputes, if necessary by resort to mutually

agreeable conciliation or mediation, or to submit to procedures under existing agreements, or to submit by mutual agreement their disputes to binding arbitration or judicial decision.

* * * *

VII. Relationship of Draft Articles to the UN Charter

The Commission has sought "quite specific comments by States," Commentaries at 139, footnote 226, with respect to the questions raised by draft article 39, which states that the "legal consequences of an internationally wrongful act" set out in the draft articles "are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security."

The United States agrees with the objective of draft article 39 in emphasizing that the Charter's allocation of responsibility for the maintenance of peace and security rests with the Security Council, and that an act of a state, properly undertaken pursuant to a Chapter VII decision of the Security Council, cannot be characterized as an internationally wrongful act. State responsibility principles may inform the Security Council's decision-making, but the draft articles would not govern its decisions.

The Charter states clearly that its obligations prevail over any other international agreements. See UN Charter, art. 103 (stating that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"). Article 103 not only establishes the preeminence of the Charter, but it makes clear that subsequent agreements may not impose contradictory obligations on states. Thus, the draft articles would not derogate from the responsibility of the Security Council to maintain or restore international peace and security.

The responsibility of the Council, and the coordinate responsibility of member states to implement Council decisions, pervades the Charter. Article 2(5) states, for instance, that "all Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter . . ." In Article 25,

"the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Similarly, Article 48 commits member states to take the "action required to carry out the decisions of the Security Council for the maintenance of international peace and security." In accordance with these articles, therefore, member states are obligated to "carry out" decisions of the Council under Chapter VII with respect to the maintenance of peace and security. The Charter does not provide an exception for existing obligations states might owe other states.

The discretion of the Council, moreover, is broad. See UN Charter, art. 24(2). Thus, the Council has authority to take all necessary action, consistent with the purposes and principles of the Charter, to maintain or restore international peace and security. The Council, in connection with its Chapter VII responsibilities, may "deny a State's plea of necessity" or "a State's right to take countermeasures." Commentaries at 139, footnote 226.

* * * *

Conclusion

Several years ago two scholars commented, with respect to the Commission's efforts to codify the law of state responsibility, that "no other codification project goes so deeply into the 'roots,' the theoretical and ideological foundations of international law, or has created comparable problems." M. Spinedi and B. Simma, "Introduction," in Spinedi and Simma eds., *United Nations Codification of State Responsibility* vii (1987). Indeed, as one reviews the draft articles, it becomes clear that the project of codification deserves exceedingly careful review and revision. As these comments have indicated, the United States believes that, while there is much to be commended in the draft articles, there are also several serious and substantial flaws. To a significant degree, the draft contains provisions that do not reflect customary international law. In those cases where progressive development might be warranted, the draft articles take steps in directions that unacceptably complicate the structure of enforcement of international norms.

If the major flaws of the draft are not addressed and corrected, it will be difficult for the project to obtain the wide support from the international community necessary for a movement toward a state responsibility convention.

* * * *

11. Settlement of USSR Lend-Lease Debt

During World War II, many Allied countries borrowed money from the United States to help fund the war effort. In the years following the war, the United States worked with these countries to allow for a repayment process through trade contracts and property leases.

During the early 1970s, the United States and the USSR negotiated a repayment system that was dependent on most-favored-nation status for the USSR. Because this trade relationship was not established, the debt repayments for the USSR were delayed indefinitely. In 1993 Assistant Secretary of State for Legislative Affairs Janet G. Mullins responded to an inquiry from Senator Carl Levin concerning the status of the Soviet Union's debt repayment.

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

---

* * * *

The Soviet Union's debt to the United States arising out of World War II was settled by the U.S.-USSR lend-lease agreement signed October 18, 1972. The agreement provided for three mandatory payments totaling $48 million ($12 million was paid on October 18, 1972, $24 million on July 1, 1973, and $12 million on July 1, 1975) and payment of the balance of $674 million in regular installments extending to July 1, 2001. Repayment of the $674 million was contingent on the U.S. extending most-favored-nation treatment (MFN) to the Soviet Union under terms "no less favorable" than those provided in a 1972 commercial agreement, which never entered into force.

A side letter to the 1972 agreements also conditioned repayment of the $674 million on the restoration of "export credits, guarantees and insurance through the Export–Import Bank and other similar credits for the purchase of American goods, on terms appropriate to the transactions." Since MFN is not yet available to the USSR, and export credits are restricted, the Soviet obligation to pay on the $674 million balance had not yet been triggered.

The USSR is obligated to resume repayment when the President waives the Jackson-Vanik amendment, eliminating an obstacle to export credits and MFN treatment; the U.S. Congress approves the U.S.-Soviet Trade Agreement, signed June 1, 1990, which accords MFN status to the Soviet Union; and the Congress provides for the normal availability of export credits. The President has indicated he is prepared to waive Jackson-Vanik when the Soviet Union passes emigration legislation which meets international standards, and that he will then submit the 1990 Trade Agreement to Congress for approval and work with Congress on export credits to the Soviet Union.

12. Moscow Embassy Arbitration

On June 17, 1992, Secretary of State James A. Baker III and Russian Federation Minister of Foreign Affairs Andrey Kozyrev signed the Memorandum of Mutual Understanding Between the Government of the United States of America and the Government of the Russian Federation on Settlement of the Problem of the New Embassy Administrative Buildings in Washington and Moscow. This Memorandum settled an arbitration dispute that had arisen in 1985 based on the alleged intentional defects, delays, and performance failures in the construction of the new U.S. Embassy in Moscow. For a further discussion of the arbitration, and the text of the Memorandum, *see III Cumulative Digest 1981–1988* at 3307–17.

13. 1995 Belarus Balloon Shoot-down

On September 12, 1995, a gas balloon participating in the Coupe Gordon Bennett international balloon race was shot down by a helicopter of the Belarussian Air Force, resulting in the loss of the two pilots on board. These two pilots, Alan Fraenckel and John Stuart-Jervis, were American citizens representing the Virgin Islands Aero Club. The U.S. State Department began negotiations with the Government of Belarus to attempt to achieve some type of compensation for the families of the victims. At the end of 2003 these negotiations were still unresolved.

In June 1999 Assistant Secretary of Legislative Affairs Barbara Larkin responded to a letter from Senators Connie Mack and Bob Graham concerning the status of the negotiations.

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

---

* * * *

The Department of State has held two substantive and productive rounds of discussions with the Government of Belarus concerning our claim for compensation arising out of the balloon shootdown. During these talks, the United States has presented a number of documents substantiating the calculation of damages and legal basis of the claim. The Government of Belarus has agreed that compensation is due in this matter.

However, the eviction of our Ambassador from his residence in Minsk last summer severely strained U.S.—Belarussian bilateral relations and suspended dialogue in most other areas. We have been working with the Belarussian government to resolve that dispute. Nevertheless, we soon plan to propose another round of talks on the balloon shootdown issue. When our Ambassador does return to Minsk, the United States will be in a better position to press on this and many other important issues.

* * * *

B. PRIVATE CLAIMS BY INDIVIDUALS

1. Claims Against the United States by Panamanian Businesses

In May 1991 a number of Panamanian businesses filed suit seeking damages from the United States for its allegedly negligent failure to protect their businesses in Panama City between December 20, 1989, and January 10, 1990. The businesses alleged that during that period, United States armed forces occupied Panama City and therefore assumed a duty to maintain law and order pursuant to Articles 42 and 43 of Regulations annexed to the 1907 Hague Convention Respecting the Law and Customs of War on Land ("1907 Hague Convention"), 1 Bevans 631, 36 Stat. 2277.

As a consequence of the United States' purported breach of its international obligations, plaintiffs alleged that their businesses were looted, burned and destroyed by Panamanian civilians. Plaintiffs sought to hold the United States responsible for compensation under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2671 et seq., and the Alien Tort Statute, 28 U.S.C. § 1350.

The U.S. District Court for the Eastern District of Virginia granted the government's motion to dismiss on the basis of U.S. sovereign immunity. *Goldstar* (*Panama*) *S.A. v. United States*, No. 91–725 (E.D. Va. Sept. 6, 1991). The U.S. Court of Appeals for the Fourth Circuit affirmed. *Goldstar* (*Panama*) *S.A. v. United States*, 967 F.2d 965 (4th Cir. 1992). Because it found that it lacked subject matter jurisdiction, the court of appeals did not find it necessary to reach the question of whether the issue presented a political question, not subject to judicial review.

Excerpts from the court of appeals decision dismissing claims under the Alien Tort Statute on the basis of U.S. sovereign immunity are provided below (footnotes omitted).

---

* * * *

Goldstar's first contention is that jurisdiction is proper under the Alien Tort Statute, 28 U.S.C. § 1350. That provision states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Id. While this statute would facially appear to grant jurisdiction for Goldstar's action, the Alien Tort Statute has been interpreted as a jurisdictional statute only—it has not been held to imply any waiver of sovereign immunity. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985); Canadian Transp. Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980). Thus, any party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit.

Goldstar contends that the United States has waived sovereign immunity under the provisions of the Hague Convention, a multilateral international treaty to which the United States is a signatory. The relevant provision of that document states, "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Hague Convention Respecting the Law and Customs of War on Land, 1907, art. 3, 36 Stat. 2277, 2290. The "Regulations," referenced by the treaty, contain a provision relating to the circumstance in which one nation occupies the territory of another:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Hague Convention, Annexed Regulations, art. 43, 36 Stat. at 2306. Under Goldstar's theory, the United States failed to comply with the duty imposed on occupying nations by Article 43 of the Hague Convention. Accordingly, Goldstar contends that the United States is liable for compensation under Article 3 of the Convention, and

that Article 3 must be interpreted as a self-executing waiver of sovereign immunity with regard to such claims.

International treaties are not presumed to create rights that are privately enforceable. See Head Money Cases, 112 U.S. 580, 598–99, 28 L. Ed. 798, 5 S. Ct. 247 (1884); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314, 7 L. Ed. 415 (1829). 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. United States v. Thompson, 928 F.2d 1060, 1066 (11th Cir.), cert. denied, 116 L. Ed. 2d. 222, 112 S. Ct. 270 (1991); Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976). The Hague Convention does not explicitly provide for a privately enforceable cause of action. Moreover, we find that a reasonable reading of the treaty as a whole does not lead to the conclusion that the signatories intended to provide such a right. . . .

In sum, we hold that the Hague Convention is not self-executing and, therefore, does not, by itself, create a private right of action for its breach. As a result, we find that neither the Hague Convention nor, derivatively, the Alien Tort Statute, constitutes a waiver of sovereign immunity for the type of action advanced by Goldstar. Accordingly, Goldstar cannot establish subject matter jurisdiction under the terms of the Alien Tort Statute.

* * * *

2. LIBERTAD Act: Title III

On May 17, 1996, Attorney General Janet Reno published in the Federal Register a summary of the provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Pub. L. No. 104–114, approved March 12, 1996. 61 Fed. Reg. 24,955 (May 17, 1996). Under Title III, entitled Protection of Property Rights of United States Nationals, the notice explained, "a United States national with a claim to property expropriated by the Government of Cuba on or after January 1, 1959, may bring a private lawsuit in U.S. federal district court against a person who traffics in that property beginning three months after Title III's effective date [subject to certain

requirements, conditions, and possible suspensions]. The scheduled effective date is August 1, 1996, subject to the President's authority to suspend Title III."

Subsequently, on July 16, 1996, President Clinton reported to the Congress his determination to allow Title III to take effect August 1, 1996, but also to suspend the right to bring an action under Title III for six months beyond August 1, 1996. The President determined that these actions were "necessary to the national interests" of the United States and "would expedite a transition to democracy in Cuba." In a statement accompanying his letters, the President explained his reasons for permitting Title III to become effective on August 1, and for suspending the right to file suit for six months, excerpted below. *See also* 91 Am. J. Int'l L. 110 (1997).

The full text of President Clinton's letter and his accompanying statement and the White House fact sheet, all dated July 16, 1996, are available at 32 WEEKLY COMP. PRES. DOC. 1265 (July 22, 1996). See also statement of Under Secretary of State for Economic, Business, and Agricultural Affairs Stuart E. Eizenstat, July 16, 1997, concerning continued suspension of Title III and international cooperation, available at *www.state.gov/www/regions/wha/970716a_eizenstat.html*.

---

* * * *

Title III allows U.S. nationals to sue foreign companies that profit from American-owned property confiscated by the Cuban regime. The law also provides me with the authority to suspend the date on which Title III enters into force, or the date on which U.S. nationals can bring suit, if I determine that suspension is necessary to the national interests and will expedite a transition to democracy in Cuba. I have decided to use the authority provided by Congress to maximize Title III's effectiveness in encouraging our allies to work with us to promote democracy in Cuba.

I will allow Title III to come into force. As a result, all companies doing business in Cuba are hereby on notice that by trafficking in expropriated American property, they face the prospect of lawsuits and significant liability in the United States.

This will serve as a deterrent to such trafficking—one of the central goals of the LIBERTAD Act.

At the same time, I am suspending the right to file suit for six months. During that period, my Administration will work to build support from the international community on a series of steps to promote democracy in Cuba. These steps include: increasing pressure on the regime to open up politically and economically; supporting forces for change on the island; withholding foreign assistance to Cuba; and promoting business practices that will help bring democracy to the Cuban workplace.

At the end of that period, I will determine whether to end the suspension, in whole or in part, based upon whether others have joined us in promoting democracy in Cuba. Our allies and friends will have a strong incentive to make real progress because, with Title III in effect, liability will be established irreversibly during the suspension period and suits could be brought immediately when the suspension is lifted. And for that very same reason, foreign companies will have a strong incentive to immediately cease trafficking in expropriated property—the only sure way to avoid future lawsuits.

* * * *

We will work with our allies when we can. But they must understand that for countries and foreign companies that take advantage of expropriated property the choice is clear: They can cease profiting from such property. They can join our efforts to promote a transition to democracy in Cuba. Or they can face the risk of full implementation of Title III.

* * * *

Title III continued to be suspended for six-month periods throughout the 1990s. A fact sheet released by the Department of State January 15, 2000, described the President's actions as excerpted below.

The full text of the fact sheet is available at *www.state.gov/www/regions/wha/fs_000115_titleIII_suspen.html*.

---

* * * *

In January 1997, the President cited significant progress in the development of the multilateral initiative and renewed the suspension for another 6 months in order to consolidate and further develop the multilateral approach. At that time, he said he would expect to continue to suspend the Title III lawsuit provision as long as our friends and allies continue their efforts to promote a transition to democracy in Cuba. In July 1997, January 1998, July 1998, January 1999, and July 1999, the President noted additional concrete steps to promote democracy and human rights when he announced additional 6-month suspensions.

The President's initiative to gain international support for democracy in Cuba—the most ambitious since Castro seized power—is yielding tangible positive results. In the past 6 months, governments, non-governmental organizations, and the private sector have taken additional important steps to promote democracy in Cuba. Cuban officials at home and abroad continue to hear a concerted message in support of democratic change.

* * * *

3. U.S. Interest in the Enforcement of Arbitral Awards

In 1988, Revpower Limited, a U.S. company, contracted with Shanghai Far East Aero-Technology Import and Export Corporation ("SFAIC") to establish an industrial battery plant in Shanghai. According to Revpower, SFAIC was owned by a state-owned Chinese company, Shanghai Aviation Industry Corporation ("SAIC"), and created specifically to do business with Revpower.

Subsequently, a dispute developed between Revpower and SFAIC over pricing, and Revpower filed a complaint with the Arbitration Institute of the Stockholm Chamber of Commerce. On July 13, 1993, the Arbitration Institute awarded Revpower $4.9 million plus interest.

Efforts to enforce the award in Chinese courts met with protracted delays. By the time Revpower was able to enforce its award, SFAIC had no assets to satisfy the judgment. SFAIC filed for bankruptcy soon thereafter. As of 1999, Revpower

was a creditor in the SFAIC bankruptcy action, but had not received any portion of its award. Assistant Secretary of State for Legislative Affairs Barbara Larkin explained the U.S. position regarding the Revpower case in a January 1998 letter to Senator Bob Graham:

> The Department of State is very concerned about the difficulties U.S. companies have faced in enforcing arbitral awards in China, and is quite familiar with the Revpower case in particular. We have been very active in raising these issues with the Chinese government, and have emphasized the importance of establishing a fair and transparent investment climate in China that includes adequate legal and judicial protection for all parties. Moreover, we have indicated to the Chinese that timely and fair resolution of Revpower and other investment disputes would send a positive signal to U.S. businesses about the investment climate in China. Enforcement of arbitral awards has been an issue of particular focus of both the Department of State and the Department of Commerce in our communications with Chinese government officials, and we have both raised the Revpower dispute repeatedly as an example of this problem. . . .

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

4. Holocaust-related Claims

As noted in Mr. Eizenstat's September 14, 1999, testimony in A.1.b., *supra,* private claimants brought suit in U.S. courts during the 1990s against certain foreign governments, corporations, and banks for claims arising out of the Nazi period. Some claims against Swiss and Austrian banks were settled in court. *See In re Holocaust Victim Assets Litigation,* 105 F.Supp.2d 139 (E.D.N.Y. 2000); *In re Austrian and German Holocaust Bank Litigation,* 80 F.Supp.2d 184 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). *See Digest 2000* at 445–46, 460.

In 2000–2001, most of the remaining claims against banks, insurance companies, and companies allegedly using slave and forced labor were voluntarily dismissed by the claimants in favor of negotiated payment mechanisms. Mr. Eizenstat played a facilitative role in negotiations among foreign governments and other entities in creating these payment mechanisms but the United States did not espouse these claims. *See, e.g., In re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429 (D.N.J. 2000); *In re Austrian and German Holocaust Litigation*, 250 F.3d 156 (2d Cir. 2001). *See Digest 2000* at 446–60, 485–89; *Digest 2001* at 386–413; *Digest 2002* at 430–34

In 1997 the U.S. District Court for the Northern District of Illinois dismissed claims against Germany based on enslavement during World War II, and against Germany and the claims conference for an alleged conspiracy to deprive plaintiff of full compensation for his injuries. *Sampson v. Federal Republic of Germany and the Conference on Jewish Material Claims Against Germany, Inc.*, 975 F. Supp. 1108 (N.D. Ill. 1997), *aff'd* 250 F.3d 1145 (7th Cir. 2001). The court of appeals found that suit against Germany was barred by the Foreign Sovereign Immunities Act, concluding that there was no implied waiver exception to foreign sovereign immunity for *jus cogens* violations, and that plaintiff lacked standing to sue the claims conference. *See Digest 2000* at 473–85.

In 1999 the state of California passed two pieces of legislation relevant to claims during the Nazi period. The California Holocaust Victim Insurance Relief Act ("HVIRA") required, among other things, that insurers doing business in California that sold insurance polices to persons in Europe in effect between 1920 and 1945 file certain information about those policies with the California Insurance Commissioner. That statute was ultimately found unconstitutional by the U.S. Supreme Court as pre-empted by federal foreign policy. *American Insurance Association v. Garamendi*, 539 U.S. 396, *rehearing denied*, 124 S.Ct. 35 (2003). *See Digest 2000* at 460–73; *Digest 2001* 413–17; *Digest 2002* at 415–29; *Digest 2003* at 462–68.

Also in 1999 California enacted a statute permitting World War II forced laborers to sue the companies that benefited from their labor. Cal. Civ. Proc. Code § 354.6 (West 1999). Most of the claims under this statute were brought against Japanese companies. The Ninth Circuit found that the statute intruded "on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2003), as amended, March 6, 2003. *See Digest 2000* at 500–40; *Digest 2001* at 339–40; *Digest 2003* at 468–71.

Cases brought under § 354.6 in California state courts were also dismissed. *E.g., Mitsubishi Materials Corp. v. Superior Court of Orange County* (*Dillman, real party in interest*), 113 Cal. App. 4th 55 (Cal. App. 4th Dist. 2003); *See Digest 2002* at 434–456; *Digest 2003* at 471–72. and *Taiheiyo Cement Corp. v. Superior Court* (*Jae Won Jeong, Real Party in Interest*), 12 Cal. Rptr. 3d 32 (Cal. App. 2nd Dist. 2004). *See Digest 2002* at 434–56 and *Digest 2003* at 472–74.

In Florida, the 1998 Florida Holocaust Victims Insurance Act, Fla. Stat. § 626.9543, was found to violate Constitutional due process limits on legislative jurisdiction. *Gerling Global Reins. Corp. of America v. Gallagher,* 267 F.3d 1228 (11th Cir. 2001). *See Digest 2001* at 414 n.3.

Cross-references

Claims for damages arising out of cooperative space activity, **Chapter 4.A.2.d.**

Claims under Alien Tort Statue and Torture Victims Protection Act, **Chapter 6.G.2.**

Claims under FSIA and others affected by head of state, diplomatic, and consular immunities and related issues, **Chapter 10.**

Interpretation of Algiers Accords in enforcement of judgment, **Chapter 15.A.3.b.(1).**

Chapter 9

Diplomatic Relations, Succession and Continuity of States

A. DIPLOMATIC RELATIONS AND RECOGNITION

1. Issues of Recognition Under U.S. Law

a. President's constitutional authority to recognize

On May 16, 1995, Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, issued a memorandum opinion for the Counsel to the President concerning the constitutionality of a pending legislative proposal (S. 770) that would have required the recognition of Jerusalem as the capital of Israel. The bill, introduced in the Senate on May 9, 1995, stated that "[i]t is the policy of the United States that—(1) Jerusalem should be recognized as the capital of the State of Israel; (2) groundbreaking for construction of the United States Embassy in Jerusalem should begin no later than December 31, 1996; and (3) the United States Embassy should be officially open in Jerusalem no later than May 31, 1999." S. 770, 104th Cong. § 3(a) (1995). It would also have required that not more than fifty percent of the funds appropriated to the State Department for FY heading 1997 under the "Acquisition and Maintenance of Buildings Abroad" could be obligated until the Secretary of State determined and reported to Congress that construction had begun on the site of the U.S. Embassy in Jerusalem. *S. 770*, § 3(b).

In concluding that these requirements would be unconstitutional, Mr. Dellinger's memorandum discussed the President's exclusive "recognition" authority under the United States Constitution. Excerpts from Mr. Dellinger's memorandum follow.

The full text is available at *www.usdoj.gov/olc/s770.16.htm*.

---

* * * *

It is well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States. This authority flows, in large part, from the President's position as Chief Executive, U.S. Const. art. II, § 1, cl. 1, and as Commander in Chief, id. art. II, § 2, cl. 1. It also derives from the President's more specific powers to "make Treaties," id. art. II, § 2, cl. 2; to "appoint Ambassadors . . . and Consuls," id.; and to "receive Ambassadors and other public Ministers," id. art. II, § 3. The Supreme Court has repeatedly recognized the President's authority with respect to the conduct of diplomatic relations. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive' ") (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705–06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"); see also *Ward v. Skinner*, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, C.J.) ("[T]he Constitution makes the Executive Branch . . . primarily responsible" for the exercise of "the foreign affairs power."), cert. denied, 503 U.S. 959 (1992); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (Scalia, J.) ("[B]road leeway" is "traditionally accorded the Executive in matters of foreign affairs."). Accordingly, we have affirmed that the Constitution "authorize[s] the President to determine the form and manner in which the United States will maintain relations with foreign nations." Issues Raised by

Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 21 (1992).

Furthermore, the President's recognition power is exclusive. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 204 (1987) ("[T]he President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government."). It is well established, furthermore, that this power is not limited to the bare act of according diplomatic recognition to a particular government, but encompasses as well the authority to take such actions as are necessary to make the power of recognition an effective tool of United States foreign policy. *United States v. Pink*, 315 U.S. 203, 229 (1942) (The authority to recognize governments "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition.").

* * * *

In general, because the venue at which diplomatic relations occur is itself often diplomatically significant, Congress may not impose on the President its own foreign policy judgments as to the particular sites at which the United States' diplomatic relations are to take place. More specifically, Congress cannot trammel the President's constitutional authority to conduct the Nation's foreign affairs and to recognize foreign governments by directing the relocation of an embassy. This is particularly true where, as here, the location of the embassy is not only of great significance in establishing the United States' relationship with a single country, but may well also determine our relations with an entire region of the world. Finally, to the extent that S. 770 is intended to affect recognition policy with respect to Jerusalem, it is inconsistent with the exclusivity of the President's recognition power.

* * * *

Finally, it does not matter in this instance that Congress has sought to achieve its objectives through the exercise of its spending

power, because the condition it would impose on obligating appropriations is unconstitutional. *See United States v. Butler*, 297 U.S. 1, 74 (1936); 16 Op. O.L.C. at 28–29 ("As we have said on several prior occasions, Congress may not use its power over appropriation of public funds 'to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs.' ") *(*quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 42 n.3 (1990)) (quoting *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Action*s, 13 Op. O.L.C. 258, 261–62 (1989)).

b. Unrecognized governments: access to U.S. courts

In response to a request from the U.S. District Court for the Southern District of New York, by letter dated November 29, 1995, the United States submitted a Statement of Interest in *Meridien International Bank Ltd. v. Government of the Republic of Liberia*, 1996 U.S. Dist. LEXIS 499 (S.D.N.Y. Jan. 19, 1996). The Statement of Interest stated that the executive branch had determined that allowing the second Liberian National Transitional Government ("LNTG II") access to American courts to present claims and defenses on behalf of the Republic of Liberia would be consistent with U.S. foreign policy even though the United States had not officially recognized that government and that the court should defer to the executive branch determination in this case.

The Statement of Interest, with an attached declaration by William H. Twaddell, Deputy Assistant Secretary of State for African Affairs, summarized events in the six-year Liberian civil war and the series of failed peace agreements as of that date. It also outlined the deployment of a peacekeeping force, the Economic Community of West African States Military Observer Group ("ECOMOG") in August 1990 and the formation at that time of an Interim Government of National Unity of the Republic of Liberia ("IGNU") and the installation of a coalition government in March 1994, the Liberian National Transitional Government ("LNTG I").

Excerpts below from the Statement of Interest address the available access by unrecognized governments to U.S. courts (footnotes and references to paragraphs in the Twaddell declaration and to other attachments to the Statement of Interest are omitted).

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

---

* * * *

In August 1995, all the warring factions signed an agreement. That agreement provides for a broad-based transitional government. The United States believes that this agreement offers the best hope to date of resolving the six-year conflict and supports its implementation. A cease-fire went into effect on August 26, 1995, and is generally holding.

The new transitional government (the LNTG II), headed by a six-member Council of State, was installed on September 1, 1995. The LNTG II is the first transitional government to include the leaders of the key factions in the conflict. . . . No other entity or faction claims to be the government of Liberia in lieu of the LNTG II. . . . National elections are scheduled for August 1996. . . .

* * * *

It would be consistent with the foreign policy interests of the United States for the Court to confer standing upon the LNTG II in this lawsuit to present claims and defenses on behalf of the Republic of Liberia. It is well established that courts must defer to determinations made by the Executive branch as to what government is to be regarded as representative of a foreign state in litigation pending before domestic courts. . . .

* * * *

Although the Department of State has not announced formal recognition of any entity as the government of Liberia, the absence of such formal recognition "cannot serve as the touchstone for determining whether the Executive branch has 'recognized' a foreign nation for the purpose of granting that government access

to United States courts." *National Petrochemical Co. of Iran* v. *M/T Stolt Sheaf*, 860 F.2d 551, 554 (2d Cir. 1988). Rather, as part of the President's implied power to maintain international relations, "the Executive branch must have the latitude to permit a foreign nation access to United States Courts. . . ." *Id.*, at 555. "Because the purpose of denying the privilege of suit to governments not recognized by the Executive branch is solely to give full effect to that branch's sensitive political judgments, a determination by the Executive branch that the unrecognized government, or its instrumentality, should be allowed to sue would naturally free a court from any restrictions placed on the exercise of its jurisdiction." *National Oil Corp.* v. *Libyan Sun Oil Co.*, 733 F.Supp. 800, 807 (D. Del. 1990) (quoting *Transportes Aereos de Angola Ronair, Inc.*, 544 F.Supp. 858, 863–64 (D. Del. 1982)). For example, in *M/T Stolt Sheaf*, the Second Circuit Court of Appeals ruled that formal recognition was not necessary for Iran to gain access to United States courts, especially where the Executive branch had evinced a willingness—through treaties, documents, and other ties, as well as the submission of a statement of interest—to permit the government of Iran to avail itself of Federal forum[s].

In four prior civil actions, the Executive branch submitted Statements of Interest urging that the respective courts accord the IGNU standing to assert claims and defenses on behalf of the Republic of Liberia in those actions, *e.g.*, *Meridien International Bank* v. *Government of the Republic of Liberia*, 91 Civ. 127 (D.N.J. 1991); *Meridien International Bank* v. *Government of the Republic of Liberia*, 91 Civ. 0302 (S.D.N.Y. 1991); *Liberian National Petroleum Co.* v. *Government of the Republic of Liberia*, 90 Civ. 5514 (S.D.N.Y. 1992); *Republic of Liberia* v. *Bickford*, 787 F.Supp. 397 (S.D.N.Y. 1992). Moreover, in *Republic of Liberia and the National Patriotic Reconstruction Assembly Government of Liberia* v. *Liberian Services, Inc.*, 92 Civ. 145 (E.D. Va. 1992), the United States filed a Statement of Interest urging the Court not to confer standing upon the National Patriotic Reconstruction Assembly Government of Liberia to assert claims and defenses on behalf of the Republic of Liberia in that case.

More recently, the Department of State had been requested by the United States District Court for the Southern District of New York to effectuate service via diplomatic channels pursuant to 28 U.S.C. § 1608(a)(4) on the Republic of Liberia in a pending case, *Yona International Limited* v. *Republic of Liberia and National Bank of Liberia*, 94 Civ. 3937 (RPP). In a letter dated November 8, 1995, Conrad K. Harper, Legal Adviser for the Department of State, responded to an inquiry by the Court on the status of the service request. That letter explained that the Department had not effected service on the Republic of Liberia "because of instability in that country, the lack of a government recognized by the United States in Liberia, and the consequent absence of normal diplomatic channels between Liberia and the United States through which service would usually be accomplished." Subsequent to that letter, the LNTG II has become more stable. It has accepted service in the *Yona* case. The LNTG II has also indicated that it is prepared to accept service of process effected pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 et seq. (the "FSIA"), including § 1608(a) (3), in other cases.

As in *M/T Stolt Sheaf*, 860 F.2d at 551, the Executive branch here evinces a willingness to permit the LNTG II to avail itself of a Federal forum. Accordingly, this court should defer to the Executive branch and confer standing upon the LNTG II to present claims and defenses on behalf of the Republic of Liberia in this action.

On January 19, 1996, the court held that, on the basis of the U.S. Statement of Interest, LNTG II had standing to assert claims and defenses on behalf of Liberia in the action. *Meridien Int'l Bank Ltd.* v. *Gov't of the Republic of Liberia*, 1996 U.S. Dist. LEXIS 499 (S.D.N.Y. Jan. 19, 1996). *See also* 90 Am. J. Int'l L. 263 (1996).

c. Other issues of state recognition

On occasion, the question arises in U.S. courts whether citizens from "unrecognized" countries or dependent territories qualify for purposes of "alienage" jurisdiction in

federal court under the U.S. Constitution, art. III, § 2, cl. 1. *See Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied,* 522 U.S. 1091 (1998); *Favour Mind Limited v. Pacific Shores, Inc.*, 1999 U.S. Dist. LEXIS 18887 (S.D.N.Y. Dec. 7, 1999), discussed in Chapter 5.A.2.

The question of what constitutes a "foreign country" also arises in connection with the foreign country exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(k). *See*, *e.g.*, *Smith v. United States*, 953 F.2d 1116 (9th Cir. 1991) (Antartica); *Rossini v. United States*, 82 F.3d 423 (9th Cir. 1996) (Morocco).

2. Establishment of Diplomatic Relations and Recognition of States

a. Albania

Albania was the last of the Central and East European countries to move away from communism. In December 1990 the government agreed to hold multi-party elections taking place on March 31, 1991, marking an end to a 47-year reign of totalitarian and isolationist rule by the communist party. The United States strongly supported the movement of Albania toward democratic and economic reform. Diplomatic relations resumed between the United States and Albania after Foreign Minister Muhamet Kapllani and Assistant Secretary of State for European Affairs Raymond Seitz signed a memorandum of understanding at the Department of State on March 15, 1991. *See* Background Note at *www.state.gov/r/pa/ei/bgn/3235.htm*.

b. Angola

On May 31, 1991, the National Union for Total Independence of Angola ("UNITA") and the Luanda government of the Popular Movement for the Liberation of Angola ("MPLA") signed the Angola Peace Accords, marking the end of a 16-year war in Angola. The United States, in conjunction with

the Soviet Union, helped negotiate a United Nations monitored cease-fire and a political settlement that included free and fair multi-party elections and legalization of political parties. Excerpts below from Secretary of State Baker's remarks at the peace accord signing ceremony in Lisbon, Portugal, announced plans to open a U.S. liaison office. 2 Dep't St. Dispatch No. 23 at 408–09 (June 10, 1991), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html.*

* * * *

Those of us in the international community who have worked long and hard to reach this settlement know that implementation of these binding peace accords will not be easy. Time and again in the months and years ahead, the will of the Angolan people and their leaders will be severely tested.

But we are here today to say that Angola shall not stand alone. For our part, the United States will do all we can to assist Angola's transition to democracy. For we are convinced that democracy offers Angola the best chance for enduring peace and well-being at home and for stability and prosperity in the region.

We will support Angola's new multi-party system and help to ensure that the upcoming national elections are truly fair and free. Working through the Joint Commission, we will help provide the resources for voter education programs and for maximum popular participation in the election process.

Moreover, the United States shall fully meet all our commitments as observers to these peace accords. We will open a liaison office in Luanda and participate actively in the work of the Joint Political Military Commission and of the commission which will verify the cease fire.

We will honor our obligation not to provide any lethal materiel to anyone in Angola, and we will closely monitor other countries to the same end.

* * * *

On September 16, 1991, President George H.W. Bush met with Angolan President José Eduardo dos Santos at the

White House. A White House Press Office statement indicated that the President "reiterated our firm commitment to the full and timely implementation of all aspects of the Accords" and informed President dos Santos that the United States "remain[ed] committed to establishing diplomatic relations with the government which emerges from free and fair internationally monitored elections." The full text of the statement by the Press Secretary is available at *http://bushlibrary.tamu.edu/research/papers/1991/91091605.html*.

The United States opened a liaison office in Luanda on January 10, 1992, in order to facilitate U.S. participation in the implementation of the peace accords and to work as an official observer to the newly formed Joint Political and Military Commission, which oversaw the implementation of all aspects of the agreement. *See www.state.gov/r/pa/ho/po/com/10361.htm*.

Multi-party elections were held in Angola on September 29, 1992. The United States, the United Nations, and others certified the elections as generally free and fair. The Government of the Republic of Angola affirmed its commitment to provide broadened participation at all levels of government to the major opposition party, UNITA, in the spirit of national reconciliation. President José Eduardo dos Santos became the constitutional head of state despite the fact that he did not obtain the 50% majority required to win the presidency. A presidential run-off election was to follow within 30 days, but that became unachievable. The government institutionalized a democratic system and swore in the democratically elected National Assembly.

Violence and bloodshed marked a post-electoral crisis in Angola with allegations that the elections were fraudulent. *See* testimony of Acting Assistant Secretary for African Affairs Jeffrey Davidow in a hearing before the Subcommittee on Africa of the House Foreign Affairs Committee, November 19, 1992, 3 Dep't St. Dispatch No. 49 at 866–67 (Dec. 7, 1992), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

On May 19, 1993, President Clinton announced the U.S. recognition of the Government of Angola. Excerpts from the President's statement are set forth below. 29 WEEKLY COMP. PRES. DOC. 908 (May 24, 1993).

---

* * * *

In 1992, after years of bitter civil war, the people of Angola held a multi-party election that the United States, the United Nations, and others monitored and considered free and fair. Since taking office on January 20, I have tried to use the possibility of U.S. recognition as a leverage toward promoting an end to the civil war and hostilities and, hopefully, the participation of all relevant political groups in the Government of Angola.

Sadly, the party that lost the election, UNITA, resumed the fighting before the electoral process could even be completed. And UNITA has now refused to sign the peace agreement currently on the table. The Angolan Government, by contrast, has agreed to sign that peace agreement, has sworn in a democratically elected national assembly, and has offered participation by UNITA at all levels of government.

Today we recognize those achievements by recognizing the Government of the Republic of Angola. It is my hope that UNITA will accept a negotiated settlement and that it will be a part of this government. I intend to continue working closely with the Government of Angola and with UNITA to achieve a lasting peace settlement and a vibrant democracy there. I hope the efforts of the United States have been helpful. I am confident that the Government of Angola has more than earned the recognition that the United States extends today.

* * * *

In a letter of June 8, 1993, Secretary of State Warren Christopher proposed that the United States and Angola conduct diplomatic relations. That proposal was accepted by letter of June 17, 1993, from President dos Santos and confirmed in a declaration executed at Luanda on June 21,

1993. *See* 87 Am. J. Int'l L. 595 (1993). Excerpts from the Secretary's letter are set forth below.

---

* * * *

. . . The United States was proud to contribute to the process of consolidating peace and preparing for the transition to democracy in Angola. The elections last September represented a significant step in that process.

* * * *

Not only was it the electoral process, but also the appropriate context of democratic and human rights that led to President Clinton's May 19 announcement of U.S. recognition of the Government of the Republic of Angola. It is in the same context that I am now pleased to propose that our two countries conduct diplomatic relations. Upon your agreement to the establishment of U.S.-Angolan diplomatic relations, our mission in Luanda would be the United States embassy.

* * * *

c. Slovenia, Croatia, and Bosnia-Herzegovina

As discussed in Chapters 17.A.1 and 18.A.4., widespread armed conflict existed in the former Yugoslavia throughout the 1990s. On April 7, 1992, The White House Office of the Press Secretary issued a statement by President George H.W. Bush, announcing the U.S. recognition of Slovenia, Croatia, and Bosnia-Herzegovina. 28 WEEKLY COMP. PRES. DOC. 601 (Apr. 7, 1992).

---

* * * *

The United States recognizes Bosnia-Hercegovina, Croatia, and Slovenia as sovereign and independent states and will begin immediately consultations to establish full diplomatic relations. The United States accepts the pre-crisis republic borders as the

legitimate international borders of Bosnia-Hercegovina, Croatia, and Slovenia.

We take this step because we are satisfied that these states meet the requisite criteria for recognition. We acknowledge the peaceful and democratic expression of the will of the citizens of these states for sovereignty.

We will continue to work intensively with the European Community [EC] and its member states to resolve expeditiously the outstanding issues between Greece and the republic of Macedonia, thus enabling the United States to recognize formally the independence of that republic as well. The United States will also discuss with the governments of Serbia and Montenegro their interest in remaining in a common state known as Yugoslavia.

* * * *

The United States views the demonstrated commitment of the emerging states to respect borders and to protect all Yugoslav nationalities as an essential element in establishing full diplomatic relations. Equally, we view such a commitment by Serbia and Montenegro as essential to proceed in discussions on their future status.

On August 6, 1992, in remarks to the press "on the situation in Bosnia and the former Yugoslavia and what the United States, working with the international community, is doing to contain and defuse this escalating crises," President Bush announced, among other things, his intent to establish diplomatic relations:

> [W]e must support the legitimate governments of Slovenia, Croatia, and Bosnia-Hercegovina. To this end, I have decided that the United States will move now to establish full diplomatic relations with those governments. I will shortly submit to the Senate my nominations for ambassadors to these posts.

The full text of the remarks by the President is available at 28 WEEKLY COMP. PRES. DOC. 1392 (Aug. 6, 1992).

On August 11, 1992, Croatia and Slovenia accepted the U.S. proposal to establish full diplomatic relations, and

Bosnia-Herzegovina did so on August 14. On August 25, the United States opened embassies in Zagreb and Ljublijana and announced plans to open an embassy in Sarajevo "when the security situation permit[ted]." *See* Chronology: Developments Related to the Crisis in Bosnia, March 10–August 28, 1992, 3 Dep't St. Dispatch No. 35 at 676–79 (Aug. 31, 1992), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

d. Czechoslovakia

On December 31, 1992, at midnight, the Czech and Slovak Federal Republic, or Czechoslovakia, ceased to exist and was succeeded by two separate and independent states, the Czech Republic and the Slovak Republic. The United States formally recognized the Czech Republic and the Slovak Republic as independent states on January 1, 1993, and full diplomatic relations with each of them were immediately established. A statement by White House Press Secretary Marlin Fitzwater, January 1, 1993, 4 Dep't St. Dispatch No. 3 at 35 (Jan. 18, 1993), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html,* is excerpted below.

The President today recognized the new Czech and Slovak Republics and offered to establish full diplomatic relations. In an exchange of letters, Czech Prime Minister Klaus and Slovak Prime Minister Meciar welcomed US recognition and accepted our offer of full diplomatic relations.

Both leaders provided assurances that the new states will fulfill the obligations and commitments of the former Czechoslovakia and will abide by the principles and provisions of the UN Charter, the Charter of Paris, the Helsinki Final Act, and subsequent CSCE [Conference on Security and Cooperation in Europe] documents. They also pledged to prevent the proliferation of destabilizing military technology, to respect human rights and fundamental freedoms, to uphold international standards concerning national minorities, and to move rapidly to create free market economies.

The United States looks forward to full and mutually productive relations with the new Czech and Slovak states. We commend both republics for the peaceful means by which their separation was carried out. In the interest of ensuring stability and prosperity in the region and speeding full integration into the international community, the United States urges continued close regional cooperation among the states of Central Europe.

Our ambassador to Czechoslovakia will remain in Prague as the US ambassador to the Czech Republic. We look forward to appointing an ambassador to the Slovak Republic as soon as possible.

e. Cambodia

U.S.-Cambodian relations began to deteriorate in the early 1960s and diplomatic relations were officially broken by Cambodia in May 1965, but were reestablished on July 2, 1969. Diplomatic relations continued after the establishment of the Khmer Republic but again ceased with the evacuation of the U.S. mission on April 12, 1975. The United States condemned the brutal character of the Khmer Rouge regime between 1975 and 1979. Efforts in the 1980s by the Association of Southeast Asian Nations ("ASEAN") to achieve a comprehensive political settlement were supported by the United States and were successfully accomplished on October 23, 1991. It was on that date that the Paris Conference (initially convened in mid-1989 to include the various internal Cambodian parties, representatives of 18 concerned countries and the UN Secretary General, *see Digest 1989–1990* at 527–37) was reconvened to sign a comprehensive settlement. Shortly thereafter, the U.S. mission in Phnom Penh opened on November 11, 1991, headed by designated U.S. Special Representative Charles H. Twining, Jr.

When the freely elected Royal Government of Cambodia was formed on September 24, 1993, the United States and the Kingdom of Cambodia immediately established full diplomatic relations. The U.S. mission was upgraded to the U.S. Embassy and in May 1994, Mr. Twining became the

U.S. Ambassador. After factional fighting in 1997, the United States suspended bilateral assistance to the Cambodian Government. Since that time, U.S. assistance to the Cambodian people has been provided mainly through nongovernmental organizations, which flourish in Cambodia. *See* Background Note at *www.state.gov/r/pa/ei/bgn/2732.htm*.

f. Eritrea

On April 27, 1993, Eritrean authorities announced that in an April 23–25 referendum the Eritrean people voted overwhelmingly for independence from Ethiopia, a result that the Ethiopian Government respected. Eritrean authorities considered Eritrea a sovereign country as of April 27. Following this announcement, the U.S. Consulate at Asmara advised the authorities that the United States recognized Eritrea as an independent state. On April 28, 1993, the Department of State's Spokesman, Richard Boucher, confirmed that formal steps to establish diplomatic relations with Eritrea were underway. *See* Statement by Department Spokesman Richard Boucher, April 28, 1993, *reprinted in* 4 Dep't St. Dispatch No. 18 at 320 (May 3, 1993), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

In a note to Eritrean Secretary of Foreign Relations Mahmud Sharifu, U.S. Ambassador Marc Allen Baas congratulated the Eritrean people on their independence, and proposed arrangements for the basis of establishing diplomatic relations between the United States and Eritrea. The United States urged the Eritreans to declare that Eritrea considered itself bound by agreements to which Ethiopia was a party at the time of Eritrean independence.

See 87 Am. J. Int'l. L. 597 (1993).

First, I seek your concurrence that our diplomatic relations will be conducted in accordance with the Vienna Convention on Diplomatic Relations and, in particular, that the status and privileges

and immunities of the U.S. Mission and its members will be governed by that agreement. Second, I seek your confirmation of our understanding that bilateral agreements between the United States and Ethiopia in force as of this date are also in force as between the United States and Eritrea. As relations between our two countries progress, we are, of course, prepared to review any such agreements to determine whether they should be revised, terminated, or replaced to take into account developments in U.S.-Eritrean relations.

* * * *

In a note dated June 3, 1993, addressed to the U.S. Consulate at Asmara, the Department of External Affairs of the Provisional Government of Eritrea confirmed its agreement to establish diplomatic relations in accordance with the Vienna Convention on Diplomatic Relations. The Eritrean provisional government also confirmed that bilateral agreements between the United States and Ethiopia in force as of June 3, 1993, would continue in force between the United States and Eritrea pending review by both sides.

On June 11, 1993, diplomatic relations between Eritrea and the United States were established with an appointed chargé d'affaires, and continued with the first U.S. Ambassador arriving later that year. *See also* 87 Am. J. Int'l L. 595, 597–98 (1993).

g. Andorra

In March 1993, by popular referendum, Andorra achieved independence from Spain and France, which had co-ruled the territory since 1278. France and Spain immediately recognized the new state and established embassies. Consistent with the U.S. Government's practice towards European microstates, the U.S. Consulate General in Barcelona became responsible for both diplomatic and consular functions for Andorra and the U.S. Ambassador to Spain was accredited as ambassador to Andorra. Diplomatic relations were officially established with Andorra on

February 21, 1995. *See* Background Note at *www.state.gov/r/pa/ei/bgn/3164.htm*.

h. Republic of Palau

Following the entry into force of the Compact of Free Association with Palau, the United States and Palau agreed that relations between the two Governments would be conducted in accordance with the Vienna Convention on Diplomatic Relations. In addition to diplomatic missions, the Governments could establish and maintain other offices on terms and in locations as might be mutually agreed. The agreement entered into force on March 2, 1995. Agreement Concerning Relations Under the Vienna Convention on Diplomatic Relations, Dec. 14, 1994, U.S.-Palau, TIAS. No. 12587. *See* Chapter 5.B.2.b.(3); s*ee also* 89 Am. J. Int'l L. 761, 766–67 (1995).

The United States first named an ambassador to the Republic of Palau on July 2, 1996, also serving as ambassador to the Philippines and resident in the Philippines.

i. Haiti

On February 7, 1991, President Jean-Bertrand Aristide took office following a presidential election that was deemed largely fair and free. President Aristide was overthrown that September in a violent coup. Following the coup, President Aristide began a three-year exile in the United States, while an unconstitutional military de facto regime governed Haiti. *See* discussion of U.S. sanctions during this period in Chapter 16.A.2.

In a letter dated October 27, 1992, Steven K. Berry, Acting Assistant Secretary for Legislative Affairs, U.S. Department of State, responded to questions from U.S. Congressman Sam M. Gibbons concerning the continued presence of a U.S. ambassador in Haiti.

The full text of the letter is set forth below.

I am responding to your October 8 letter asking, on behalf of Mr. Frank Chapman, why the United States continues to have an ambassador in Haiti.

While the United States does not accept the current regime in Haiti, we do accept President Aristide as Haiti's legitimate President and also accept as legitimate those parliamentary and local officials duly elected in the December 1990 elections which brought President Aristide to office. We have concluded that we can best support the restoration of democratic government to Haiti and oversee other U.S. interests there by maintaining a fully functioning embassy.

Nonetheless, we do not currently have an ambassador in Haiti. Ambassador Alvin Adams departed Haiti after a normal tour of duty in July; since then our Embassy has been headed by a Charge d'Affaires. In August President Bush nominated Roland Kuchel, a career Foreign Service officer, to succeed Ambassador Adams, but the nomination has not yet received Senate confirmation.

The U.S. remains committed to the goal of democratic government in Haiti. Our efforts, in conjunction with the OAS, have yielded some positive results. Discussions between the representatives of President Aristide and Mr. Bazin in early September resulted in the deployment of an OAS civilian presence to Haiti and hold the promise of further talks aimed at starting negotiations toward a settlement. We remain hopeful that a settlement will be reached soon.

On July 31, 1994, the United Nations Security Council adopted Resolution 940, authorizing member states to use all necessary means to facilitate the departure of Haiti's de facto leadership, in order to restore the constitutionally elected government. U.N. Doc. S/RES/940 (1994). On October 15, 1994, after international forces oversaw the end of military rule, President Aristide and other exiled elected officials returned to Haiti.

j. Vietnam

A statement released by U.S. Department of State Spokesman Michael D. McCurry on May 26, 1994, announced that the

United States and Vietnam had reached an agreement on the legal framework for opening liaison offices in Hanoi and Washington. *See* Daily Press Briefing, May 26, 1994, available at *http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1994/9405/940526db.html*. The agreement was established by an exchange of letters between Assistant Secretary of State for East Asian and Pacific Affairs Winston Lord and Vietnamese Vice Foreign Minister Le Mai, dated May 20, 1994, at Washington and May 21, 1994, at Hanoi. Vice Foreign Minister Le Mai's letter accepted the terms set forth in Mr. Lord's letter and stated that Vietnam "wishes that the relationship between the two countries develop on the basis of respect for independence, sovereignty, non-intervention in each other's domestic affairs, equality, and mutual interests."

Excerpts from Mr. Lord's letter are set forth below. *See also* 88 Am. J. Int'l L. 728 (1994).

Further to President Clinton's announcement of February 3, 1994, concerning the lifting of the trade embargo and establishment of a United States liaison office in Vietnam and the Vietnam Foreign Ministry statement of February 4, 1994, on behalf of the United States Government, I am pleased to propose that our two governments establish offices in our respective countries. We propose that these liaison offices would, pending further progress in our overall relations, function in accordance with the terms described herein.

Since both the United States and the Socialist Republic of Vietnam are parties to the 1963 Vienna Convention on Consular Relations (VCCR), I propose as a general principle that our two governments conduct their relations within the framework of this universally respected international instrument. Consistent with the purposes of the VCCR, I propose that both governments agree on the need to provide all standard consular services.

The initial official presence of the United States in Vietnam and that of Vietnam in the United States would be "liaison offices" at the level of Consulate General, the head of which would hold the title of "Chief of the Liaison Office" with the rank of Consul General. Further discussions would be held early to determine

such matters as the initial number of staff to be assigned to the respective liaison offices.

The staff members of our respective liaison offices, and their families forming part of their households, will enjoy all of the facilities, privileges, and immunities that are provided for in the VCCR. Based on mutual agreement, we will pursue provision of appropriate facilities, privileges, and immunities to other personnel.

The United States is prepared to accept the establishment of a comparable liaison office of the Socialist Republic of Vietnam in the United States.

While taking this step, the U.S. Government believes that there remain many technical and substantive issues that will have to be resolved between our two governments before full normalization of our relations can be realized, particularly progress on American POWs and MIAs. In this context, we welcome Vietnam's statements reaffirming its commitment to assist on the POW/MIA issues as well as its decision to begin a bilateral dialogue on human rights issues. We hope the establishment of liaison offices will enable us to make further progress on these and other issues of interest to both countries.

* * * *

In addition to the exchange of letters, the United States and Vietnam signed an "Agreed Minute," reading as follows.

A Vietnamese delegation, led by Mr. Nguyen Xuan Phong, Director, Americas Department, Ministry of Foreign Affairs, and a United States delegation, led by Mr. James H. Hall, Director, Office of Vietnam [*sic*], Laos and Cambodia Affairs, Department of State, met periodically between February 28 and May 7, 1994, to discuss the opening of liaison offices in their respective countries, following the February 3, 1994 statement of the President of the United States and the February 4, 1994 statement of the Vietnamese Ministry of Foreign Affairs. The two delegations agreed to the texts of the proposed letters to be exchanged between their respective governments that would provide the framework for the creation of their respective liaison offices.

In addition to the matters addressed in the texts of the proposed letters, the delegations agreed to the following:

1) Vietnam and U.S. liaison offices would serve as vehicles to deal with the issues of interest to both countries.

2) Liaison office employees may participate in dialogue and liaison office premises may be used for dialogue on any issue of concern between the two countries.

3) Consistent with the purposes of the 1963 Vienna Convention on Consular Relations (VCCR), the liaison offices will provide all standard consular services.

4) Both states reaffirm their policies of not supporting or condoning efforts to overthrow or destabilize the other government, and pledge to inform their citizens of their responsibilities to observe local laws. Moreover, U.S. neutrality and related laws impose substantial criminal and civil penalties for individuals within the U.S. who knowingly provide financial or materiel support for efforts to destabilize foreign governments.

5) The two sides will notify each other immediately, but no later than within 96 hours, of the arrest or detention of passport holders of the sending state. If it is not possible to notify the sending state within 96 hours because of communications difficulties, the receiving state will provide notification as soon as possible. The receiving state will provide consular access to the detained person within 48 hours after notification.

6) Each country will provide reciprocal and non-discriminatory treatment to the liaison office of the other.

7) All citizens of the receiving state would be equally treated in terms of employment at the liaison office of the sending state, without discrimination regardless of their prior affiliation with the sending state.

8) Occupation of respective diplomatic properties would be based on simultaneousness. Each side would assist the other to find suitable temporary office and residential space on a reciprocal and non-discriminatory basis.

After twenty years of severed ties, President Clinton announced on July 11, 1995, the formal normalization of diplomatic relations with Vietnam. 31 WEEKLY COMP.

PRES. DOC. 1217–19 (July 17, 1995). *See also* discussion of Diplomatic Property Agreement signed January 28, 1995, in Chapter 8.A.7.b.

By notes exchanged in Hanoi, Vietnam, on August 5, 1995, Secretary of State Warren Christopher and Vietnamese Foreign Minister Nguyen Manh Cam confirmed the establishment of diplomatic relations between the United States and the Socialist Republic of Vietnam by mutual consent on July 12, 1995. *See* remarks of Secretary Christopher at the signing ceremony and related documents at 6 Dep't St. Dispatch No. 33 at 630 (Aug. 14, 1995), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

Secretary Christopher's note to Foreign Minister Cam is set forth below. *See also* 90 Am. J. Int'l L. 79 (1996).

Further to President Clinton's announcement of July 11 in Washington, D.C. and Prime Minister Vo Van Kiet's announcement of the following day in Hanoi, I have the honor to confirm that the United States of America and the Socialist Republic of Vietnam established diplomatic relations by mutual consent on July 12, and to propose that we establish permanent diplomatic missions in our respective countries and exchange ambassadors.

It is the understanding of the United States that our relations will be conducted within the framework of the 1961 Vienna Convention on Diplomatic Relations (VCDR), which is in force for both of our countries.

I look forward to receiving your concurring response in behalf of the Government of the Socialist Republic of Vietnam.

* * * *

Foreign Minister Cam's note to Secretary Christopher accepting these terms reaffirmed the "position of the Government of Vietnam as expressed in the July 12, 1995 statement by Prime Minister Vo Van Kiet that the Government of Vietnam is ready to join the Government of the United States of America in leaving the past behind and building together a new relationship between the two countries on the basis of

equality, respect for each other's independence, sovereignty, non-intervention in each other's internal affairs, mutually beneficial co-operation, and in keeping with the universal principles of international law."

A separate exchange of letters, also dated August 5, 1995, between the Director, Vietnam, Laos, and Cambodia Affairs, Department of State, Dennis G. Harter, and the Director, Department of American Affairs, the Vietnam Ministry of Foreign Affairs, Nguyen Xuan Phong, addressed problems posed by the dual nationality of individuals assigned to the respective diplomatic and consular missions and/or their dependents. *See id.*

Mr. Harter's letter is excerpted below.

In light of the historic announcements by President Clinton and Prime Minister Vo Van Kiet of the decision to establish diplomatic relations between the United States of America and the Socialist Republic of Vietnam, and the exchange of letters between Secretary of State Christopher and Minister of Foreign Affairs Cam of this date, consistent with arrangements made related to relations between our two governments, and the need for diplomatic and consular missions to be accorded the status necessary for their proper functioning, I have the honor to confirm the following understanding:

The two governments agree that they will provide for diplomatic and consular agents, administrative and technical staff and their dependents of the sending state promptly and expeditiously to renounce citizenship of the receiving state under the law of the receiving state.

* * * *

Mr. Phong agreed, adding that

> [w]ithin the framework of the related provisions stipulated by the Vietnamese law Vietnam will give priority to resolve the above requests as soon as possible. To that end, those who want to renounce their citizenship or nationality

should cooperate with the Vietnamese authorities by fully completing all necessary procedures required by Vietnamese regulations.

In a further note, also dated August 5, 1995, Vice Foreign Minister Le Mai informed Assistant Secretary of State for East Asian and Pacific Affairs Winston Lord that Le Van Bang would take charge of the Embassy of the Socialist Republic of Vietnam in the United States in the capacity of chargé d'affaires ad interim.

On June 18, 1997, Jeffrey Bader, Deputy Assistant Secretary of State for East Asian and Pacific Affairs, testified before the Subcommittee on Asia and the Pacific, House Committee on International Relations, on the U.S. policy toward Vietnam. Excerpts of his statement are set forth below.

The full text of Mr. Bader's testimony is available at *http://commdocs.house.gov/committees/intlrel/hfa45505.000/hfa45505_0.htm*.

---

* * * *

Vietnam's desire to improve relations with the U.S. has led it to engage us on a number of issues of concern to us, in many cases flexibly. These include: POW/MIA accounting, establishment of diplomatic relations, resettlement opportunities abroad for Vietnamese boat people and return of some of them to Vietnam, economic and commercial cooperation, protection of intellectual property rights, repayment of sovereign debt, security dialogue, and law enforcement cooperation. I would now like to turn to U.S. policy in Vietnam—what we have been doing and some next steps.

* * * *

Since the early 1990s, the U.S. has been proceeding cautiously in developing relations with Vietnam, following a road map conceived in the Bush Administration. In 1994, in light of progress in POW/MIA accounting and the successful implementation of the Paris Peace Accords, the Clinton Administration lifted the trade embargo on Vietnam. The U.S. opened a Liaison Office in Hanoi

later in 1994. On July 11, 1995, President Clinton announced our establishment of diplomatic relations, and on May 9, former Congressman Pete Peterson took up his duties as our Ambassador to Vietnam.

* * * *

Obtaining the fullest possible accounting of American POW/MIAs from the Vietnam War continues to be our highest priority with regard to Vietnam. . . .

In 1993, the President set out four specific areas in which cooperation by the Vietnamese would be examined as a basis for further improvement in relations:

— Resolving discrepancy cases and live sightings, as well as conducting field activities. With the assistance of the SRV, we have been able to confirm the fate of all but 48 of the 196 "last known alive" high priority cases; i.e., persons known to have survived their capture or aircraft loss, but who did not return alive. After evaluating over 1,850 reports that POW/MIAs had been sighted alive since 1975 and over 140 field investigations, we have found "no compelling evidence that any American remains alive in captivity in Southeast Asia."
— Recovering and repatriating remains. This month, JTF-FA (Joint Task Force-Full Accounting) began the 46th JFA (Joint Field Activity) in Vietnam, 26 of these since January 1993. These joint U.S.-Vietnamese operations and unilateral Vietnamese turnovers of remains have produced 211 sets of remains since 1993. During these activities, Vietnamese and Americans work together under harsh and dangerous conditions to recover remains of the missing.
— Accelerating efforts to provide documents that will help lead to the fullest possible accounting. The Vietnamese creation of teams in 1994 to search nationwide for documents and records has provided new leads. Joint research teams have reviewed and photographed approximately 28,000 archival items. In 1995 and 1996, Vietnamese officials unilaterally turned over 300 documents totaling

500–600 untranslated pages. We have conducted more than 195 oral history interviews of Vietnamese veterans and officials.

— Providing further assistance in implementing trilateral investigations with Laos. Since the Vietnamese agreed in December 1994 to cooperate on recovery operations in Laos, 22 Vietnamese witnesses have assisted in field activities in Laos, providing information that led to the repatriation in 1996 of remains associated with cases of 12 unaccounted-for Americans.

Taking into account all information available to the government, the President signed a Presidential Determination on December 3, 1996 that Vietnam is cooperating in full faith in all four of these areas.

The arrival of Pete Peterson in Hanoi provides us an invaluable asset as we pursue the goal of fullest possible accounting. As a former POW, he brings a special, unique commitment and credibility to this task. At the same time, he has already demonstrated an extraordinary ability to communicate with the Vietnamese, enabling him to build a framework of cooperation necessary to further the goal of accounting for our POW/MIAs.

* * * *

In January of this year, we reached agreement with the Vietnamese.

We are working with Congress to open a Consulate General in Ho Chi Minh City. Opening a Consulate General is very much in our own interest. It will enable us to provide consular and business services to the 3,000 Americans resident in Ho Chi Minh City and 75,000 American tourists visiting annually. There is a huge demand for immigrant and non-immigrant visas, which currently must be handled at great expense to the U.S. Government out of Bangkok. When it opens, Ho Chi Minh City will be one of the biggest visa-issuing posts in East Asia and the Pacific. A presence in Ho Chi Minh City will enable us to more closely monitor the economic, social, and human rights situation in the South.

* * * *

Because of the embargo and the absence of contacts between our two countries for so long, the U.S.-Vietnam economic relationship is one of the handful in the world which should experience dramatic growth in the years to come and create jobs for Americans as exports grow. For this to happen, Vietnam needs to eliminate trade barriers and continue to develop an institutional and legal framework meeting the needs of American business.

* * * *

The U.S. and Vietnam have begun to normalize relations on a wide front. The result is an increasingly complex relationship. The U.S. and Vietnam have a tragic history. Healing the wounds of war takes time, effort, and good will. We are moving toward a time when Americans will truly see Vietnam not as a war but as a country, and the Vietnamese not as former enemies but as a people with whom Americans can build a relationship based on reconciliation and shared hopes for the future. We still have much more work ahead of us.

* * * *

B. CONTINUITY AND SUCCESSION AND RELATED ISSUES

1. Yugoslavia

a. Succession to the Socialist Federal Republic of Yugoslavia

On April 27, 1992, Serbia-Montenegro announced the creation of the Federal Republic of Yugoslavia ("FRY"), claiming that the FRY was now "the state, international legal and political personality" of the Socialist Federal Republic of Yugoslavia ("SFRY"). Such a continuation of statehood would have entailed the assumption by only one of the entities that emerged from the break-up of the SFRY(in this case, Serbia and Montenegro) of certain non-divisible rights and obligations of the predecessor state, including the right to continue its membership in international organizations. A letter dated April 28, 1992, to Michel Hansenne, Director-General of the International Labour Office, from the Permanent Mission of

the SFRY, informed the United Nations that the Assembly of the SFRY at its session held on April 27, 1992, had promulgated the Constitution of the FRY, excerpted below.

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

---

* * * *

Under the Constitution, on the basis of a continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia consisting of the Republic of Serbia and the Republic of Montenegro.

Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to and obligations assumed by the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia. The Federal Republic of Yugoslavia as a founding member of the United Nations acknowledges its full commitment to the world organizations, the United Nations Charter. . . .

* * * *

The Federal Republic of Yugoslavia shall cooperate with other participants of the Conference on Yugoslavia in order, inter alia, to ensure a speedy and just distribution of the rights and responsibilities of the Socialist Federal Republic of Yugoslavia between the Federal Republic of Yugoslavia and the other republics, if they wish it, to continue an independent membership in international organizations and participation in international treaties.

As noted in A.2.c., *supra*, the United States had already recognized Slovenia, Croatia, and Bosnia-Herzegovina. On May 22, 1992, Slovenia, Croatia, and Bosnia-Herzegovina were admitted to the United Nations, with the support of the United States. On that occasion, the U.S. Permanent Representative to the United Nations stated, "If Serbia and

Montenegro desire to sit in the U.N., they should be required to apply for membership and be held to the same standards as all other applicants." On May 30, 1992, the UN Security Council adopted Resolution 757, co-sponsored by the United States, imposing immediate sanctions against Serbia-Montenegro and specifically noting that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted." U.N. Doc. S/RES/757 (1992).

On August 24, 1992, Ambassador Alexander F. Watson, U.S. Permanent Representative to the United Nations, addressed this issue in a statement at the 46th Session of the United Nations General Assembly, in Plenary, on the resumed Session on Bosnia-Herzegovina. U.N. Doc. A/46/PV.90 at 7 (1992).

---

* * * *

. . . It is the firm position of my government that the United States does not recognize Serbia-Montenegro as the continuation of the former Yugoslavia. Therefore, the claim by Serbia-Montenegro to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations cannot be accepted and the United States believes that this should be confirmed by passage of appropriate resolutions by the Security Council and General Assembly. Pending such action by the Security Council and General Assembly, the participation of the Representatives of Serbia-Montenegro in the activities of the Security Council or the General Assembly should be viewed as without prejudice to the disposition of this issue. We ask that all states join in putting an end to the charade that the brutal, expansionist regime currently in power in Belgrade is entitled to the rights and privileges of the former Yugoslavia. We urge your support for a Security Council resolution asking the General Assembly to determine that the former Yugoslavia no longer exists. To pretend otherwise is a disservice to all.

* * * *

On September 22, 1992, the UN General Assembly, acting on a recommendation of the Security Council of September 19, adopted a resolution in which it stated that it

> [c]onsiders that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

U.N. Doc. A/RES/47/1 (1992). The U.S. delegation provided an explanation of its vote in support of the resolution, as set forth in full below.

---

* * * *

We meet this evening to address the extraordinary consequences of one of the great tragedies of our time. The conflict in the territory of the former Yugoslavia endangers the security of us all, for it challenges the democratic and peaceful world order we seek. We can have no more important goal than the achievement of peace. We support all practical efforts to bring peace to the territory of the former Yugoslavia. In this regard, we have listened closely to the message of Prime Minister Panic. We welcome warmly his stated desire for peace. We respect what he is trying to do and will follow his efforts closely. We look for his desires to be translated into effective action. We stand ready to help him in his efforts for peace.

With respect to that search for peace, we want to stress that the action taken today by the General Assembly reflects only the realities of the situation in the former Yugoslavia. Although that action is without precedent, it was by no means completely unforeseen. Forty-five years ago, the UN Sixth (Legal) Committee formulated principles to guide the United Nations in deciding membership questions related to the break up of states. Those principles suggest that when a member state breaks up, if there is

no clearly predominant portion remaining that can fairly be said to be the continuation of the former states, the former state's legal personality is considered extinguished and no state is entitled to continue its membership in the United Nations.

Prior to its dissolution, the SFRY was one of the most decentralized nations in the world. Since then, there has been no agreement among the former Yugoslavia Republics on the status of the former Yugoslavia's UN seat. Similarly, none of the former republics is so clearly a predominant portion of the original state so as to be entitled to be treated as the continuation of that state. My government has, therefore, made clear all along that we cannot accept Serbia-Montenegro's claim to the former Yugoslavia's seat. We view the action by the Security Council and General Assembly as the appropriate response in this extraordinary situation.

Today's action confirms that this issue—like other membership questions—should be decided by the General Assembly upon that recommendation of the Security Council. Other bodies throughout the UN system should now follow up on the decision of the General Assembly and act quickly to ensure that Serbia-Montenegro no longer remains in the seat of the former Yugoslavia.

Resolution 777 (1992), which the Security Council adopted over the weekend, recognized that the former Yugoslavia has ceased to exist. Upon the recommendation of the Council, today's General Assembly resolution rejects the claim of Serbia-Montenegro to continue the membership of the former Yugoslavia. This is not a suspension of a member state, as some may claim. Rather, following up on the actions of the Security Council, the General Assembly has simply decided that the former Yugoslavia has ceased to exist and that its membership in the United Nations has therefore expired.

Since the Council and General Assembly have confirmed that Serbia-Montenegro is not the continuation of the Socialist Federal Republic of Yugoslavia, it follows automatically that Serbia-Montenegro must apply for membership, just as the other former Yugoslavia Republics have done, if it wishes to participate in the United Nations.

When it applies, Serbia-Montenegro will be judged by the same criteria as all new states. Like all applicants, Serbia-Montenegro

will have to demonstrate that it is willing and able to fulfill the obligations of the UN Charter, including the obligation to comply with binding resolutions of the Security Council. We hope that its desire to become a member of the United Nations will serve as a strong incentive for Serbia-Montenegro to honor these obligations. Until such time as it applies and is formally admitted, Serbia-Montenegro, like any other country that is not a member of the United Nations, cannot participate in the work of the General Assembly or its committees and specialized agencies unless specifically invited to do so.

* * * *

Macedonia was admitted as a member of the United Nations on April 18, 1993. U.N. Doc. A/RES/47/225 (1993). The Federal Republic of Yugoslavia was admitted as a new member of the United Nations on November 1, 2000, following its application for membership. U.N. Doc. A/RES/55/12 (2000); *see Digest 2000* at 561–63.

b. Protection of successor state assets

James B. Foley, Deputy Spokesman for the U.S. Department of State, released a statement on September 29, 1997, regarding the protection of the Yugoslav successor state assets.

The full text of the statement is set forth below, available at *http://secretary.state.gov/www/briefings/statements/970929a.html*.

The U.S. government reiterates that it unequivocally rejects the assertion of the "Federal Republic of Yugoslavia" (the "FRY") that it is the sole successor state to, or the sovereign continuation of, the former Socialist Federal Republic of Yugoslavia (SFRY). Consistent with customary international law, the United States considers that all five successor states, Bosnia & Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia

and the "FRY" are equal successors to the SFRY. The United States is joined in this view by the international community.

The outer wall of sanctions against Serbia and Montenegro remains fully in force. These sanctions include a prohibition on membership in international organizations such as the UN and the OSCE and access to international financial institutions as well as normalization of relations with the United States.

Progress on succession issues continues to be a central element of the outer wall of sanctions. Belgrade continues to be the main impediment to progress towards a resolution on this issue. Belgrade's record in other areas has also fallen far short of acceptable, including cooperation with the International Criminal Tribunal for the Former Yugoslavia, resolving the problems in Kosovo, and real progress on democratization.

In keeping with our policy on furthering progress on state succession issues, and our continuing efforts to protect successor state assets, today the United States filed, at the request of the U.S. District Court in New York, statements of interest in two cases, *Beogradska Banka v. Interenergo* and *Jugobanka v. U.C.F. International and Slovenijales*. These two cases involve claims by "Federal Republic of Yugoslavia" (FRY) banks against commercial entities of two other successor republics of the former Yugoslavia (SFRY) regarding defaulted loans.

The U.S. government will support the adjudication of these claims in order to protect former SFRY financial assets. Allowing these cases to go forward fulfills our responsibility to help protect former Yugoslav assets for the benefit of all the successor states until they reach an agreement on their allocation. Failure to permit timely adjudication of these claims could seriously risk diminution of the value of the assets involved. For example, over time, there is a risk that applicable statutes of limitation will lapse; that evidence will be lost; and that the debtors could fall into bankruptcy or otherwise become unable to repay the valid debts.

Any payments in favor of the plaintiff banks in these cases must, under U.S. law, be paid only into escrow or otherwise blocked accounts pending resolution of the succession and asset allocation issues among the five successor states. It is the view of the U.S. government that going forward with adjudication of the

plaintiff's cases will not prejudice any successor state claims against the assets of the SFRY and does not imply nor would it result in the allocation of any SFRY assets.

As part of the United States' continuing efforts to protect successor state assets, the U.S. government intends to facilitate the reconstitution of bank records from "FRY" banks in order to establish what assets and liabilities are legally valid and extant. However, the U.S. government will not authorize "FRY" banks to resume operations in the United States.

The allocation of SFRY assets remains unresolved pending the conclusion of an agreement among the five successor states. At present, negotiations towards this end are under way in Brussels under the authority of the High Representative Carlos Westendorp, and conducted by the Special Negotiator Sir Arthur Watts. In an effort to lend support to these negotiations and to promote a prompt and successful outcome, the United States will explore ways to assist the Special Negotiator in resolving outstanding succession issues among the successor states.

The United States calls on all the successor states to the SFRY, and in particular the "FRY", to cooperate with Sir Arthur Watts in resolving these outstanding issues.

2. Former Soviet Union

When the former U.S.S.R. broke up, President George H.W. Bush formally recognized each of the twelve Republics (not including the Baltics*) at the same time. As with Yugoslavia, the United States faced numerous issues regarding the rights and obligations of the new states of the U.S.S.R., including rights to membership in international organizations and conferences, allocation of assets and debts, claims against the predecessor state, and obligations under international agreements.

---

* The United States never accepted the forcible incorporation of Estonia, Latvia, and Lithuania into the Soviet Union, and continued to recognize those states diplomatically.

The United States viewed each newly created state of the former U.S.S.R. as a successor state, and not a "continuation" state. However, in certain cases, the United States did endorse the notion that Russia was the continuation of the U.S.S.R., where rights and obligations were indivisible and could not be recreated, such as the permanent seat of the U.S.S.R. in the UN Security Council and the U.S.S.R.'s nuclear weapons state status under the Non-Proliferation Treaty. *See* discussion of treaty succession issues in Chapter 4.B.6.a.

Russia's assumption of the U.S.S.R.'s seat in the United Nations was supported by relevant factors, including Russia's proportion of the population of the former U.S.S.R. (over fifty percent of the population of the former U.S.S.R.); as well as its territory (seventy-seven percent of the territory of the former U.S.S.R.) and resources. The Russian Federation obtained formal agreement by all the members of the Commonwealth of Independent States, in the Alma Ata Accords, that it should occupy the seat of the former U.S.S.R. in UN bodies. Moreover, because two of the larger Soviet Republics, Ukraine and Byelorussia, had through historical anomaly been members of the UN since its inception, the residual U.S.S.R., for purposes of the UN membership, had always consisted overwhelmingly of Russia.

On December 21, 1991, in Alma Ata, Kazakhstan, at the formation of the Commonwealth of Independent States ("CIS"), leaders of the eleven republics joining the commonwealth signed five instruments: (1) Protocol to the Agreement establishing the Commonwealth of Independent States; (2) Alma Ata Declaration; (3) Minutes of the meeting of Heads of Independent States (on the military); (4) Agreement on coordinating bodies of the Commonwealth of Independent States (on institutions); and (5) Decision by the Council of Heads of State of the Commonwealth of Independent States (on United Nations membership) ("Decision"). *See* Letter dated 27 December 1991 from the Permanent Representative of Belarus to the United Nations to the Secretary-General, transmitting the documents as annexes I–V, U.N. Doc. A/47/60 (Dec. 30, 1991), *reprinted in* 31 I.L.M. 138 (1992). An agreement

on joint measures with respect to nuclear weapons, signed by the four republics with nuclear arms on their territories, and a statement by the delegation of the Republic of Belarus (on conditions for membership in the CIS, adopted unanimously at Alma Ata) were transmitted as annexes VI and VII.

In Article 12 of the Alma Ata Declaration, the states agreed to fulfill treaty and other international obligations of the former U.S.S.R. *See* Chapter 4.B.6.A. Excerpts below from the Decision address UN membership

---

The States participating in the Commonwealth, referring to article 12 of the Agreement establishing the Commonwealth of Independent States,

Proceeding from the intention of each State to discharge the obligations under the Charter of the United Nations and to participate in the work of that Organization as full Members,

Bearing in mind that the Republic of Belarus, the Union of Soviet Socialist Republics and Ukraine were founder Members of the United Nations,

Expressing satisfaction that the Republic of Belarus and Ukraine continue to participate in the United Nations as sovereign independent States,

Resolved to promote the strengthening of international peace and security on the basis of the Charter of the United Nations in the interests of their peoples and of the entire international community,

Have decided that:

1. The States of the Commonwealth support Russia's continuance of the membership of the Union of Soviet Socialist Republics in the United Nations, including permanent membership of the Security Council, and other international organizations.
2. The Republic of Belarus, the RFSFR and Ukraine will extend their support to the other States of the Commonwealth in resolving issues of their full membership in the United Nations and other international organizations.

* * * *

The U.S. Embassy in Moscow continued to function as the U.S. Embassy to Russia, and plans for the Consulate General in Kiev to become the U.S. Embassy to Ukraine were underway, when President Bush spoke to the nation on December 25, 1991. In a televised speech from the Oval Office, President Bush announced U.S. recognition of the new states. *See generally* Background Note at *www.state.gov/r/pa/ei/bgn/3211.htm*.

The full text of the President's speech is available at *http://bushlibrary.tamu.edu/research/papers/1991/91122501.html*.

---

* * * *

During these last few months, you and I have witnessed one of the greatest dramas of the 20th century, the historic and revolutionary transformation of a totalitarian dictatorship, the Soviet Union, and the liberation of its peoples. As we celebrate Christmas, this day of peace and hope, I thought we should take a few minutes to reflect on what these events mean for us as Americans.

For over 40 years, the United States led the West in the struggle against communism and the threat it posed to our most precious values. This struggle shaped the lives of all Americans. It forced all nations to live under the specter of nuclear destruction.

That confrontation is now over. The nuclear threat, while far from gone, is receding. Eastern Europe is free. The Soviet Union itself is no more. This is a victory for democracy and freedom. It's a victory for the moral force of our values. Every American can take pride in this victory, from the millions of men and women who have served our country in uniform, to millions of Americans who supported their country and a strong defense under nine Presidents.

New, independent nations have emerged out of the wreckage of the Soviet empire. Last weekend, these former Republics formed a Commonwealth of Independent States. This act marks the end of the old Soviet Union, signified today by Mikhail Gorbachev's decision to resign as President.

I'd like to express, on behalf of the American people, my gratitude to Mikhail Gorbachev for years of sustained commit-

ment to world peace, and for his intellect, vision, and courage. I spoke with Mikhail Gorbachev this morning. We reviewed the many accomplishments of the past few years and spoke of hope for the future.

Mikhail Gorbachev's revolutionary policies transformed the Soviet Union. His policies permitted the peoples of Russia and the other Republics to cast aside decades of oppression and establish the foundations of freedom. His legacy guarantees him an honored place in history and provides a solid basis for the United States to work in equally constructive ways with his successors.

The United States applauds and supports the historic choice for freedom by the new States of the Commonwealth. We congratulate them on the peaceful and democratic path they have chosen, and for their careful attention to nuclear control and safety during this transition. Despite a potential for instability and chaos, these events clearly serve our national interest.

We stand tonight before a new world of hope and possibilities for our children, a world we could not have contemplated a few years ago. The challenge for us now is to engage these new States in sustaining the peace and building a more prosperous future.

And so today, based on commitments and assurances given to us by some of these States, concerning nuclear safety, democracy, and free markets, I am announcing some important steps designed to begin this process.

First, the United States recognizes and welcomes the emergence of a free, independent, and democratic Russia, led by its courageous President, Boris Yeltsin. Our Embassy in Moscow will remain there as our Embassy to Russia. We will support Russia's assumption of the U.S.S.R.'s seat as a permanent Member of the United Nations Security Council. I look forward to working closely with President Yeltsin in support of his efforts to bring democratic and market reform to Russia.

Second, the United States also recognizes the independence of Ukraine, Armenia, Kazakhstan, Belarus, and Kyrgyzstan, all States that have made specific commitments to us. We will move quickly to establish diplomatic relations with these States and build new ties to them. We will sponsor membership in the United Nations for those not already members.

Third, the United States also recognizes today as independent States the remaining six former Soviet Republics: Moldova, Turkmenistan, Azerbaijan, Tadjikistan, Georgia, and Uzbekistan. We will establish diplomatic relations with them when we are satisfied that they have made commitments to responsible security policies and democratic principles, as have the other States we recognize today.

These dramatic events come at a time when Americans are also facing challenges here at home. I know that for many of you these are difficult times. And I want all Americans to know that I am committed to attacking our economic problems at home with the same determination we brought to winning the cold war.

I am confident we will meet this challenge as we have so many times before. But we cannot if we retreat into isolationism. We will only succeed in this interconnected world by continuing to lead the fight for free people and free and fair trade. A free and prosperous global economy is essential for America's prosperity. That means jobs and economic growth right here at home.

This is a day of great hope for all Americans. Our enemies have become our partners, committed to building democratic and civil societies. They ask for our support, and we will give it to them. We will do it because as Americans we can do no less.

For our children, we must offer them the guarantee of a peaceful and prosperous future, a future grounded in a world built on strong democratic principles, free from the specter of global conflict.

May God bless the people of the new nations in the Commonwealth of Independent States. And on this special day of peace on Earth, good will toward men, may God continue to bless the United States of America. Good night.

3. Czech and Slovak Republics

As discussed in A.2.d., *supra*, the Czech and Slovak Federal Republic ("Czechoslovakia") ceased to exist on December 31, 1992, and was succeeded by two countries: the Czech Republic and the Slovak Republic. A diplomatic note from the Czechoslovak foreign ministry to the U.S. Embassy in

Prague outlined the status of the Czech Republic and Slovak Republic representation at the United Nations after January 1, 1993. It informed the U.S. Embassy that Czechoslovakia's membership at the United Nations would cease to exist on December 31, 1992. However, it stated that both the Czech Republic and the Slovak Republic would apply for UN membership in the first days of 1993. In that connection, it clarified that, after January 1, 1993, the permanent mission staff of Czechoslovakia would represent interests of both successor states, and that the mission staff would simultaneously be working on termination of the current mission and arrangements for the membership of new successor states as well as inauguration of permanent missions of these states to the United Nations in New York.

4. Hong Kong

On July 1, 1997, Hong Kong became a Special Administrative Region ("SAR") of the People's Republic of China. To provide for a non-contentious transfer of sovereignty over Hong Kong, and to retain the social and economic system, rights, and freedoms the people of Hong Kong enjoyed as a British colony, China and the United Kingdom signed the 1984 United-Kingdom-People's Republic of China Joint Declaration ("Joint Declaration"). The Joint Declaration established the "one country, two systems" approach to Hong Kong. As discussed in Chapter 4.A.4., the Joint Declaration also provided that international agreements to which the People's Republic of China was not a party, but that did currently apply to Hong Kong, could remain implemented. Article 3(2) of the Joint Declaration provided, in relevant part, that the SAR would "enjoy a high degree of autonomy, except in foreign and defense affairs which are the responsibilities of the Central People's Government." However, Article 3(10) provided that the SAR, utilizing the name "Hong Kong, China," could on its own "maintain and develop economic and cultural relations and conclude relevant agreements with states, regions, and relevant international organizations."

On March 7, 1997, the United States and China concluded negotiations and initialed the text of the Agreement between the Government of the United States of America and the Government of the People's Republic of China Regarding the Maintenance of the United States Consulate General in the Hong Kong Special Administrative Region and an Agreed Minute. The agreement contained no limitations on the size or existing operations of the Consulate General and guaranteed a broad range of privileges and immunities for U.S. officials and specific protections for U.S. nationals arrested or otherwise detained by Hong Kong authorities. The agreement was signed in Beijing on March 25 during a visit by Vice President Gore and entered into force on July 1, 1997. The text of the agreement is available at *www.state.gov/s/l/c8183.htm*. Further information on the Basic Law and the Joint Declaration and a discussion of U.S. interests is available in the United States-Hong Kong Policy Act Report, as of March 31, 1997, *www.state.gov/www/regions/eap/970331_us-hk_pol_act_rpt.html*.

Jeffrey A. Bader, Department of State, Deputy Assistant Secretary for East Asian and Pacific Affairs, testified on these issues before the House International Relations Committee, Subcommittee on Asia and the Pacific, on February 13, 1997.

The full text of Mr. Bader's testimony, excerpted below, is available at *www.state.gov/www/regions/eap/970213_bader_hong_kong.html*.

---

* * * *

In less than 140 days, Hong Kong will revert to Chinese sovereignty. At midnight on June 30, more than a century and a half of British colonial rule will end and Hong Kong will become a Special Administrative Region of the People's Republic of China. This transfer of sovereignty is without precedent or historic parallel, and it has commanded increasing attention around the world. . . . It is an opportune time to review Hong Kong's progress toward reversion and its implications for the United States.

* * * *

Hong Kong's intended status after reversion is spelled out in two important documents: the 1984 Sino-British Joint Declaration and the 1990 Basic Law promulgated by the People's Republic of China. Together, these documents are China's promise that, although sovereignty will change, Hong Kong's way of life will not.

The Joint Declaration provides for the transition of sovereignty from the United Kingdom to China. Unlike other areas of China, however, Hong Kong will retain a high degree of autonomy in all matters except foreign affairs and defense. The social and economic systems, lifestyle, and rights and freedoms enjoyed by the Hong Kong people in the post-July Hong Kong Special Administrative Region (HKSAR) will remain unchanged for at least fifty years. The Joint Declaration established the concept of "one country, two systems" for Hong Kong and is a treaty registered with the United Nations.

The Basic Law provides the fundamental governing framework for implementing the "one country, two systems" principle in Hong Kong consistent with China's commitments in the Joint Declaration. It says that the PRC socialist system and policies will not be extended to the territory. And the Basic Law reiterates the Joint Declaration promise to allow Hong Kong to exercise a high degree of autonomy and to exercise separate executive, legislative, and judicial power after 1997.

We believe Hong Kong's best interests would be served by faithful attention to the commitments in the Joint Declaration. In it, China has made an extraordinary series of pledges about Hong Kong's future. The Joint Declaration establishes a framework that can, if honored and effectively implemented, help assure that Hong Kong remains the vibrant and attractive place it is today. Among other things, the Joint Declaration provides that:

— Hong Kong will have independent courts, with ultimate judicial authority resting in a local Court of Final Appeal;
— Hong Kong residents, not non-Hong Kong PRC officials, will occupy all important government and civil service positions, including the Chief Executive;
— Hong Kong laws will apply;

— Hong Kong's finances will be independent of China, and no tax revenues will be collected for or sent to Beijing;
— Hong Kong will continue to maintain its own currency, the Hong Kong Dollar, which will be freely convertible;
— Hong Kong police will maintain public order;
— Hong Kong will be empowered to enter into international agreements in a wide range of areas; and
— Hong Kong people will elect their legislature.

* * * *

United States policy toward Hong Kong is therefore grounded in a determination to help preserve Hong Kong's prosperity and way of life. Let me review the basis of that policy. Like previous administrations, the Clinton Administration strongly supports the Joint Declaration. It provides a sound basis for a smooth transfer of sovereignty and a comprehensive and rational framework for Hong Kong's continued stability and prosperity. But, it is not only our policy that underscores support for the Joint Declaration. While recognizing that Hong Kong will become a part of China, the U.S.-Hong Kong Policy Act establishes domestic legal authority to treat Hong Kong as an entity distinct from the PRC after reversion. This accepts and reinforces the Joint Declaration concept of "one country, two systems."

U.S. interests—and those of Hong Kong itself—are best served by faithful implementation of the commitments made in the Joint Declaration. As I have stated, we are not parties to the agreement, and specific arrangements for Hong Kong's transition have been matters for the British, the Chinese, and the Hong Kong people to decide. But we do play a strong supportive role to ensure that our interests are protected.

* * * *

An inter-agency memorandum of June 1997 described, among other things, the application of U.S. regulations and laws to Hong Kong after reversion, as excerpted below. *See also* Chapter 4.B.6.d. concerning treaty succession issues.

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

---

* * * *

In 1992 Congress enacted the US—Hong Kong Policy Act, 22 U.S.C. 55701, et seq. ("the HKPA"), which provides legislative authority to treat post-reversion Hong Kong as being a separate and distinct legal entity from the PRC in those areas in which Hong Kong will continue to exercise a "high degree of autonomy."

The HKPA expresses United States policy to further Hong Kong's autonomy by playing an active role in supporting Hong Kong's prosperity and status as an international financial center and by maintaining and expanding bilateral relations and agreements with Hong Kong in areas such as trade, investment, finance, aviation, shipping, communications, and tourism.

In addition, the HKPA provides in (§ 201(a), 22 U.S.C. § 5721(a)) that

> the laws of the United States shall continue to apply with respect to Hong Kong, on and after July 1, 1997, in the same manner as the laws of the United States were applied with respect to Hong Kong before such date unless otherwise expressly provided by law or by Executive order under section 202.

Under § 202 (22 U.S.C. § 5722), the President may make a determination that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States, or any provision thereof, different from that accorded the People's Republic of China . . . (and) may issue an Executive order suspending the application of section 201(a) to such law or provision of law.

Thus, after July 1, existing U.S. statutes and regulations affecting Hong Kong will remain applicable as if there were no reversion to the PRC. If, on or after July 1, 1997, it emerges that Hong Kong is not sufficiently autonomous to justify treatment

separate from the PRC under U.S. law, the President may issue an order suspending the application of relevant statutes or parts of statutes to Hong Kong.

* * * *

5. Macau

The April 13, 1987, Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau recorded China's resumption of the exercise of sovereignty over Macau on December 20, 1999. The Macau Special Administrative Region of the People's Republic of China would continue to enjoy a high degree of autonomy on all matters other than defense and foreign affairs. Similar to Hong Kong, Macau would retain its current lifestyle and legal, social, and economic systems until at least the year 2049, under the "one country, two systems" approach. The United States fully supported the resumption of Chinese sovereignty of Macau.

Paragraph 2 of the March 25, 1997, agreement between the United States and the PRC regarding the U.S. Consulate General in the Hong Kong SAR ("Agreement") discussed *supra*, provided:

> The Government of the People's Republic of China takes note of the consular function which the Consulate General of the United States in Hong Kong performs in Macau, and agrees to the continuation of this function after the Government of the People's Republic of China resumes the exercise of sovereignty over Macau with effect from December 20, 1999.

In a diplomatic note of September 27, 1999, from the U.S. Embassy in Beijing to the Ministry of Foreign Affairs of the People's Republic of China, the United States referred to the Agreement and the agreed minute of March 7, 1997, and stated that it

> wished to confirm that, on or after December 20, 1999, the Macau Special Administrative Region ("Macau") shall be an integral part of the consular district of the United States Consulate General in Hong Kong SAR, and that said Agreement, including the agreed Minute, shall govern the United States consular presence and services in Macau, and shall apply, *mutatis mutandis*, to Macau.

By reply note of October 1999, the PRC Ministry of Foreign Affairs concurred that as of December 20, 1999, "the American Consulate General in Hong Kong can execute the consular duty in Macao Special Administrative Region as of December 1999, when the Government of the People's Republic of China resumes sovereignty over Macao, and the relevant items of the Agreement apply to Macao SAR too."

The full texts of the diplomatic notes are available at *www.state.gov/s/l/c8183.htm*.

Cross-references

Presidential power to recognize foreign state or government, **Chapter 4.B.6.a.(3)(ii).**
Succession to treaties, **Chapter 4.B.6.**
Diplomatic relations with Palau, **Chapter 5.B.2.b.(3).**
Statehood analysis of Republica Srpska, **Chapter 6.G.2.a.**
Settlement with Vietnam of diplomatic property claims, **Chapter 8.A.7.b.**
U.S. succession to ownership of assets of Confederacy, **Chapter 12.A.5.a.(2).**
Establishment of U.S. office in Pristina, **Chapter 17.B.3.b.(3).**
Opening of liaison offices with North Korea, **Chapter 18.C.9.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 organs, agencies and 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 U.S. Department of State. When the Department of State filed no suggestion, 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 'assur[e] 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, 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, reproduced at Dep't State Bull. No. 26 at 984–85 (1952). *See Alfred Dunhill of*

London, Inc. v. Cuba, 425 U.S. 682, 711–15 (1976). Generally speaking, with regard to "commercial activities," 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." *Id.* at 704. The test for making this distinction under the FSIA is the nature of the transaction in question—the outward form of the conduct that 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, Inc.*, 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 incorporated additional exceptions. In 1996 an exception to immunity from suit in U.S. courts for certain acts of state-sponsored terrorism was enacted in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996) ("AEDPA" or "Antiterrorism Act"). The antiterrorism exception, codified at 28 U.S.C. § 1605(a)(7), and related developments are discussed in section A.3.d. below.

The various statutory exceptions set forth at §§ 1605(a)(1) to (7) have been subject to extensive judicial interpretation. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. Government is not a party and in which it does not otherwise participate. The following items represent only a selection of the relevant decisional material from the 1990s.

1. Scope: Definition of Foreign State

The following cases involve the interpretation of the definition of "state" under §§ 1603(a) and (b) of the FSIA, which provide:

> (a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign

state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

a. Foreign state

(1) Status of PLO

Klinghoffer v. S.N.C. Achille Lauro Ed Al Tri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria., 937 F.2d 44 (2d Cir. 1991), arose out of the 1985 highjacking of an Italian passenger liner, the *Achille Lauro*, off the Egyptian coast and the murder of a U.S. citizen passenger, Leon Klinghoffer, by terrorists affiliated with the Palestine Liberation Organization ("PLO"). On appeal from the district court's denial of the PLO's motion to dismiss, the court ruled that, lacking a defined territory or permanent population as well as the capacity to enter into genuine formal relations with other nations, the PLO was not a "state" for purposes of immunity under the FSIA, nor was it immune from suit in the United States as a result of its status as a permanent observer at the United Nations. Moreover, the fact that the United States had not extended formal diplomatic recognition to the PLO did not deprive it of capacity to be sued. The court of appeals stated:

> While unrecognized regimes are generally precluded from appearing as plaintiffs in an official capacity without the

> Executive Branch's consent, *see Banco Nacional v. Sabbatino*, 376 U.S. 388, 410–11, 84 S.Ct. 923, 931, 11 L.Ed.2d 804 (1964); *National Petrochemical Co* [*of Iran v. M/T Stolt*, 860 F.2d 551 at 554–55 (2d Cir. 1988)], there is no bar to suit where an unrecognized regime is brought into court as a defendant. *Cf. United States v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984) (contempt proceeding against attorney claiming to be representative of the "Republic of New Afrika," an unrecognized nation), *cert. denied*, 479 U.S. 855, 107 S.Ct. 192, 93 L.Ed.2d 125 (1986).

937 F.2d at 48.

(2) Status of Bolivian Air Force

Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995), involved the alleged failure of the Bolivian Air Force to pay Transaero, a New York corporation and supplier of aircraft parts, the interest it was due under a credit agreement entered into in May of 1981. After obtaining a default judgment in the Eastern District of New York, *see* 24 F.3d 457 (2d Cir. 1994), Transaero registered the judgment in the District Court of the District of Columbia for enforcement purposes. The Bolivian Air Force moved for summary judgment, claiming that the district court in New York lacked personal jurisdiction because service of process had not complied with § 1608(a) of the FSIA, applicable to service on a "foreign state or political subdivision of a foreign state." The lower court found that the air force was an "agency or instrumentality" of Bolivia and that Transaero's method of service therefore had been adequate under § 1608(b) of the act.

On appeal to the D.C. Circuit, the U.S. Government submitted an *amicus curiae* brief arguing that the armed forces of a sovereign nation, whose core function is the defense of that nation, are presumptively part of the state itself under the FSIA, although the presumption can be rebutted with a strong showing of separateness. The U.S. brief contended

that the district court should have looked to the core function of the air force in trying to determine the entity's relation to the Bolivian state. Moreover, the government argued, the district court should have focused its inquiry on such factors as where the liability for a judgment against the Bolivian Air Force would lie, and whether the Bolivian Air Force operated with assets separate from those of the central state. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

The court of appeals agreed, holding that the lower court lacked personal jurisdiction over the Bolivian Air Force under the FSIA because service had not complied with the more stringent requirements of 28 U.S.C. § 1608(a), 30 F.3d at 154, as explained in the excerpt below (footnotes omitted).

---

* * * *

The question, then, is whether the core functions of the armed forces of a foreign sovereign are governmental or commercial. We hold that armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the "foreign state" itself, rather than a separate "agency or instrumentality" of the state. The "powers to declare and wage war" are among the "necessary concomitants" of sovereignty. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318, 81 L.Ed. 255, 57 S.Ct. 216 (1936). Since the passage of the Foreign Sovereign Immunities Act, the two federal cases to squarely consider the question have held that a foreign military force is a "foreign state" rather than an "agency or instrumentality of a foreign state." See *Marlowe v. Argentine Naval Comm'n*, 604 F.Supp. 703, 707 (D.D.C. 1985); Unidyne, 590 F.Supp. at 400. Apart from authority it is hard to see what would count as the "foreign state" if its armed forces do not. Any government of reasonable complexity must act through men organized into offices and departments. If a separate name and some power to conduct its own affairs suffices to make a foreign department an "agency" rather than a part of the state itself, the structure of section 1608 will list too far to one

side. We hold that the armed forces of a foreign sovereign are the "foreign state" and must be served under section 1608(a).

* * * *

b. Agencies and instrumentralities

In *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), the appellate court held that the Alberta Pork Producers Development Corporation, established by legislation of the Province of Alberta, Canada, for purposes of promoting the pork industry, was an "agency or instrumentality" of a foreign government for purposes of the FSIA and was therefore entitled to immunity. However, a pork processing plant headquartered in British Columbia and wholly owned by the Alberta Pork Producers Development Corporation was not entitled to immunity under the FSIA because the plant was not an "agency or instrumentality" of a foreign government nor was its owner "a foreign state or political subdivision thereof." To be an "agency or instrumentality" for purposes of the FSIA, the court said, the entity in question must either be an "organ of a foreign state" or have a majority of its shares owned by "a foreign state or political subdivision thereof." The pork processing plant in *Gates* was an ordinary plant that could not be considered an "organ" of the Province of Alberta and it was owned by the Alberta Pork Producers Development Corporation, which is an agency or instrumentality of a foreign government but not "a foreign state or political subdivision thereof."

c. Government officials

(1) El-Fadl v. Central Bank of Jordan

El-Fadl v. Central Bank of Jordan, 75 F.3d 668 (D.C. Cir. 1996) involved the filing of a wrongful termination suit against the Central Bank of Jordan by the Jordan-based former regional

manager of the Central Bank's District of Columbia subsidiary and accusations against the Central Bank and its Governor and Deputy Governor of malicious prosecution and false arrest. The district court dismissed the complaint against the Central Bank and its Governor and Deputy Governor on grounds of immunity under the FSIA. The court of appeals agreed, finding *inter alia* that an individual can qualify as an "agency or instrumentality of a foreign state" for purposes of immunity under the FSIA, citing *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990) (*see Digest 1989–1990* at 302–11). The Court found that the Governor and Deputy Governor had fired the plaintiff while discharging their official responsibilities on behalf of the Central Bank, and that each of them enjoyed sovereign immunity as an "agency or instrumentality of a foreign state," precluding suit against them for firing an employee of the Central Bank's subsidiary.

(2) Byrd v. Corporacion Forestal y Industrial de Olancho SA

In *Byrd v. Corporacion Forestal y Industrial de Olancho SA*, 182 F.3d 380 (5th Cir. 1999), discussed in A.3.c.(4) below, the Fifth Circuit upheld immunity under the FSIA of two named defendants despite allegations that they acted beyond their official capacity. The court stated:

> Appellees argue that Pacheco and Figueroa acted beyond their official capacity, and therefore fall outside the shelter of the FSIA. Appellees claim that Figueroa and Pacheco's conduct demonstrates that they acted out of personal gain and that they subverted their official positions to advance their personal objectives. . . . These allegations, however, are not legally sufficient to strip FSIA immunity from Pacheco and Figueroa. *See Chuidian*, 912 F.2d at 1106–1107. In *Chuidian*, the Ninth Circuit rejected the argument that personal motives convert an official action into an individual one. The court observed that "the most [plaintiff] Chuidian can allege is that [defendant] Danza

experienced a convergence between his personal interest and his official duty and authority." *Id.* at 1107. "Such a circumstance does not serve to make his action any less an action of his sovereign." *Id.*

2. No Exception for *Jus Cogens* Violations

a. Siderman de Blake v. Republic of Argentina

A violation of *jus cogens* does not in itself confer jurisdiction under the FSIA. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993), an Argentine family, including a U.S. citizen daughter, sued the Republic of Argentina and one of its provinces based on alleged torture of an Argentine citizen and expropriation of property by military officials. The action was dismissed on grounds of immunity under the FSIA, and plaintiffs appealed. The appellate court found that the prohibition against official torture had attained the status of *jus cogens* but held that an alleged violation of a *jus cogens* norm did not in itself confer jurisdiction over a foreign state under the FSIA. The court reversed the dismissal of the claims on other grounds; *see*, e.g., 3.a. below. Excerpts below from the court's decision explain the court's analysis and conclusions relating to plaintiff's theory based on *jus cogens. See also* 3.a.(1) *and* e.(1), below.

---

* * * *

. . . [W]e conclude that . . . [u]nder international law, any state that engages in official torture violates *jus cogens*.

The question in the present case is what flows from the Sidermans' allegation that Argentina tortured Jose Siderman and thereby violated a *jus cogens* norm. . . .

The Sidermans posit that because sovereign immunity derives from international law, *jus cogens* supersedes it. "*Jus cogens* norms represent the fundamental duties incident to international life. They

are an essential component of the modern law definition of sovereignty." [Belsky, Merva & Roht-Arriaza, Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, 77 Calif. L. Rev. 365, 392 (1989).] International law does not recognize an act that violates *jus cogens* as a sovereign act. A state's violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law.

Unfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the FSIA. . . . [W]e conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.

* * * *

b. Jus cogens *violations not implied waivers*

Other cases attempted to bring *jus cogens* violations under the implied waiver exception to sovereign immunity in § 1605 (a)(1) of the FSIA.

(1) Princz v. Federal Republic of Germany

In 1993 Hugo Princz, a Holocaust survivor, sued the Federal Republic of Germany, seeking to recover money damages for injuries he suffered and for slave labor he performed while a prisoner in Nazi concentration camps. The U.S. District Court for the District of Columbia held that it had subject matter jurisdiction over Princz's claim. *Princz v. Fed. Republic of Germany*, 813 F.Supp. 22 (D.D.C. 1992). Germany appealed and the Court of Appeals for the D.C. Circuit reversed this holding, dismissing the case. 26 F.3d 1166 (D.C. Cir. 1994). The appellate court examined, but did not decide, whether the FSIA applied retroactively to the

events occurring in 1942–1945 in this case; *see* 4.a., below. The court examined plaintiff's arguments that the case fell within several of the FSIA exceptions, if the act did apply retroactively, but concluded that "the terrible events giving rise to this case . . . come[ ] within no exception in the Act." The court's analysis in concluding that the *jus cogens* violations in this case did not bring the case under the implied waiver exception is excerpted below. *See also* Chapter 8.A.1.c. concerning the 1995 German agreement to compensate Princz and comparable U.S. nationals who were victims of Nazi persecution.

---

* * * *

. . . [I]t is doubtful that any state has ever violated *jus cogens* norms on a scale rivaling that of the Third Reich. . . .

The *amici* argue that interpreting the FSIA to imply a waiver where a violation of *jus cogens* norms has occurred "would reconcile the FSIA with accepted principles of international law." *Citing* Adam Belsky, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Cal. L. Rev. 365 (1989). Although no reported decision considers the *amici's* specific argument that a violation of *jus cogens* norms forfeits immunity under the implied waiver provision of the FSIA, the Ninth Circuit has stated broadly that "the fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA." *Siderman de Blake*, 965 F.2d at 719.

Moreover, the *amici's jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1). *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 284 U.S. App. D.C. 333, 905 F.2d 438, 444 (D.C. Cir. 1990), *quoting Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) (courts "rarely find that a nation has waived its sovereign immunity . . . 'without strong evidence that this is what the foreign state intended' "); *accord Drexel Burnham Lambert v. Committee of Receivers*, 12 F.3d 317, 326 (2d Cir. 1993); *Joseph v. Office of the Consulate General*,

830 F.2d 1018, 1022 (9th Cir. 1987); *Zercinek v. Petroleos Mexicanos*, 614 F.Supp. 407, 411 (S.D. Tex. 1985), *aff'd*, 826 F.2d 415 (5th Cir. 1987). That requirement is also reflected in the examples of implied waiver set forth in the legislative history of § 1605(a)(1), all of which arise either from the foreign state's agreement (to arbitration or to a particular choice of law) or from its filing a responsive pleading without raising the defense of sovereign immunity. *See* H.R. Rep. 1487, 94th Cong. 2d Sess., 18 (1976); Sen. Rep. 1310, 94th Cong. 2d Sess., 18 (1976). And as the Seventh Circuit has observed, "since the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." *Frolova*, 761 F.2d at 377.

In sum, an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. Mr. Princz does not maintain, however, that either the present government of Germany or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities. We have no warrant, therefore, for holding that the violation of *jus cogens* norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA.[1]

* * * *

[1] Our dissenting colleague Judge Wald suggests, in effect, that because the Congress has not expressly excluded suits for the violation of jus cogens norms from the scope of § 1605(a)(1), international law requires that we "construe the [FSIA] to encompass an implied waiver exception" for such suits, thus providing jurisdiction over Mr. Princz's claims. Dis. Op. at 17. While it is true that "international law is a part of our law," Paquete Habana, 175 U.S. at 700, it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction. Judge Wald finds that grant through a creative, not to say strained, reading of the FSIA against the background of international law itself.

We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts

(2) Smith v. Socialist People's Libyan Arab Jamahiriya

Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (2nd Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997), involved three lawsuits filed against the Government of Libya alleging that it had been responsible for the bombing destruction of Pan American Flight 103 over Lockerbie, Scotland. The district court dismissed the suits for lack of subject matter jurisdiction, on the basis of the FSIA. On appeal, plaintiffs argued that by violating international *jus cogens* norms, Libya had impliedly waived its sovereign immunity. The appellate court affirmed the dismissals, as excerpted below (footnotes omitted). The court also noted that two other courts of appeal had already rejected the contention that a violation of a *jus cogens* standard constitutes an implied waiver within the meaning of the FSIA, citing to *Princz v. Federal Republic of Germany* and *Siderman de Blake v. Republic of Argentina, supra. See also* 3.a.(2), b.(1) and f.(1) below.

---

* * * *

The contention that a foreign state should be deemed to have forfeited its sovereign immunity whenever it engages in conduct that violates fundamental humanitarian standards is an appealing one. . . . The argument is premised on the idea that because observance of *jus cogens* is so universally recognized as vital to the functioning of a community of nations, every nation impliedly waives its traditional sovereign immunity for violations of such

---

but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.

Like Judge Wald, we recognize that this suit may represent Mr. Princz's last hope of reparation. Still, we cannot responsibly make the inferential leap that would be required in order to provide him with the federal forum he seeks.

fundamental standards by the very act of holding itself out as a state. . . .

The issue we face, however, is not whether an implied waiver derived from a nation's existence is a good idea, but whether an implied waiver of that sort is what Congress contemplated by its use of the phrase "waiver . . . by implication" in section 1605(a)(1) of the FSIA. We have no doubt that Congress has the authority either to maintain sovereign immunity of foreign states as a defense to all violations of *jus cogens* if it prefers to do so or to remove such immunity if that is its preference, and we have no doubt that Congress may choose to remove the defense of sovereign immunity selectively for particular violations of *jus cogens*, as it has recently done in the 1996 amendment of the FSIA. . . .

* * * *

Whether or not an implied waiver might, in some circumstances, arise from a foreign state's actions not intimately related to litigation, we conclude that Congress's concept of an implied waiver, as used in the FSIA, cannot be extended so far as to include a state's existence in the community of nations—a status that arguably should carry with it an expectation of amenability to suit in a foreign court for violations of fundamental norms of international law.

* * * *

[W]hen Congress recently amended the FSIA to remove the sovereign immunity of foreign states as a defense to acts of international terrorism, it enacted a carefully crafted provision that abolishes the defense only in precisely defined circumstances. . . .

Our reluctance to construe the concept of implied waiver to include all violations of *jus cogens* is . . . based on our understanding of what the 94th Congress meant when it illustrated the inexact phrase "waiver . . . by implication" with examples drawn entirely from the context of conduct related to the litigation process. We recognize that the examples given in the House Report are not necessarily the only circumstances in which an implied waiver might be found. . . . Nevertheless, they indicate the principal context that Congress had in mind . . . and, at a minimum, they preclude a sweeping implied waiver for all violations of *jus cogens*.

3. Exceptions to Immunity

a. Existing treaty provisions

Section 1604 of the FSIA provides that a state is immune "subject to existing international agreements to which the United States is a party at the time of enactment of this Act."

(1) Siderman de Blake v. Republic of Argentina

In *Siderman*, 965 F.2d 699, A.2.a. *supra*, the Ninth Circuit held that allegations of acts of official torture in violation of the Universal Declaration of Human Rights ("UDHR") or the UN Charter do not suffice to bring claims within the "existing treaty provisions" exception. The court noted that in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the U.S. Supreme Court rejected the argument that an exception to immunity could be based on the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention. The *Siderman* court noted that although those conventions "were quite specific about the rights to compensation of merchant ships in time of war . . . the [*Amerada Hess*] Court was unwilling to hold that the treaties expressly conflicted with the immunity created by the FSIA, and thus found section 1604 inapplicable."

As to the UN Charter, the *Siderman* court concluded: "We cannot, consistently with *Amerada Hess*, accept the . . . argument that the U.N. Charter expressly conflicts with the FSIA when the Charter does not even discuss compensation or individual remedies." The court also found "no indication in the FSIA or its legislative history that Congress intended the term 'international agreements' to include non-binding resolutions of the General Assembly of the United Nations," such as the UDHR. 956 F.2d at 719–20.

(2) Smith v. Socialist People's Libyan Arab Jamahiriya

In *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2nd Cir. 1996), A.2.b.(2) *supra*, the court rejected a different argument based on the UN Charter, as excerpted below.

---

* * * *

Appellants do not assert that any provision of the UN Charter subjects Libya to suit in the United States. Instead, they reason that Article 25 of the Charter binds all member nations to abide by decisions of the Security Council taken under Chapter VII of the Charter and contend that Security Council Resolution 748, adopted on March 31, 1992, commits Libya to pay compensation to the victims of Pan Am Flight 103.

* * * *

We reject the contention for the threshold reason that the FSIA's displacement of immunity, applicable to international agreements in effect at the time the FSIA was adopted, does not contemplate a dynamic expansion whereby FSIA immunity can be removed by action of the UN taken after the FSIA was enacted. Such a contention would encounter a substantial constitutional issue as to whether Congress could delegate to an international organization the authority to regulate the jurisdiction of United States courts. It would take an explicit indication of Congressional intent before we would construe an act of Congress to have such an effect. . . . There is no such indication in section 1604.

* * * *

b. Implied waiver

The FSIA allows a foreign state to waive its immunity either "explicitly or by implication." 28 U.S.C. § 1605(a)(1). As discussed in A.2.b. *supra*, courts have held that violations of *jus cogens* norms do not constitute implied waivers under

the FSIA. The Second Circuit noted in *Smith v. Socialist People's Libyan Arab Jamahiriya* that the examples in the legislative history of the implied waiver provision were "drawn entirely from the context of conduct related to the litigation process."

(1) Smith v. Socialist People's Libyan Arab Jamahiriya

Plaintiffs in *Smith*, b.(2) *supra*, had also argued that Libya impliedly waived its immunity by reason of a paragraph in a letter from the Secretary of the Libyan government's "People's Committee for Foreign Liaison and International Cooperation" to the Secretary General of the United Nations guaranteeing payment of any judgment against two Libyan suspects in the bombing of Pan Am 103. The court rejected this theory of implied waiver, finding that "[a] generalized undertaking to pay the debt of a national . . . does not imply that the guaranteeing state agrees to be sued on such an undertaking in a United States court." *Smith*, 101 F.3d at 246.

(2) Cabiri v. Government of the Republic of Ghana

In *Cabiri v. Government of the Republic of Ghana*, 165 F.3d 193 (2nd Cir. 1999), *cert. denied*, 527 U.S. 1022 (1999), the plaintiff, who served as Ghana's trade representative to the United States, enjoyed the use of a house in Westbury, New York pursuant to his employment contract. In 1986 Ghana summoned the plaintiff home, where he was allegedly detained and tortured, and undertook to discharge him from his post. When Ghana subsequently sued in state court to evict the plaintiff's family from the Westbury house, he asserted counterclaims for breach of contract, abuse of trust, fraudulent misrepresentation, false imprisonment, and intentional infliction of emotional distress. The plaintiff's wife also asserted a counterclaim for intentional infliction of emotional distress. After the parties settled the eviction proceeding, the Cabiris repleaded their counterclaims in an

action against Ghana in federal court. On appeal from the district court's dismissal of the claims, the Second Circuit Court of Appeals held that the counterclaim exception to the FSIA in § 1607 (providing an exception to immunity for counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state") applied to the breach of contract claim, insofar as such claim arose out of same transactions as the state eviction action brought by Ghana. The court held that Ghana had not impliedly waived its sovereign immunity to the other claims, however, by bringing the eviction action after Ghanaian authorities had released the plaintiff. In so holding it characterized the implied waiver theory in *Siderman* as "new and dubious" and stated: "We agree with the district court that the eviction action lacks a direct connection to the Cabiris' claims in this lawsuit. . . . Even assuming that *Siderman* were sound and persuasive, the opinion itself disclaims the broader reach that the Cabiris claim for it." (fn. omitted) 165 F.3d at 202.

See also Saudi Arabian Airlines Corp. v. Tamimi, 176 F.3d 274 (4th Cir. 1999). The court found that Saudi Arabian Airlines Corporation, wholly owned by the Kingdom of Saudi Arabia, qualified as a "foreign state" under the FSIA and had not impliedly waived its sovereign immunity to a garnishment action by informing ex-wife that an employee had irrevocably authorized and directed airline to deduct child support payments from his salary in the future.

c. Commercial activities

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a

direct effect in the United States." Two cases before the U.S. Supreme Court during the 1990s and a few of the many lower court cases during the period that considered whether alleged activities are "commercial" within the meaning of the FSIA are discussed below.

(1) Weltover, Inc. v. Republic of Argentina

In *Weltover, Inc. v. Republic of Argentina*, 753 F.Supp. 1201 (S.D.N.Y. 1991), *aff'd*, 941 F.2d 145 (2d Cir. 1991), foreign creditors brought an action in federal court in New York against the Republic of Argentina and its central bank, Banco Central de la Argentina, alleging that defendants had breached their obligations arising out of the Argentine government's issuance of certain bonds payable in U.S. dollars ("Bonods"). The Bonods, valued at approximately $1.3 billion, provided for payment of principal and interest in New York, London, Frankfurt, or Zurich in U.S. dollars, with interest based on the London Interbank Rate for Eurodollar deposits. The Central Bank became unable to meet its payment obligations and attempted to reschedule payments, but the Bonod holders refused to accept the rescheduling and brought an action to compel defendants to honor their contractual obligations. Argentina moved to dismiss for lack of subject matter jurisdiction, but that motion was denied by the U.S. District Court for the Southern District of New York, and defendants appealed. The Court of Appeals for the Second Circuit affirmed the lower court's decision, holding that the issuance of the bonds as a public debt constituted "commercial activity" within the FSIA's exception in § 1605(a)(2) and the subsequent nonpayment of that debt was therefore a "commercial activity," as well. "Where a sovereign enters the marketplace as a commercial actor, a subsequent breach of the commercial contract retains that commercial nature," 941 F.2d at 151. The appellate court also held that the nonpayment of debt payable in the United States met the statutory requirement of § 1605(a)(2) that the acts in question must cause a "direct effect in the United States."

Defendants sought Supreme Court review of the court of appeals decision. In March 1992 the U.S. Government filed a brief as *amicus curiae* in support of the plaintiffs, contending that the court of appeals had in fact correctly interpreted the FSIA. The Supreme Court agreed, 504 U.S. 607 (1992).

Excerpts from the Court's opinion follow (footnotes omitted).

---

* * * *

Respondents and their *amicus*, the United States, contend that Argentina's issuance of, and continued liability under, the Bonods constitute a "commercial activity" and that the extension of the payment schedules was taken "in connection with" that activity. The latter point is obvious enough, and Argentina does not contest it; the key question is whether the activity is "commercial" under the FSIA.

The FSIA defines "commercial activity" to mean:

> "[E]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

This definition, however, leaves the critical term "commercial" largely undefined: The first sentence simply establishes that the commercial nature of an activity does not depend upon whether it is a single act or a regular course of conduct, and the second sentence merely specifies what element of the conduct determines commerciality (*i.e.*, nature rather than purpose), but still without saying what "commercial" means. Fortunately, however, the FSIA was not written on a clean slate. As we have noted, see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486–489 (1983), the Act (and the commercial exception in particular) largely codifies the so called "restrictive" theory of foreign sovereign immunity first endorsed by the State Department in 1952. The meaning of

"commercial" is the meaning generally attached to that term under the restrictive theory at the time the statute was enacted. See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) ("[W]e assume that when a statute uses [a term of art], Congress intended it to have its established meaning"); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Morissette v. United States*, 342 U.S. 246, 263 (1952).

This Court did not have occasion to discuss the scope or validity of the restrictive theory of sovereign immunity until our 1976 decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682. Although the Court there was evenly divided on the question whether the "commercial" exception that applied in the foreign sovereign immunity context also limited the availability of an act of state defense, compare *id.*, at 695–706 (plurality) with *id.*, at 725–730 (Marshall, J., dissenting), there was little disagreement over the general scope of the exception. The plurality noted that, after the State Department endorsed the restrictive theory of foreign sovereign immunity in 1952, the lower courts consistently held that foreign sovereigns were not immune from the jurisdiction of American courts in cases "arising out of purely commercial transactions," *id.*, at 703, citing, *inter alia, Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2nd Cir. 1964), cert. denied, 381 U.S. 934 (1965), and *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2nd Cir.), cert. denied, 385 U.S. 931 (1966). The plurality further recognized that the distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other, was not entirely novel to American law. See 425 U.S., at 695–696, citing, *inter alia, Parden v. Terminal R. Co.*, 377 U.S. 184, 189–190 (1964) (Eleventh Amendment immunity); *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat. 904, 907–908 (1824) (same); *New York v. United States*, 326 U.S. 572, 579 (1946) (opinion of Frankfurter, J.) (tax immunity of States); and *South Carolina v. United States*, 199 U.S. 437, 461–463 (1905) (same). The plurality stated that the restrictive theory of foreign sovereign immunity would not bar a suit based upon a foreign state's participation in the marketplace in the manner of a private citizen or corporation. 425 U.S., at 698–705. A foreign state engaging in "commercial"

activities "do[es] not exercise powers peculiar to sovereigns"; rather, it "exercise[s] only those powers that can also be exercised by private citizens." *Id.*, at 704. The dissenters did not disagree with this general description, see *id.*, at 725. Given that the FSIA was enacted less than six months after our decision in *Alfred Dunhill* was announced, we think the plurality's contemporaneous description of the then prevailing restrictive theory of sovereign immunity is of significant assistance in construing the scope of the Act.

In accord with that description, we conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue 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," Black's Law Dictionary 270 (6th ed. 1990). See, e.g., *Rush Presbyterian St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir.), cert. denied, 493 U.S. 937 (1989). Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity, because private companies can similarly use sales contracts to acquire goods, see, e.g., *Stato di Rumania v. Trutta*, [1926] Foro It. I 584, 585–586, 589 (Corte di Cass. del Regno, Italy), translated and reprinted in part in 26 Am. J. Int'l L. 626–629 (Supp. 1932).

The commercial character of the Bonods is confirmed by the fact that they are in almost all respects garden variety debt instruments: they may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income. We recognize that, prior to the enactment of the FSIA, there was authority suggesting

that the issuance of public debt instruments did not constitute a commercial activity. *Victory Transport*, 336 F.2d, at 360 (dicta). There is, however, nothing distinctive about the state's assumption of debt (other than perhaps its purpose) that would cause it always to be classified as *jure imperii*, and in this regard it is significant that *Victory Transport* expressed confusion as to whether the "nature" or the "purpose" of a transaction was controlling in determining commerciality, *id*., at 359–360. Because the FSIA has now clearly established that the "nature" governs, we perceive no basis for concluding that the issuance of debt should be treated as categorically different from other activities of foreign states.

Argentina contends that, although the FSIA bars consideration of "purpose," a court must nonetheless fully consider the *context* of a transaction in order to determine whether it is "commercial." Accordingly, Argentina claims that the Court of Appeals erred by defining the relevant conduct in what Argentina considers an overly generalized, a contextual manner and by essentially adopting a *per se* rule that all "issuance of debt instruments" is "commercial." See 941 F.2d, at 151 (" '[I]t is self evident that issuing public debt is a commercial activity within the meaning of [the FSIA]' "), quoting *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1018 (2nd Cir. 1991). We have no occasion to consider such a *per se* rule, because it seems to us that even in full context, there is nothing about the issuance of these Bonods (except perhaps its purpose) that is not analogous to a private commercial transaction.

Argentina points to the fact that the transactions in which the Bonods were issued did not have the ordinary commercial consequence of raising capital or financing acquisitions. Assuming for the sake of argument that this is not an example of judging the commerciality of a transaction by its purpose, the ready answer is that private parties regularly issue bonds, not just to raise capital or to finance purchases, but also to refinance debt. That is what Argentina did here: by virtue of the earlier FEIC contracts, Argentina was *already* obligated to supply the U.S. dollars needed to retire the FEIC insured debts; the Bonods simply allowed Argentina to restructure its existing obligations. Argentina further asserts (without proof or even elaboration) that it "received consideration [for the Bonods] in no way commensurate with [their]

value," Brief for Petitioners 22. Assuming that to be true, it makes no difference. Engaging in a commercial act does not require the receipt of fair value, or even compliance with the common law requirements of consideration.

Argentina argues that the Bonods differ from ordinary debt instruments in that they "were created by the Argentine Government to fulfill its obligations under a foreign exchange program designed to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of foreign exchange." *Id*., at 23–24. In this regard, Argentina relies heavily on *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), in which the Fifth Circuit took the view that "[o]ften, the essence of an act is defined by its purpose"; that unless "we can inquire into the purposes of such acts, we cannot determine their nature"; and that, in light of its purpose to control its reserves of foreign currency, Nicaragua's refusal to honor a check it had issued to cover a private bank debt was a sovereign act entitled to immunity. *Id*., at 1393. Indeed, Argentina asserts that the line between "nature" and "purpose" rests upon a "formalistic distinction [that] simply is neither useful nor warranted." Reply Brief for Petitioners 8. We think this line of argument is squarely foreclosed by the language of the FSIA. However difficult it may be in some cases to separate "purpose" (*i.e*., the reason why the foreign state engages in the activity) from "nature" (*i.e*., the outward form of the conduct that the foreign state performs or agrees to perform), see *De Sanchez, supra*, at 1393, the statute unmistakably commands that to be done. 28 U.S.C. § 1603(d). We agree with the Court of Appeals, see 941 F.2d, at 151, that it is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so. We conclude that Argentina's issuance of the Bonods was a "commercial activity" under the FSIA.

The remaining question is whether Argentina's unilateral rescheduling of the Bonods had a "direct effect" in the United States, 28 U.S.C. § 1605(a)(2). In addressing this issue, the Court of Appeals rejected the suggestion in the legislative history of the FSIA that an effect is not "direct" unless it is both "substantial" and "foreseeable." 941 F.2d, at 152; contra, *America West*

Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793, 798–800 (9th Cir. 1989); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 417–419 (5th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 224 U.S. App. D.C. 119, 135–136, 693 F.2d 1094, 1110–1111 (1982), cert. denied, 464 U.S. 815 (1983); *Ohntrup v. Firearms Center Inc.*, 516 F.Supp. 1281, 1286 (E.D. Pa. 1981), aff'd, 760 F.2d 259 (3rd Cir. 1985). That suggestion is found in the House Report, which states that conduct covered by the third clause of § 1605(a)(2) would be subject to the jurisdiction of American courts "consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." H.R. Rep. No. 94–1487, p. 19 (1976). Section 18 states that American laws are not given extraterritorial application except with respect to conduct that has, as a "direct and foreseeable result," a "substantial" effect within the United States. Since this obviously deals with jurisdiction to *legislate* rather than jurisdiction to adjudicate, this passage of the House Report has been charitably described as "a bit of a *non sequitur*," *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 311 (CA2 1981), cert. denied, 454 U.S. 1148 (1982). Of course the generally applicable principle *de minimis non curat lex* ensures that jurisdiction may not be predicated on purely trivial effects in the United States. But we reject the suggestion that § 1605(a)(2) contains any unexpressed requirement of "substantiality" or "foreseeability." As the Court of Appeals recognized, an effect is "direct" if it follows "as an immediate consequence of the defendant's . . . activity," 941 F.2d at 152.

The Court of Appeals concluded that the rescheduling of the maturity dates obviously had a "direct effect" on respondents. It further concluded that that effect was sufficiently "in the United States" for purposes of the FSIA, in part because "Congress would have wanted an American court to entertain this action" in order to preserve New York City's status as "a preeminent commercial center." *Id.*, at 153. The question, however, is not what Congress "would have wanted" but what Congress enacted in the FSIA. Although we are happy to endorse the Second Circuit's recognition of "New York's status as a world financial leader," the effect of

Argentina's rescheduling in diminishing that status (assuming it is not too speculative to be considered an effect at all) is too remote and attenuated to satisfy the "direct effect" requirement of the FSIA. *Ibid.*

We nonetheless have little difficulty concluding that Argentina's unilateral rescheduling of the maturity dates on the Bonods had a "direct effect" in the United States. Respondents had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming. We reject Argentina's suggestion that the "direct effect" requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to the United States. We expressly stated in *Verlinden* that the FSIA permits "a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied," 461 U.S. at 489.

Finally, Argentina argues that a finding of jurisdiction in this case would violate the Due Process Clause of the Fifth Amendment, and that, in order to avoid this difficulty, we must construe the "direct effect" requirement as embodying the "minimum contacts" test of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Assuming, without deciding, that a foreign state is a "person" for purposes of the Due Process Clause, cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 323–324 (1966) (States of the Union are not "persons" for purposes of the Due Process Clause), we find that Argentina possessed "minimum contacts" that would satisfy the constitutional test. By issuing negotiable debt instruments denominated in U.S. dollars and payable in New York and by appointing a financial agent in that city, Argentina "'purposefully avail[ed] itself of the privilege of conducting activities within the [United States],'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985), quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

(2) Nelson v. Saudi Arabia

Scott Nelson, an American citizen, filed suit against the Kingdom of Saudi Arabia, claiming damages for torture and unlawful detention allegedly committed in Saudi Arabia. Nelson had been hired in the United States as a monitoring systems engineer for the King Faisal Specialist Hospital in Riyadh. He alleged that, in the course of performing his duties under his employment contract with the hospital, he was detained and tortured by agents of the Saudi government in retaliation for reporting safety violations at the hospital. He brought suit for his injuries against Saudi Arabia, the hospital, and Royspec, a corporation owned and controlled by the government of Saudi Arabia (collectively, "Saudi Arabia"). The district court concluded that Nelson's claims were not based upon commercial activities carried on in the United States, as required by the FSIA, and granted Saudi Arabia's motion to dismiss for lack of subject matter jurisdiction. *Nelson v. Saudi Arabia*, 1989 WL 435302 (S.D. Fla. Aug. 11, 1989). The Eleventh Circuit Court of Appeals reversed, 923 F.2d 1528 (11th Cir. 1991).

Defendants sought Supreme Court review of the court of appeals decision. The U.S. Government submitted a brief as *amicus curiae* in support of the Kingdom of Saudi Arabia, contending that the court of appeals erred in deciding that jurisdiction could be exercised under the first clause of the FSIA's commercial activity exception, which allows adjudication of a suit against a foreign state that "is based upon a commercial activity carried on in the United States by the foreign state."

The Supreme Court agreed with this analysis and concluded that Nelson's action was not "based upon a commercial activity" within the meaning of the first clause of § 1605(a)(2) of the FSIA, and accordingly reversed the judgment of the court of appeals. *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). Excerpts below provide the history of the litigation and the Supreme Court's analysis of the issues presented (footnotes omitted).

---

* * * *

In 1988, Nelson and his wife filed this action against petitioners in the United States District Court for the Southern District of Florida seeking damages for personal injury. The Nelsons' complaint sets out 16 causes of action, which fall into three categories. Counts II through VII and counts X, XI, XIV, and XV allege that petitioners committed various intentional torts, including battery, unlawful detainment, wrongful arrest and imprisonment, false imprisonment, inhuman torture, disruption of normal family life, and infliction of mental anguish. *Id.*, at 6–11, 15, 19–20. Counts I, IX, and XIII charge petitioners with negligently failing to warn Nelson of otherwise undisclosed dangers of his employment, namely, that if he attempted to report safety hazards the Hospital would likely retaliate against him and the Saudi Government might detain and physically abuse him without legal cause. *Id.*, at 5–6, 14, 18–19. Finally, counts VIII, XII, and XVI allege that Vivian Nelson sustained derivative injury resulting from petitioners' actions. *Id.*, at 11–12, 16, 20. Presumably because the employment contract provided that Saudi courts would have exclusive jurisdiction over claims for breach of contract, *id.*, at 47, the Nelsons raised no such matters.

The District Court dismissed for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330 1602 et seq. It rejected the Nelsons' argument that jurisdiction existed, under the first clause of § 1605(a)(2), because the action was one "based upon a commercial activity" that petitioners had "carried on in the United States." Although HCA's recruitment of Nelson in the United States might properly be attributed to Saudi Arabia and the Hospital, the District Court reasoned, it did not amount to commercial activity "carried on in the United States" for purposes of the Act, *id.*, at 94–95. The court explained that there was no sufficient "nexus" between Nelson's recruitment and the injuries alleged. "Although [the Nelsons] argu[e] that but for [Scott Nelson's] recruitment in the United States, he would not have taken the job, been arrested, and suffered the personal injuries," the court said, "this 'connection' [is] far too tenuous to support jurisdiction" under the Act, *id.*, at 97. Likewise, the court concluded that Royspec's commercial activity in the United States, purchasing supplies and equipment

for the Hospital, *id*., at 93–94, had no nexus with the personal injuries alleged in the complaint; Royspec had simply provided a way for Nelson's family to reach him in an emergency, *id*., at 96.

The Court of Appeals reversed [923 F.2d 1528 (11th Cir. 1991)]. It concluded that Nelson's recruitment and hiring were commercial activities of Saudi Arabia and the Hospital, carried on in the United States for purposes of the Act, *id*., at 1533, and that the Nelsons' action was "based upon" these activities within the meaning of the statute, *id*., at 1533–1536. There was, the court reasoned, a sufficient nexus between those commercial activities and the wrongful acts that had allegedly injured the Nelsons: "the detention and torture of Nelson are so intertwined with his employment at the Hospital," the court explained, "that they are 'based upon' his recruitment and hiring" in the United States, *id*., at 1535. The court also found jurisdiction to hear the claims against Royspec, *id*., at 1536. After the Court of Appeals denied petitioners' suggestion for rehearing en banc, App. 133, we granted certiorari, 504 U.S. 972 (1992). We now reverse.

The Foreign Sovereign Immunities Act "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping* Corp., 488 U.S. 428, 443 (1989). Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488–489 (1983); see 28 U.S.C. § 1604; J. Dellapenna, Suing Foreign Governments and Their Corporations 11, and n.64 (1988).

Only one such exception is said to apply here. The first clause of § 1605(a)(2) of the Act provides that a foreign state shall not be immune from the jurisdiction of United States courts in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." The Act defines such activity as "commercial activity carried on by such state and having substantial contact with the United States," § 1603(e), and provides that a commercial activity may be "either a regular course of commercial conduct or a particular commercial transaction or

act," the "commercial character of [which] shall be determined by reference to" its "nature," rather than its "purpose." § 1603(d).

There is no dispute here that Saudi Arabia, the Hospital, and Royspec all qualify as "foreign state[s]" within the meaning of the Act. Brief for Respondents 3; see 28 U.S.C. §§ 1603(a), (b) (term "foreign state" includes "an agency or instrumentality of a foreign state"). For there to be jurisdiction in this case, therefore, the Nelsons' action must be "based upon" some "commercial activity" by petitioners that had "substantial contact" with the United States within the meaning of the Act. Because we conclude that the suit is not based upon any commercial activity by petitioners, we need not reach the issue of substantial contact with the United States.

We begin our analysis by identifying the particular conduct on which the Nelsons' action is "based" for purposes of the Act. See *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2nd Cir. 1981), cert. denied, 454 U.S. 1148 (1982); Donoghue, Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception, 17 Yale J. Int'l L. 489, 500 (1992). Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the "basis," or "foundation," for a claim, see Black's Law Dictionary 151 (6th ed. 1990) (defining "base"); Random House Dictionary 172 (2d ed. 1987) (same); Webster's Third New International Dictionary 180, 181 (1976) (defining "base" and "based"), the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case. See *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (focus should be on the "gravamen of the complaint"); accord, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) ("An action is based upon the elements that prove the claim, no more and no less"); *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 272 U.S. App. D.C. 240, 246, 855 F.2d 879, 885 (1988).

What the natural meaning of the phrase "based upon" suggests, the context confirms. Earlier, see n.3, supra, we noted that

§ 1605(a)(2) contains two clauses following the one at issue here. The second allows for jurisdiction where a suit "is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," and the third speaks in like terms, allowing for jurisdiction where an action "is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Distinctions among descriptions juxtaposed against each other are naturally understood to be significant, see *Melkonyan v. Sullivan*, 501 U.S. 89, 94–95 (1991), and Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.

In this case, the Nelsons have alleged that petitioners recruited Scott Nelson for work at the Hospital, signed an employment contract with him, and subsequently employed him. While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, those facts alone entitle the Nelsons to nothing under their theory of the case. The Nelsons have not, after all, alleged breach of contract, see *supra*, at 4, but personal injuries caused by petitioners' intentional wrongs and by petitioners' negligent failure to warn Scott Nelson that they might commit those wrongs. Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit.

Petitioners' tortious conduct itself fails to qualify as "commercial activity" within the meaning of the Act, although the Act is too "'obtuse'" to be of much help in reaching that conclusion. *Callejo, supra*, at 1107 (citation omitted). We have seen already that the Act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the

course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). If this is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case on the subject, it "leaves the critical term 'commercial' largely undefined." *Republic of Argentina v. Weltover*, Inc., 504 U.S. 607, 612 (1992); see Donoghue, supra, at 499; Lowenfeld, Litigating a Sovereign Immunity Claim—The *Haiti* Case, 49 N.Y.U.L. Rev. 377, 435, n.244 (1974) (commenting on then draft Act) ("Start with 'activity,' proceed via 'conduct' or 'transaction' to 'character,' then refer to 'nature,' and then go back to 'commercial,' the term you started out to define in the first place"); G. Born & D. Westin, International Civil Litigation in United States Courts 479–480 (2d ed. 1992). We do not, however, have the option to throw up our hands. The term has to be given some interpretation, and congressional diffidence necessarily results in judicial responsibility to determine what a "commercial activity" is for purposes of the Act.

We took up the task just last Term in *Weltover, supra*, which involved Argentina's unilateral refinancing of bonds it had issued under a plan to stabilize its currency. . . .

* * * *

Unlike Argentina's activities that we considered in *Weltover*, the intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct 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 for purposes of the restrictive theory as peculiarly sovereign in nature. See *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980); *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2nd Cir. 1964) (restrictive theory does not extend immunity to a foreign state's "internal administrative acts"), cert. denied, 381 U.S. 934 (1965); *Herbage v. Meese*, 747 F.Supp. 60, 67 (D.D.C. 1990), affirmance order, 292 U. S. App. D.C. 84, 946 F.2d 1564 (D.C. Cir. 1991); K. Randall, Federal Courts and the

International Human Rights Paradigm 93 (1990) (the Act's commercial activity exception is irrelevant to cases alleging that a foreign state has violated human rights). Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. "[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such." Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y.B. Int'l L. 220, 225 (1952); see also *id*., at 237.

The Nelsons and their *amici* urge us to give significance to their assertion that the Saudi Government subjected Nelson to the abuse alleged as retaliation for his persistence in reporting Hospital safety violations, and argue that the character of the mistreatment was consequently commercial. One *amicus*, indeed, goes so far as to suggest that the Saudi Government "often uses detention and torture to resolve commercial disputes." Brief for Human Rights Watch as *Amicus Curiae* 6. But this argument does not alter the fact that the powers allegedly abused were those of police and penal officers. In any event, the argument is off the point, for it goes to purpose, the very fact the Act renders irrelevant to the question of an activity's commercial character. Whatever may have been the Saudi Government's motivation for its allegedly abusive treatment of Nelson, it remains the case that the Nelsons' action is based upon a sovereign activity immune from the subject matter jurisdiction of United States courts under the Act.

In addition to the intentionally tortious conduct, the Nelsons claim a separate basis for recovery in petitioners' failure to warn Scott Nelson of the hidden dangers associated with his employment. The Nelsons allege that, at the time petitioners recruited Scott Nelson and thereafter, they failed to warn him of the possibility of severe retaliatory action if he attempted to disclose any safety hazards he might discover on the job. See *supra*, at 4. In other words, petitioners bore a duty to warn of their own propensity for tortious conduct. But this is merely a semantic ploy. For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce

its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity. Cf. *United States v. Shearer*, 473 U.S. 52, 54–55 (1985) (opinion of Burger, C.J.).

The Nelsons' action is not "based upon a commercial activity" within the meaning of the first clause of § 1605(a)(2) of the Act, and the judgment of the Court of Appeals is accordingly reversed.

* * * *

(3) Holden v. Canadian Consulate

In *Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996), a former commercial officer sued the Canadian Consulate in San Francisco for wrongful termination, asserting various claims including age and sex discrimination after she lost her job when the consulate was closed. The consulate appealed from the denial of its motion to dismiss, contending that because plaintiff had been a fulltime government employee and part of its "internal administrative staff," her employment was *per se* governmental. The court of appeals affirmed the denial of the motion to dismiss, finding that the employment contract constituted "commercial activity" within the meaning of the relevant FSIA exception. The court noted that the plaintiff had not been a member of the foreign government's diplomatic service, civil service or military personnel, was not provided the same benefits as foreign service officers, and did not receive any civil service protections from the Canadian Government. Rather, her job involved trade promotion, responding to inquiries from Canadian companies regarding information on prospective buyers, providing assistance in obtaining sales representation or wholesale distributors, furnishing names and appointments with trade contacts and evaluating the sales potential of a particular product—all functions analogous to those performed by a marketing agent. By contrast, she had not been involved in making policy, did not engage in any

lobbying activities or legislative work, and could not speak for the foreign state.

(4) Byrd v. Corporacion Forestal y Industrial de Olancho SA

In *Byrd v. Corporacion Forestal y Industrial de Olancho SA*, 182 F.3d 380 (5th Cir. 1999), Byrd and others connected with a Honduran sawmill brought suit in Mississippi state court. As described in the court of appeals decision:

> This case begins with a sawmill in Honduras. The sawmill is owned by defendant-appellant Corporacion Forestal y Industrial de Olancho, S.A., ("CORFINO"), a private corporation organized and existing under the laws of Honduras, and which is almost entirely (98% of its shares) owned and controlled by the Republic of Honduras through a governmental entity known as Corporation Hondurena de Desarrolla Forestal ("COHDEFOR"). Running CORFINO at the time the facts alleged in this lawsuit took place are the two remaining defendants-appellants . . . [b]oth . . . adult resident citizens of Honduras.
>
> Briefly, the factual setting of this case revolves around a power struggle between CORFINO's former business partners as to the control of the sawmill and its accompanying financial rewards. The losers of this struggle are suing the winners on several business-related legal theories, such as breach of contract. . . .

Id. at 382.

CORFINO leased its chief asset, the sawmill, to a U.S. citizen; that lease was assigned to Simmons Lumber Company, S.A., a private Honduran corporation owned by American citizens including two of the plaintiffs; Simmons Lumber was then acquired by Great Southern, a Mississippi company owned by American citizens. Plaintiff Byrd, a U.S. citizen, was CEO of Great Southern, among other things.

Following removal to federal court, the district court denied defendants' motions to dismiss on grounds of

sovereign immunity and lack of personal jurisdiction. The Fifth Circuit Court of Appeals affirmed, finding the requisite "direct effect in the United States" from the complex business interactions with U.S. individuals and entities, as excerpted below.

---

* * * *

. . . [A]pellees contend that appellants' Honduras business activities, upon which the complaint was based, had a direct effect in the United States, and that these activities serve as a jurisdictional nexus for our subject matter jurisdiction. Appellees point to five business activities:

(1) Appellants' leasing the sawmill, which produces and sells woods products;
(2) Appellants' knowledge that Byrd and others would obtain a loan of $1 million to refurbish the mill;
(3) Appellants' request of proof of Byrd and Simmons Lumbers' good financial standing;
(4) Appellants' knowledge that the lease required the appellees would acquire fire insurance (worth $2 million), a bank guarantee to cover utilities (worth $55,000); and
(5) Appellants' knowledge and implicit consent, every step of the way, that Americans were being involved in the project.

In making this argument, appellees rely heavily on our decision in *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir.), *cert. denied* 525 U.S. 1041, 119 S.Ct. 591, 142 L.Ed.2d 534 (1998). In *Voest-Alpine*, we held that a nontrivial financial loss to a plaintiff was sufficient to confer the district court with subject matter jurisdiction. *See id.* at 897. There, an American corporation brought an action against the Bank of China when that bank refused to honor a letter of credit it had issued to the benefit of the American corporation. *See id.* at 890. The plaintiff corporation had instructed the defendant bank to wire the $1.2 million to plaintiff's Texas bank. See *Id.* at 890. We found that the failure to pay on a letter of credit caused a direct effect in the United States because "Voest-Alpine's nonreceipt of

funds in its Texas bank account followed as an immediate consequence of the Bank of China's actions." *Id.* at 896.

Appellants submit that *Voest-Alpine* is distinguishable. . . .

. . . On these facts, however, we cannot agree with the appellants. According to appellees' allegations, appellants foresaw and perhaps even helped to plan the financial harms which occurred to appellees. The mere fact that appellees were the assignee of the lease at issue does nothing to weaken the relationship between appellees and appellants; appellees' status as assignee means that they replace for all effective purposes the original lessee. We therefore conclude that the district court correctly asserted subject matter jurisdiction over the appellants under this clause of the commercial activity exception to the FSIA.

* * * *

(5) Cicippio v. Islamic Republic of Iran

In *Cicippio v. Islamic Republic of Iran,* 30 F.3d 164 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1078 (1995), which arose prior to the adoption of the anti-terrorism exception in § 1607(a)(7) discussed in A.3.d. below, plaintiffs sought damages for a number of intentional torts and violations of international law based on the abduction and subsequent torture of U.S. citizens Joseph Cicippio and David Jacobson in Lebanon by Islamic fundamentalists hired by the State of Iran. Captors made demands for the return of Iranian assets frozen in the United States and payment of ransom by relatives. The court of appeals rejected initial efforts to bring a claim under the "commercial activity" exception to the FSIA, as excerpted below. The court also held that the FSIA's "noncommercial tort" exception did not apply because the alleged tortious actions did not occur in the United States. *See also Cicippio v. the Islamic Republic of Iran*, 18 F.Supp. 2d 62 (D.C.D.C. 1998) (finding jurisdiction under the subsequently enacted anti-terrorism exception).

---

* * * *

. . . Unless an act takes place in a commercial context it would be impossible to determine whether it is conducted in the manner of a private player in the market. Otherwise, any act directed by a foreign government and carried out by irregular operatives in whatever circumstances could be thought commercial including isolated acts of assassination, extortion, blackmail, and kidnapping (for, perhaps, the sexual pleasure of a depraved monarch). That can hardly be what Congress meant by commercial activity nor what the Weltover Court thought were typical acts of market participants.

. . . That money was allegedly sought from relatives of the hostages could not make an ordinary kidnapping a commercial act any more than murder by itself would be treated as a commercial activity merely because the killer is paid. Perhaps a kidnapping of a commercial rival could be thought to be a commercial activity. If so, it would not be because the kidnappers demanded a ransom, but because the kidnapping took place in a commercial context.

There remains the question whether the kidnapping can be thought as an act, not itself a commercial activity, but taken in connection with commercial activity elsewhere. The commercial activity under that reading would be presumably, the Iranian government's continued effort to gain the unfreezing of its assets in the United States. We do not think, however, that those efforts are properly regarded under the Act as commercial. The United States government was acting purely as a sovereign regulator when it froze the assets of Iran and its citizens, and the government of Iran's alleged efforts to release the freeze were likewise peculiarly sovereign. When two governments deal directly with each other as governments, even when the subject matter may relate to the commercial activities of its citizens or governmental entities, or even the commercial activity conducted by government subsidiaries, those dealings are not akin to that of participants in a marketplace. Governments negotiating with each other invariably take into account non-marketplace considerations—most obviously political relations—and so they cannot be thought to be behaving, in that setting, as businessmen.

* * * *

(6) Virtual Defense and Development International, Inc. v. Republic of Moldova

In *Virtual Defense and Development International, Inc. v. Republic of Moldova*, 133 F.Supp.2d 1 (D.D.C. 1999), an American consulting firm sued the Republic of Moldova for breach of contract, alleging that it was entitled to a commission for brokering Moldova's sale of Soviet-designed MiG-29 aircraft to the United States. In denying Moldova's motion to dismiss, the district court held that the sale of military aircraft by a foreign sovereign was a "commercial activity" within the meaning of § 1605(a)(2), even though the aircraft in question were capable of firing nuclear weapons, as excerpted below (footnotes omitted).

* * * *

Moldova contends that the commercial activity exception does not apply in this instance because the type of action at issue, i.e., the sale of planes capable of firing nuclear weapons, is not the "type of action[ ] by which a private party engages in trade and traffic or commerce" because only sovereign nations own or sell these planes. *Weltover*, 504 U.S. at 614, 112 S.Ct. 2160 (internal quotations omitted). However, the legislative history surrounding the FSIA states that:

> [T]he fact that goods or services to be procured through a contract are to be used for public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus a contract by a foreign government *to buy provisions or equipment for its armed forces* or to construct a government building constitutes a commercial activity.

H.Rep. No. 94–1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6615 (emphasis added). In addition "[s]everal cases construing FSIA also make clear that a contract by a foreign government to buy equipment for its armed services constitutes a commercial activity to which sovereign

immunity does not apply." *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir. 1985) (citing *Behring Int'l v Imperial Iranian Air Force*, 475 F.Supp. 383, 388–90 (D.N.J. 1979) ("actions of Iranian Air Force in contracting for freight forwarding services is commercial and not sovereign"); *Texas Trading & Milling v. Federal Republic of Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981) (dictum) ("contract by foreign government 'for the sale of army boots' constitutes a 'commercial activity' "); *National Amer. Corp. v. Federal Republic of Nigeria, 448 F.Supp.* 622, 627, 641–42 (S.D.N.Y. 1978).

In the instant case, Moldova acted as a private participant in the market when it engaged in discussions with Virtual regarding the sale of the MiGs and when it eventually sold the MiGs to the United States. The mere fact that the goods sold by Moldova were MiG-29 planes does not change the nature of Moldova's actions. Accordingly, the court concludes that the relevant actions of Moldova constitute commercial activities within the definition espoused in the FSIA.

The court also rejected Moldova's contention that the sale in question lacked the requisite jurisdictional 'nexus' to the United States, as excerpted below.

---

* * * *

The mere solicitation of Virtual in the United States may constitute a sufficient nexus with the United States. *See In re Papandreaou*, 139 F.3d 247, 253 (D.C. Cir. 1998) (stating that "our cases do not foreclose the possibility that some degree of solicitation in the U.S. might satisfy the 'substantial contact' requirement"). Here, not only did Moldova solicit Virtual, a United States corporation, in the United States, but it also authorized Virtual to deal solely with United States entities or those approved by the United States government. These facts lead the court to conclude that the nexus requirement of the FSIA has been fulfilled.

It is true that the actions taken in the United States were those of Virtual, not Moldova, but they were taken based on Moldova's letter providing Virtual with the authority to do so on its behalf.

In *Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1104 (D.C. Cir. 1982) (hereinafter *MINE*), the court held that even though the actions in question were carried on by an agent, they could still be attributed to the foreign state for purposes of the section 1605(a)(2) exception. Moreover, the legislative history surrounding a foreign sovereign's representation in the United States by an agent suggests that "a foreign state, in Congress's view, can surrender immunity by virtue of activities committed by an agent, and that, consequently, the 'carried on by' requirement can be interpreted in light of broad agency principles." *MINE*, 693 F.2d at 1105. "We also think it appropriate to note the well-established principle that, in assessing personal jurisdiction under either a constitutional due process standard or a statutory standard, courts may look to the contacts between the forum and agents of the defendant." *MINE*, 693 F.2d at 1105 (citing Texas Trading, 647 F.2d at 314–15).

* * * *

Alternatively, if the commercial activity at issue is characterized as the actual negotiations to hire Virtual to broker the sale of the MiGs, then the third clause of the commercial activity exception is applicable. The nexus requirement of the commercial activity exception of the FSIA may be fulfilled if the action at issue was based "upon an act outside of the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the U.S." 28 U.S.C. § 1605(a)(2). Here, Virtual traveled to Moldova to discuss and negotiate an agreement by which it would broker the sale of the MiG-29 planes. The actual negotiations took place in Moldova.

The focus of the inquiry then is whether the breach of the agreement, which was formed in Moldova, had a direct effect in the United States. . . .

Because Virtual is solely a United States corporation and the alleged contract contemplated that Virtual would receive compensation from the profits of the sale of the MiG-29 planes, the court concludes that the alleged breach of contract had a direct effect in the United States. In sum, whether the commercial activity in this case is described as (1) the actions taken by Virtual in its

position as an agent of Moldova, or (2) the negotiation process to hire Virtual to act on behalf of Moldova, the court concludes that the nexus requirement is satisfied. Accordingly, the court concludes that it may exercise jurisdiction over Moldova for the purposes of this lawsuit.

* * * *

Finally, the court declined to dismiss the claims on the basis of the Act of State doctrine.

d. Acts of state-sponsored terrorism

(1) Legislation

(i) Enactment of anti-terrorism exception to FSIA

As noted above, in 1996 Congress amended the FSIA to provide a limited exception to sovereign immunity in certain circumstances in U.S. courts for claims resulting from acts of state-sponsored terrorism. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"or "Antiterrorism Act"), Pub. L. No. 104–132, 110 Stat. 1214, created an exception to the immunity of foreign sovereigns in claims "for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such act (as defined in § 2339A of title 18) if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." The exception was made available only for states "designated as state sponsors of terrorism under § 6(j) of the Export Administration Act of 1979 (50 U.S.C. app. § 2405(j)) or § 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371) at the time the act occurred, unless later so designated as a result of such act." At the time of enactment seven states were so designated: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. Furthermore, the exception was made unavailable if

> (i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or
>
> (ii) neither the claimant nor the victim was a national of the United States (as that term is defined in § 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)]) when the act upon which the claim is based occurred.

Pub. L. No. 104–132, § 221(a)(1), codified at 28 U.S.C. § 1605(a)(7). *See also Digest 2001* at 460–75 and *Digest 2002* at 523–27 concerning later amendment to § 1605(a)(7).

(ii) Availability of assets for execution

A number of default judgments were obtained under the new antiterrorism exception during the 1990s. *See Flatow v. Islamic Republic of Iran*, 999 F.Supp.1 (D.D.C. 1998); *Cicippio v. Islamic Republic of Iran*, 18 F.Supp. 2d 62 (D.D.C. 1998); and *Alejandre v. Republic of Cuba,* 996 F.Supp. 1239 (S.D. Fla. 1997)*.

---

* In Alejandre, the court explained the special nature of "default" judgments under the FSIA:

> The personal representatives of three of the deceased instituted this action against the Republic of Cuba ("Cuba") and the Cuban Air Force to recover monetary damages for the killings. One of the victims was not a U.S. citizen and his family therefore could not join in the suit. This is the first lawsuit to rely on recent legislative enactments that strip foreign states of immunity for certain acts of terrorism. Neither Cuba nor the Cuban Air Force has defended this suit, asserting through a diplomatic note that this Court has no jurisdiction over Cuba or its political subdivisions. A default was thus entered against both Defendants on April 23, 1997 pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. Because this is a lawsuit against a foreign state, however, the Court may not enter judgment by default. Rather, the claimants must establish their "claim or right to relief by evidence that is satisfactory to the Court." 28 U.S.C. § 1608(e) (1994); see Compania

Successful plaintiffs encountered difficulty in finding assets against which their judgments could be executed, however. Under the FSIA, property of a foreign state in the United States is immune from attachment or execution, unless an exception under § 1610 or 1611 of Title 28 provides otherwise.

In 1998 Congress amended § 1610 of the FSIA to provide that blocked and regulated assets "shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7)." *See* Treasury and General Governmental Appropriations Act for Fiscal Year 1999, as contained in Omnibus Consolidated and Emergency Supplemental Appropriations Act for FY 1999, Pub. L. 105–277, Div. A, Title I, § 117 (1998), codified as 28 U.S.C. § 1610(f). Specifically, the new § 1610(f) applied to "any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto." New subsection (f)(2) provided that the Departments of State and the Treasury, at the request of a party in whose favor such a judgment had been issued, "shall fully, promptly, and effectively assist any judgment creditor or any court executing against the property of that foreign state or any agency or instrumentality of such state." Section 117(d),

---

Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion, 88 F.3d 948, 951 (11th Cir. 1996). These three consolidated cases proceeded to trial on November 13, 14, and 20, 1997, on the issues of liability and damages. Because the Court finds that neither Cuba nor the Cuban Air Force is immune from suit for the killings, and because the facts amply prove both Defendants' liability and Plaintiffs' damages, the Court will enter judgment against Defendants.

however, authorized a Presidential waiver of the attachment provision "in the interest of national security."

On October 21, 1998, President William J. Clinton executed such a waiver in Presidential Determination 99-1, 63 Fed. Reg. 59,921 (Oct. 21, 1998). In his statement on signing Public Law No. 105–277 into law on the same date, President Clinton explained his decision to waive § 117 as follows:

> . . . If [section 117] were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to "receive Ambassadors and other public ministers." Moreover, if applied to foreign diplomatic or consular property, section 117 would place the United States in breach of its international treaty obligations. It would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations. Absent my authority to waive section 117's attachment provision, it would also effectively eliminate the use of blocked assets of terrorist states in the national security interests of the United States, including denying an important source of leverage. In addition, section 117 could seriously affect our ability to enter into global claims settlements that are fair to all U.S. claimants, and could result in U.S. taxpayer liability in the event of a contrary claims tribunal judgment. To the extent possible, I shall construe section 117 in a manner consistent with my constitutional authority and with U.S. international legal obligations, and for the above reasons, I have exercised the waiver authority in the national security interest of the United States.

34 WEEKLY COMP. PRES. DOC. 2108 (Nov. 2, 1998). *See also* § 2002(f)(2) of Pub. L. No. 106–386, 114 Stat. 1543 (1999), amending language in subsection (f)(2) from "shall" to "should make every effort to" and inserting waiver language similar to that in § 117(d).

(2) Execution of judgments

(i) Flatow v. Islamic Republic of Iran

In *Flatow v. Islamic Republic of Iran*, No. 97–396, 2000 U.S. Dist. LEXIS 8910 (D.D.C. June 6, 2000), the court summarized efforts during 1999 to execute on the judgment (noted in d.(1)(ii) *supra; see also* A.4.b. *below*), as excerpted below. In the 2000 order the court quashed the writ of attachment against Iran's Foreign Military Sales Fund ("FMS Fund") because the funds were held in the U.S. Treasury, and attachment was barred by the doctrine of U.S. sovereign immunity, absent an effective waiver, as decided in 74 F.Supp. 2d 18, referenced below. *See Digest 2000* at 543–48 for the U.S. brief in this case.

---

* * * *

The present matter represents another effort by plaintiff Stephen M. Flatow to execute the judgment he obtained against the Islamic Republic of Iran under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602–11 (1996 and Supp. 1999), for the wrongful death of his daughter Alisa, who was killed in a 1995 terrorist bombing of a tourist bus in Gaza. *See* Flatow v. The Islamic Republic of Iran, et al., 999 F.Supp. 1, 5 (D.D.C. 1998) (entering default judgment against Iran and its codefendants and finding them jointly and severally liable for compensatory damages, loss of accretions, solatium and $225,000,000.00 in punitive damages). Thus, far, each of Flatow's previous attempts to satisfy his judgment against Iran have proven fruitless. *See, e.g.*, Flatow v. Islamic Republic of Iran, et al., 76 F.Supp.2d 16, 18 (D.D.C. 1999) (quashing writs of attachment directed against Iranian real estate in Washington, D.C., including the former Iranian embassy, and two bank accounts containing funds generated by the State Department's lease of such properties to third parties); Flatow v. Islamic Republic of Iran, et al., 76 F.Supp.2d 28, 29 (D.D.C. 1999) (quashing writ of attachment

directed at arbitration award issued by Iran-United States Claims Tribunal in favor of Iran against garnishee); Flatow v. Islamic Republic of Iran, et al., 74 F.Supp.2d 18, 25 (D.D.C. 1999) (quashing writ of attachment issued to the United States Treasury, directed at "all credits held by the United States to the benefit of the Islamic Republic of Iran"); Flatow v. Islamic Republic of Iran, et al., 67 F.Supp.2d 535, 543 (D. Md. 1999) (quashing writs of execution against nonprofit foundation's property). The present writ of attachment is directed to the Secretary of Defense and purports to attach the "property of the Defendants, The Islamic Republic of Iran and/or The Iranian Ministry of Information and Security . . . , which is believed to be in the possession, care, custody, held in trust, or otherwise within the control and/or jurisdiction of the United States Department of Defense," including defendants' Foreign Military Sales Accounts ("FMS"), all accounts related to such FMS Accounts, and all accounts, property, credits, or "assets of any type whatsoever." . . .

* * * *

. . . As the United States correctly notes, this court's prior decision quashing plaintiff's writ directed at "all credits held by the United States to the benefit of the Islamic Republic of Iran" disposes of the present writ as well. In that opinion, the court held that because plaintiff had failed to identify an unequivocal waiver, the writ of attachment against the U.S. Treasury was barred by sovereign immunity as a suit against the United States. Flatow, 74 F.Supp.2d at 22 (finding that funds were held in U.S. Treasury and that their attachment constitutes a suit against the United States, which is barred by sovereign immunity absent "an explicit, unequivocal waiver"). . . .

* * * *

(ii) Alejandre v. Telefonica Larga Distancia De Puerto Rico, Inc.

In *Alejandre v. Republic of Cuba.*, 996 F.Supp. 1239 (S.D. Fla. 1997), survivors of American victims whose unarmed

civilian airplanes were shot down by the Cuban Air Force over international waters on February 24, 1996, obtained judgments against the Republic of Cuba and the Cuban Air Force. The district court found that the exception to immunity in 1605(a)(7) applied to both defendants because the Cuban Air Force, as an agent of the terrorist-sponsoring Cuban Government, had committed an act of extrajudicial killing by shooting down the airplane.

The plaintiffs thereafter obtained writs of execution and garnishment against certain debts owed to a Cuban telecommunications company, Empresa de Telecomunicaciones de Cuba, S.A. ("ETECSA"), *Alejandre v. Republic of Cuba*, 42 F.Supp. 2d 1317 (S.D. Fla. 1999). The court of appeals vacated the judgment and remanded with instructions to dissolve the writs of garnishment insofar as they sought to garnish amounts owed to ETECSA. *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999), *reh'g and reh'g en banc denied, Alejandre v. Republic of Cuba*, 205 F.3d 1357 (11th Cir. 1999).

The court of appeals explained that the lower court had "concluded that the carriers' debts were owed to ETECSA (rather than directly to the Cuban Government itself) and that the Cuban Government's control over ETECSA was insufficient to render ETECSA responsible for the Government's debt to the plaintiffs. . . . Nevertheless, the court held ETECSA responsible for the Government's debt on the ground that a contrary holding would unjustly prevent the plaintiffs from collecting their judgment and would override the legislative policy in favor of broadening the assets that may be executed upon to compensate victims of terrorist attacks." *See* 183 F.3d at 1282.

The court agreed that "ETECSA was a government instrumentality because the Cuban Government owned or controlled the companies that held a majority of ETECSA's stock." *Id.* at 1283. The court also found, however, that ETECSA had separate juridical status and that payments to it could not be subject to garnishment to satisfy judgments against the

government itself. The court's analysis is excerpted below (footnotes omitted).

---

* * * *

The exception upon which the plaintiffs relied below is *28* U.S.C. § 1610(a)(7) (West Supp. 1999), n.14 which provides:

> The property in the United States of a foreign state, . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution . . . upon a judgment entered by a court of the United States . . . [if] the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

The last requirement of this exception is clearly met here, as the plaintiffs' underlying judgment against the Cuban Government related to a claim from which the Government was not immune by virtue of section 1605(a)(7). Thus, assuming arguendo that the amounts owed to ETECSA are property in the United States used for a commercial activity therein, these amounts are not immune from garnishment if ETECSA constitutes a "foreign state" for purposes of this exception. This question might appear to be easily answered: ETECSA is an instrumentality as defined by section 1603(b), and section 1603(a) declares that the term "foreign state" under the FSIA includes an instrumentality, so ETECSA is a "foreign state" under section 1610(a)(7). The Supreme Court's decision in First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) [hereinafter Bancec], however, teaches that things are not that simple.

According to Bancec, "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, or the attribution of liability among instrumentalities of a foreign state." *Id.* at 620, 103 S.Ct. at 2597.

Instead, government instrumentalities enjoy a presumption of separate juridical status vis-a-vis the foreign government to which they are related. While Bancec applied this presumption for purposes of determining whether an instrumentality could be held substantively liable for the debts of its related foreign government, subsequent decisions have also applied it in determining whether an exception to immunity that applies to the government may be attributed to the instrumentality as well. See *id*. at 613, 103 S.Ct. at 2593 (considering whether Citibank could set off value of branches nationalized by Cuban Government against amount Citibank owed to presumptively separate Cuban instrumentality); Hercaire, 821 F.2d at 564–65 (considering whether waiver of immunity by foreign government also operated to deprive presumptively separate instrumentality of immunity). We must consider, therefore, whether this presumption may be overcome in order to make ETECSA's assets the property of a "foreign state" (i.e., the property of the Cuban Government), thus rendering the exception to immunity in section 1610(a)(7) applicable to ETECSA and making ETECSA substantively liable for the Government's debt to the plaintiffs. See Letelier v. Republic of Chile, 748 F.2d 790, 793 (2d Cir. 1984).

In Bancec, the Supreme Court highlighted two situations in which a plaintiff may overcome the presumption of separate juridical status enjoyed by an instrumentality. First, when a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, the Court observed that one may be held liable for the actions of the other. Second, the Court recognized the broader equitable principle that the doctrine of corporate entity will not be regarded where to do so would work fraud or injustice or defeat overriding public policies. See Bancec, 462 U.S. at 629–630, 103 S.Ct. at 2601–02. In either situation, the plaintiff bears the burden of proving that the instrumentality is not entitled to separate recognition. See Foremost-McKesson, Inc. v. Islamic Republic of Iran, 284 U.S. App. D.C. 333, 905 F.2d 438, 447 (D.C. Cir. 1990); Letelier, 748 F.2d at 795.

* * * *

The court disregarded the presumptively separate juridical status of ETECSA by invoking the second situation mentioned in Bancec: that the corporate entity will not be regarded where to do so would work fraud or injustice or defeat overriding public policies. The court did not rely upon the fraud element of this rule, and indeed there appears to be no evidence in the record that would support a finding of fraud. For example, the plaintiffs made no showing that the apparent novation that transferred the rights and obligations of EMTELCUBA (an alter ego responsible for the debts of the Cuban Government, see supra note 7) under the Operating Agreements to ETECSA was entered into for the purpose of insulating payments made under those Agreements from garnishment by the Cuban Government's creditors. Instead, the court rested its decision on concerns about injustice and public policy. The core of the court's legal rationale was that failing to disregard ETECSA's separate status "not only would prevent [the plaintiffs] from collecting their court-ordered final judgment for the victims of a grave violation of international law, but also would override the clear legislative policy against such terrorist attacks and in favor of broadening the property which may be executed [upon] to compensate for them." Alejandre II, 42 F.Supp. 2d at 1339. In particular, the court concluded that 28 U.S.C. § 1610(f)(1)(A) constituted an "express[ ] legislative commitment to subject the property of a government instrumentality to attachment or execution to satisfy a judgment against [a] terrorist foreign state." *Id.*

Upon reviewing this rationale de novo, we conclude that it is not a sufficient basis for overcoming the presumption of separate juridical status that ETECSA enjoys. While the district court's concern about the injustice of preventing plaintiffs from collecting their judgment is understandable, this concern is present in every case in which a plaintiff seeks to hold an instrumentality responsible for the debts of its related government. Allowing the Bancec presumption of separate juridical status to be so easily overcome would effectively render it a nullity. We recognize that the district court made an effort to distinguish this case based upon the gravity of the underlying violation of international law. Given the absence of any evidence that ETECSA was involved in the violation,

however, we fail to see how this distinction is relevant to the question of whether ETECSA's separate juridical status should be overcome.

* * * *

With regard to the district court's public policy concerns, we agree that recent enactments evince a congressional policy against terrorist attacks and in favor of making additional property of governments that sponsor terrorism (such as Cuba) available to compensate victims of such attacks. We disagree, however, with the district court's conclusion that Congress—in section 1610(f)(1)(A)—took the further step of overriding the Bancec presumption of separate juridical status by making instrumentalities responsible for the debts of their related terrorist-sponsoring governments. Section 1610(f)(1)(A) provides:

> Notwithstanding any other provision of law, . . . any property with respect to which financial transactions are prohibited or regulated pursuant to [certain statutes, including those authorizing the CACR] . . . [or any] license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7).

The effect of this section is not to subject property claimed by the instrumentality ETECSA to execution in order to satisfy the plaintiffs' judgment against the Cuban Government, but to allow the plaintiffs to execute upon property claimed by the Government itself in order to satisfy their judgment (which relates to a claim from which the Government was not immune by virtue of section 1605(a)(7)) without first obtaining a license under the CACR. See 31 C.F.R. § 515.203(e). Congress has previously demonstrated in the FSIA context that it knows how to express clearly an intent to make instrumentalities substantively liable for the debts of their related foreign governments. Absent such a clear expression, which does not appear in section 1610(f)(1)(A), we

see no reason to interpret that section as contravening Congress' original understanding that the FSIA "[is] not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." Bancec, 462 U.S. at 620, 103 S.Ct. at 2597.

* * * *

The court of appeals also concluded that plaintiffs had failed to establish an alter ego relationship between the Cuban Government and ETECSA.

For further discussion of similar efforts to attach, *see Digest 2000* at 543–60. Subsequent legislation to provide compensation for American victims of terrorism and their families is discussed in *Digest 2000* at 540–42.

(3) Constitutionality of 1605(a)(7)

In *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F.Supp. 325 (E.D.N.Y. 1998), *aff'd in part, dismissed in part*, 162 F.3d 748 (2nd Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999), the survivors and representatives of persons killed aboard Pan Am Flight 103 above Lockerbie, Scotland in December 1988, brought suit against Libya to recover damages for wrongful death, pain and suffering, and a variety of other injuries. The plaintiffs based their jurisdictional claim on § 1605(a)(7). Libya challenged the provision as an unconstitutional bill of attainder and an *ex post facto* law and argued that it unconstitutionally delegated legislative power. The district court denied Libya's motion to dismiss finding *inter alia* that the provision was constitutional and that the court had subject matter jurisdiction. The court of appeals affirmed. It found the bill of attainder and *ex post facto* challenges not ripe for review because those issues "are germane, if at all, only to the potential imposition of punitive damages in this suit and not to the existence of jurisdiction." 162 F.3d at 761.

The court of appeals did review the lower court's decision "that § 1605(a)(7) does not unconstitutionally delegate legislative power." *Id.* at 762. The court of appeals rejected the lower court's reasoning that § 1605(a)(7) only deprived Libya of an affirmative defense and thus did not determine jurisdiction at all, citing *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493–94 (1983). The court concluded, however, that

> in the particular case before us there was no delegation at all. The decision to subject Libya to jurisdiction under § 1605(a)(7) was manifestly made by Congress itself rather than by the State Department. At the time that § 1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism. No decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103. That jurisdiction existed the moment that the AEDPA amendment became law.

162 F.3d at 764.

In June 1998 the U.S. Government had filed a brief as intervenor and argued that the FSIA properly provided for subject matter jurisdiction over the cases against Libya, addressing all of the challenges raised by Libya to the statute's constitutionality, most of which were not addressed by the court. The full text of the U.S. brief, as excerpted below (most footnotes omitted), is available at 1998 WL 34088648 (2d Cir. 1998).

---

* * * *

ARGUMENT

I. The Foreign Sovereign Immunities Act Is Fully Consistent With The Constitution Insofar As It Provides Subject Matter Jurisdiction For Private Civil Suits Against Foreign States That Engage In Acts Such As Aircraft Sabotage.

On appeal, Libya argues that the FSIA is unconstitutional insofar as it provides subject matter jurisdiction in these cases by eliminating sovereign immunity from a civil suit seeking damages caused by aircraft sabotage by Libya. Libya contends first (Br. at 15–22) that FSIA Section 1605(a)(7) violates the constitutional separation of powers principle by making Article III federal court jurisdiction depend upon a determination by an Executive Branch official, designating Libya as a state sponsor of terrorism. Next, Libya asserts (Br. at 22–26) that this part of the FSIA is a prohibited bill of attainder since it focuses upon a small group of states designated by the Secretary of State. Finally, Libya also asserts (Br. at 26–28) that the provision at issues constitutes forbidden *ex post facto* punishment.

These arguments are all misconceived, and we show below that the district court was correct to reject them.

A. Foreign Sovereign Immunity Is a Matter of Grace and Comity Bestowed by the Political Branches of our Government.

It is important as background to recognize first what Libya does not dispute: "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1982).

Simply put, sovereign immunity for foreign states in our courts is a privilege that may be restricted by Congress and the Executive Branch as they choose; it is not any kind of right that a foreign state has in relation to the U.S. Government or the citizens of the United States. "By reason of its authority over foreign commerce and foreign relations, Congress has the *undisputed power to decide*, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." *Id.* at 493 (emphasis added). Congress enacted the FSIA, which "comprehensively regulat[ed] the amenability of foreign nations to suit in the United States" pursuant to its "unquestioned Art. I powers." *Id.* at 493, 496.

* * * *

Not only do the political departments of our government have the discretion to determine whether a foreign state is amenable to

suit in U.S. courts but, in an analogous context, the Supreme Court has recognized that access to U.S. courts by a foreign state is also based on considerations of comity by the political branches. See *Banco Nacionale de Cuba v. Sabbatino*, 376 U.S. 398, 409 (1964) (access by sovereign states to U.S. courts turns on considerations of comity by the political branches).

* * * *

B. Nothing in the Constitution Prohibits Congress from Basing Federal Court Jurisdiction on an Underlying Determination Made by the Executive, Which Does Not Affect a Determination of Liability.

Libya contends that Congress cannot base subject matter jurisdiction on a determination by the Executive Branch that Libya is a state sponsor of terrorism. Libya alleges that Section 1605(a)(7) makes an impermissible delegation of authority to the Executive Branch because only Congress can establish the jurisdiction of the Federal courts.

1. As a threshold matter, there is considerable doubt that the constitutional separation of powers doctrine provides protection to Libya in the way that this foreign state claims.

The Supreme Court has made clear that the constitutional principle of separating the powers among three branches of government is a central aspect of the constitutional framework in order to protect individual liberties, by ensuring that no one branch of the national government can become dominant over the others. The declared purpose of separating the powers vested by the Constitution into the Legislative, Executive, and Judicial Branches was to "diffus[e] power the better to secure liberty." *Morrison v. Olson*, 487 U.S. 654, 694 (1988), quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

"The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches * * * placing both substantive and procedural limitations on each. The ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metropolitan Washington Airports Authority v. Citizens for the Abatement of*

Aircraft Noise, Inc., 501 U.S. 252, 272 (1991). "The essence of the separation of powers concept * * * is essential to the liberty and security of the people. Each branch, in its own way, is the people's agent, its fiduciary for certain purposes." *Ibid.*, quoting Levi, *Some Aspects of Separation of Powers*, 76 Columbia L. Rev. 385–86 (1976).

Thus, the Supreme Court has explained that "courts have consistently regarded the Bill of Attainder Clause * * * and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). . . .

Given its purpose to protect individual liberty interests, the separation of powers doctrine accordingly has no relevance when a foreign state is seeking to invalidate an Act of Congress that denies that state the benefit of immunity in U.S. courts.

2. Even if the separation of powers principle applied to Libya in this context, that nation's attack against the FSIA on this ground is mistaken.

Libya's argument is wrong because Congress has itself established the basis for jurisdiction over Libya through the FSIA. Congress has decided that, if the Secretary of State has made the appropriate designation of state sponsorship of terrorism, federal district court jurisdiction exists for certain tort suits. We thus disagree with any notion in the district court's opinion (see App. 102, 104) that a district court has discretion to decide not to exercise jurisdiction if the necessary determination has been made (unless there are some independent, valid grounds for abstention by the court). Congress has legislated that jurisdiction will exist in the described circumstances. Therefore, Libya's argument has to be that jurisdiction cannot under any circumstances legislatively be made dependent on a finding by the Executive.

* * * *

As long as Congress sets constitutionally sufficient bounds on the Executive's exercise of discretion, the Supreme Court has

rejected arguments like Libya's claim, which asserts that Congress cannot delegate certain types of authority to the executive. The Supreme Court has upheld broad delegations of authority to the Executive in a wide variety of areas, and has never accepted an argument that the type of delegation at issue here cannot be made. See, *e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989) (taxing power); *Mistretta v. United States*, 488 U.S. 361 (1989) (power over sentencing).

* * * *

Similarly, courts have consistently held that diversity jurisdiction under 28 U.S.C. §§ 1332(a)(2) and 1332(a)(4)—which provide, respectively, for federal court jurisdiction in cases involving citizens of foreign states, and foreign states as plaintiffs—is predicated upon Executive Branch recognition of the relevant foreign state. See, e.g., *Pfizer v. India*, 434 U.S. 308, 318–320 & n.19 (1978); *Matimak Trading Co.*, 118 F.3d at 79–84. Courts have also recognized that the original jurisdiction of the Supreme Court in cases involving ambassadors and consuls, under Article 3, section 2, clause 2 of the Constitution, and 28 U.S.C. § 1251(b)(1), extends only to diplomatic representatives who are accredited in the sole and absolute discretion of the Executive Branch. See *United States v. Egorov*, 222 F.Supp. 106, 108–109 (E.D.N.Y. 1963); *United States v. Fitzpatrick*, 214 F.Supp. 425, 433, 441 (S.D.N.Y. 1963); *United States v. Melekh*, 193 F.Supp. 586, 596–97 (N.D.Ill. 1961).

Likewise, federal courts have accepted as conclusive the State Department's accreditation of a diplomat for the purpose of determining whether that individual is immune from the jurisdiction of United States courts. See *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984); *Jungquist v. Nahyan*, 940 F.Supp. 312, 321–22 (D.D.C. 1996).

Indeed, in a large area of the law, federal court jurisdiction is similarly dependent upon a prior determination by the Executive. Under the Administrative Procedure Act (5 U.S.C. § 704), the sovereign immunity of the United States has been waived to allow judicial review when there has been "final agency action." See, *e.g., National Wildlife Federation v. Goldschmidt*, 677 F.2d 259,

262–63 (2d Cir. 1982). Thus, jurisdiction through that statute is made dependent on an initial determination by the Executive. Prior to final agency action, the matter is unripe and thus not within the courts' jurisdiction, even if an agency has asserted jurisdiction over a private party through institution of administrative charges.

* * * *

Libya's argument on this point is thus based on a constitutional restriction that does not exist.

It is also important to remember, as the district court pointed out (App. 107–09), that the Executive plays no role in deciding in this case whether or not Libya is liable; the district court alone considers and rules upon the merits of the plaintiffs' allegations. Consequently, there is no intrusion by the Executive Branch at the behest of Congress into the province of the Judicial Branch. All that Congress has done is to condition whether a case gets to the courts on a prior determination made by the Executive. There is nothing unusual or unconstitutional about such a delegation of authority.

* * * *

Indeed, prior to the enactment of FSIA, determinations as to the immunity of foreign states were almost exclusively made by the Executive Branch on a case-by-case basis, and recognized and followed by the courts. The initial "responsibility for deciding questions of sovereign immunity *fell primarily upon the Executive* acting through the State Department, and *the courts abided by* 'suggestions of immunity' from the State Department." Verlinden, 486 U.S. at 487 (emphasis added); see also *Republic of China*, 348 U.S. at 360 ("[a]s the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit" and "[i]ts failure or refusal to suggest such immunity has been accorded significant weight by this Court").

* * * *

For these reasons, Libya's separation of powers claim, even if cognizable, lacks merit.

C. No Bill of Attainder Is Present Here.

Libya's challenge based on the Bill of Attainder Clause similarly lacks merit. But on this claim too there is strong doubt that Libya is within the zone of interests protected by the constitutional provision it invokes.

As quoted above, the Supreme Court has already stated that the Bill of Attainder Clause protects only "individuals and private groups." *South Carolina v. Katzenbach*, 383 U.S. at 324. Libya has provided no ground for instead finding that this clause provides protection to foreign states. In any event, if the substance of Libya's bill of attainder argument is reached, the Court should conclude that there is no constitutional violation by the FSIA.

* * * *

"The proscription against bills of attainder reaches only statutes that inflict *punishment* on the specified individual or group." *Selective Service*, 468 U.S. at 851 (emphasis added). Accord *Flemming* v. *Nestor*, 363 U.S. 603, 613 (1960). Thus, even a statute that imposes burdens on a single individual—identified in the statute by name—is not a forbidden bill of attainder if it does not impose punishment within the meaning of the constitutional proscription. *Nixon*, 433 U.S. at 472–73.

It is important to recognize that the Bill of Attainder Clause has been given a narrow reach by the Supreme Court, and has rarely been invoked to condemn legislation. The Court has struck down statutes on bill of attainder grounds only five times in this nation's history. In each case the government had sought to punish "members of a political group thought to present a threat to the national security." *United States* v. *Brown*, 381 U.S. 437, 453 (1965).

* * * *

These principles lead ineluctably to the conclusion that Section 1605(a)(7) is not a bill of attainder. There has been no legislative determination of guilt or imposition of punishment here at all. As emphasized earlier, the FSIA provision that Libya challenges merely

removes Libya's ability to invoke sovereign immunity in order to stop a suit at the outset; nothing in the FSIA imposes any kind of liability on Libya. Rather, the suit will now go forward and Libya will have a full opportunity to defend itself on the merits.

* * * *

In this instance, Libya has provided no unmistakable evidence of a legislative intent to punish it through amendment of the FSIA. The fact that, as Libya points out in its brief (at 24 n.10), a legislator stated her view that the 1996 amendment would serve the cause of "justice" (see 142 Cong. Rec. H2132 (daily ed. March 13, 1996) and 142 Cong. Rec. H3603 (daily ed. April 18, 1996)) does not establish that Congress had a punitive intent. See *Doe v. Pataki*, 120 F.3d 1263, 1277–78 (2d Cir. 1997) (the subjective view of one legislator does not satisfy plaintiff's burden to produce "unmistakable evidence of punitive intent"), cert. denied, 118 S.Ct. 1066 (1998).

D. The 1996 FSIA Amendment Is Not An Unconstitutional Ex Post Facto Law.

Libya's claim that Section 1605(a)(7) is a forbidden *ex post facto* law is also wrong, and was correctly rejected by the district court (App. 108a–109). However, on this point too, before reaching the merits, we urge the Court to hold that Libya's claim to sovereign immunity is not within the protection afforded by this constitutional provision.

* * * *

The *ex post facto* doctrine is inapplicable here for the reasons discussed above concerning the bill of attainder argument. This constitutional doctrine is directed at protecting *individuals* from arbitrary penal sanctions that unfairly deprive them of a liberty interest. It has no applicability to whether a foreign *state* may be immune from possible liability for civil tort damages, particularly compensatory ones. Libya's *ex post facto* claim mistakenly seeks to enshrine as a constitutional right a benefit that may be bestowed

by the United States as a matter of grace. For the reasons stated earlier, Libya is not criminally punished or subjected to a penal sanction simply because the United States decides to remove its immunity from a civil suit. And, the FSIA does not establish criminal sanctions, or civil penalties, or any standards for determining civil liability; it merely governs whether Libya is amenable to suit.

II. The Assertion Of Personal Jurisdiction Over The Libyan Government Defendants Here Is Consistent With The Constitution.

As noted earlier, under the FSIA, once subject matter jurisdiction has been established and service has been made, personal jurisdiction exists. Here, the Libyan government defendants argue that the exercise of personal jurisdiction over them by the district court violates the Due Process Clause. Libya contends (Br. at 29–38) that, even as a foreign nation it is protected by the Due Process Clause, and that the facts alleged in the complaints fail to demonstrate sufficient contacts with the United States to permit the assertion of jurisdiction.

A. As Libya discusses (Br. at 28–29), this Court held before the adoption of Section 1605(a)(7) that foreign states are "persons" covered by the Due Process Clause to the extent that jurisdiction cannot be asserted over them in court absent sufficient minimum contacts. See *Texas Trading*, 647 F.2d at 313; *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1019 (2d Cir. 1991).

Given its determination that the states of our Union are not "persons" under the Due Process Clause (see *South Carolina v. Katzenbach*, 383 U.S. at 323–24), the Supreme Court has reserved this issue. See *Republic of Argentina v. Weltover*, 504 U.S. 607, 619 and n.2 (1992). See also *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 1998 WestLaw 111500, at *16–*19 (D.D.C. March 11, 1998) (finding that foreign states are not "persons" under the Due Process Clause); *Palestine Information Office v. Shultz*, 674 F.Supp. 910, 919 (D.D.C. 1987) ("If the States of the Union have no due process rights, then a 'foreign mission' qua 'foreign mission'

surely can have none"), affirmed on other grounds, 853 F.2d 932 (D.C. Cir. 1988).[8]

In light of this Court's precedent, this issue need not be reexamined at this point. As we now show, the district court correctly concluded that there is an adequate basis for assertion of personal jurisdiction in a case like this, as Section 1605(a)(7) explicitly provides.

B. The Supreme Court has emphasized on many occasions that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). Thus, in its seminal decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), the Court expressly eschewed a rigid formula for delineating the contacts necessary to exercise personal jurisdiction and satisfy due process concerns. Each case requires evaluation in light of its own facts and circumstances in order to ensure that the exercise of jurisdiction complies with "fair play and substantial justice." *Ibid.*

Thus, the exercise of personal jurisdiction is permitted "only when the nonresident defendant possesses sufficient "minimum contacts" with the forum state so that the assertion of personal jurisdiction over the defendant is consistent with "traditional notions of fair play and substantial justice." *Bensmiller v. E.I. Dupont*, 47 F.3d 79, 84 (2d Cir. 1995) (quoting *International Shoe*, 326 U.S. at 316).

The "defendant's conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). *See also Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567–68 (2d Cir.) (due process test for personal jurisdiction has related components of whether "minimum contacts"

[8] The fact that a foreign state might not be a "person" for purposes of the Due Process Clause would not mean that a federal court could treat it unfairly in the process of litigation, just as it does not mean that a state within the Union can be so treated despite the fact that it is not a "person." Article III may itself contain an inherent requirement that the federal courts, as an aspect of their institutional existence, treat those before them in a fair and just way.

exist, and whether the assertion of jurisdiction over the defendant comports with traditional notions of fair play and substantial justice, that is, whether it is "reasonable under the circumstances of the particular case"), *cert. denied*, 117 S.Ct. 508 (1996).

For purposes of personal jurisdiction under the FSIA, the relevant forum for assessing contacts is the entire United States. See *Texas Trading*, 647 F.2d at 314. In addition, a court may assess the relevant factors as part of a continuum whereby a lesser showing of actual contacts may be fortified by a substantial showing that justice and fairness support the exercise of personal jurisdiction (which is true in this instance). *Metropolitan Life*, 84 F.3d at 568–69.

Traditional indicia of minimum contacts that focus on a defendant's commercial activities in the forum state are of limited value in evaluating the propriety of personal jurisdiction under Section 1605(a)(7) of the FSIA. Where, as here, Congress clearly intended that Section 1605(a)(7) reach extraterritorial conduct, the relevant inquiry is not whether a defendant state has "purposefully avail[ed] itself of the privilege of conducting activities" *within* the United States, thus "invoking the benefits and protections of its law," as is typically the case. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Rather, insofar as the minimum contacts analysis applies to cases involving allegations of claims such as aircraft sabotage by foreign state defendants, the courts should consider whether the effects of a defendant state's actions upon or within the United States are sufficient to provide "fair warning" (*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)) that those responsible for the conduct in question may be subject to the jurisdiction of the United States. The original legislative history of the FSIA indicates that the immunity provisions of the Act by themselves were intended to "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction." See H.R. Rep. No. 94–1487 at 13, 1976 U.S.C.A.A.N. at 6612.[9]

[9] Because FSIA Section 1605(a)(7) applies solely to victims or claimants who are U.S. nationals, the harm that Congress intended would be addressed by this provision was that directed at the United States. Thus, apart from "minimum contacts" analysis, this provision alone might serve as the basis for exercising personal jurisdiction over foreign states for claims arising thereunder.

The Supreme Court has held as a matter of general principle that intentional torts that are directed at, and generate effects within, a forum may give rise to personal jurisdiction. *Calder v. Jones*, 465 U.S. 783, 788–90 (1984) (personal jurisdiction upheld in California over Florida newspaper that published libelous story concerning actress residing in California). Where defendants are "not charged with mere untargeted negligence" but, "[r]ather, their intentional, and allegedly tortious, actions were expressly aimed at" the forum, the exercise of personal jurisdiction is proper. *Id.* at 789. The defendants "knew that the brunt of that injury would be felt" in the forum and, thus, could reasonably anticipate being haled into court there. *Id.* at 789–90. "An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Id.* at 790.

Thus, an intentional act committed outside a forum state, but which has effects within the forum can confer jurisdiction over a defendant who has never physically entered the forum. Indeed, to defeat personal jurisdiction, "a defendant who purposefully has directed his activities at forum residents * * * must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477.

Application of these principles to the allegations in these cases requires the conclusion that personal jurisdiction is proper. In deciding minimum contacts issues, the allegations in the complaint must be taken as true. *Seetransport Wiking Trader v. Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993). In addition, this Court must evaluate the "totality of the circumstances" surrounding defendants' contacts with the relevant forum. *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1109 (2d Cir. 1997).

At issue here is the destruction of a U.S. flag aircraft, owned by U.S. corporations, and in route to the United States on a regularly scheduled flight, with 189 U.S. nationals aboard. The destruction of Pan Am 103 unquestionably had a far-reaching impact on the United States—even beyond the significant fact that 189 U.S. nationals were killed—for, as with all terrorist acts, it was designed to harm the interests of the United States.

This latter point should be a key one in any weighing of jurisdictional fairness considerations.

The bombing posed immediate and significant security concerns for the United States and its aviation industry in seeking to protect international air travel aboard U.S. flag carriers, and other carriers flying to and from the United States. Such terrorist acts also pose other significant harms to U.S. businesses and the domestic economy through, for example, a decline in passenger travel and increased operating, insurance, and potential liability costs.

Moreover, "traditional notions of fair play and substantial justice" strongly support a finding of personal jurisdiction here. Any foreign person, entity, or state responsible for the intentional destruction of a U.S. aircraft, particularly one flying to the United States with many U.S. nationals aboard, "should reasonably anticipate being haled into court" in the United States. Any foreign state must surely know that the United States has a substantial interest in the protection of its flag carriers and nationals in international air travel from terrorist activity, and can reasonably expect that any action that harmed this interest would subject it to a response in many forms, including possible civil actions in U.S. courts. See *Flatow*, 1998 Westlaw at 111500, *16–*18. It is certainly in the interests of fairness and justice to do so.

In its brief, Libya discusses in some depth the factual circumstances in several other cases and tries to show that they involved greater contacts than are present here, or that they demonstrate that mere effects on the forum state are insufficient. However, none of the cases discussed by Libya involves allegations of the intentional destruction of a U.S. carrier aircraft carrying U.S. nationals, when the terrorist act is designed to have an impact upon, and indeed harm, the United States. These other cases are of little help here other than to lay down general principles. As this Court has observed, ultimately, personal jurisdiction inquiries are "'necessarily fact sensitive because each case is dependent upon its own particular circumstances.'" *PDK Labs*, 103 F.3d at 1108.

Libya also complains about the retroactive nature of the change in sovereign immunity and the fact that it will now have to defend itself in court on the basis of conduct that occurred while Libya

believed it was immune from suit. However, the Supreme Court has comfortably upheld the validity of statutory schemes that impose liability after the fact for prior conduct. See, *e.g., Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

In light of the harmful effects that the Pan Am 103 bombing had on the United States, the purposeful creation of these effects in the United States, and the fairness of holding Libya to answer in this forum for its alleged intentional tort, a finding of personal jurisdiction in this case is amply supported.

* * * *

Libya sought certiorari to the Supreme Court to challenge the Second Circuit's holding. In May 1999 the U.S. government submitted a brief on the petition for a writ of certiorari, arguing that the court of appeals correctly held that § 1605(a)(7) was constitutional as applied to the suit against Libya and that the Second Circuit's holding did not conflict with any decision of the Supreme Court or of another court of appeals and, therefore, warranted no further review. The Supreme Court denied Libya's petition for writ of certiorari. *Socialist People's Libyan Arab Jamahiriya v. Rein*, 527 U.S. 1003 (1999).

The full text of the U.S. government's brief, as excerpted below (footnotes omitted) is available at *www.usdoj.gov/osg/briefs/1998/oresponses/98-1449.resp.pdf*.

---

* * * *

As the court of appeals correctly held, Section 1605(a)(7) as applied to this suit involves "no delegation of legislative power and, necessarily, no unconstitutional delegation either." Pet. App. 36a. Under Section 1605(a)(7), a foreign state's susceptibility to suit for acts such as aircraft sabotage generally turns on whether that state was "designated as a state sponsor of terrorism * * * at the time the act occurred." 28 U.S.C. 1605(a)(7)(A) (Supp. III 1997). Libya had been designated by the Executive Branch as a state sponsor of terrorism well before the bombing of Pan Am Flight 103, and before the enactment of Section 1605(a)(7). See p. 3,

supra. Thus, when Congress enacted Section 1605(a)(7), it thereby divested Libya of sovereign immunity for the acts alleged in this case. See Pet. App. 35a ("No decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103."); *Id.* at 36a (Section 1605(a)(7) "creates jurisdiction directly at the behest of Congress and without any intervening decision by another body."). Moreover, the legislative history suggests that enactment of Section 1605(a)(7) was intended, at least in part, to divest Libya of sovereign immunity in suits concerning Pan Am Flight 103. See note 2, *supra*. The statute divested Libya of immunity for the acts at issue in this case by incorporating an action previously taken by the Executive Branch; because of this particular sequence of events, no subsequent exercise of delegated authority under Section 1605(a)(7) could either remove or restore Libya's immunity for those acts. Indeed, even if Executive Branch officials had removed Libya from the list of state sponsors of terrorism after AEDPA was enacted, Libya could not assert sovereign immunity in the instant suit, since a subsequent delisting would not alter the fact that the country was "designated as a state sponsor of terrorism * * * at the time the act occurred." 28 U.S.C. 1605(a)(7)(A) (Supp. III 1997).

As the court of appeals observed, an "issue of delegation might be presented if another foreign sovereign—one not identified as a state sponsor of terrorism when § 1605(a)(7) was passed—was placed on the relevant list by the State Department and, on being sued in federal court, interposed the defense that Libya now raises." Pet. App. 35a. As set forth below, Section 1605(a)(7) would be constitutional as applied in that setting as well. But regardless of the proper disposition of that hypothetical case, application of Section 1605(a)(7) to this suit raises no significant constitutional concern.

2. Although the question is not presented in this case, Section 1605(a)(7) would be constitutional even as applied to a country designated as a "state sponsor of terrorism" after the enactment of AEDPA. Section 1605(a) establishes precise and detailed rules concerning the circumstances under which foreign states will be subject to suit in the federal courts. The fact that application of

those rules depends in part on Executive Branch determinations creates no constitutional infirmity. To the contrary, Congress's approach is fully consistent with the significant constitutional role and expertise of the Executive Branch in the area of foreign relations. Cf. *Dames & Moore v. Regan*, 453 U.S. 654, 679–680 (1981) (explaining the "longstanding practice" by which the President has undertaken to settle claims of United States nationals against foreign countries); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936) (observing that "the President alone has the power to speak or listen as a representative of the nation," and that "he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries").

As the court of appeals recognized, this Court in *Jones v. United States*, 137 U.S. 202 (1890), "upheld the existence of federal court jurisdiction even though that jurisdiction depended on a factual determination that had been delegated to the Department of State." Pet. App. 33a. The Court in Jones rejected a constitutional challenge to provisions of the Guano Islands Act of August 18, 1856, Rev. Stat. §§ 5570–5578 (1878 ed.). The Act provided that "any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, * * * may, at the discretion of the President, be considered as appertaining to the United States." § 5570. It further stated that crimes committed in such areas "shall be deemed committed on the high seas, on board a merchant-ship or vessel belonging to the United States." § 5576. The Court in *Jones* sustained the defendant's conviction for a murder committed on Navassa Island, an area that had been designated pursuant to the Act as "appertaining to the United States." The Court rejected the defendant's constitutional challenge to the Act's jurisdictional provisions, explaining that "[w]ho is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges." 137 U.S. at 212; see also *Id.* at 224 (concluding that the Act was "constitutional and valid" and affirming the defendant's conviction).

The application of other jurisdictional rules also depends in part on determinations made by the Executive Branch. Diversity

jurisdiction under 28 U.S.C. 1332(a)(2) and (4)-the statutory provisions that vest the federal district courts with jurisdiction in cases involving citizens of foreign states, and cases in which foreign states are plaintiffs-is predicated upon Executive Branch recognition of the relevant foreign state. See, *e.g.*, *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 79–85 (2d Cir. 1997) (Hong Kong corporation held not to be a citizen of a foreign state for purposes of diversity jurisdiction because the United States did not recognize Hong Kong as a sovereign state when the suit was filed), cert. denied, 522 U.S. 1091 (1998). This Court's original jurisdiction in cases involving ambassadors and consuls, see U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(b)(1), extends only to diplomatic representatives who are accredited in the sole and absolute discretion of the Executive Branch. See *In re Baiz*, 135 U.S. 403, 417–418, 428–432 (1890). Diplomatic immunity from suits in United States courts is determined by the State Department's accreditation of a diplomat. See *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984). Head-of-state immunity turns on an Executive Branch determination that a particular individual should be treated as the official head of state. See, *e.g.*, *Lafontant v. Aristide*, 844 F.Supp. 128, 131–134 (E.D.N.Y. 1994); see also *Kadic v. Karadzic*, 70 F.3d 232, 248 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996).

Petitioners' constitutional claim is particularly misconceived given the manner in which issues of foreign sovereign immunity were resolved before the FSIA was enacted in 1976. Until the enactment of the FSIA, "initial responsibility for deciding questions of [foreign] sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983); see also *Id.* at 486 ("this Court consistently has deferred to the decisions of the political branches-in particular, those of the Executive Branch-on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"); *National City Bank v. Republic of China*, 348 U.S. 356, 360 (1955) ("[a]s the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a

sovereign be granted immunity from a particular suit"). Although the FSIA reflects Congress's determination that the prior case-by-case approach created unnecessary diplomatic and practical difficulties, see Verlinden, 461 U.S. at 488, nothing in this Court's decisions suggests that the pre-FSIA regime was inconsistent with the Constitution.

3. Petitioners also contend (Pet. 18–23) that the court of appeals erred in holding that it lacked pendent appellate jurisdiction over their other constitutional and statutory challenges to the district court's decision. The United States intervened in this case pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Section 1605(a)(7). Although the United States argued in the court of appeals that petitioners' additional constitutional claims failed on the merits, we took no position regarding the scope of that court's appellate jurisdiction. Accordingly, the United States will not address that question at the current stage of the proceedings unless requested to do so by this Court.

* * * *

e. Expropriation

In claims for takings of property, courts examine whether an exception to immunity exists under the FSIA—either the commercial activities exception in § 1605(a)(2), A.3.c. *supra*, or the international takings exception in § 1605(a)(3), or both. Section 1605(a)(3) provides an exception to immunity in cases "in which rights in property taken in violation of international law are in issue and the property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or . . . owned or operated by an agency or instrumentality of the foreign state . . . engaged in a commercial activity in the United States."

(1) Siderman de Blake v. Republic of Argentina

In *Siderman*, 965 F.2d 699 (9th Cir. 1992), A.2.a. *supra,* plaintiffs alleged, among other things, that Argentina had

expropriated Inmobiliaria del Nor-Oeste, S.A. ("INOSA"), an Argentine corporation owned by the plaintiffs, which included the Hotel Gran Corona, and was retaining the profits from the hotel's continued operation. The district court dismissed the expropriation claims on the basis of the act of state doctrine. The Ninth Circuit Court of Appeals reversed, holding that the court could not reach the act of state issue unless it first determined that it had jurisdiction under the FSIA, which it had not done. The Ninth Circuit found that the expropriation claims, as alleged, appeared to fall within both the commercial activities exception set forth in § 1605(a)(2) and the international takings exception of § 1605(a)(3) for purposes of jurisdiction at that stage of the litigation. The court relied on evidence that "Argentina advertises the Hotel Gran Corona in the United States and solicits American guests through its U.S. agent" and that "numerous Americans have stayed at the Hotel, which accepts all the major American credit cards." *Id*. at 709. The court added: "Because of Argentina's acts in the United States—the solicitation and acceptance of reservations—Americans spend money at the Hotel Gran Corona, money which the Sidermans claim rightfully belongs to them . . . Argentina undertakes those acts, furthermore, in connection with commercial activity elsewhere, mainly its operation of the Hotel. The Sidermans' claims thus fall squarely within . . . the commercial activity exception." *Id*. at 710.

As to the international takings exception, the court concluded that it was available to the one plaintiff who was not a citizen of Argentina. As to the others, however, the exception "does not apply where the plaintiff is a citizen of the defendant country at the time of the expropriation, because 'expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law,'" citing *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990). On the basis of these findings, the Ninth Circuit remanded to the district court to allow Argentina to refute the indications of jurisdiction under the FSIA. If the court found that it had jurisdiction under the FSIA, Argentina could raise the act of state issue at that time.

As to the takings claim, the court reasoned as excerpted below.

---

* * * *

. . . At the jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a "claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction." *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir.), *cert. denied*, 482 U.S. 906 . . . (1987). In *West*, we described three requisites under international law for a valid taking. First, "valid expropriations must always serve a public purpose." 807 F.2d at 831. Second, "aliens [must] not be discriminated against or singled out for regulation by the state." *Id.* at 832. Finally, "an otherwise valid taking is illegal without the payment of just compensation." *Id.* . . .

Susana Siderman de Blake's claim that Argentina violated the international law of expropriation is substantial and non-frivolous. The complaint alleges that Argentina officials seized INOSA for their personal profit and not for any public purpose. The complaint also alleges that Argentina seized INOSA because the Siderman family is Jewish—a discriminatory motivation based on ethnicity. See Restatement § 712 Comment f (noting that "taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law"). Finally, none of the Sidermans has received any compensation for the seizure, let alone just compensation. As in *West*, we have no difficulty concluding that the Sidermans' complaint contains "substantial and non-frivolous" allegations that INOSA was taken in violation of international law.

Beyond establishing that property has been taken in violation of international law, Susan Siderman de Blake must demonstrate that the expropriated property, or property exchanged for it, is owned or operated by an agency or instrumentality of Argentina and that the agency or instrumentality is engaged in commercial activity in the United States. The Sidermans' allegations establish that INOSA itself has become an agency or instrumentality of Argentina. . . . The final requirement under clause two—that the

agency or instrumentality must be engaged in a commercial activity in the United States—is also met. The Sidermans' allegations concerning Argentina's solicitation and entertainment of American guests at the Hotel Gran Corona and the hotel's acceptance of American credit cards and traveler's checks are sufficient at this stage of the proceedings to show that Argentina is engaged in a commercial activity in the United States. . . .

We hold that the Sidermans' complaint and declarations allege sufficient facts to bring their expropriation claims within both the commercial activity and international takings exceptions to the FSIA's grant of foreign sovereign immunity. We emphasize the preliminary nature of our holding; following further development of the factual record on remand, the district court ultimately must determine whether the FSIA exceptions do or do not apply to the expropriation claims. . . .

* * * *

(2) Soudavar v. Islamic Republic of Iran

In *Soudavar v. Islamic Republic of Iran*, 186 F.3d 671 (5th Cir. 1999), shareholders in the Khawar Industrial Group ("KIG"), one of the largest industrial enterprises in Iran and a licensee of Mercedes-Benz, sued the Government of Iran alleging that Iran had expropriated their property and nationalized KIG in 1979. Although the law instituting the nationalization made certain provisions for the compensation of KIG's shareholders, the plaintiffs had never been paid. The district court dismissed the action for failure to state a claim. On appeal, the Fifth Circuit Court of Appeals vacated the district court's dismissal for failure to state a claim but dismissed the suit for lack of subject matter jurisdiction. The court of appeals analyzed the claim under the commercial activities exception, finding that it lacked the requisite jurisdictional nexus with the United States to satisfy that exception: "At the time of the expropriation, the Plaintiffs lived in Iran and their property was in Iran. Hence, the financial loss occurred in Iran. The fact that the Plaintiffs

have since become United States residents does not alter this analysis." *Id*. at 674.

f. Noncommercial tort

Section 1605(a)(5) provides that a foreign state is not immune to suit in any case ". . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." The exception does not, however, apply to "(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

(1) Smith v. Socialist People's Libyan Arab Jamahiriya

In *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997), A.2.b.(2) *supra*, which involved claims against the Government of Libya arising out of the bombing of Pan Am Flight 103, the Second Circuit Court of Appeals rejected a contention that Pan Am Flight 103 should be considered to have been territory of the United States for purposes of the noncommercial tort exception. Plaintiffs' argument relied on the principle that "a nautical vessel 'is deemed to be a part of the territory' of 'the sovereignty whose flag it flies.'" *See United States v. Flores*, 289 U.S. 137 (1933). The court concluded that

> the fact that a location is subject to an assertion of United States authority does not necessarily mean that it is the "territory" of the United States for purposes of the FSIA. Cases rejecting FSIA jurisdiction over foreign states for torts committed at United States embassies make this

> point clear. *See Persinger v. Islamic Republic of Iran*, . . . 729 F.2d 835, 839–42 (D.C. Cir. 1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 87–88 (9th Cir. 1983).

101 F.3d at 246. *See also Rein v. Socialist People's Libyan Arab Jamahiriya,* 995 F.Supp. 325 (E.D.N.Y. 1998), *aff'd in part, dismissed in part*, 162 F.3d 748 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999) (finding jurisdiction under subsequently-enacted anti-terrorism exception, discussed in A.3.d.(3). *supra*).

(2) Moran v. Kingdom of Saudi Arabia

In *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169 (5th Cir. 1994), plaintiff, a civilian employee of the U.S. Department of Defense, was seriously injured in an automobile accident, allegedly caused by Royal Saudi Arabian Air Force personnel, at a U.S. Air Force base in Mississippi. He sued the Kingdom of Saudi Arabia, among others. The Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of his suit against Saudi Arabia, holding that the noncommercial tort activities exception to the FSIA, in cases covering personal injury and property damage caused by tortious acts or omissions of officers or employees, was limited to actions by those individuals within the scope of their employment at the time of the incident and did not apply to an accident caused while the foreign national was on private business. The court explained:

> The exception can only be met if the officer or employee of the foreign state was acting within the scope of his employment at the time he committed the tortious act or omission. *Liu v. Republic of China*, 892 F.2d 1419, 1425 (9th Cir. 1989), cert. dismissed, 497 U.S. 1058 . . . (1990). Therefore, the "scope of employment" provision of the "tortious activity" exception requires a finding that the doctrine of *respondeat superior* applies to the tortious act or omission committed by the officer or employee of the foreign state. *Id*.

27 F.3d at 173. In this case, a Saudi airman, who was temporarily assigned to the base by the Saudi Arabian Air Force to receive air traffic controller training, was on his way to a personal doctor's appointment at the time of the accident. The appeals court affirmed the district court's conclusion that, under the applicable state law of Mississippi, the airman was driving for personal reasons, his actions were outside the scope of his employment, and therefore the exception to sovereign immunity was inapplicable to Saudi Arabia.

See also Kozorowski v. Russian Federation, No. 93–16388, 1997 U.S. App. LEXIS 26266, 124 F.3d 211 (Table) (9th Cir. 1997) affirming dismissal of an action involving claims against the Russian Federation and its agents for wrongful death, intentional infliction of emotional distress, conspiracy, and fraud and deceit arising out of the executions of plaintiffs' relatives in western Russia during World War II, on a finding that the noncommercial tort did not apply. The court concluded that, assuming the FSIA applied retroactively, claims related to the killings could not satisfy the requirements of 1605(a)(5) because they did not occur in the United States and that other claims constituted libel and fraud, both excluded from the noncommercial tort exception in 1605(a)(5)(B).

g. Arbitration

Section 1605(a)(6) of the FSIA provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.

In *Creighton Ltd v. Government of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999), the Court of Appeals for the

District of Columbia examined two theories put forward by Creighton for finding subject matter jurisdiction over Qatar consistent with the FSIA in a case brought in the U.S. District Court for the District of Columbia to enforce an arbitral award. In that case, Qatar had agreed to arbitrate in France any contractual disputes with Creighton Limited, a Cayman Islands corporation with offices in Tennessee that Qatar hired to build a hospital in Doha. Because both the United States and France are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the arbitral award that Creighton Limited subsequently obtained against Qatar from the International Chamber of Commerce in Paris was clearly enforceable in U.S. courts. The court stated: "If Qatar were a private party, then there could be no doubt about the subject matter jurisdiction of the district court; because it is a foreign state, however, we must consider the effect of the FSIA upon the court's power to hear this case." 181 F.3d at 121.

The court first examined and rejected Creighton's claim that Qatar had implicitly waived its sovereign immunity to suit in United States by agreeing to the arbitration in France. Relying *inter alia* on *Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 577 (2d Cir. 1993), the court concluded that since Qatar had not signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, "we do not think that its agreement to arbitrate in a signatory country, without more, demonstrates the requisite intent to waive its sovereign immunity in the United States" under § 1605(a)(1) of the FSIA. 181 F.3d 123.

Turning to the arbitration exception in 1605(a)(6), the court noted that Qatar did not contest that this provision "applies by its terms to this action," thus providing an exception to Qatar's sovereign immunity. *Id*. The court dismissed the suit, however, for lack of personal jurisdiction, finding that Qatar had not waived its objection to personal jurisdiction in the United States by agreeing to arbitrate in France, and that Qatar lacked minimum contacts with the United States with respect to the construction contract.

4. Retroactivity of the FSIA

a. Princz v. Federal Republic of Germany

As discussed in A.2.b.(1)., *supra*, Hugo Princz sued the Federal Republic of Germany, seeking to recover money damages for injuries he suffered and for slave labor he performed while a prisoner in Nazi concentration camps. The U.S. District Court for the District of Columbia held that it had subject matter jurisdiction over Hugo Princz's claim against the Federal Republic of Germany for slave labor performed in Nazi concentration camps. Germany appealed. The Court of Appeals for the D.C. Circuit reversed this holding, and dismissed the case. *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994). The appellate court examined, but did not decide, whether the FSIA applied retroactively to the events occurring in 1942–1945 in this case. In analyzing the statutory exceptions to immunity, if the FSIA did apply, the court of appeals determined that the FSIA's commercial activity exception (§ 1605(a)(2)) would not apply to Mr. Princz's claims because, even if leasing prisoners as slave labor were considered a commercial activity, such activity did not have a "direct effect in the United States." Nor did it agree with the contention that the Third Reich had impliedly waived Germany's sovereign immunity for purposes of § 1605(a)(1) by violating *jus cogens* norms of the law of nations. Portions of the majority opinion relating to the retroactivity issue are excerpted below.

In 1995 the United States and Germany reached an agreement to provide compensation for Princz and certain other U.S. nationals. See Chapter 8.A.1.c.

---

* * * *

II. ANALYSIS

Germany argues that the district court lacks subject matter jurisdiction over Mr. Princz's complaint for damages sounding in tort and quasi contract because the FSIA is the only basis for

obtaining jurisdiction over a foreign sovereign in the courts of the United States and this case comes within no exception to the rule of sovereign immunity codified in that Act. In the alternative, Germany argues that the FSIA does not apply retroactively to this case, and that Germany is therefore entitled to absolute sovereign immunity under the law of this circuit as it stood at the time the Nazis enslaved Mr. Princz. . . .

A. What Law Applies?

The FSIA was enacted in 1976. If it applies to this case, which arose from events occurring from 1942 to 1945, then it "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 690, 102 L.Ed.2d 818 (1989). Under the Act, the general rule is that of sovereign immunity, subject to various statutory exceptions.

If the FSIA does not apply to this case, then we are presumably remitted to the practice that prevailed in the federal courts during 1942–45, when the events now in suit occurred. During that time, indeed from 1812, when the Supreme Court decided *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 132, 3 L.Ed. 287, until 1952 the United States, as a matter of grace and comity, granted foreign sovereigns "virtually absolute immunity" from suit in the courts of this country. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967, 76 L.Ed.2d 81 (1983). For their part, the courts consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.

Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns. *Id.* (citations omitted). In the first half of the 20th century the "restrictive" theory of sovereign immunity increasingly gained international acceptance. Restatement (Third) of The Foreign Relations Law of the United States, Ch. 5 p. 391 (1987). . . .

By enacting the FSIA in 1976, the Congress substantially codified the restrictive theory of sovereign immunity. . . .

There is a strong argument in favor of applying the FSIA retroactively. . . . In declaring the purpose of the FSIA, the Congress directed 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. This suggests that the FSIA is to be applied to all cases decided after its enactment, i.e. regardless of when the plaintiff's cause of action may have accrued. . . .

Indeed, under the teaching of a recent Supreme Court case, application of the FSIA to the pre-1952 events here in suit may not even count as "a genuinely 'retroactive' effect". *Landgraf v. USI Film Products*, 511 U.S. 244, ——, 114 S.Ct. 1483, 1503, 128 L.Ed.2d 229 (1994). Only a statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" is truly retroactive. *Id.* 511 U.S. at ——, 114 S.Ct. at 1505. A statute affecting jurisdiction, on the other hand, "usually 'take[s] away no substantive right but simply changes the tribunal that is to hear the case.' *Hallowell [v. Commons]*, 239 U.S. [506] 508, 36 S.Ct. [202] 202, [60 L.Ed. 409.] Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,' *Republic Nat. Bank of Miami, [v. U.S.]* 506 U.S. [80, ——] 113 S.Ct. [554] 565 [121 L.Ed.2d 474] (Thomas, J., concurring)." *Id.* 511 U.S. at ——, 114 S.Ct. at 1502. At least when one of the several states is a defendant, an exception of immunity from suit is not such a "right." . . .

We do not have to decide whether the FSIA applies to pre-1952 events, however, in order to resolve this case. . . . [E]ven if the FSIA does apply here, none of the statutory exceptions to foreign sovereign immunity appliees. On the other hand, if the FSIA does not apply to Mr. Princz's claims, and even if Germany is not immune from suit under the pre-FSIA law that would apply, then . . . a federal district court does not have jurisdiction over Mr. Princz's claims because they arise in tort and quasi contract. Mr. Princz offers no case law, and we are aware of none, suggesting that a court can revive the pre-FSIA diversity jurisdiction of § 1332 over cases brought by a United States citizen against a

foreign state in order to entertain a case arising from pre-FSIA facts. In either event, therefore, the district court is without subject matter jurisdiction of the present case.

* * * *

b. Flatow v. The Islamic Republic of Iran

In *Flatow v. The Islamic Republic of Iran,* 999 F.Supp. 1 (D.D.C. 1998), Stephen Flatow, the father of an American citizen killed in 1995 in a terrorist attack in Gaza, filed a wrongful-death action against the Islamic Republic of Iran and various Iranian officials under the FSIA's terrorism exception to the FSIA, discussed in A.3.d., *supra*. Although the events complained of by the plaintiff occurred more than a year prior to the enactment of the terrorism exception, the District Court for the District of Columbia, in its opinion excerpted below, found that § 1605(a)(7) did provide a basis for subject matter jurisdiction and entered a default judgment against Iran in favor of Flatow in the amount of $247,513,220.

---

* * * *

Although the events complained of herein occurred more than a year prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 1605(a)(7) provides a basis for subject matter jurisdiction. Congress has expressly directed the retroactive application of 28 U.S.C. § 1605(a)(7) in order to further a comprehensive counterterrorism initiative by the legislative branch of government:

> The amendments made by this subtitle shall apply to any cause of action arising before, on or after the date of the enactment of this Act [April 24, 1996].

§ 221(c) of Pub. L. 104–132. As the Supreme Court has stated with respect to the application of legislation to pre-enactment conduct, "where congressional intent is clear, it governs." *Kaiser*

Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837, 108 L.Ed.2d 842, 110 S.Ct. 1570 (1990). Although the application of statutes to pre-enactment conduct is traditionally disfavored, *see Bowen v. Georgetown Hospital*, 488 U.S. 204, 102 L.Ed.2d 493, 109 S.Ct. 468 (1988), where "Congress has expressly prescribed the statute's proper reach[,] there is no need to resort to judicial default rules." *Landgraf v. USI Film Products*, 511 U.S. 244, 271, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994).

Furthermore, the state sponsored terrorism exception to foreign sovereign immunity is a remedial statute. It creates no new responsibilities or obligations; it only creates a forum for the enforcement of pre-existing universally recognized rights under federal common law and international law. *See, e.g., Alvarez-Machain v. United States*, 107 F.3d 696, 702 (9th Cir. 1997), cert. denied, 118 S.Ct. 60 (1997) (discussing Torture Victim Protection Act). As with all other civil jurisdiction statutes, 28 U.S.C. § 1605(a)(7) "'speak[s] to the power of the courts rather than to the rights or obligations of the parties.'" *Landgraf*, 511 U.S. at 274 (discussing Civil Rights Act of 1991) (citation omitted). Almost all courts have upheld the retroactive application of long-arm statutes. See 2 SUTHERLAND ON STATUTORY CONSTRUCTION at § 41.09 *citing McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199 (1957).

At the time of the act complained of herein, the terrorist acts enumerated in 28 U.S.C. § 1605(a)(7) were federal criminal offenses, see 18 U.S.C. § 2331. Given mounting Congressional frustration at the refusal of the federal courts to find jurisdiction in cases such as *Princz*, *Pan Am 103*, *Cicippio*, and *Nelson*, and the progressive development of United States legislation and jurisprudence on the subject of jus cogens violations, *see, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767; *Kadic v. Karadzic*, 70 F.3d 232; *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 136 L.Ed.2d 51, 117 S.Ct. 96 (1996); *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189 (S.D.N.Y. 1996); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995). *See also Princz*, 26 F.3d at

1176 (D.C. Cir. 1994) (Wald, J., dissenting), the creation of an exception to foreign sovereign immunity which provides jurisdiction over foreign state perpetrators of the acts enumerated in 28 U.S.C. § 1605(a)(7) should not have been unanticipated. "Any expectation . . . [to the contrary] . . . is rightly disturbed." *Cabiri*, 921 F.Supp. at 1195–96 (S.D.N.Y. 1996) (discussing Torture Victim Protection Act), *citing Landgraf*, 511 U.S. at 273–275.

The Islamic Republic of Iran in particular has been aware of United States policy condemning international terrorism at least since the 1979–1981 hostage crisis in Tehran. It has been continuously designated a state sponsor of terrorism since January 19, 1984. Its continued support of terrorist groups has prompted the United States to suspend diplomatic relations and participate in the international embargo, including extraordinary enforcement measures such as trade restrictions. See U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 1995 at 23; Iran and Libya Sanctions Act of 1996, Pub. L. 104–72, 104th CONG., 2D SESS. (August 5, 1996), 110 Stat. 1541. As international terrorism is subject to universal jurisdiction, Defendants had adequate notice that their actions were wrongful and susceptible to adjudication in the United States. Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 COLUM. L. REV. 1515, 1528–30 (1987) (concluding that criminal statutes apply retroactively to international terrorist acts).

Therefore, the state sponsored terrorism provision implicates no Constitutionally protected interest which would prohibit the application of 28 U.S.C. § 1605(a)(7) to pre-enactment conduct.

* * * *

5. Injunctions and Equitable Remedies

In *Hilao v. Estate of Ferdinand Marcos*, 94 F.3d 539 (9th Cir. 1995), a class of alleged victims of torture and victims' representatives brought an action against the estate of

Ferdinand Marcos, the deposed president of the Philippines. The district court entered judgment in favor of the plaintiffs, which included a permanent injunction preventing the Republic of Philippines from entering into agreements with Marcos's estate to transfer to the Philippines assets of the estate that the Republic asserted were looted from its treasury. Because the Republic was entitled to sovereign immunity, the court of appeals held the injunction was unenforceable.

B. HEAD OF STATE IMMUNITY

1. Aristide

Lafontant v. Aristide, 844 F.Supp. 128 (E.D.N.Y. 1994), involved a claim against President Jean-Bertrand Aristide of Haiti for the alleged extrajudicial killing of a political opponent. As the court stated: "The question posed by this case is whether the recognized head of a state who has violated the civil rights of a person by having him killed can avoid civil prosecution in this country by virtue of his status." *Id*. at 129–30. In dismissing the claims against President Aristide pursuant to the U.S. Suggestion of Immunity, the court answered this question in the affirmative. Excerpts below from the court's opinion review the common law head-of-state immunity doctrine and its application to this case, including the court's analysis concluding that neither the Foreign Sovereign Immunities Act nor the Torture Victim Protection Act modified the doctrine of head of state immunity or altered the binding nature of the Executive Branch's suggestions of immunity pursuant to that doctrine.

The U.S. Suggestion of Immunity is available at *www.state.gov/s/l/c8183.htm*. *See also* discussion of Torture Victim Protection Act in Chapter 6.G.2.

---

* * * *

II. Law

A. Common Law Head-of-State Immunity

A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States. A visiting head-of-state is generally immune from the jurisdiction of a foreign state's courts. *See, e.g., Mr. Saltany v. Reagan*, 702 F.Supp. 319 (D.C.C 1988), *order aff'd in part, reversed in part* (*on other grounds*), 886 F.2d 438 (D.C.Cir. 1989), *cert. denied*, 495 U.S. 932, 110 S.Ct. 2172, 109 L.ED.2d 501 (1990) (granting head-of-state immunity to Prime Minister of England in suit alleging violations of international law); *Kilroy v. Windsor*, Civ. No. C-78-291 (N.D.Ohio 1978), (Prince Charles, The Prince of Wales, granted immunity from suit alleging human rights violations in Northern Ireland), excerpted in 1978 Dig.U.S.Prac.Int'l L. 641–43; *Psinakis v. Marcos*, Civ. No. C-75-1725 (N.D.Cal. 1975), excerpted in 1975 Dig.U.S.Prac. Int'l L. 344–45 (immunity granted to then-President Marcos following suggestion of immunity by the Executive Branch); *Kendall v. Saudi Arabia*, 65 Adm. 885 (S.D.N.Y. 1965), reported in 1977 Dig.U.S.Prac.Int'l L. 1017, 1053–34.

Head-of-state immunity, like foreign sovereign immunity, is premised on the concept that a state and its ruler are one for purposes of immunity. As early as 1812 the Supreme Court embraced the notion, grounded in customary international law, that a head-of-state is absolutely "exempted" from the jurisdiction of the receiving state's courts. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812).

This absolute form of immunity is based on the notion that all states are equal and that no one state may exercise judicial authority over another. The foreign head-of-state, as representative of his nation, enjoys extraterritorial status when travelling abroad because he would not intend "to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation." *Id.* at 137, 3 L.Ed. 287, *see also* L. Henkin, *International Law* 893 (2d Ed. 1987).

Head-of-state immunity is also supported by the doctrine of comity—that is to say, each state protects the immunity concept so that its own head-of-state will be protected when he or she is abroad. Comity has been described as:

> neither a matter of absolute obligation . . . nor of mere courtesy and good will . . . [b]ut it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163–64, 16 S.Ct. 139 143, 40 L.Ed. 95 (1895). This concept of doing to others as you would have them do to you is the principal rationale for a number of important doctrines of international law. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (rationale for enforcing arbitration agreements in international contracts rests on comity); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed. 513 (1972) (rationale for enforcing forum selection clauses in international contracts rests on comity); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762, 92 S.Ct. 1808, 1810, 32 L.Ed.2d 513 (1972) (Act of State rule based on comity).

Like the related doctrine of diplomatic immunity, head-of-state immunity is required to safeguard mutual respect among nations. *See, Restatement (Third) of Foreign Relations Law of the United States* (1986) §§ 464, 455 (diplomatic immunity). Heads of state must be able to freely perform their duties at home and abroad without the threat of civil and criminal liability in a foreign legal system. *See*, Note, *Resolving the Confusion Over Head of State Immunity; The Defined Rights of Kings*, 86 Colum.L.Rev. 169 (1986).

The immunity extends only to the person the United States government acknowledges as the official head-of-state. Recognition of a government and its officers is the exclusive function of the Executive Branch. Whether the recognized head-of-state has *de*

facto control of the government is irrelevant; the courts must defer to the Executive determination. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 031, 11 L.Ed.2d (1964) (Act of State doctrine premised on Executive Branch's recognition of state in question). Presidential decisions to recognize a government are binding on the courts, and the courts must give them legal effect. *United States v. Pink*, 315 U.S. 203, 230, 62 S.Ct. 552, 565, 86 L.Ed 706 (1942) (Executive Branch's determination that recognition of Soviet Union required settlement of claims is binding on the courts).

Since determination of who qualifies as a head-of-state is made by the Executive Branch, it is not a factual issue to be determined by the courts. No judicial hearing or factual determination aside from receipt of the State Department's communication is warranted.

In *United States v. Noriega*, 746 F.Supp. 1506 (S.D.Fla. 1990), General Noriega, prosecuted criminally in this country, challenged jurisdiction, arguing that he was entitled to head-of-state immunity. Noriega had never been officially recognized by the United States as the head-of-state of Panama. Instead, the United States had recognized President Eric Arturo Delvalle, even though General Noriega held *de facto* power in Panama and was dealt with as if he were head-of-state by United States officials. General Noriega argued that because he was the *de facto* ruler of Panama, he was entitled to head-of-state immunity. *Noriega*, 746 F.Supp. at 1520. This argument was rejected because the grant of immunity is a privilege which the United States may withhold from any claimant. The fact that Noriega controlled Panama did not entitle him to head-of-state immunity absent explicit recognition from the United States. *Id.* at 1520. The court noted that if Noriega's argument that he was entitled to head-of-state immunity were accepted, "illegitimate dictators [would be granted] the benefit of their unscrupulous and possibly brutal seizures of power." *Id.* at 1521.

In *Saltany v. Reagan*, 702 F.Supp. 319 (D.D.C. 1988), residents of Libya brought suit against Prime Minister Margaret Thatcher of the United Kingdom, for alleged violations of international law. Pursuant to 28 U.S.C. § 517 the State Department submitted an immunity letter, suggesting that the court grant Prime Minister Thatcher immunity as the head of government of a friendly foreign

state. The court accepted the State Department's suggestion as conclusive, and granted immunity. *Saltany*, 702 F.Supp. At 320. See also, Restatement (Second) of Foreign Relations Law of the United States (1962) § 66 (defining head-of-state as either the head-of-state or head of government, thus both Queen and Prime Minister are considered the head-of-state); *Kilroy v. Windsor* (*Prince Charles, The Prince of Wales*), Civ. No. C-78-291 (N.D.Ohio 1978), excerpted in 1978 Dig.U.S.Prac. Int'l L. 641–43, (holding Prince Charles as heir apparent to the throne is head-of-state in accordance with State Department suggestion of immunity).

The government of a foreign state which is recognized by the Executive Branch may waive its head-of-state immunity. In *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir. 1987), *cert. denied*, 484 U.S. 890, 108 S.Ct. 212, 98 L.Ed.2d 176 (1987), Ferdinand and Imelda Marcos, the former leaders of the Philippines, were found civilly liable for failing to comply with federal grand jury subpoenas. The court held that the doctrine of head-of-state immunity is not an individual right but an "attribute of state sovereignty," a privilege that can be revoked by the foreign state. Corazon Aquino was recognized by the United States as the then head-of-state of the Philippines. The Aquino government waived Mr. and Mrs. Marcos' residual head-of-state or diplomatic immunity in a note to the United States government. The court honored President Aquino's waiver, holding that application of head-of-state immunity to the Marcoses would "clearly offend the present Philippine government, and would therefore undermine the international comity that the head-of-state immunity doctrine is designed to promote." *Id.* at 1111; *see also, Mr. And Mrs. Doe v. United States*, 860 F.2d 40 (2nd Cir. 1988).

Similarly, the court held that the foreign government waived immunity in *Paul v. Arvil*, 812 F.Supp. 207 (S.D.Fla. 1993). Prosper Avril, the ex-Lieutenant-General of the Armed Forces of Haiti and former military ruler of Haiti was sued for alleged violations of international law. Defendant moved to dismiss, claiming head-of-state immunity. The government of Haiti waived any immunity enjoyed by Mr. Avril. Mr. Avril argued that by following Haiti's suggestion of waiver the court would "encourage

countries to disavow those former leaders who do not curry favor with the new government." *Paul*, 812 F.Supp. at 210. The court held that the Haitian government then recognized by the United States could waive head-of-state immunity of the former head of military government, and that waiver extends to whatever "residual" head-of-state immunity defendant possessed. *Id.*

Waiver of head-of-state immunity is analogous to waiver provisions in the Vienna Convention of Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, TIAS. No. 7502, 500 U.N.T.S. 95, Articles 31(a), 31(2), and 29, which provide that the immunity of diplomatic agents may be waived by the sending state. Such waiver must be explicit. *See Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47 49 (2d Cir. 1982) (requirement of explicit waiver of foreign sovereign immunity prevents "inadvertent, implied or constructive waiver in cases where the intent of the foreign state is equivocal or ambiguous").

B. Application of Common Law Immunity to Facts

President Aristide is the head-of-state of the Republic of Haiti who is recognized by the U.S. government. He enjoys head-of-state immunity unless there has been a waiver of immunity.

Plaintiff contends that the Republic of Haiti has waived President Aristide's immunity. She argues that the failure of the military rulers of Haiti to comply with the terms of the Governor's Island Agreement constitutes an implied waiver of President Aristide's right to legally govern Haiti and claim head-of-state immunity.

This argument is invalid for several reasons. First, the terms of the Governor's Island agreement do not explicitly or implicitly condition President Aristide's status as President of Haiti on his return to Haiti. Second, even if the agreement did provide for the forfeiture of President Aristide's status, recognition of a head-of-state by courts of the United States is an issue for resolution by the Executive Branch of the United States government. A court may not make an independent inquiry into the facts underlying our government's decision. *See United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942).

The warrant for President Aristide's arrest issued by a Haitian court and a personal note allegedly signed by President Aristide that purports to declare his renunciation of the Presidential office are without effect on the issue of immunity. Assuming without deciding that these documents are valid, they cannot affect the court's treatment of the suggestion of immunity. The court must rely on the Executive's determination of who is a lawful head-of-state.

Here there has been no explicit waiver of President Aristide's immunity recognized as a waiver by the United States. Unlike *In re Mr. And Mrs. Doe*, 860 F.2d 40 (2nd Cir. 1988), where the recognized Philippines government specifically waived the Marcoses' head-of-state immunity, the unrecognized *de facto* rulers of Haiti have no power to and have not undertaken any action accepted by our government as an implicit waiver of immunity. While not decisive, we note that the recognized Ambassador of Haiti to the United States has submitted a letter stating affirmatively that President Aristide is the head-of-state of the Republic of Haiti, and that the embassy does not waive any of the sovereign, head-of-state, or diplomatic immunities that he may enjoy.

The United States government does not recognize the *de facto* military rulers of Haiti. It has repeatedly condemned their regime. The United Nations has also severely criticized their illegal seizure of power. See, *The Situation of Democracy and Human Rights in Haiti: Report of the Secretary General*, U.N. GAOR, 47th Sess., Agenda Item 22, U.N. Doc. A/47/975 (July 12, 1993). Because the United States does not recognize the *de facto* government, that government does not have the power to waive President Aristide's immunity.

Granting President Aristide head-of-state immunity will further the goals of comity. The State Department, in its suggestion of immunity letter, states that "permitting this action to proceed against President Aristide would be incompatible with the United States' foreign policy interests."

The United States foreign policy goal of encouraging democratic elections is strengthened by recognizing President Aristide as the democratically elected head of Haiti. Numerous Executive Orders supporting President Aristide establish that the Republic of Haiti is a "friendly foreign state."

Even, however, if the goal of the United States were less lofty, it would make no difference. In this matter the courts are bound by executive decision.

C. Lack of Statutory Modification of Immunity Law

No statute has modified the long standing rule of international and common law. The two statutes which need to be considered are the Foreign Sovereign Immunities Act and the Torture Victim Protection Act.

1. Foreign Sovereign Immunities Act

Any uncertainty as to the current scope of head-of-state immunity is due to passage of the Foreign Sovereign Immunities Act ("FSIA") in 1976. *See Mr. And Mrs. Doe v. United States*, 860 F.2n 40, 45 (2nd Cir. 1988); *see also*, Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum.L.Rev. 169, 175 (1986). Until 1952, courts adhered to the theory of absolute immunity, granting foreign states immunity for both public and private acts. In 1952, the State Department published the Tate letter adopting a restrictive theory of immunity which gave foreign states immunity for official public acts, but not for private or commercial acts. Even after 1952, however, the State Department continued to decide immunity issues and submit suggestion of immunity letters distinguishing public and other kinds of acts.

In 1976 the FSIA codified the doctrine of restrictive immunity and transferred the power to make determinations of sovereign immunity based upon public-private-commercial distinctions from the State Department to the federal courts. *See* H.R.Rep. No. 1487 94th Cong. 2nd Sess. 7, reprinted in 1976 U.S.Code Cong. and Admin.News 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 foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds").

The FSIA created specific, limited exceptions to sovereign immunity, including a commercial activity exception and a tort exception. . . .

* * * *

The Supreme Court held that the FSIA must be applied by district courts in every suit against a foreign sovereign since subject-matter jurisdiction in such cases depends on the existence of a specified exception to foreign sovereign immunity contained in the FSIA. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 1971, 76 L.Ed.2d 81 (1983).

Because the FSIA is the sole basis for obtaining jurisdiction over a foreign sovereign, courts have found that the FSIA superseded the State Department's role in "suggesting" sovereign immunity. *See Vulcan Iron Works Inc. v. Polish American Machinery Corp.*, 470 F.Supp. 1060 (S.D.N.Y. 1979) (discussing the legislative history of FSIA and finding Congress particularly concerned with the "politicization" of the suggestion of immunity process in commercial suits).

In *Chuidain v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), a Philippine national brought suit against a Philippine government official for dishonoring a letter of credit issued by the Republic of the Philippines to Chuidian. The United States government submitted a suggestion of immunity letter. The court, after determining that there was little practical difference between a suit against a state and against an individual acting in his official capacity, held that the pre-1976 common law suggestion of immunity approach was invalid with respect to foreign sovereign immunity. *Chuidian*, 912 F.2d at 1103. Because none of the exceptions to the FSIA had been satisfied, the court held that jurisdiction was lacking. *Id.* at 1106.

The critical question remains: does the common law head-of-state immunity survive the FSIA? The term "head-of-state" is not mentioned in the FSIA. It defines "foreign state" as the state and its agencies or instrumentalities, providing in pertinent part:

> (a) A "foreign State," except as used in section 1608 of this title [service of process], includes a political subdivision

> of a foreign state or an agency of instrumentality of a foreign state as defined in subsection (b)
> (b) An "agency or instrumentality of a foreign state" means any entity—
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603 (1982).

There is some support for the application of immunity under the FSIA to individuals as "instrumentalities" of foreign states. *See Kline v. Kaneko*, 685 F.Supp. 386 (S.D.N.Y. 1988) (holding Mexican Secretary of Government can be sued in his official capacity and is entitled to FSIA protection); *Mueller v. Diggelman*, No.82 Civ. 5512, WL 25419 (S.D.N.Y. 1981) (Swiss court is "organ" of state); *Rios v. Marshall*, 530 F.Supp. 351 (S.D.N.Y. 1981) (foreign labor board is "instrumentality" under FSIA, thus entitling board officials to protection). No case has, however, construed "agency or instrumentality" to include a head-of-state.

The legislative history of the FSIA does not directly address the issue of head-of-state immunity, stating that "an entity which does not fall within the definitions of 1603(a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court." H.R.Rep. No. 1487, 94th Cong., 2d Sess. 15, reprinted in 1976 U.S. Code Cong. and Admin.News 6604, 6614.

That history does demonstrate that the FSIA is not "intended to affect either diplomatic or consular immunity." H.R.Rep. No. 1487, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S.Code Cong. and Admin.News, 6610.

> Since the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives, section

> 1695(a)(5) [the non-commercial tort exception] would not govern suits against diplomatic or consular representatives but only suits against the foreign state.

Id. at 6620.

One of the Congressional hearings on the bill touched briefly on the role of head-of-state immunity under the FSIA. In testimony before Congress, a Justice Department official discussed hypothetical situations where an exception to foreign sovereign immunity might apply under the FSIA. Focusing on the commercial activity exception, he explained how the FSIA would enable foreign corporations that are government agencies, such as Lufthansa, a West German Government Corporation Airline, to be sued in United States courts. He went on to emphasize that "Now we are not talking, Congressmen, in terms of permitting suit against the Chancellor of the Federal Republic. . . . That is an altogether different question." Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 16 (1976) (statement of Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice).

In *Estate of Silme G. Domingo v. Republic of the Philippines*, 694 F.Supp. 782 (W.D.Wash. 1988), plaintiffs brought suit against then-President Marcos for participation in an alleged conspiracy to "silence his political opposition." The State Department submitted a head-of-state immunity letter. The court granted President Marcos immunity, rejecting plaintiff's argument that in enacting the FSIA, Congress intended to completely eliminate the suggestion of immunity procedure. Relying on the legislative history of the FSIA, the court concluded that Congress did not intend to modify the suggestion of immunity procedure with respect to heads-of-state. Citing to the House report, *supra* at 6610, (which establishes that enactment of the FSIA was not intended to affect the immunity of diplomatic or consular officials), it reasoned that because it would be illogical to accord a lesser degree of immunity to a foreign head-of-state than to a diplomat appointed by that head-of-state, the legislative history of the FSIA supports the proposition that the FSIA was not meant to alter head-of-state immunity.

The view that the FSIA is inapplicable to a head-of-state comports with both the history of the FSIA and the underlying policy of comity. The FSIA was not designed to apply to diplomatic or other consular officials. Instead, it was crafted primarily to allow state-owned companies, which had proliferated in the communist world and in the developing countries, to be sued in United States courts in connection with their commercial activities. The FSIA took these cases out of the political arena of the State Department, while leaving traditional head-of-state and diplomatic immunities untouched. Scholars have argued that the willingness of the State Department, which co-authored the FSIA, to continue issuing suggestions of immunity for heads-of-state, and the willingness of courts to defer to such suggestions evidences the FSIA's nonapplicability to heads of state. *See*, Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum.L.Rev. 169, 175 n.24 and accompanying text (1986). Both comity and the Executive's plenary role in fashioning foreign policy suggest that the State Department needs to retain decisive control of grants of head-of-state immunity, by preserving the pre-FSIA "absolute" theory of immunity. The language and legislative history of the FSIA, as well as case law, support the proposition that the pre-1976 suggestion of immunity procedure survives the FSIA with respect to heads-of-state.

2. Torture Victim Protection Act

Plaintiff argues that President Aristide should be denied immunity because head-of-state immunity extends only to official acts, and the alleged extrajudicial killing is not an official act under color of law. The scope of head-of-state immunity in this regard has not been conclusively established.

The Second Circuit, in *Mr. And Mrs. Doe v. United States*, 860 F.2d 40 (2nd Cir. 1988), decided that head-of-state immunity for former President Marcos and his wife had been waived by the Philippines. In *dicta,* however, the court, citing *Schooner Exchange v. McFaddon*, stated "we believe there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law." *Id.* at 45. *See also*

In re Grand Jury Proceedings, John Doe # 700, 817 F.2d 1108, 1111 (4th Cir. 1987), *cert. denied* 484 U.S. 890, 108 S.Ct. 212, 98 L.Ed.2d 176 (1987) (declining to decide whether head-of-state immunity extends to unauthorized acts carried out during Mr. Marcos' term or whether it would have been limited to official authorized acts).

Plaintiff relies upon this *dicta* and the Torture Victim Protection Act ("TVPA"). She sues President Aristide in his individual and official capacity for committing "private, unauthorized criminal acts." Her theory for circumventing head-of-state immunity is unacceptable.

The TVPA on its face does give federal courts jurisdiction over some suits against foreign officials who kill illegally on foreign territory. It provides in part:

> Sec. 2.
> (a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.
> (b) Exhaustion of remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.
>
> * * * *
>
> Sec. 3. Definitions
> (a) Extrajudicial Killing.—For the purposes of this Act, the term "extrajudicial killing means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognizable as indispensable by civilized peoples. Such term, however, does not include

> any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 note (1992).

It can be assumed for the purpose of this memorandum, that the killing described in the plaintiff's complaint falls within the statute. Nevertheless, as indicated below, the TVPA does not negate head-of-state immunity. Enacted after *Mr. and Mrs. Doe v. United States*, 860 F.2d 40 (2nd Cir. 1988), the TVPA is the governing law on the extent of *subject matter jurisdiction* over foreign tortfeasors not of authority of the courts to exercise *personal jurisdiction* over a head-of-state.

The TVPA codifies the holding in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) which assumed subject matter jurisdiction over foreign individuals (but not states or state agencies) in the case of torture in violation of international law under the Judiciary Act of 1789, ch. 20 § 9(b), 1 Stat. 73, 77 (1789) *codified at* 28 U.S.C. § 1350 (1948) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"). Like the FSIA, the language of the TVPA does not specifically mention heads-of-state.

The legislative history of the TVPA lends ample support for the proposition that the Act was not intended to trump diplomatic and head-of-state immunities. *See, e.g.*, Sen.Comm. on the Judiciary, *The Torture Victim Protection Act of 1991*, S.Rep. No. 249, 102nd Cong., 1st Sess. 7–8 (1991) ("The TVPA is not intended to override traditional diplomatic immunities which prevent the exercise of jurisdiction by U.S. courts over foreign diplomats. . . . Nor should visiting heads of state be subject to suits under the TVPA."); House Comm. on the Judiciary, *The Torture Victims Protection Act of 1991*, H.R.Rep. No. 367, 102nd Cong., 1st Sess., Pt. 1 (1991), 1992 U.S.Code Cong. and Admin. News 84, 88 ("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.").

The Restatement (Third) of Foreign Relations Law of the United States (1986) also buttresses this view of continuing head-of-state and diplomatic immunity. Reporter's Note 14 reads:

> Heads of state or government. Ordinarily, a proceeding against a head-of-state or government that is in essence a suit against the state is treated like a claim against the state for purposes of immunity. 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 are accorded to members of special missions, essentially those of an accredited diplomat.

How the TVPA interacts with the FSIA was recently indicated by the Ninth Circuit in *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), *cert. denied* 508 U.S. 972, 113 S.Ct. 2960, 125 L.Ed.2d 661 (1993). A Philippine citizen brought an action under the TVPA for wrongful death in connection with the extrajudicial killing of her son. Defendant was Imee Marcos-Manotoc, the daughter of former President Ferdinand Marcos and head of military intelligence, who allegedly instructed the police and military intelligence personnel under her control to murder plaintiff's son.

Estate of Marcos did not involve head-of-state immunity. The court found that an "agency or instrumentality" of a foreign state for purposes of the FSIA includes individuals acting in their official capacity. *Estate of Marcos*, 978 F.2d at 496. Defendant there argued that since *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989), dictates that the FSIA controls the Alien Tort Statute, regardless of whether she was acting in her official capacity, plaintiff must satisfy an exception of immunity in the FSIA for jurisdiction to lie. Because the "tort exception" requires that the tortious conduct occur in the United States, defendant argued that there was no jurisdiction under the FSIA. *Estate of Marcos*, 978 F.2d at 497.

The court held that the FSIA does not immunize acts of individuals which are outside the scope of their official duties, or beyond the scope of their authority. *Id.* It found that since the

defendant acted on her own without the authority of the state, she could not be considered an "agency or instrumentality" for purposes of the FSIA and that the TVPA was applicable. *Id.* Because, the court indicated, the TVPA applies to individuals while the FSIA applies to states and state actors, the TVPA will only apply to state actors when they act in their individual capacity —as the defendant, the court held, did in *Estate of Ferdinand E. Marcos Human Rights Litigation.* Cf. *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990) (holding individuals acting in official capacity immune under FSIA and citing *Monell v. Department of Social Services*, 436 U.S. 658, 690 n.55, 98 S.Ct. 2018, 2035 n.55, 56 L.Ed.2d 611 (1978) and *Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1382 n.5 (9th Cir. 1988) in context of a suit against foreign sovereign); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (official torture which violates customary international law is actionable under Alien Tort Statute); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D.Cal. 1987) (acts by Argentine military and police constitute official torture actionable under Alien Tort Statute but acts of private torture do not violate international law and are not actionable).

We need not consider whether an act of President Aristide in ordering the killing would be official or private because he now enjoys head-of-state immunity. The courts are barred from exercising personal jurisdiction over him.

III. Conclusion

The State Department has submitted a letter of immunity. It speaks for the President of the United States. Its suggestion of immunity is controlling with respect to President Aristide. The court must defer to the Executive on this matter.

2. Karadzic

As discussed in Chapter 6.G.2.a., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), involved an action for compensatory and punitive damages (as well as injunctive relief) brought by

victims of rape and other human rights violations against Radovan Karadzic, the former self-proclaimed Bosnian Serb president, for killings, torture, and other human rights abuses and violations of international law under, *inter alia*, the Alien Tort Statute. The federal district court dismissed the case for lack of subject matter jurisdiction. *Doe v. Karadzic*, 866 F.Supp. 734 (S.D.N.Y. 1994). The Second Circuit reversed.

As to head of state immunity, the court of appeals noted that the district court had stated "that the Court might be deprived of jurisdiction if the Executive Branch were to recognize Karadzic as the head of state of a friendly nation, . . . and that this possibility could render the plaintiffs' pending claims requests for an advisory opinion. The District Judge recognized that this consideration was not dispositive but believed that it 'militates against this Court exercising jurisdiction.' *Doe*, 866 F.Supp. at 738."

The United States filed a Statement of Interest with the Second Circuit, arguing that Radovan Karadzic was not entitled to head-of-state immunity. The court of appeals agreed:

> . . . [W]e note that the mere possibility that Karadzic might at some future date be recognized by the United States as the head of state of a friendly nation and might thereby acquire head-of-state immunity does not transform the appellants' claims into a nonjusticiable request for an advisory opinion, as the District Court intimated. Even if such future recognition, determined by the Executive Branch, . . . would create head-of-state immunity, . . . it would be entirely inappropriate for a court to create the functional equivalent of such an immunity based on speculation about what the Executive Branch *might* do in the future.

Id. at 238.

3. Noriega

In *United States v. Noriega*, 746 F.Supp. 1506 (S.D. Fla. 1990), the former Panamanian dictator Manuel Noriega was

convicted in the U.S. District Court for the Southern District of Florida of conspiracy to commit racketeering, racketeering, conspiracy to manufacture, import and distribute cocaine, distribution of cocaine, manufacture of cocaine, and traveling in interstate or foreign commerce to promote unlawful enterprise. At the time of his indictment in February 1988, Noriega served as commander of the Panamanian Defense Forces in the Republic of Panama, and he claimed head of state immunity on the ground that he had functioned as the *de facto*, if not *de jure*, leader of his country. The trial court rejected that argument because the U.S. Government never recognized Noriega as Panama's legitimate, constitutional ruler. 746 F.Supp. at 1519–20. The Court of Appeals for the Eleventh Circuit affirmed. *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997), *reh'g denied*, 128 F.3d 734 (11th Cir. 1997). Excerpts from the decision of the Eleventh Circuit are set out below.

---

* * * *

Noriega first argues that the district court should have dismissed the indictment against him based on head-of-state immunity. He insists that he was entitled to such immunity because he served as the *de facto*, if not the *de jure*, leader of Panama.

The Supreme Court long ago held that "[t]he jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287 (1812). The Court, however, ruled that nations, including the United States, had agreed implicitly to accept certain limitations on their individual territorial jurisdiction based on the "common interest impelling [sovereign nations] to mutual intercourse, and an interchange of good offices with each other. . . ." *Id.* at 137. Chief among the exceptions to jurisdiction was "the exemption of the *person of the sovereign* from arrest or detention within a foreign territory." *Id.* (emphasis added).

The principles of international comity outlined by the Court in *The Schooner Exchange* led to the development of a general doctrine of foreign sovereign immunity which courts applied most often to protect foreign nations in their corporate form from civil process in the United States. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). To enforce this foreign sovereign immunity, nations concerned about their exposure to judicial proceedings in the United States:

> follow[ed] the accepted course of procedure [and] by appropriate representations, sought recognition by the State Department of [their] claim of immunity, and asked that the [State] Department advise the Attorney General of the claim of immunity and that the Attorney General instruct the United States Attorney for the [relevant district] to file in the district court the appropriate suggestion of immunity. . . .

Ex Parte Republic of Peru, 318 U.S. 578, 581, 63 S.Ct. 793, 795, 87 L.Ed. 1014 (1943) (citations omitted). As this doctrine emerged, the "Court consistently [ ] deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V.*, 461 U.S. at 486, 103 S.Ct. at 1967.

In 1976, Congress passed the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611. . . . Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in *The Schooner Exchange* and its progeny. As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim. *See Kadic v. Karadzic*, 70 F.3d 232, 248 (2d Cir. 1995). . . .

Generally, the Executive Branch's position on head-of-state immunity falls into one of three categories: the Executive Branch (1) explicitly suggests immunity; (2) expressly declines to suggest immunity; or (3) offers no guidance. Some courts have held that

absent a formal suggestion of immunity, a putative head of state should receive no immunity. *See, e.g., In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988). In the analogous pre-FSIA, foreign sovereign immunity context, the former Fifth Circuit accepted a slightly broader judicial role. It ruled that, where the Executive Branch either *expressly* grants or denies a request to suggest immunity, courts must follow that direction, but that courts should make an independent determination regarding immunity when the Executive Branch neglects to convey clearly its position on a particular immunity request. *See Spacil v. Crowe*, 489 F.2d 614, 618–19 (5th Cir. 1974) (granting petition for writ of mandamus directing district court to follow government's suggestion of immunity in civil case).

Noriega's immunity claim fails under either the *Doe* or the *Spacil* standard. The Executive Branch has not merely refrained from taking a position on this matter; to the contrary, by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity. Noriega has cited no authority that would empower a court to grant head-of-state immunity under these circumstances. Moreover, given that the record indicates that Noriega never served as the constitutional leader of Panama, that Panama has not sought immunity for Noriega and that the charged acts relate to Noriega's private pursuit of personal enrichment, Noriega likely would not prevail even if this court had to make an independent determination regarding the propriety of immunity in this case. *See generally In re Doe*, 860 F.2d at 45 (noting that "there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts" and finding that immunity claim was waived by the government of the foreign defendant). Accordingly, we find no error by the district court on this point.

* * * *

4. Sheikh Zayed and Dubai Defendants

Suggestions of immunity were filed on behalf of Sheikh Zayed (President of the United Arab Emirates) in two lawsuits

related to the BCCI financial scandal, described in excerpts below. The first suit, *Hartmann. v. Sheikh Zayed Bin Sultan Al-Nahyan.*, 94 Civ. 5547 (S.D.N.Y.), brought by three former outside directors of BCCI, involving allegations of fraud and other violations of U.S. law, was voluntarily dismissed against Zayed and other defendants by plaintiffs. The second case, *First American Corp. v. Al-Nahyan*, 948 F.Supp. 1107 (D.D.C. 1996), involved allegations of illegal attempts to acquire ownership and control of banking interests in the United States. The court, rejecting arguments that the FSIA governs the immunity of heads of state, held that it was bound by the U.S. Suggestion of Immunity and that Sheikh Zayed was therefore immune from the court's jurisdiction in light of his position as a sitting head of state. *Id.* at 1119. As to other defendants, referred to as the "Dubai Defendants," the court found that the FSIA did not apply and that neither the act of state nor head of state immunity doctrine barred the suit.

Relevant excerpts from the district court memorandum opinion in *First American Corp. v. Al-Nahyan* (footnotes omitted) are set forth below. The Suggestions of Immunity filed in *Hartmann* and *First American Corp.* are available at *www. state.gov/s/1/c8183.htm.*

---

* * * *

The central issue in this case involves an allegation that the defendants, as senior officers, managers, agents and nominees for the Bank of Credit and Commerce International ("BCCI"), illegally and secretly sought to acquire ownership and maintain control of First American Corporation ("FAC") and First American Bankshares ("FAB"), collectively known as First American. The 282-page, 687-paragraph Complaint charges 30 defendants with violations of the Racketeer Influenced Corrupt Organizations Act ("RICO"), codified at 18 U.S.C. § 1962, common law fraud, breach of fiduciary duty, other tortious conduct, and civil conspiracy. . . .

[Included among the 30 defendants are the "Dubai Defendants":] 1. His Highness Sheikh Zayed Bin Sultan Al-Nahyan ("H.H. Sheikh Zayed"), President of the United Arab Emirates

("UAE") and Ruler of the Emirate of Abu Dhabi. H.H. Sheikh Zayed is also the Chairman of the Supreme Council of Rulers of the UAE, which is the UAE authority responsible for making policy decisions and promulgating and implementing UAE laws;
2. His Highness Sheikh Khalifa Bin Zayed Al-Nahyan ("H.H. Sheikh Khalifa"), the eldest son of Sheikh Zayed and Crown Prince and Deputy Ruler of the Emirate of Abu Dhabi. H.H. Sheikh Khalifa is the designated successor to H.H. Sheikh Zayed as the Ruler of Abu Dhabi. H.H. Sheikh Khalifa was appointed Prime Minister of Abu Dhabi in 1971 and is currently the Chairman of the Abu Dhabi Investment Authority, Chairman of the Supreme Petroleum Council and Deputy Supreme Commander of the UAE Armed Forces;

* * * *

4. His Excellency Ghanim Faris Al-Mazrui ("H.E. Mazrui") the principal financial advisor to the Ruling Family of Abu Dhabi. This defendant is also the Secretary General of the Abu Dhabi Investment Authority, Chairman of the Department of Private Affairs of Sheikh Zayed, Chairman of the "Committee for the Follow-Up and Supervision of Private Investments" ("Investment Committee") and holds various positions in several Abu Dhabi banks, including BCCI Holdings, BCCI Overseas and BCCI S.A.;

* * * *

Contrary to [two co-defendants'] argument that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., governs H.H. Sheikh Zayed's immunity, the enactment of the FSIA was not intended to affect the power of the State Department, on behalf of the President as Chief Executive, to assert immunity for heads of state or for diplomatic and consular personnel. *Lafontant v. Aristide*, 844 F.Supp. 128, 137 (E.D.N.Y. 1994); see, e.g., 22 U.S.C. § 254a–e. The United States has filed a Suggestion of Immunity on behalf of H.H. Sheikh Zayed, and courts of the United States are bound to accept such head of state determinations as conclusive. *Ex Parte Peru*, 318 U.S. at 589; *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974); *Lafontant*, 844 F.Supp. at 137 & 139; see *Abdulaziz v. Metropolitan Dade County*, 741 F.2d

1328, 1331 (11th Cir. 1984); *Carrera v. Carrera*, 84 U.S. App. D.C. 333, 174 F.2d 496, 497 (D.C. Cir. 1949). Accordingly, the Suggestion of Immunity as to H.H. Sheikh Zayed will be accepted here.

* * * *

First, the Dubai Defendants assert that this Court has no subject matter jurisdiction over this case with regard to them due to the FSIA, act of state doctrine and doctrine of head of state immunity. They argue that "as members of the Ruling Family of the Emirate of Dubai or their alleged 'alter egos' [Stock Holding Company and Crescent Holding Company], [they] are foreign sovereigns, and their investments are investments of *public* funds." Dubai Defendants' Motion to Dismiss, at 2 & 7–11 (emphasis in original). They contend that their alleged conduct does not fall within an exception to the FSIA, *id.* at 12, and that both the act of state doctrine and doctrine of head of state immunity bar this suit. *Id.* at 22–27.

* * * *

. . . [T]the FSIA does not apply to these defendants' actions. The Complaint plainly alleges that the Dubai Defendants are being sued for acts directing their "*personal* holding compan[ies] and alter ego[s]" to participate in the scheme to fraudulently acquire and maintain ownership of First American. Complaint at ¶ ¶ 20–23 (emphasis added). Use of corporate entities created under the laws of a third country, as the plaintiffs allege Sheikh Rashid and Sheikh Mohammed used their alter egos-Stock Holding Company and Crescent Holding Company-are "presumptively engaging in activities that are either commercial or private in nature." H.R.Rep. No. 94–1487, 94th Cong., 2d Sess. 15 (1976) U.S.Code Cong. & Admin.News 6604, 6613–14; S.Rep. No. 94–1310, 94th Cong., 2d Sess. 15 (1976) U.S.Code Cong. & Admin.News 6604, 6613–14; *see Leith v. Lufthansa German Airlines*, 793 F.Supp. 808, 810 n.2 (N.D.Ill. 1992). The acts alleged as private investments to act as sham nominees are not activities that are traditionally considered to be "sovereign or governmental in nature." *Herbage*, 747 F.Supp. at 67. Assuming the facts alleged are true, the plaintiffs have adequately pled that the Dubai Defendants accepted sham loans from BCCI in their personal capacities to acquire and

maintain ownership of First American. The FSIA is, therefore, no bar to this suit against these defendants.

The act of state doctrine is equally inapplicable. This doctrine only applies if "the relief sought or the defense interposed would have required a court of the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick v. Environmental Tectonics Corp.*, 493 U.S. 400, 405, 110 S.Ct. 701, 704, 107 L.Ed.2d 816 (1990). As noted above, the allegations against the Dubai Defendants do not implicate "official act[s] of a foreign sovereign;" therefore, the act of state doctrine does not apply.

Nor are the Dubai Defendants entitled to head of state immunity as members of the ruling family of Dubai. The State Department has not suggested immunity on their behalf, and their claim is further undermined since the United States recognizes the Emirate of Dubai only as a political subdivision of the UAE, not as an independent state. *See Drexel Burnham Lambert v. Committee of Receivers*, 810 F.Supp. 1375, 1377 (S.D.N.Y. 1993), *rev'd on other grounds*, 12 F.3d 317 (2d Cir. 1993), *cert. denied*, 511 U.S. 1069, 114 S.Ct. 1645, 128 L.Ed.2d 365 (1994). Moreover, while there is considerable doubt whether Dubai has the defining characteristics of an independent state under international law, *see* 1973 Dig.U.S.Prac.Int'l Law 17; Restatement (Third) of Foreign Relations § 201 (1987), even were Dubai entitled to recognition as an independent state, the Dubai Defendants would not be entitled to head of state immunity, because none is a sitting head of state. *See, e.g., Lafontant*, 844 F.Supp. at 132; *Republic of Philippines v. Marcos*, 665 F.Supp. 793, 797 (N.D.Cal. 1987). *See generally* Jerrold L. Mallory, Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum.L.Rev. 169 (1986).

* * * *

5. King Fahd

In *Alicog v. Kingdom of Saudi Arabia*, 860 F.Supp. 379 (S.D. Tex. 1994), *aff'd*, 79 F.3d 1145 (table) (5th Cir. 1996), plaintiffs

alleged they had been falsely imprisoned and abused while working as servants for the Saudi Royal family in the United States; they filed suit against the Kingdom of Saudi Arabia, King Fahd, and other individuals in Texas state court. The King and Kingdom removed the case to federal court, where the claims against the King were dismissed pursuant to a Suggestion of Immunity filed by the United States, and the claims against the Kingdom were dismissed for lack of jurisdiction under the FSIA. The text of the Suggestion of Immunity is available at *www.state.gov/s/l/c8183.htm*. As to head of state immunity, the court stated:

> Under long-standing international law, the head of a state as recognized by the executive branch of the United States government is immune from personal jurisdiction in United States courts unless that immunity has been waived by our statute or by the foreign government. *See* 28 U.S.C. § 517 (1966); *Saltany v. Reagan,* 702 F.Supp. 319, 320 (D.D.C. 1988); *Lafontant v. Aristide,* 844 F.Supp. 128, 131–32 (E.D.N.Y. 1994). The immunity extends only to the person the United States government acknowledges as the head of state. *See Lafontant,* 844 F.Supp. at 132. Even if there were a dispute about the actual government in Saudi Arabia, this court must accept the recognition by the United States as conclusive.
>
> Because there is no dispute and, in any event, because the United States has appeared in this action to acknowledge that King Fahd is the head of state of Saudi Arabia, the king's motion to dismiss will be granted.

6. Pope John Paul II

Pope John Paul II was a named defendant in *Guardian F. v. Archdiocese of San Antonio,* No. 93-CI-11345 (D. Tex., Mar. 15, 1994), in which plaintiff alleged sexual abuse by a Roman Catholic priest. The United States filed a Suggestion of Immunity recognizing the Pope as the sitting head of

state of the Vatican City. Noting the binding nature of the Suggestion, the court dismissed the claims against the Pope. Both the text of the Suggestion of Immunity and the Order dismissing the claims against the Pope are available at *www.state.gov/s/l/c8183.htm*.

C. DIPLOMATIC AND CONSULAR IMMUNITY

1. Diplomatic Immunity

The United States is a party to the Vienna Convention on Diplomatic Relations done at Vienna Apr. 18, 1961, 23 UST 3227, 500 U.N.T.S. 95 (entered into force for the United States on Dec. 13, 1972) ("VCDR" or "Convention"). It is the practice of U.S. courts to accept the certification by the Department of State of an individual's diplomatic status and entitlement to immunity under the Convention. *See*, for example, *Zdravkovich v. Consul General of Yugoslavia*, 1998 U.S. App. LEXIS, 15466 (D.C. Cir. June 23, 1998) ("The courts are required to accept the State Department's determination that a foreign official possesses diplomatic immunity from suit. *See Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949); *Abdulaziz v. Metro. Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984)."). It is also accepted that the VCDR is considered to be a self-executing treaty in U.S. law. Article 32(1) of the VCDR provides that a sending state may waive the immunity of its diplomatic officers.

The Diplomatic Relations Act of 1978, Pub. L. No. 95–393, 92 Stat. 808, as amended, codified at 22 U.S.C. §§ 254a et seq., provides for diplomats from states that are not parties to the Convention to receive the same privileges and immunities as those of states parties and codifies certain provisions of the Convention as they apply to diplomats from states that are parties. Section 5 of the Act requires dismissal of any action or proceeding brought against an individual entitled to immunity under the Convention (or any other laws extending diplomatic privileges and immunities). 28 U.S.C. § 254d.

In May 1998 the Office of Foreign Missions (in conjunction with the Office of Protocol) in the Department of State published a revised edition of its pamphlet entitled "Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities." Department of State Publication 10524 (rev. May 1998). The pamphlet describes the various categories of foreign mission personnel and the privileges and immunities to which each is entitled, for the benefit of law enforcement officials and others who encounter such issues in practice. The publication may be requested by appropriate judicial and law enforcement offices by email to *OFMInfo@state.gov*. *See also* discussion of diplomatic immunity in *767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations*, 988 F.2d 295 (2d Cir. 1993), *cert. denied*, 510 U.S. 819 (1993), in D.2. below.

a. Effect of waiver of criminal immunity in civil case

On December 31, 1997, John A. Knab, as Personal Representative of the Estate of Joviane Waltrick, filed a suit seeking damages from the Republic of Georgia and Georgui Makhardaze, a Georgian diplomat who had been involved in a fatal traffic accident in Washington, D.C., resulting in the death of Ms. Waltrick. The District Court of the District of Columbia dismissed the complaint against the diplomat, finding that Georgia had not waived his civil immunity. *Knab v. Republic of Georgia*, 1998 U.S. Dist. LEXIS 8820 (D.D.C. May 29, 1998).

Responding to a formal request from the U.S. State Department, the Republic of Georgia had waived the diplomat's immunity from criminal prosecution "so that he can be prosecuted in the United States for the accident that took place on January 3, 1997, in Washington, D.C." The defendant pled guilty and was sentenced to prison. Subsequently, plaintiff filed this case seeking compensation in a civil action for claims related to the accident. On January 9,

1998, plaintiff asked the State Department to request a waiver from the Republic of Georgia for defendant's civil immunity. As described in the court's opinion:

> The State Department replied that it was not its practice to seek waiver of immunity for civil cases. . . . The State Department also stated its opinion that, pursuant to Article 39(2) of the Vienna Convention on Diplomatic Relations, defendant Makharadze "has residual immunity from the civil jurisdiction of U.S. courts only 'with respect to acts performed . . . in the exercise of his functions as a member of the mission.'" The Department noted, however, that defendant Makharadze would be amenable to suit if the Court determined that "his actions were nondiplomatic in nature."

Excerpts below provide the court's analysis of the defendant's residual immunity to civil actions. Claims against the Republic of Georgia were resolved through settlement by the parties.

---

* * * *

Under Article 32(1) of the Vienna Convention, a sending state may waive the immunity of its diplomatic officers, if it wishes.[2] However, such a waiver must be "express," Vienna Convention Art. 32(2). . . .

There is no doubt that the Republic of Georgia expressly waived Makharadze's immunity from criminal jurisdiction when it waived "the diplomatic immunity for Mr. George Makharadze, so that he can be prosecuted in the United States, for the accident that took place on January 3, 1997, in Washington, D.C."

---

[2] It appears, however, that a diplomatic officer may not, of his own accord, waive his immunity. See e.g., Logan v. Dupuis, 990 F.Supp. 26, 31 (D.D.C. 1997). Therefore, defendant Makharadze has not waived his immunity by appearing in this action, as plaintiff argues, because he lacks the authority to execute such a waiver. Furthermore, even if defendant could waive his immunity, the Court finds that defendant's appearance would not serve as a sufficient waiver.

However, the waiver does not explicitly discuss immunity from civil jurisdiction. Thus, the crucial question is whether the Republic of Georgia has waived defendant's civil immunity as well as his criminal immunity. The Court has been unable to find any published precedent that is directly germane to this issue; surprisingly, it appears to be a question of first impression.

Plaintiff primarily argues that the Vienna Convention does not contemplate a "limited waiver" of immunity; that is, plaintiff asserts that a waiver of any diplomatic immunity waives all diplomatic immunity. . . .

The Court agrees with plaintiff that a "limited waiver" does not seem possible under the Vienna Convention. For example, the Republic of Georgia could not waive defendant's immunity from criminal jurisdiction for purposes of one criminal prosecution and then seek to assert it in another criminal prosecution. However, Article 31 of the Convention does not confer immunity in a single blanket statement, but confers criminal immunity in one sentence and civil and administrative immunity separately, in another sentence. This suggests that the Convention considers immunity from criminal jurisdiction and immunity from civil and administrative jurisdiction to be distinct privileges. Therefore, it is possible that a state may waive one immunity and not waive the other, just as a person may waive his attorney-client privilege as to one document but not as to another. Such a waiver of criminal, but not civil, immunity is not a "limited waiver," but is instead a complete waiver of one immunity, which does not necessarily affect the other, distinct immunity. For this reason, the Republic of Georgia's waiver of defendant Makharadze's criminal immunity does not necessarily affect his civil immunity.

Plaintiff also argues that the Republic of Georgia has, in fact, waived defendant's civil immunity as well as his criminal immunity. While the evidence could perhaps support an inference of such a waiver, however, it certainly does not establish an explicit waiver. . . .

In addition, the State Department has suggested its opinion that defendant Makharadze's civil immunity remains intact. . . .

Although the Court is not obliged to defer to the State Department's opinion, it finds the letter useful evidence. Because plaintiff has not presented any evidence, beyond speculation and hearsay, to suggest that the Republic of Georgia's waiver extends beyond the context of criminal liability, the Court cannot find that it has waived defendant's immunity from civil jurisdiction.

B. Defendant's Current Diplomatic Status

It is undisputed that defendant Makharadze no longer performs diplomatic functions in this country. Plaintiff argues that, even if defendant's immunity from civil jurisdiction is not waived, it does not protect him from suit because he no longer enjoys diplomatic status.

Again, the Court is faced with an issue rarely discussed by American courts. Article 39 of the Vienna Convention states that an official's privileges and immunities end when his diplomatic functions cease. Because defendant Makharadze's diplomatic functions ceased in October of 1997, he no longer enjoys the blanket, functional immunities conferred by the Vienna Convention. However, Article 39 provides that a residual immunity subsists with respect to "acts performed by such a person in the exercise of his functions as a member of the mission." Therefore, defendant's immunity remains intact for acts performed in the exercise of his duties as a diplomatic officer of the Republic of Georgia.

Plaintiff does not contend that the accident on January 3, 1997, occurred outside the scope of those duties; indeed, the Amended Complaint explicitly asserts that defendant Makharadze was acting within the scope of his duty [as part of plaintiff's claims against the Republic of Georgia]. (fn. omitted) Thus, there is no reason to suppose that this accident lies outside the protection of defendant's residual immunity. (fn. omitted) For this reason, defendant's current status does not affect the force of his immunity from civil jurisdiction.

* * * *

b. Exceptions to diplomatic immunity

(1) Commercial activity exception

In *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996), the Counselor of the Embassy of the Hashemite Kingdom of Jordan and his wife were sued for allegedly violating the Fair Labor Standards Act during plaintiff's employment as a domestic. The plaintiff argued that the diplomat's employment of her to perform domestic duties constituted a "commercial activity" for which no immunity is provided under Article 31(1)(c) of the VCDR. In the U.S. Statement of Interest, referred to below, the United States also pointed out that the VCDR's exception for commercial activity is narrower than the FSIA exception for jurisdiction over commercial activities in 28 U.S.C. § 1603(d).

The Fourth Circuit Court of Appeals upheld the district court's finding that the diplomats were immune. Excerpts from the opinion follow (footnotes omitted). The U.S. Statement of Interest is available at *www.state.gov/s/l/c8183.htm.*

The Vienna Convention provides diplomats with absolute immunity from criminal prosecution and protection from most civil and administrative actions brought in the "receiving State," i.e., the state where they are stationed. Article 31 lists three exceptions to a diplomat's civil immunity. Chief among them, and at issue here, is the elimination in Article 31(1)(c) of immunity from actions "relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." 23 U.S.T. at 3241. Also relevant to the present matter is Article 42's pronouncement that "[a] diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity." *Id.* at 3247.

* * * *

The United States Department of State narrowly interprets the Article 31(1)(c) exclusion based on the agreement's negotiating

history. In a statement of interest filed in the present matter, the State Department concluded that the term "commercial activity" as used in the exception "focuses on the pursuit of trade or business activity; it does not encompass contractual relationships for goods and services incidental to the daily life of the diplomat and family in the receiving State." Statement of Interest of the United States at 4. Substantial deference is due to the State Department's conclusion. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85, 72 L.Ed.2d 765, 102 S.Ct. 2374 (1982); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 579 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016, 89 L.Ed.2d 312, 106 S.Ct. 1198 (1986), *judgment vacated*, 10 F.3d 338 (6th Cir. 1994); *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

* * * *

It is evident . . . that the phrase "commercial activity," as it appears in the Article 31(1)(c) exception, was intended by the signatories to mean "commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." Day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them.

* * * *

(2) Exception for "real action relating to private immovable property"

In *Logan v. Dupuis*, 990 F.Supp. 26 (D.D.C. 1997), the court was required to address, among other things, the scope of the exception to diplomatic immunity for "a real action relating to private immovable property" contained in article 31(1)(a) of the VCDR. In this litigation, Logan, a landlord, sought compensation from his tenant, the Alternative Representative of Canada at the Permanent Mission of Canada to the Organization of American States, to whom he had rented an apartment in the District of Columbia. According to the complaint, Dupuis had notified Logan that

he planned to vacate the property pursuant to a "diplomatic clause" in the lease, which provided that if the lessee were transferred from Washington "by reason of his official duties" the lease would be terminable upon sixty days written notice. However, Logan alleged that Dupuis was not in fact transferred from the Washington, D.C. area nor did he meet other requirements for early termination of the lease. The district court dismissed the case, finding no applicable exception to defendant's diplomatic immunity. Excerpts from the district court's opinion follow.

* * * *

This would be a garden-variety breach of contract case, but for the diplomatic status of Dupuis, which potentially shields him from the personal jurisdiction of this Court.[2]

[2] Subject matter jurisdiction appears to lie through 28 U.S.C. § 1351, which vests in federal district courts original jurisdiction over "all civil actions and proceedings against . . . (2) members of a mission or members of their families (as such terms are defined in section 2 of the Diplomatic Relations Act.)." An Agreement between the United States and the Organization of American States, 26 U.S.T. 1026 (Mar. 20, 1975), authorized by 22 U.S.C. § 288g, provides that representatives of OAS member states and their staffs are entitled to "the same privileges and immunities in the United States, subject to corresponding conditions and obligations, as the United States accords to diplomatic envoys who are accredited to it." Whether federal subject matter jurisdiction is cast as a privilege or an obligation, it applies to suits involving members of a diplomatic mission to the United States, and thus appears to apply to Dupuis by virtue of the Agreement.

Contrary to plaintiff's assertion in his Motion to Reinstate Complaint, the Foreign Sovereign Immunities Act (FSIA) is inapplicable to the instant action, where the complaint contains no indication that Dupuis entered the lease on behalf of the government of Canada. The FSIA does not confer jurisdiction over foreign diplomats as such, but is the source of federal jurisdiction over suits involving foreign states or their instrumentalities. *See Joseph v. Office of the Consulate General of Nigeria* 830 F.2d 1018 (9th Cir. 1987), *cert. denied* 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (FSIA governs landlord-tenant dispute where premises leased on behalf of foreign consulate; immunity of consular officer is determined by Vienna Convention on Consular Relations).

II. The question of diplomatic immunity has raised both procedural and substantive complications in this case.[3] With respect to procedure, Dupuis was duly served with the complaint on May 14, 1997, but has not filed an answer or other pleading, and apparently has no intention of doing so. (fn. omitted) On June 4, 1997, a three-page document was filed with the Court by unknown persons, which contained a certification from the Assistant Chief of Protocol of the Department of State that (1) defendant Dupuis is a diplomatic agent entitled to the privileges and immunities set forth in the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227; TIAS 7502; 500 U.N.T.S. 95, and (2) the government of Canada does not intend to waive any immunity enjoyed by Dupuis. . . .

A Memorandum & Order of July 11, 1997 noted that Dupuis had asserted diplomatic immunity on June 4, 1997, and that plaintiff's motion provided no reason why such immunity did not obtain under the Vienna Convention; accordingly, the motion for entry of default judgment was denied, and the complaint was dismissed without prejudice. On July 25, 1997, however, plaintiff Logan filed a motion to reinstate the complaint, stating that he had been unaware of the defendant's assertion of immunity, and arguing on several grounds that the defendant's diplomatic status does not confer immunity in the context of this lawsuit.

Shortly thereafter, on August 7, 1997, the Court (and the plaintiff) received a letter from the Office of the Legal Adviser at the Department of State, to which was attached a second certification of immunity from the Assistant Chief of Protocol. The certification, like that filed on June 4, 1997, stated that Dupuis is a diplomatic agent who is accorded "privileges and immunities as provided in the Vienna Convention on Diplomatic Relations." The certification included, *inter alia*, an excerpt of Article 31 of the Convention. . . .

---

[3] See August 7, 1997 Letter from Mary Catherine Malin, Office of the Legal Adviser, Department of State, docket no. 10–1 ("We understand that neither the government of Canada nor Mr. Dupuis intend to take action with respect to [the] above referenced case. . . .")

However, neither the letter nor the attached certification addressed plaintiff's contention that the Convention, by its own terms, does not shield defendant from the instant suit.[4]

Relying on the State Department certification that the defendant's immunity is governed by the Convention, and noting the exception in Article 31 for "a real action relating to private immovable property"—a provision previously called to the Court's attention by plaintiff in his motion to reinstate the complaint—a Memorandum & Order of August 22, 1997 stated that "unless defendant Lionel Alain Dupuis files an opposition to the Motion to Reinstate Complaint on or before September 1, 1997, the Motion will be treated as conceded and default will be reinstated." There have been no subsequent filings by Dupuis or by the Department of State.

III. The failure of Dupuis to answer the complaint or to respond directly to plaintiff's motion may be based on sound diplomatic policy,[5] but it has unfortunately hampered the resolution of the immunity issue in this court, where "the self-interests of the adversaries are relied upon to provide the foundation for sound adjudication." *See 13A* Wright, Miller & Cooper, *Federal Practice & Procedure*, 2d. Civil § 3530 (1984). Here, while the parties appear to agree that the Vienna Convention on Diplomatic Relations defines the scope of immunity to which Dupuis is entitled,

---

[4] For this reason, the State Department letter is taken to be a certification of diplomatic status, rather than a suggestion of immunity. *See Restatement (Third) of Foreign Relations* § 464 cmt. f (1987) (noting that in addition to certifying a person's diplomatic status, the State Department "will sometimes 'suggest' whether immunity should be granted *in the circumstances*" of a particular case, and that "such a suggestion is [ ] binding on the courts") (emphasis supplied).

[5] The August 7, 1997 letter from the State Department states: "We understand that neither the government of Canada nor Mr. Dupuis intend to take action with respect to [the] above referenced case, as the government of Canada maintains the position that the receiving state is obligated to take the necessary measures to protect the immunity of diplomatic envoys accredited to it. In reciprocal situations abroad, the United States requests the foreign ministry certify directly to the local court the immunity of U.S. diplomats."

only the plaintiff has advanced an interpretation of the Convention as it applies to the present case. Specifically, plaintiff argues that his suit—which pertains to lease of residential property by defendant in the District of Columbia—falls within the exception to diplomatic immunity contained in Article 31(1)(a) of the Convention for "a real action relating to private immovable property situated in the territory of the receiving State." Unchallenged by the defendant, plaintiff's reading of the Convention appeared, on the basis of plain language, to be correct, and was thus adopted in the Memorandum & Order of August 22, 1997.

However, further research suggests that plaintiff's interpretation of Article 31(1)(a) is inaccurate. While few courts (and, apparently, none in the United States) have had occasion to address the issue, treatises on the law of diplomatic immunity suggest that the term "real action" as used in Article 31(1)(a) does not encompass all civil suits pertaining to real property. One of the leading commentaries on the Convention states:

> The essence of the term "real action" is that the relief sought is either a declaration of title to the property, an order for sale by authority of the court, or an order for possession. The term is used in the sense of an action in rem, and the action in rem is given the sense which it has in many civil law jurisdictions, which, unlike English law, allow proceedings in rem in respect of immovable property.

Eileen Denza, *Diplomatic Law* 159–60 (1976). *See also* Charles J. Lewis, *State and Diplomatic Immunity* 139 (3d ed. 1990) ("[I]t appears from the commentators that 'action reélle' in the original text of the Convention is an action where the ownership or possession of land is in question, and therefore it would be straining the meaning to say that a claim to effect repairs, as opposed to one to take over possession of the premises, was a real action.") While plaintiff's suit concerns real property, it is essentially a breach-of-contract claim, rather than a dispute over title or possession that would normally give rise to *in rem* jurisdiction. *Cf. Agostini v. De Antueno*, 199 Misc. 191, 99 N.Y.S.2d 245 (1950) (holding that court has *in rem* jurisdiction over action

to recover possession of real property held by a diplomat) (pre-Convention opinion).

A treaty is to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980), reprinted in 8 I.L.M. 679 (1969).[6] In this case, the term "real action" has an ordinary legal meaning that does not include.

III. Plaintiff also asserts that his suit falls within another exception to the general immunity conferred by Article 31 of the Convention, that contained in paragraph 1(c): "an action relating to any

---

[6] Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention (and specifically, Article 31) as codifying the customary international law of treaties. *See* Restatement (Third) of The Foreign Relations Law of The United States, Part III, introductory note (1986).

Breach-of-contract actions. *See* Black's Law Dictionary (6th ed. 1991) (A real action, "[a]t common law, [was] one brought for the specific recovery of lands, tenements, or hereditaments. . . . Among [civil law countries], real actions, otherwise called 'vindications,' were those in which a man demanded something that was his own."). There is no evidence that parties to the Convention intended to attribute any special meaning to the term apart from its historical definition. Denza at 161. By contrast, plaintiff's position rests on reading "real action" to mean "action relating to real property," an interpretation so broad as to encompass not only suits involving rental leases, but any dispute—a claim concerning construction and repair work, an insurance coverage dispute, a personal injury action—somehow related to a piece of real property. Such an expansive reading of "real action" is inconsistent with Article 31 as a whole, which provides diplomats with general immunity from civil jurisdiction, subject to only three exceptions. The purpose of the Convention as stated in the preamble—"to ensure the efficient performance of the functions of diplomatic missions"—confirms that the exceptions to diplomatic immunity should be read narrowly.

In sum, plaintiff's suit for breach of a real estate rental contract does not constitute a "real action relating to private immovable property;" thus, Article 31(1)(a) of the Convention provides no basis for an exercise of this Court's jurisdiction.

professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."

In support of this proposition, plaintiff cites *Joseph v. Office of Consulate General*, 830 F.2d 1018 (9th Cir. 1987), contending that the court . . . found that the rental of a private residence for a consular officer fell within the exception set forth in Article 31, at paragraph 1.(c). That court found that the consular [sic] had entered the market place as a commercial actor, and that neither the rental agreement nor the alleged breach of that agreement constituted sovereign activities for which he would otherwise be immune from civil lawsuits.

Pl's Mot. to Reinstate. at 4

Plaintiff misreads *Joseph*, which makes no mention of Article 31(1)(c), but is based instead on the "commercial activity" exception to the Foreign Sovereign Immunities Act, which governs the jurisdictional immunity of foreign *states*, rather than individual foreign diplomats.[7] *See* 28 U.S.C. § 1603 *et seq*. While the reasoning of the *Joseph* court could conceivably be applied to interpret Article 31(1)(c) by analogy, another circuit court has recently examined the parameters of Article 31(1)(c) directly. In *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996), the Fourth Circuit addressed whether the employment of a domestic servant by a foreign diplomat constituted "commercial activity" for purposes of Article 31(1)(c), such that the employment relationship could be the subject of a civil suit in a U.S. court. After considering the term in the context of the Convention as a whole, with regard for the interpretation of "commercial activity" advanced by the State Department both prior to and after ratification of the Convention by the United States, the *Tabion* court held that contracts for goods and services "incidental to [a diplomat's] daily life" do not fall within the scope of the "commercial activity" exception of Article 31(1)(c). 73 F.3d at 538–39. Moreover, the *Tabion* court explicitly declined

[7] The Foreign Sovereign Immunities Act has no bearing on the instant case, where plaintiff has not alleged that the defendant was renting property on behalf of the government of Canada. *See* note 2 *supra*. . . .

to use the "commercial activity" exception of the Foreign Sovereign Immunities Act as an interpretative guide to Article 31(1)(c) of the Convention, on grounds that it is a domestic statute rather than a treaty, that it was not a textual source for the Convention, and that Congress did not intend the Act to affect diplomatic immunity under Convention. *Id.* at 539 n.7.

The *Tabion* analysis of Article 31(1)(c) is both germane and persuasive. (fn. omitted) The defendant's efforts to secure housing for himself, albeit through a commercial transaction, do not constitute "professional or commercial activity exercised by [a] diplomatic agent" as contemplated by Article 31(1)(c). Thus, they are not excepted from the general immunity from civil jurisdiction accorded to diplomatic agents under the Convention.

IV. Notwithstanding any immunity to which the defendant may be entitled, plaintiff argues that the defendant has waived such immunity by entering a lease which "contemplated adjudication of any dispute in the local and federal courts." Pl's Mot. to Reinstate at 2. Article 32 of the Convention governs waiver of diplomatic immunity, and provides in pertinent part:

1. The immunity from jurisdiction of diplomatic agents . . . may be waived *by the sending State*.

2. Waiver must always be *express*.

(emphasis supplied). Dupuis thus has no authority to waive his immunity from civil jurisdiction; that is the prerogative of the government of Canada, which, to date, has declined to do so.[9] Moreover, there are no provisions in the lease which expressly address—let alone purport to waive—the diplomatic immunity otherwise enjoyed by Dupuis. Plaintiff's "waiver of immunity" theory thus cannot be reconciled with the Convention. (fn. omitted).

---

[9] *See* August 6, 1997 State Department certification at 2 ("The Permanent Mission of Canada to the Organization of American States has further informed the Department of State that the Government of Canada does not waive Mr. Lionel Alain Dupuis's diplomatic immunity.").

The international conference responsible for drafting the Convention also adopted a resolution which "recommends that the sending state should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving state when this can be done without impeding the performance of the functions of the mission, and that, when immunity is not waived, the sending state should use its best endeavors to bring about a just settlement of the claims." *Restatement (Third) of Foreign Relations* § 464 Rep. Note 14 (1986). However, waiver and settlement are remedies to be pursued through diplomatic, rather than judicial channels. *See* Grant V. McClanahan, *Diplomatic Immunity* 86 (1989) ("Where a citizen or a company has suffered damages and cannot get redress through litigation because of diplomatic immunity, the protocol office [of the State Department] makes itself available to both sides to seek a resolution of the problem.").

In light of the foregoing, an accompanying Order shall vacate the Memorandum & Order of August 22, 1997, and deny plaintiff's Motion to Reinstate Complaint.

(3) Suits against insurers

Section 7 of the Diplomatic Relations Act, codified at 22 U.S.C. § 1364, permits "direct actions" for personal injury, death or property damage against the insurers of individuals entitled to immunities under the VCDR or the 1946 Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16 (entered into force for the United States on April 29, 1970). Such actions are within the original and exclusive jurisdiction of the federal district courts.

In *Urlic v. American International Group*, No. 96 Civ. 1177, 1997 U.S. Dist. LEXIS 5947 (S.D.N.Y. May 1, 1997), plaintiff, a U.S. citizen, sought to recover damages for personal injury and loss of consortium arising from an accident in Croatia involving a vehicle owned by the United Nations Protection Force ("UNPROFOR") and operated at the time in question by an individual affiliated with UNPROFOR. Defendants

denied that they were in fact the insurers of UNPROFOR and asserted that, in any event, § 1364 was inapplicable to accidents occurring outside the United States. The court agreed and granted their motion to dismiss. Relevant excerpts from the court's opinion are reproduced below.

---

* * * *

Section 1364 was enacted in 1978 as part of the Diplomatic Relations Act (the "Act"), Pub. L. No. 95–393, 92 Stat. 808 (1978). The Act, which constituted a substantial revision of [U.S. domestic] law of diplomatic immunity, contained two provisions which are of relevance to this lawsuit. Section 6 of the Act, now codified at 22 U.S.C. § 254e, requires members of diplomatic missions to acquire liability insurance for risks "arising from the operation in the United States of any motor vehicle, vessel, or aircraft." Section 7 of the Act, codified at 28 U.S.C. § 1364, which forms the basis for this lawsuit, establishes a right of action on behalf of a person injured by a member of a diplomatic mission to proceed directly against the wrongdoer's insurer. These two provisions were meant to correct the inequity which would arise when a person was injured by a member of a diplomatic mission and subsequently left without a remedy because the wrongdoer was entitled to diplomatic immunity. *Windsor v. State Farm Ins. Co.*, 509 F.Supp. 342, 344–45 (D.D.C. 1981). This inequity was remedied by (1) requiring diplomats to obtain insurance and (2) allowing injured persons to sue the diplomats' insurers directly. *Id.* at 345. The legislative history of the Act sets forth the intent of Congress:

> During the consideration of this legislation, it became apparent that the most serious problems of diplomatic immunity arose in connection with traffic accidents caused by foreign diplomats. Strong support was shown for mandatory liability insurance as a method of providing redress for victims of accidents caused by diplomatic personnel. Furthermore, the hearings pointed out that a procedure merely requiring diplomatic personnel to carry liability insurance . . . would not, by itself, insure an

> opportunity to obtain compensation since certain diplomatic personnel are personally immune from suit. To provide an effective remedy, Senator Mathias and the administration witnesses urged the committee to enact, as part of the comprehensive revision of United States law dealing with diplomatic immunity, a "direct action" statue which would allow an injured party to sue the insurance company directly, without infringing upon the inviolability of a diplomat in those instances where personal immunity from suit may be validly invoked on behalf of the diplomat under the Vienna Convention or under other applicable international agreements. Such a mechanism is provided for in section 7. . . .

S.Rep. No. 95–1108, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1941.

* * * *

Taking into consideration all evidence of legislative intent, including the language of the Act itself as well as its legislative history, we conclude that Plaintiffs have failed to overcome the presumption that Congress intended section 1364 to apply solely to injuries occurring within the United States. The express language of the Act contains no reference to the applicability of section 1364 where an American citizen is injured in a foreign country by a person who has diplomatic immunity. The only express reference to territoriality is contained in section 6 of the Act, which imposes an insurance requirement only for those risks "arising from the operation *in the United States* of any motor vehicle, vessel, or aircraft." (emphasis added) Plaintiffs point out that the words "in the United States" do not appear in section 7 of the Act, which creates the direct right of action that Plaintiffs seek to invoke. However, we do not find this argument persuasive. The legislative history of the Act shows that the insurance requirement of section 6 and the direct action provision of section 7 were meant to go hand-in-hand to provide relief to persons injured by diplomats. *See* S.Rep. No. 95–1108, at 3 (stating that requiring diplomats to carry insurance would not be sufficient to accord complete relief

to injured persons; a right to sue the diplomats' insurers would also be necessary); S.Rep. No. 95–958, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1935 (stating that witnesses at committee hearings "urged the committee to adopt a 'direct action' provision to accompany any legislation that might impose a mandatory liability insurance requirement on the diplomatic community. Therefore, section 7 [of the Act] creates a substantive right of an injured or damaged party to proceed directly against the insurance company where the insured diplomat enjoys immunity from suit.").

The legislative history of the Act reveals that Congress was largely concerned with the problem of automobile accidents caused by negligent diplomats on the streets of Washington, D.C., New York City, and other parts of the United States. . . .

Plaintiffs resort to two possible grounds in an attempt to overcome the presumption against extraterritorial effect, but these grounds lack merit. First, Plaintiffs contend that the presumption should not apply to a statute, such as section 1364, which does not regulate conduct, but merely serves to create a right to sue. However, this argument does not comport with existing precedent. The Second Circuit has indicated that the presumption should apply to all types of statutes. . . .

Second, Plaintiffs contend that the presumption against extraterritorial effect is overcome by the broad language of section 1364, which lacks an express statement disclaiming extraterritorial effect, and by the broad remedial purpose of the statute, which seeks to provide relief to Americans injured by tortfeasors who have diplomatic immunity. However, the presumption cannot be overcome merely by pointing to broad terminology in the statute. . . .

Finally, we note that other courts have accorded the presumption so much weight as to deny extraterritorial effect even in circumstances where there existed some evidence of a legislative intent to reach conduct occurring in foreign countries. *See, e.g.*, *Labor Union of Pico Korea*, 968 F.2d at 194 (holding that section 301 of Labor Management Relations Act did not apply extraterritorially, despite fact that section 301 contained language making it applicable "without regard to the citizenship of the parties."); *Hammell v. Banque Paribas*, 780 F.Supp. 196, 199–200 (S.D.N.Y. 1991) (holding that New York Human Rights Law

did not apply extraterritorially, despite fact that statute was expressly made applicable to acts "committed outside this state [New York]."). In the case at bar, there is no evidence of legislative intent to give extraterritorial effect to section 1364, which would of course entail trials in this country arising out of accidents occurring abroad. Such trials often present special problems with respect to the availability of witnesses and proof. Although Congress has an interest in the protection of American citizens wherever they are injured, we conclude that the presumption against extraterritoriality has not been overcome.

* * * *

2. Consular Privileges and Immunities

The United States is a party to the Vienna Convention on Consular Relations, done at Vienna Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force for the United States December 24, 1969) ("VCCR").

In *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340 (9th Cir. 1993), a political protester sued senior officials of the Mexican Consulate General in Los Angeles. As described by the court of appeals,

> Gerritsen . . . distributed Spanish and English language pamphlets, newspapers, and handbills near the Consulate; he gave speeches (sometimes using a loudspeaker or megaphone) there; and, sometimes attempted to confront the Consulate officials directly about various policies of the Mexican government.
>
> Gerritsen's theory is that Mexican Consulate officials, the City of Los Angeles and its employees, park security guards, the LAPD, and the FBI conspired to deprive him of his First Amendment rights to distribute political literature, engage in political speech, and participate in other expressive activities. He alleges that the consular defendants inhibited his activities by asking him to desist in his protests and disruptions of consular business,

> threatening to take legal action against him, assaulting him, falsely imprisoning him, and kidnapping him.

Id. at 342.

On appeal from the district court's summary judgment ruling in favor of the Consulate General and several consular officers, the Ninth Circuit Court of Appeals affirmed. Excerpts below address the immunity of the two consular officials.

---

* * * *

Immunity of consular officials is governed by Article 43 of the Vienna Convention: "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect to acts performed in the exercise of the consular functions." 21 U.S.T. at 104. The term "consular functions" is defined in the several clauses of Article 5. Only one of these clauses is relevant here, 5(m), the catch-all provision which states:

> . . . any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

21 U.S.T. at 82–85.

. . . The functions of protecting the dignity and premises of the Consulate are reasonable functions of a foreign mission in this country, and they are not illegal in and of themselves. . . . [W]e agree [with the district court] that this was a "consular function" within the meaning of the Vienna Convention.

This does not end our inquiry, however, as the Vienna Convention also requires that the acts for which the consular officials seek immunity must be "performed in the exercise of the consular functions" in question . . .

* * * *

We . . . conclude, based upon the record before us . . . , that the defendants' actions constitute reasonable efforts to effectuate the consular function of maintaining the dignity and safety of the Consulate. Consul Escobar's reliance on government officials in the host country (including the local police and the U.S. Attorney) was reasonable in the context of Gerritsen's repeated disruptions and refusals to leave the Consulate. Likewise, Escobar's and Silva's verbal warnings and threats, without accompanying physical contact, were attempts to persuade Gerritsen to leave the area or to desist from disrupting consular business.

* * * *

In *Ford v. Clement*, 834 F.Supp. 72 (S.D.N.Y. 1993), *aff'd without opinion*, 29 F.3d 621 (2d Cir.), *cert. denied*, 513 U.S. 974 (1994) plaintiff Sonia Ford, the Vice Consul for Maritime Affairs for the Panamian Consulate in New York, brought an action against Consul General Luis Felipe Clement and the Republic of Panama alleging that the Consul General had, among other things, improperly caused her to be discharged. The court noted that "[a]ccording to a September 21, 1990, letter from Richard Gookin, Associate Chief of Protocol for the United States Department of State, the United States had, effective September 5, 1990, recognized Mr. Clement as a consular officer in New York and extended to him the immunities set out in the [VCCR]." 834 F.Supp. At 74. Mr. Gookin had stated further that "whether a particular action or activity would be considered to be an exercise of a person's consular functions is a matter for judicial determination." Citing *Gerritsen*, *supra*, the court addressed a "two-part inquiry" to determine whether "the actions of the consular officials implicated some 'consular function' " and whether the acts for which the consular officials sought immunity were " 'performed in the exercise of the consular functions' " in question. *Id.* at 75. The court dismissed the claims, concluding that

> . . . Mr. Clement's actions in dealing with Mrs. Ford and in communicating with Panamanian officials regarding

> Mrs. Ford were "performed in the exercise of" his consular functions of managing and supervising the consular staff so as to effectuate other consular functions. Moreover, although the finding of immunity may leave Mrs. Ford without a remedy in American courts, "some unfairness to the wronged party is inherent in the notion of immunity." Koeppel, 704 F.Supp. at 524. It would be unsound international policy to allow the courts of one nation to sit in judgment about the delicate policy decisions of another nation regarding the supervision and management of its consular personnel, especially those at the level of vice consul. The claims against Mr. Clement must therefore be dismissed.[3]

Id. at 77.

See also Mateo v. Perez, 1999 U.S. Dist. LEXIS 4871 (S.D.N.Y. 1999), involving a claim of defamation against the Consul General of the Dominican Republic in New York City arising *inter alia* from statements made at a press conference. The defendant moved to dismiss for lack of subject matter jurisdiction based on consular immunity under Article 43 of the VCCR and jurisdictional immunity under the Foreign Sovereign Immunities Act ("FSIA"). The district court found the FSIA inapplicable. Citing *Ford* and *Gerritsen*, *supra*, however, the court noted that Article 43 affords immunity protections when the alleged actions were performed in the exercise of consular functions, and scheduled an evidentiary hearing to resolve that issue.

Using the same analysis, the court in *Berdakin v. Consulado de la Republica de El Salvador,* 912 F.Supp. 458

---

[3] . . . [T]he dismissal of an action under the Vienna Convention "does not leave foreign consuls free to abuse legal rights with impunity." *Koeppel*, 704 F.Supp. at 523. The State Department possesses means to deal with the unacceptable behavior of foreign diplomats. *See Heaney v. Government of Spain*, 445 F.2d 501, 505 (2d Cir. 1971); Vienna Convention, Article 23 (receiving state may declare a consular officer "persona non grata").

(C.D. Cal. 1995), involving an action against the Consulate and Consul General of El Salvador by a landlord alleging breach of a lease for consulate premises, found the Consul General immune under the VCCR. In that case the Consul had entered into the lease for the space occupied by the Consulate. The Court concluded "that obtaining space in which to operate the Consulate is a legitimate consular function, and that entering into a lease to procure such space is a reasonable means of fulfilling that function. The possibility that the Consul's actions in vacating the premises constitute a breach of the lease does not affect the Court's conclusion that the Consul's acts which plaintiff complains of were performed in the exercise of consular functions."

D. INTERNATIONAL ORGANIZATIONS

1. International Organizations Immunities Act

The International Organizations Immunities Act of 1945 ("IOIA"), Title I of the Act of Dec. 29, 1945, ch. 652, 59 Stat. 669, codified as amended at 22 U.S.C. §§ 288–288k, specifies the privileges and immunities to which certain public international organizations are entitled under U.S. law. The term "international organization" is defined to mean "a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter." The IOIA provides that designated international organizations enjoy immunity from suit and judicial process to the extent provided to foreign governments, immunity of assets from execution, and inviolability of archives. A list of designated organizations is available at 22 U.S.C. § 288 note.

a. Designations

In addition to international organizations already designated under the IOIA, during the period 1991–1999, the following organizations were designated by executive order as indicated:

Border Environmental Cooperation Commission, Exec. Order No. 12904, Mar. 16, 1994, 59 Fed. Reg. 13,179.

Commission for Environmental Cooperation, Exec. Order No. 12904, Mar. 16, 1994, 59 Fed. Reg. 13,179.

Commission for Labor Cooperation, Exec. Order No. 12904, Mar. 16, 1994, 59 Fed. Reg. 13,179.

European Space Agency [formerly European Space Research Organization (ESRO)], Exec. Order No. 11318, Dec. 5, 1966, 31 Fed. Reg. 15,307; Exec. Order No. 11351, May 22, 1967, 32 Fed. Reg. 7511; Exec. Order No. 11760, Jan. 17, 1974, 39 Fed. Reg. 2343; Exec. Order No. 12766, June 158, 1991, 56 Fed. Reg. 28,463.

Hong Kong Economic and Trade Offices, Exec. Order No. 13052, June 30, 1997, 62 Fed. Reg. 35,659.

International Criminal Police Organization (INTERPOL) (limited privileges), Exec. Order No. 12425, June 16, 1983, 48 Fed. Reg. 28,069; Exec. Order No. 12971, Sept. 15, 1995, 60 Fed. Reg. 48,617.

International Development Law Institute, Exec. Order No. 12842, Mar. 29, 1993, 58 Fed. Reg. 17,081.

International Union for Conservation of Nature and Natural Resources, Exec. Order No. 12986, Jan. 18, 1996, 61 Fed. Reg. 1693.

Interparliamentary Union, Exec. Order No. 13097, Aug. 7, 1998, 63 Fed. Reg. 43,065.

Israel-United States Binational Industrial Research and Development Foundation, Exec. Order No. 12956, Mar. 13, 1995, 60 Fed. Reg. 14,199.

Korean Peninsula Energy Development Organization, Exec. Order No. 12997, Apr. 1, 1996, 61 Fed. Reg. 14,949.

North American Development Bank Exec. Order No. 12904, Mar. 16, 1994, 59 Fed. Reg. 13,179.

North Pacific Anadromous Fish Commission, Exec. Order No. 12895, Jan. 26, 1994, 59 Fed. Reg. 4239.

North Pacific Marine Science Organization, Exec. Order No. 12894, Jan. 26, 1994, 59 Fed. Reg. 4237.

Organization for the Prohibition of Chemical Weapons, Exec. Order No. 13049, June 11, 1997, 62 Fed. Reg. 32,471.

World Trade Organization, Exec. Order No. 13042, Apr. 9, 1997, 50 Fed. Reg. 28,301.

b. Enforcement of child and spousal support orders

In July 1998 the Department of State responded to complaints concerning the difficulty of obtaining documents from international organizations to determine the salary and benefits of international organization employees involved in family law proceedings and of obtaining enforcement of U.S. child and spousal support decrees entered against employees of international organizations. Secretary of State Madeleine K. Albright sent a diplomatic note to the chiefs of all international organizations designated under the IOIA requesting that voluntary steps be taken to resolve the issue. The Secretary also sent a personal cover letter to chief officials of the United Nations, the World Bank, the International Monetary Fund and the Inter-American Development Bank making a special appeal for their leadership on this issue. In response, all major international organizations headquartered in the United States that had not already done so formulated and published a written policy on employee failure to pay court-ordered child and spousal support. Following promulgation of the new policies, compliance with child and spousal support court orders improved markedly. The full text of the July 1998 diplomatic note, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

* * * *

It is recognized and generally accepted that international organizations need privileges and immunities in order to carry out their

functions. The United States Government believes, however, that it is highly inappropriate for international organizations to allow their privileges and immunities to be used by employees of the organizations to avoid meeting their court-ordered obligations to divorced spouses and dependent children. Recent cases drawn to the attention of the Department of State indicate that the practices and policies of some international organizations are not effective in ensuring prompt compliance with court orders in family separations and divorce proceedings involving employees of the organizations.

The Secretary of State requests that steps be taken promptly to ensure that all international organizations designated under the IOIA voluntarily provide court-ordered or subpoenaed information required to determine the salary and benefits of an employee involved in divorce and family law proceedings, and that all international organizations voluntarily take steps to enforce court-ordered payments to divorced spouses and dependent children. Moreover, the Secretary of State requests that the international organizations' policies and practices in this regard are transparent and readily available to employees and spouses who may be engaged in family separation and divorce proceedings.

The Secretary of State commends those international organizations which have already taken steps to establish such practices and policies, and encourages others to do so as soon as possible. Otherwise, the perception that immunities are being used to avoid just financial obligations is likely to lead to the imposition of non-voluntary remedies which may result in either a diminution of privileges and immunities under the IOIA or protracted litigation, neither of which is in the best interest of the international organizations community.

The United States Government is considering various means to address this problem. To enable the Department of State to represent accurately to other entities of the United States Government the international organizations' policies and practices with respect to court-ordered child and spouse support, as well as measures taken to inform employees and spouses of these practices and policies, the chiefs of the international organization are also requested to provide the Department of State with the most current information available about their organization on this subject. . . .

c. Garnishment proceeding

In *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998), the plaintiff sought a declaratory judgment in the district court that her former husband's employer, the Inter-American Development Bank ("Bank") was not immune from garnishment proceedings under the IOIA. At the request of the former husband, the Bank had previously paid appellant monthly alimony and child support from salary due him. This action sought to enforce two state court judgments by garnishing his wages.

The court of appeals affirmed the dismissal of the declaratory judgment action by the district court, stating that the IOIA entitled the Bank to "'enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.' 22 U.S.C. § 288a(b)." In addressing plaintiff's argument that the Bank had waived its immunity, the court noted that the Agreement Establishing The Inter-American Development Bank, Apr. 8, 1959, Art. XI, Section 3, 10 U.S.T. 3068, 3095, had been construed as waiving immunity for some suits, but found that that waiver was not applicable here.

The plaintiff also contended "that the IOIA, by virtue of its reference to 'the same immunity from suit and every form of judicial process as is enjoyed by foreign governments,' . . . incorporates the commercial activities exception to immunity, a central doctrine of the modern law governing the immunity of foreign governments from judicial process." She argued that payment of wages constituted a commercial activity so that her garnishment proceeding was not barred. The court rejected this argument, as excerpted below (footnotes omitted). Finally, the court found that, even if there were a commercial activity exception, it would not apply to the garnishment proceeding.

---

* * * *

The key phrase at issue in this case is the "same immunity . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b) (emphasis added). Obviously, the 1945 Congress was legislating in shorthand, referring to another body of law—the law governing the immunity of foreign governments—to define the scope of the new immunity for international organizations. But did the 1945 Congress mean to refer to the law governing the immunity of foreign governments as it existed in 1945, or to incorporate as well—as appellant claims—subsequent (i.e., post-1945) changes to that body of law? When Congress enacted the IOIA in 1945, foreign sovereigns enjoyed—contingent only upon the State Department's making an immunity request to the court—"virtually absolute immunity." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486. . . . In 1952, however, the landscape changed when the State Department announced its adoption of the restrictive theory of immunity, under which immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts. . . . In 1976, Congress addressed problems of political pressure and non-uniformity inherent in this dual branch scheme by codifying the principle of restrictive immunity and shifting responsibility for its application to the courts. Foreign Sovereign Immunities Act of 1976. . . .

* * * *

The text of the IOIA unfortunately provides no express guidance on whether Congress intended to incorporate in the IOIA subsequent changes to the law governing the immunity of foreign sovereigns. That does not mean, however, that the statutory text is completely unhelpful. As explained above, the IOIA sets forth an explicit mechanism for monitoring the immunities of designated international organizations: the President retains authority to modify, condition, limit, and even revoke the otherwise absolute immunity of a designated organization. See 22 U.S.C. § 288. It seems, therefore, that Congress was content to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances. This built-in mechanism for updating the IOIA undermines

appellant's claim that Congress intended a different updating mechanism: automatic alteration of the scope of immunity under the IOIA in accordance with developments in the law governing the immunity of foreign sovereigns.

The legislative history supports this reading. The Senate Report describes the provision delegating to the President the authority to modify an organization's immunities as "permitting the adjustment or limitation of the privileges in the event that any international organization should engage, for example, in activities of a commercial nature." S. REP. No. 861, 79th Cong., 1st Sess., at 2 (1945). . . .

In light of this text and legislative history, we think that despite the lack of a clear instruction as to whether Congress meant to incorporate in the IOIA subsequent changes to the law of immunity of foreign sovereigns, Congress' intent was to adopt that body of law only as it existed in 1945—when immunity of foreign sovereigns was absolute. (As we noted above, absolute immunity under the IOIA is merely a baseline that is subject to modification by executive order.) . . .

2. Inviolability of Missions to the United Nations

In *767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295 (2d Cir. 1993), *cert. denied*, 510 U.S. 819 (1993), the landlord of Zaire's Mission to the United Nations sought to evict it from the rental premises for failure to pay rent due. The U.S. District Court for the Southern District of New York granted the landlord summary judgment and Zaire appealed. The Court of Appeals for the Second Circuit reversed, holding that the inviolability of Zaire's Mission to the United Nations under international and U.S. law precluded its forcible eviction. The United States had filed an *amicus curiae* brief and appeared in support of the Mission's inviolability. Excerpts from the Second Circuit opinion follow.

---

* * * *

This appeal emerges out of a landlord-tenant dispute. When the Zaire mission to the United Nations occupying leased space on the east side of midtown Manhattan repeatedly fell into arrears on its rent, it was sued by its landlord. The tenant's defense against being evicted was diplomatic immunity. A district court refused to credit this defense and instead granted summary judgment to the landlord for back rent and also awarded it possession of the premises, ordering United States Marshals to remove the Mission physically if it failed to vacate in a timely manner.

Enforcement of an owner's common law right to obtain possession of its premises upon the tenant's non-payment of rent may not override an established rule of international law. Nor under the guise of local concepts of fairness may a court upset international treaty provisions to which the United States is a party. The reason for this 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. That possibility weighs so heavily on the scales of justice that it militates against enforcement of the landlord's right to obtain possession of its property for rental arrears.

* * * *

The inviolability of a United Nations mission under international and U.S. law precludes the forcible eviction of the Mission. Applicable treaties, binding upon federal courts to the same extent as domestic statutes, *see Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 260–61, 104 S.Ct. 1776, 1786–87, 80 L.Ed.2d 273 (1984); *United States v. Palestine Liberation Org.*, 695 F.Supp. 1456, 1464 (S.D.N.Y. 1988), establish that Zaire's Permanent Mission is inviolable. The district court erred in misinterpreting the applicable treaties and in carving out a judicial exception to the broad principle of mission inviolability incorporated in those agreements.

Although the United States' support for appellant is based solely on a number of relevant treaties, the district court rested its decision in part on an interpretation of the Foreign Sovereign

Immunities Act, 28 U.S.C. §§ 1602–1611 (1988). That Act deserves brief discussion since the landlord continues to raise its provisions. While Sage Realty correctly asserts that Congress aimed to permit courts to make sovereign immunity determinations, *see Id.* § 1602, plaintiffs give short shrift to the Act's explicit provision that it operates "[s]ubject to existing international agreements to which the United States is a party." *Id.* § 1609. Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by the Act. *See Mashayekhi v. Iran*, 515 F.Supp. 41, 42 (D.D.C. 1981) ("Under the FSIA . . . , what were then 'existing international agreements' remain[] valid and superior to the FSIA wherever terms concerning immunity contained in the previous agreement conflict with the FSIA."); *see also* 14 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3662, at 393 (2d ed. 1985) (the FSIA was "not[ ] intended to alter either diplomatic or consular immunity"). Since international agreements entered into by the United States control the protections that must be accorded to and the obligations owed to the Mission by the United States, the Act does not govern our decision.

II. International Agreements

A. Generally

The international agreements presented us and relied upon by the United States all pre-date the Foreign Sovereign Immunities Act. They include the United Nations Charter, 59 Stat. 1031 (1945), the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26–Nov. 21 1947, 61 Stat. 754, 756 [hereafter the U.N. Headquarters Agreement], the Convention on the Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, 21 U.S.T. 1418 [hereafter the U.N. Convention on Privileges and Immunities], and the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227 [hereafter the Vienna Convention].

The first three of those treaties provide for various diplomatic protections and immunities without specific reference to mission

premises. The U.N. Charter, for example, provides "[r]epresentatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." U.N. Charter, *supra*, Art. 105(2). The U.N. Headquarters Agreement states that representatives of member states "shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities . . . as it accords to diplomatic envoys accredited to it." U.N. Headquarters Agreement, *supra*, Art. V(4). The Convention on Privileges and Immunities of the United Nations recites in somewhat more detail that representatives of member states shall "enjoy the following privileges and immunities: (a) immunity from personal arrest or detention . . . ; (b) inviolability for all papers and documents; . . . (g) such other privileges, immunities and facilities not inconsistent [with] the foregoing as diplomatic envoys enjoy. . . ." U.N. Convention on Privileges and Immunities, *supra*, Art. IV, § 11.

B. Vienna Convention

While these Treaty provisions standing alone shed little light on the immunities granted a permanent mission, the 1961 Vienna Convention speaks directly to the issue of mission premises. Article 22 of that Convention declares:

> 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

Article 22, section 2 of the Vienna Convention goes on to note a host state's "special duty" to protect "the premises of the mission" from "any intrusion or damage" and "prevent any disturbance of the peace of the mission or impairment of its dignity"; Article 22, section 3 further states that the premises of a mission shall be immune from "search, requisition, attachment or execution." Mission premises covered by the Convention include both owned and leased property. *See Report of the International*

Law Commission, Diplomatic Intercourse and Immunities, U.N. GAOR, 13th Sess., Supp. 9, U.N. Doc. A/3859 (1958), *reprinted in* [1958] II Y.B. Int'l L. Comm'n 89, 95, U.N. Doc. A/CN.4/SER.A/1958/Add.1.

The other treaties referred to above are consistent with the Vienna Convention's broad interpretation of inviolability, and support the notion that the United States and the United Nations recognize extensive immunity and independence for diplomats, consulates and missions abroad. But because the Vienna Convention remains the most applicable of the treaties cited, our discussion centers on it.

With that connection as a starting predicate, we observe that the district court's judgment—and Sage's arguments supporting it—fail to take into full account the plain language of Article 22. That language contains the advisedly categorical, strong word "inviolable" and makes no provision for exceptions other than those set forth in Article 31, which are irrelevant to our discussion because they relate to personal activities not carried out on behalf of the sending state. Instead of interpreting the deliberately spare text of the Vienna Convention, the district court read into it an exception of its own making. It first observed that "the notion of protection from eviction from privately owned leased premises was not specifically addressed by any of the treaties." This statement is correct so far as it goes. But we part company with the district court when—using that statement as a foundation—it improperly concluded that this case must therefore fall under an unspecified exception to the rule safeguarding a mission's inviolability.

As the United States correctly points out, the drafters of the Vienna Convention considered and rejected exceptions, opting instead for broad mission inviolability. For instance, one proposal in an early Convention draft offered an exception to the prohibition on any non-consensual entry by the receiving state. The exception posed was one to be strictly limited to emergencies presenting "grave and imminent risks" to life, property or national security. *See Diplomatic Intercourse and Immunities*, Projet de codification du droit relatif aux relations et immunites diplomatiques, U.N. Doc. A/CN.4/91, *reprinted in* [1955] II Y.B. Int'l L. Comm'n 9,

11, U.N. Doc. A/CN.4/SER.A./1955/Add.1. This proposed exception that would have altered the rule of mission inviolability then existing under customary international law, *Id.* at 16, was not adopted. The 1957 draft of the article covering the subject of mission inviolability rejected the proposed exception, and this exception never resurfaced in later drafts. *See Report of the International Law Commission*, Diplomatic Intercourse and Immunities, U.N. GAOR, 12th Sess., Supp. 9, U.N. Doc. A/3223 (1957), *reprinted in* [1957] II Y.B. Int'l L. Comm'n 131, 136, U.N. Doc. A/CN.4/SER.A/1957/Add.1 [hereafter *1957 Report of Int'l Law Comm'n*]. The commentary to the draft article that was ultimately adopted explicitly emphasized the lack of exceptions to inviolability, stating "the receiving State is obliged to prevent its agents from entering the premises for any official act whatsoever." *Id.* at 137. Nothing could be stated more plainly.

C. History Leading to Vienna Convention

History supports the concept of inviolability expressed in Article 22. Among the laws of nations is the notion that ambassadors must be received and that they must suffer no harm. *Diplomatic Intercourse and Immunities*, Memorandum prepared by the Secretariat, U.N. Doc. A/CN.4/98, *reprinted in* [1956] II Y.B. Int'l L. Comm'n 129, 132, U.N. Doc. A/CN.4/SER.A/1956/Add.1 [hereafter *Secretariat Memorandum*]. Beginning 1000 years ago when merchants went to foreign lands seeking trade, they sought to have their disputes settled by judges of their choice administering their own national laws. In 1060, for example, Venice was granted the right to send magistrates to Constantinople to try Venetians charged in civil and criminal cases. *1957 Report of Int'l Law Comm'n, supra*, at 73. A similar process occurred in the western part of the Mediterranean basin where special magistrates called "consul judges" were appointed to settle disputes between foreign traders and local merchants. *Id.* at 74. Because of the growth of international trade the use of consuls spread. By 1251 Genoa had a consul in Seville and in 1402 there were consuls of the Italian republics in London and the Netherlands. Before the end of the fifteenth century England had consuls in Italy and Scandinavia. *Id.*

In the 16th and 17th centuries individual states took over from traders the task of sending consuls, and the function of the consul was dramatically altered. Judicial duties were eliminated and replaced by the diplomatic functions of looking after the state's interests in trade, industry and shipping. As official state representatives, consuls enjoyed corresponding privileges and immunities. By the 18th century all the major trading states had exchanged consuls. The United States set up its first consulate in France in 1780. *Id.* at 75.

Because of the extraordinary growth of consulates during the 19th century, attempts to codify the rules of international law on that subject began in the 20th century. *Id.* at 77–78. A forerunner of these attempts was the Congress of Vienna in 1815. Rosalyn Higgins, Editorial Comment, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 Am.J.Int'l L. 641, n.3 (1985) [hereafter Higgins, *Abuse of Diplomatic Privileges*]. In 1927 the Inter-American Commission of Jurists prepared a draft of 26 articles on consuls, which served as the basis for the Convention regarding Consular Agents signed at Havana, Cuba on February 28, 1928. In 1932 Harvard Law School prepared drafts of conventions for the codification of international law on diplomatic privileges and immunities. The International Law Commission added the subject "consular intercourse and immunities" to those selected for codification at the first session of the United Nations Secretariat in 1949, which the General Assembly approved, and began by the usual appointment of a Special Rapporteur on this question. *See 1957 Report of Int'l Law Comm'n, supra*, at 82. The study continued from 1956 to 1959 and his commentary provided the foundation work leading to the 1961 Vienna Convention at which 81 nations participated. Higgins, *Abuse of Diplomatic Privileges, supra*, at 641 n.3.

The Vienna Convention entered into force April 24, 1964. One hundred and thirteen member states have ratified it, including the United States on December 13, 1972. *See* Office of the Legal Advisor, U.S. Department of State, *Treaties in Force: A List of Treaties and Other Agreements of the United States in Force on January 1, 1991; Satow's Guide to Diplomatic Practice* 106–09 (Lord Gore-Booth ed., 5th ed. 1988). History establishes beyond

question therefore that the Vienna Convention on Diplomatic Relations was intended to and did provide for the inviolability of mission premises, archive documents, and official correspondence. *See Parry & Grant, Encyclopedic Dictionary of International Law* 193 (Clive Parry et al. eds., 1988).

III. Inviolability Recognized Without Exception

A. Under International Law

The fact that the Vienna Convention codified longstanding principles of customary international law with respect to diplomatic relations further supports the view that the Convention recognized no exceptions to mission inviolability. *See* Higgins, *Abuse of Diplomatic Privileges, supra*, at 642 (The Vienna Convention "is agreed to be largely confirmatory of existing customary law."); *Secretariat Memorandum, supra*, at 134. The Convention codified a wide range of diplomatic protections accorded foreign missions over the centuries, *see* Higgins, *Abuse of Diplomatic Privileges, supra*, at 641–42, and recognized the independence and sovereignty of mission premises that existed under customary international law.

Under such law the inviolability of mission premises had become by the 18th century an established international practice, *see Satow's Guide to Diplomatic Practice, supra*, at 106–09, and represented an integral part of the diplomatic privileges accorded envoys abroad. *See* Francis Deak, *Immunity of a Foreign Mission's Premises From Local Jurisdiction*, 23 Am.J.Int'l L. 582, 587 (1929); 1 L. Oppenheim, *International Law* 793–95 (H. Lauterpacht ed., 8th ed. 1955). The United States and other nations had abided by the inviolability of mission premises long before the Vienna Convention entered into force. *See* IV Green H. Hackworth, *Digest of International Law* 562 (1942) (noting that Foreign Service regulations recognized mission inviolability years before the convention was concluded).

Although diplomatic privilege and mission inviolability arose under various now-outdated theories, including Grotius' notion of the "sacredness of Ambassadors" and the conception of the diplomat as personifying the foreign state's sovereign, see Lori J.

Shapiro, *Foreign Relations Law: Modern Developments in Diplomatic Immunity*, 1989 Ann.Surv.Am.L. 281, 282 [hereafter Shapiro, *Developments*], modern international law has adopted diplomatic immunity under a theory of functional necessity. *See Id.* at 283. Under that doctrine, the United States recognizes the privileges of foreign diplomats in the U.S. with the understanding that American diplomats abroad will be afforded the same protections from intrusions by the host state. The most secure way to guarantee this protection, the United States tells us, is through blanket immunities and privileges without exception.

The risk in creating an exception to mission inviolability in this country is of course that American missions abroad would be exposed to incursions that are legal under a foreign state's law. Foreign law might be vastly different from our own, and might provide few, if any, substantive or procedural protections for American diplomatic personnel. Were the United States to adopt exceptions to the inviolability of foreign missions here, it would be stripped of its most powerful defense, that is, that international law precludes the nonconsensual entry of its missions abroad. Another related consideration is the frequent existence of a small band of American nationals residing in foreign countries, often business personnel. 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. Potential exposure of American diplomats to harm while serving abroad and to American nationals living abroad is not "pure conjecture," as plaintiffs blithely assert.

The narrow reading of the Vienna Convention urged by Sage Realty and adopted by the district court is inadequately supported. Citing only selective examples of the protection accorded by the Convention and other international agreements, Sage Realty fails to account for the functional necessity of mission inviolability. In a weak attempt to demonstrate that only extreme behavior is covered by Article 22, plaintiffs refer to a 1986 meeting of the U.N. General Assembly urging the suppression of terrorist action against missions and a 1967 U.N. study noting that the U.S. is under an obligation to protect the U.N. headquarters district from

"hostile demonstrations" outside mission premises. Similarly, the district court relied upon selected search and seizure type of protections afforded to missions and their documents to insist that only sudden unexpected intrusions are governed by the Convention. However, as explained below, the circumstance of a sudden intrusion is largely beside the point and results in a restricted view of the Vienna Convention at odds with its purport and practice.

B. Purpose and Practice Under Article 22

To begin with, the examples used by the district court do not conflict with the broad language of "inviolability" appearing in the Convention's text, nor do they confute the longstanding international support for mission inviolability. Instead, upon proper analysis, sudden intrusion and protection against search and seizure further support the sanctity of mission premises. Nothing in the commentary to the draft articles suggests that fears about "mob violence" and "unannounced seizures" were ever the main concerns underlying diplomatic immunities, as the district court mistakenly believed. *See, e.g., 1957 Report of Int'l Law Comm'n, supra*, at 137 (emphasizing respect due to a mission, noting that process servers may not even serve papers without entering at the door of a mission because that would "constitute an infringement of the respect due to the mission"). Perhaps most telling, no support may be found for an interpretation of limited inviolability in either the commentary to the Vienna Convention or the scholarly literature concerning the convention and the customary international law principles it codified.

Plaintiffs' position is also refuted by what has occurred in practice. The United States has consistently respected the complete inviolability of missions and consulates. Even in extreme cases U.S. authorities will not enter protected premises without permission following, for example, bomb threats. Nor have local authorities been permitted to enter to conduct health and building safety inspections without the consent of the mission involved. *See, e.g.*, Eleanor C. McDowell, *Digest of United States Practice*

in International Law 1976 198–99 (1977). An affidavit from the counselor for Host Country Affairs for the United States Mission to the United Nations attests that after the Soviet mission to the U.N. was bombed in 1979, the FBI and local police officers were all refused entry to the mission until the Soviets consented to allow certain law enforcement officers to enter. Absent such consent, the United States tells us, government officials would not have attempted to enter the Soviet mission's premises.

Additional support for the position we take here is found in decisional law. The Supreme Court has made clear: "When the parties to a treaty both agree to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, [the court] must, absent extraordinarily strong contradictory evidence, defer to that interpretation." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85, 102 S.Ct. 2374, 2379, 72 L.Ed.2d 765 (1982); accord *In re Air Disaster at Lockerbie, Scotland on December 21*, 1988, 928 F.2d 1267, 1280 (2d Cir.), cert. denied, 502 U.S. 920, 112 S.Ct. 331, 116 L.Ed.2d 272 (1991). This case presents such a situation. Treaty language uses the term "inviolability" and the Convention contains no exceptions relevant to this case. Because the United States agrees to an accepted interpretation of the Vienna Convention, and because no evidence appears of a contrary interpretation advanced by any of the United Nation members, all of whom are parties to the Convention, *see* G.A. Res. 41/78, U.N. GAOR, 41st Sess., Supp. No. 53, at 260, U.N. Doc. A/41.53 (1986) (General Assembly resolution emphasizing inviolability of missions as prerequisite to carrying on diplomatic functions and stressing States' duties to protect mission premises as required by international law), federal courts must defer to the language of Article 22. Cf. *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 474 (2d Cir. 1980) (recognizing U.S. obligations under Article 22 of the Vienna Convention), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1352, 67 L.Ed.2d 337 (1981).

Hence, that portion of the district court's order awarding Sage Realty immediate possession of the premises and directing U.S. Marshals to remove the mission, its effects, and its personnel physically from the premises must be reversed.

IV. Contrary Holding Foreclosed

We recognize that there are negative policy implications from the ruling we propose. The undisputed economic burden of inviolability, for example, falls most heavily upon the private landlord, not on the government that urges inviolability of mission premises. Yet, an interest in fairness to the landlord does not justify creating a judicial gloss on the concept of mission inviolability

Particularly in recent years, attention has focused on an array of abuses of diplomatic privilege, *see, e.g.*, Higgins, *Abuse of Diplomatic Privileges, supra*, at 642–43 (noting diplomats and their families committing wide range of petty and more serious offenses in England), and a number of reforms to various diplomatic immunities have been suggested. *See* Shapiro, *Developments, supra*, at 281, 294–306. Nevertheless, reform of mission inviolability has not been undertaken, and the doctrine continues without exception to be the rule. *Cf.* Higgins, *Abuse of Diplomatic Privileges, supra*, at 646 ("[N]otwithstanding popular and ill-informed views to the contrary, the inviolability of premises is not lost by the perpetration from them of unlawful acts."). Reforming the Vienna Convention may well be a valid objective. But federal courts are an inappropriate forum to accomplish the amendment of a multilateral treaty to which the United States is a party. *See* Shapiro, *Developments, supra*, at 295 (judicial reform "would threaten a loss of consistency in the application of the Vienna Convention from country to country and could have dangerous international repercussions in the form of reciprocal action by other states").

Congress is of course the branch of government best suited to address the full array of concerns involved in altering the Vienna Convention. Already, the legislature has enacted the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a–e (1988), to counter some of the more flagrant abuses of diplomatic privilege observed in this country. That Act gives the President the power "on the basis of reciprocity" to establish privileges and immunities for missions and their members "which result in more favorable or less favorable treatment than is provided under the Vienna

Convention." *Id.* § 254c. Although the act requires liability insurance coverage for diplomatic missions and their representatives and families to insure against negligence arising from the operation of motor vehicles, vessels or aircraft, *Id.* § 254e, it contains no restrictions on mission inviolability. While Congress and the President—via the Diplomatic Relations Act—possess the power to limit mission inviolability, neither has chosen to exercise that power. Our sister branches of government may more appropriately initiate whatever revision, if any, of the Vienna Convention is deemed necessary. *Cf. Palestine Liberation Org.*, 695 F.Supp. at 1465 ("Congress *has the power* to enact statutes abrogating prior treaties or international obligations entered into by the United States").

This is not to say that Sage Realty is left wholly without a remedy for the mission's egregious, albeit explicable, shortcoming in rent payments. The Zairian Mission has not raised any challenge to the district court's authority to award monetary damages in favor of the landlord. Such judgment—even absent forcible eviction—is not without weight: to date, diplomatic efforts and pressure have proven extraordinarily successful at getting Zaire to pay the judgment for its back rent. The State Department has diligently pursued the matter on behalf of plaintiffs and went so far as to demand the expulsion of several Zairian diplomats if the judgment was not paid by a certain deadline.

A landlord in Sage Realty's position that desires to rent to a foreign mission may also be able to protect itself by requesting a waiver of inviolability in advance or by demanding additional security. The market rate for rent to such tenants might itself rise to incorporate risks posed by mission inviolability. In any event, the district court's worry that landlords in New York's rental market might shut out foreign missions because of their untouchable status appears overblown, especially since Sage Realty apparently continues negotiating for a new lease with the Zairian mission. If a sophisticated landlord like Sage Realty bears some risk in renting to a U.N. mission, it is not without notice of the diplomatic immunities with which it may later become entangled.

* * * *

3. Tax Assessment on World Bank Contractor

International Bank for Reconstruction and Development v. District of Columbia, 171 F.3d 687 (D.C. Cir. 1999), involved an action against the District of Columbia seeking recovery of tax-deficiency assessments levied against an independent contractor that provided services for the cafeteria operations of the International Bank for Reconstruction and Development ("World Bank" or "Bank"). This case involved the tax immunity conferred on the Bank pursuant to the Bretton Woods Agreements Act of 1945, 22 U.S.C. §§ 286–286m. Article VII, § 9(a) provides: "The Bank, its assets, property, income and its operations and transactions authorized by this Agreement, shall be immune from all taxation and from all customs duties. The Bank shall also be immune from liability for the collection or payment of any tax or duty." The district court granted summary judgment for the Bank on the ground that operation of the food-service program fell within the scope of the "operations and transactions" for which the Bank enjoyed immunity. On appeal, the D.C. Circuit reversed, holding that while the property, income, operations and transactions of the Bank were immune from federal, state, and local taxation, the private contractor's provision of food services was not "an 'operation' of the *Bank*" (emphasis in the original). Therefore, the court concluded, the private contractor "in performing its food service contract at the World Bank's headquarters, did not share the Bank's immunity from the District's laws and use taxes."

E. ACT OF STATE

Under the act of state doctrine as developed by courts in the United States, U.S. courts generally abstain from sitting in judgment on acts of a governmental character done by a foreign state within its own territory. Because this doctrine

is often invoked in cases involving issues of immunities, act of state is addressed here. *See I Cumulative Digest 1981–1988* at 1713, and *Digest 2001* at 525–56 for a discussion of *W.S. Kirkpatrick & Co. v. Environmental Tectonics*, 493 U.S. 400 (1990). *See also, Faysound Ltc. v. Walter Fuller Aircraft Sales, Inc.*, 748 F.Supp. 1365 (E.D. Ark. 1990) (no act of state where treaty sets clear governing legal standards and where receiver acted under authority of a foreign court); *Virtual Defense and Development International, Inc. v. Republic of Moldova*, 133 F.Supp.2d 1 (D.D.C. 1999) (no act of state in cancellation of commercial contract); *World Wide Minerals, Ltd. v. Republic of Kazakhstahn*, 116 F.Supp.2d 98 (D.D.C. 2000) ("act of state" doctrine precluded adjudication of claim against state because U.S. court would have to review foreign state's denial of export permits.) *See also Siderman de Blake v. Republic of Argentina,* 965 F.2d 699 (9th Cir. 1992), as discussed in A.3.e.(1), *supra; First American Corp. v. Al-Nahyan,* 948 F.Supp. 1107 (D.D.C. 1996), in B.4., *supra.*

In 1997 in the context of defendants' claims that lawsuits should be dismissed under the act of state doctrine, the district court invited the Department of State to submit its views in *National Coalition Government of the Union of Burma v. Unocal, 176 F.R.D. 329 (C.D. Cal. 997)* and *John Doe I v. Unocal* 963 F.Supp. 880 (C.D. Cal. 1997) "concerning the ramifications this litigation may have on the foreign policy of the United States as established by congress and the Executive." In response, the United States filed a Statement of Interest attaching the letter of Michael J. Matheson, Acting Legal Adviser of the Department of State, which noted the "very preliminary procedural stage" of both cases and the resulting lack of a developed record. The Department of State did not express a view as to whether the "act of state" doctrine was implicated in these cases but advised the court that "adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma."

F. OTHER ISSUES

1. Cause of Action Against Official, Employee, or Agent of a Foreign State in Certain Circumstances

Following the enactment of the exception to the sovereign immunity of foreign states designated as state sponsors of terrorism for certain claims resulting from acts of state-sponsored terrorism (22 U.S.C. § 1605(a)(7), *see* A.3.d. *supra*), Congress adopted a provision creating a private right of action against officials, employees, or agents of a designated foreign state, as follows:

> (a) An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) . . . for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).
> (b) Provisions related to statute of limitations . . . that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought under this section. No action shall be maintained under this section if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.

This provision, entitled "Civil Liability for Acts of State Sponsored Terrorism," was enacted on September 30, 1996, as § 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, in Pub. L. No. 104–208, 110 Stat. 3009–172 (1996), *reprinted at* 28 U.S.C.A. § 1605 note (West Supp. 1997). The provision is

referred to as the "Flatow Amendment" or "Flatow Act" in recognition of the family of Alisa Flatow, a woman who died as the result of a terrorist bombing in Gaza. Although the District Court for the District of Columbia characterized the provision as an amendment to § 1605(a)(7), reading it as applicable to claims against the state (*Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1 (D.D.C. 1998), courts have subsequently recognized that it is not an amendment to the FSIA and that it is applicable only to individuals acting in their official capacity, as specified. *See, e.g., Cicippio-Puleo v. Islamic Republic of Iran,* 353 F.3d 1024 (D.C. Cir. 2004).

2. Service of Process

As discussed in B.2., *supra*, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), involved an action for compensatory and punitive damages (as well as injunctive relief) brought by victims of rape and other human rights violations against Radovan Karadzic, the former self-proclaimed Bosnian Serb president, under, *inter alia*, the Alien Tort Statute for killings, torture and other human rights abuses and violations of international law. Karadzic had been served while visiting the United Nations and argued that he was immune from service of process as an invitee of the United Nations and under federal common law. The appellate court rejected these theories, as excerpted below.

* * * *

II. Service of Process and Personal Jurisdiction

Appellants aver that Karadzic was personally served with process while he was physically present in the Southern District of New York. In the *Doe* action [consolidated in this case], the affidavits detail that on February 11, 1993, process servers approached Karadzic in the lobby of the Hotel Intercontinental at 111 East 48th St. in Manhattan, called his name and identified their purpose,

and attempted to hand him the complaint from a distance of two feet, that security guards seized the complaint papers, and that the papers fell to the floor. Karadzic submitted an affidavit of a State Department security officer, who generally confirmed the episode, but stated that the process server did not come closer than six feet of the defendant. In the *Kadic* action, the plaintiffs obtained from Judge Owen an order for alternate means of service, directing service by delivering the complaint to a member of defendant's State Department security detail, who was ordered to hand the complaint to the defendant. The security officer's affidavit states that he received the complaint and handed it to Karadzic outside the Russian Embassy in Manhattan. Karadzic's statement confirms that this occurred during his second visit to the United States, sometime between February 27 and March 8, 1993. Appellants also allege that during his visits to New York City, Karadzic stayed at hotels outside the "headquarters district" of the United Nations and engaged in non-United Nations-related activities such as fund-raising.

Fed.R.Civ.P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction. *See Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990).

Nevertheless, Karadzic maintains that his status as an invitee of the United Nations during his visits to the United States rendered him immune from service of process. He relies on both the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted at* 22 U.S.C. § 287 note (1988) ("Headquarters Agreement"), and a claimed federal common law immunity. We reject both bases for immunity from service.

A. Headquarters Agreement

The Headquarters Agreement provides for immunity from suit only in narrowly defined circumstances. First, "service of legal

process . . . may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General." *Id.* § 9(a). This provision is of no benefit to Karadzic, because he was not served within the well-defined confines of the "headquarters district," which is bounded by Franklin D. Roosevelt Drive, 1st Avenue, 42nd Street, and 48th Street, *see Id.* annex 1. Second, certain representatives of members of the United Nations, whether residing inside or outside of the "headquarters district," shall be entitled to the same privileges and immunities as the United States extends to accredited diplomatic envoys. *Id.* § 15. This provision is also of no benefit to Karadzic, since he is not a designated representative of any member of the United Nations.

A third provision of the Headquarters Agreement prohibits federal, state, and local authorities of the United States from "impos[ing] any impediments to transit to or from the headquarters district of . . . persons invited to the headquarters district by the United Nations . . . on official business." *Id.* § 11. Karadzic maintains that allowing service of process upon a United Nations invitee who is on official business would violate this section, presumably because it would impose a potential burden—exposure to suit—on the invitee's transit to and from the headquarters district. However, this Court has previously refused "to extend the immunities provided by the Headquarters Agreement beyond those explicitly stated." See *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48 (2d Cir. 1991). We therefore reject Karadzic's proposed construction of section 11, because it would effectively create an immunity from suit for United Nations invitees where none is provided by the express terms of the Headquarters Agreement.

* * * *

The parties to the Headquarters Agreement agree with our construction of it. In response to a letter from plaintiffs' attorneys opposing any grant of immunity to Karadzic, a responsible State Department official wrote: "Mr. Karadzic's status during his recent visits to the United States has been solely as an 'invitee' of the United Nations, and as such he enjoys no immunity from the

jurisdiction of the courts of the United States." Letter from Michael J. Habib, Director of Eastern European Affairs, U.S. Dept. of State, to Beth Stephens (Mar. 24, 1993) ("Habib Letter"). Counsel for the United Nations has also issued an opinion stating that although the United States must allow United Nations invitees access to the Headquarters District, invitees are not immune from legal process while in the United States at locations outside of the Headquarters District. *See In re Galvao*, [1963] U.N.Jur.Y.B. 164 (opinion of U.N. legal counsel); *see also Restatement (Third)* § 469 reporter's note 8 (U.N. invitee "is not immune from suit or legal process outside the headquarters district during his sojourn in the United States").

B. Federal common law immunity

Karadzic nonetheless invites us to fashion a federal common law immunity for those within a judicial district as a United Nations invitee. He contends that such a rule is necessary to prevent private litigants from inhibiting the United Nations in its ability to consult with invited visitors. Karadzic analogizes his proposed rule to the "government contacts exception" to the District of Columbia's long-arm statute, which has been broadly characterized to mean that "mere entry [into the District of Columbia] by non-residents for the purpose of contacting federal government agencies cannot serve as a basis for in personam jurisdiction," *Rose v. Silver*, 394 A.2d 1368, 1370 (D.C. 1978); *see also Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 785–87 (D.C. Cir. 1983) (construing government contacts exception to District of Columbia's long-arm statute), *cert. denied*, 467 U.S. 1210, 104 S.Ct. 2399, 81 L.Ed.2d 355 (1984). He also points to a similar restriction upon assertion of personal jurisdiction on the basis of the presence of an individual who has entered a jurisdiction in order to attend court or otherwise engages in litigation. *See generally* 4 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1076 (2d ed. 1987).

Karadzic also endeavors to find support for a common law immunity in our decision in *Klinghoffer*. Though, as noted above, *Klinghoffer* declined to extend the immunities of the Headquarters

Agreement beyond those provided by its express provisions, the decision applied immunity considerations to its construction of New York's long-arm statute, N.Y.Civ.Prac.L. & R. 301 (McKinney 1990), in deciding whether the Palestine Liberation Organization (PLO) was doing business in the state. *Klinghoffer* construed the concept of "doing business" to cover only those activities of the PLO that were not United Nations-related. *See* 937 F.2d at 51.

Despite the considerations that guided *Klinghoffer* in its narrowing construction of the general terminology of New York's long-arm statute as applied to United Nations activities, we decline the invitation to create a federal common law immunity as an extension of the precise terms of a carefully crafted treaty that struck the balance between the interests of the United Nations and those of the United States.

* * * *

In sum, if appellants personally served Karadzic with the summons and complaint while he was in New York but outside of the U.N. headquarters district, as they are prepared to prove, he is subject to the personal jurisdiction of the District Court.

Cross-references

Eviction of U.S. and other ambassadors by Belarus, **Chapter 1.C.2.o.(7).**
Applicability of Hague Convention on Child Abduction to diplomats, **Chapter 2.B.1.a.(3).**
Status of Palau under the FSIA, **Chapter 5.B.2.a.**
Act of state issues in other cases, **Chapter 6.G.1.b., 2.a., & 2.e.(2).**
Case dismissed against United States based on U.S. sovereign immunity, **Chapter 8.B.1.**

Chapter 11

Trade, Commercial Relations, Investment and Transportation

A. TRANSPORTATION BY AIR

1. International Civil Aviation Organization

a. Montreal Protocol No. 4

The Protocol to Amend the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at the Hague on 28 September 1955, Signed at Montreal on 25 September 1975 ("Montreal Protocol No. 4") modernized documentation requirements for transport by air, primarily to meet the pressing needs of the air cargo industry. President Gerald R. Ford transmitted Montreal Protocol No. 4 in tandem with Montreal Protocol No. 3 (on passenger liability regime) to the Senate for advice and consent to ratification in 1977. S. Treaty Doc. No. 95–2 (1977). As described in the report of the Department of State accompanying the transmittal,

> [d]uring [the early 1970s] it became clear that the role of gold in the international monetary system would be greatly diminished with no major currency convertible into gold. The Warsaw Convention, the Hague Protocol, and the Guatemala City Protocol (as well as numerous other international treaties) express liability limits in terms

> of gold, and thus a different unit was required to express these limits. At the Montreal Conference, the gold clause was deleted, and in its place a clause based on the "Special Drawing Right" (SDR) of the International Monetary Fund was adopted.
>
> The Montreal Conference adopted four separate protocols. . . . Montreal Protocol No. 4 includes basic amendments to the cargo provisions of the Warsaw Convention as revised by the Hague Protocol, including an SDR clause.

The Senate did not act at the time because of concerns relating to Montreal Protocol No. 3. On September 28, 1998, the Senate gave advice and consent to ratification of Montreal Protocol No. 4, which entered into force for the United States on March 4, 1999. 144 CONG. REC. S11,059 (Sept. 28, 1998). The resolution of ratification also directed the Secretary of the Senate to return Montreal Protocol No. 3 to the President.

The full text of Montreal Protocol No. 4 is available in S. Treaty Doc. No. 95–2 and on the International Air Transport Association website at *www.iata.org/cargooperations/customs/protocol4.htm*.

b. Convention for the Unification of Certain Rules for International Carriage by Air

On May 28, 1999, the United States signed the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal ("Montreal Convention"). Upon entry into force for the United States, this convention, where applicable, would supersede the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Warsaw October 12, 1929, as amended, 49 Stat. 3000, note following 49 U.S.C. § 40105 ("Warsaw Convention"). President William J. Clinton transmitted the convention to the Senate for advice and consent to ratification on September 6, 2000. S. Treaty Doc. No. 106–45 (2000). The Senate gave its advice and consent to ratification on

July 31, 2003, 149 CONG. REC. S10,870 (July 31, 2003), and the treaty entered into force November 4, 2003. S*ee Digest 2000* at 668–74 and *Digest 2003* at 583–86.

2. Arbitration Between The United States and The United Kingdom Over Heathrow Airport User Charges

On March 11, 1994, representatives of the United States and the United Kingdom agreed by an exchange of notes at Washington on terms settling a dispute between the United States and the United Kingdom. The dispute concerned user charges imposed on U.S. airlines at Heathrow Airport, London, by the British Airports Authority and subsequently (after privatization) by British Airports Authority Public Limited Company (BAA plc). The United States had initiated the arbitration, following unsuccessful efforts to resolve the dispute through consultations, by a note from the Department of State to the British Embassy at Washington on December 16, 1988. The British Government concurred and a tribunal was established in The Hague.

The settlement followed an award on liability issued by the tribunal on November 30, 1992, in which the tribunal ruled in favor of the United States on several important questions. Among other things, it agreed with the United States that the United Kingdom had not fulfilled its "best efforts" obligation under Article 10, paragraph 1 of the bilateral Agreement Concerning Air Services, done at Bermuda, July 23, 1977, 28 U.S.T. 5367 ("Bermuda II") to ensure that user charges were "just and reasonable."

Under the settlement agreement, the United Kingdom paid $29.5 million to the United States. On April 26, 1994, the Department of State disbursed over $28 million to the affected U.S. airlines: Pan American World Airways, Trans World Airlines, United Airlines, and American Airlines. The United Kingdom also agreed, among other things, to ensure that BAA plc would phase out international "peak" pricing at Heathrow's terminals, so that the differential would be eliminated entirely as of April 1, 1998. The phase-out was

designed to produce significant benefits for carriers serving Heathrow during peak periods, including U.S. carriers.

In addition, as part of the settlement, the United Kingdom agreed to drop an arbitration that it had requested on October 13, 1993, also under Article 10 of Bermuda II, regarding charges at U.S. airports, and the United States agreed to encourage its airports to consult with airline users in setting landing and other user fees.

Finally, under the settlement agreement, the parties deleted Article 1(o) and Article 10 from the Bermuda II Agreement, substituting new texts for them, and deprived a 1983 memorandum of understanding between the two countries of effect.

For a further discussion of the arbitration, including the 1992 Tribunal award, *see III Cumulative Digest 1981–1988* at 3317–24; *see also* 88 Am. J. Int'l L. 738 (1994).

3. U.S. Litigation Concerning Warsaw Convention

The U.S. Supreme Court addressed issues of interpretation of Article 17 of the Warsaw Convention in three cases during the 1991–1999 period: *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991), *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), and *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999).

Article 17 of the Warsaw Convention provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

As discussed below, the Supreme Court concluded in *Floyd* that the term "bodily injury" did not encompass mental or psychic injuries absent any physical injury, and in *Zicherman* that compensable damages were to be determined

by domestic law under the forum's choice-of-law rules. In *El Al Israel Airlines*, discussed in Chapter 4.B.3.a., the Court held that "the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention."

a. Mental or psychic injuries

On April 17, 1991, the U.S. Supreme Court held that the term "bodily injury" in Article 17 does not encompass "mental or psychic injuries" absent any physical injury. *Eastern Airlines v. Floyd*, 499 U.S. 530, 552 (1991). Plaintiffs in the case claimed damages solely for mental distress arising out of a forced landing of an Eastern Airlines flight in Miami after engine failure nearly caused the plane to be ditched in the Atlantic Ocean. Eastern Airlines conceded that the engine failure and preparations for ditching the plane amounted to an "accident" under Article 17. The District Court concluded that mental anguish alone is not compensable under Article 17. *In re Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport*, 629 F.Supp. 307, 314 (S.D.Fla. 1986). The U.S. Court of Appeals for the Eleventh Circuit reversed, holding that the phrase "*lesion corporelle*" in the authentic French text of Article 17 encompasses purely emotional distress. *Eastern Airlines v. Floyd*, 872 F.2d 1462, 1471 (11th Cir. 1989). After a lengthy analysis of the term at issue, the Supreme Court reversed the court of appeals, stating:

> [w]e conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury. Although Article 17 renders air carriers liable for "damage sustained in the event of" ("dommage survenu en cas de") such injuries, see 49 Stat. 3005, 3018, we express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries. That issue is not

> presented here because respondents do not allege physical injury or physical manifestation of injury.

499 U.S. at 552–53.

The Court stated further that although Eastern urged it to "hold that the Warsaw Convention provides the exclusive cause of action for injuries sustained during international air transportation," it declined to reach that question because it had not been addressed below and certiorari had not been granted to consider it. *Id.*

Excerpts below from the Court's opinion provide its analysis of the interpretative question presented (footnotes omitted).

---

* * * *

"When interpreting a treaty, we 'begin "with the text of the treaty and the context in which the written words are used."' " *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699 (1988), quoting *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522, 534 (1987), quoting *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). Accord, *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); *Maximov* v. *United States*, 373 U.S. 49, 53–54 (1963). "Other general rules of construction may be brought to bear on difficult or ambiguous passages." *Volkswagenwerk, supra*, at 700. Moreover, " 'treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.' " *Saks, supra*, at 396, quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431–432 (1943). Accord, *Volkswagenwerk, supra*, at 700. We proceed to apply these methods in turn.

A

Because the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis. See *Saks, supra*, at 397–399. The text reads as follows:

> "Le transporteur est responsable du dommage survenu *en cas de mort, de blessure ou de toute autre lesion corporelle* subie par un voyageur lorsque l'accident qui a cause le dommage s'est produit a bord de l'aeronef ou au cours de toutes operations d'embarquement et de debarquement." 49 Stat. 3005 (emphasis added).

The American translation of this text, employed by the Senate when it ratified the Convention in 1934, reads:

> "The carrier shall be liable for damage sustained *in the event of the death or wounding of a passenger or any other bodily injury* suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018 (emphasis added).

Thus, under Article 17, an air carrier is liable for passenger injury only when three conditions are satisfied: (1) there has been an accident, in which (2) the passenger suffered "mort," "blessure," "ou . . . toute autre lesion corporelle," and (3) the accident took place on board the aircraft or in the course of operations of embarking or disembarking. As petitioner concedes, the incident here took place on board the aircraft and was an "accident" for purposes of Article 17. See 872 F. 2d, at 1471. Moreover, respondents concede that they suffered neither "mort" nor "blessure" from the mishap. Therefore, the narrow issue presented here is whether, under the proper interpretation of "lesion corporelle," condition (2) is satisfied when a passenger has suffered only a mental or psychic injury.

We must consider the "French legal meaning" of "lesion corporelle" for guidance as to the shared expectations of the parties to the Convention because the Convention was drafted in French by continental jurists. See *Saks, supra*, at 399. Perhaps the simplest method of determining the meaning of a phrase appearing in a foreign legal text would be to consult a bilingual dictionary. Such dictionaries suggest that a proper translation of "lesion corporelle" is "bodily injury." See, *e.g.*, J. Jeraute, Vocabulaire

Francais-Anglais et Anglais-Francais de Termes et Locutions Juridiques 205 (1953) (translating "bodily harm" or "bodily injury" as "lesion ou blessure corporelle"); see also *id.*, at 95 (translating the term "lesion" as "injury, damage, prejudice, wrong"); *id.*, at 41 (giving as one sense of "corporel" the English word "bodily"); 3 Grand Larousse de la Langue Francaise 1833 (1987) (defining "lesion" as a "modification de la structure d'un tissu vivant sous l'influence d'une cause morbide"). These translations, if correct, clearly suggest that Article 17 does *not* permit recovery for purely psychic injuries. Although we have previously relied on such French dictionaries as a primary method for defining terms in the Warsaw Convention, see *Saks, supra*, at 400, and n. 3, we recognize that dictionary definitions may be too general for purposes of treaty interpretation. Our concerns are partly allayed when, as here, the dictionary translation accords with the wording used in the "two main translations of the 1929 Convention in English." Mankiewicz 197. As we noted earlier, the translation used by the United States Senate when ratifying the Warsaw Convention equated "lesion corporelle" with "bodily injury." See *supra*, at 535. The same wording appears in the translation used in the United Kingdom Carriage by Air Act of 1932. See L. Goldhirsch, The Warsaw Convention Annotated: A Legal Handbook 199, 204 (1988) (hereinafter Goldhirsch). We turn, then, to French legal materials, *Saks*, 470 U.S., at 400, to determine whether French jurists' contemporary understanding of the term "lesion corporelle" differed from its translated meaning.

In 1929, as in the present day, lawyers trained in French civil law would rely on the following principal sources of French law: (1) legislation, (2) judicial decisions, and (3) scholarly writing. See generally 1 M. Planiol & G. Ripert, Traite elementaire de droit civil, pt. 1, Nos. 10, 122, 127 (12th ed. 1939) (Louisiana State Law Inst. trans. 1959); F. Geny, Methode d'Interpretation et Sources en Droit Prive Positif Nos. 45–50 (2d ed. 1954) (Louisiana State Law Inst. trans. 1963); R. David, French Law: Its Structure, Sources, and Methodology 154 (M. Kindred trans. 1972). Our review of these materials indicates neither that "lesion corporelle" was a widely used legal term in French law nor that the term specifically encompassed psychic injuries.

* * * *

In sum, neither the Warsaw Convention itself nor any of the applicable French legal sources demonstrates that "lesion corporelle" should be translated other than as "bodily injury"—a narrow meaning excluding purely mental injuries. However, because a broader interpretation of "lesion corporelle" reaching purely mental injuries is plausible, and the term is both ambiguous and difficult, see *supra*, at 535, we turn to additional aids to construction.

* * * *

Our review of the documentary record for the Warsaw Conference confirms—and courts and commentators appear universally to agree—that there is no evidence that the drafters or signatories of the Warsaw Convention specifically considered liability for psychic injury or the meaning of "lesion corporelle." See generally Minutes. Two explanations commonly are offered for why the subject of mental injuries never arose during the Convention proceedings: (1) many jurisdictions did not recognize recovery for mental injury at that time, or (2) the drafters simply could not contemplate a psychic injury unaccompanied by a physical injury. See, *e.g.*, *Husserl* v. *Swiss Air Transport Co.*, 388 F. Supp. 1238, 1249 (SDNY 1975) (*Husserl II*); *Cie Air France* v. *Teichner*, 39 Revue Francaise de Droit Aerien 232, 242, 23 Eur. Tr. L. 87, 101 (Israel 1984); Mankiewicz 144–145; Miller 123–125. Indeed, the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in the Convention. Because such a remedy was unknown in many, if not most, jurisdictions in 1929, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery.

In this sense, we find it significant that, when the parties to a different international transport treaty wanted to make it clear that rail passengers could recover for purely psychic harms, the drafters made a specific modification to this effect. The liability

provision of the Berne Convention on International Rail, drafted in 1952, originally conditioned liability on "la mort, les blessures et toute autre atteinte, a l'integrite corporelle." International Convention Concerning the Carriage of Passengers and Luggage By Rail, Berne, Oct. 25, 1952, 242 U. N. T. S. 355, Article 28, p. 390. The drafters subsequently modified this provision to read "l'integrite physique *ou mentale*." See Additional Convention to the International Convention Concerning the Carriage of Passengers and Luggage by Rail (CIV) of Feb. 25, 1961, Relating to the Liability of the Railway for Death of and Personal Injury to Passengers, done Feb. 26, 1966, Art. 2, reprinted in Transport: International Transport Treaties V-52 (Kluwer Publishers) (Supp. 1–10, Jan. 1986) (emphasis added).

The narrower reading of "lesion corporelle" also is consistent with the primary purpose of the contracting parties to the Convention: limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry. . . .

C

We also conclude that, on balance, the evidence of the post-1929 "conduct" and "interpretations of the signatories," *Saks*, 470 U.S., at 403, supports the narrow translation of "lesion corporelle."

* * * *

We must also consult the opinions of our sister signatories in searching for the meaning of a "lesion corporelle." See *Saks*, 470 U.S., at 404. The only apparent judicial decision from a sister signatory addressing recovery for purely mental injuries under Article 17 is that of the Supreme Court of Israel. That court held that Article 17 does allow recovery for purely psychic injuries. See *Cie Air France* v. *Teichner*, 39 Revue Francaise de Droit Aerien, at 243, 23 Eur. Tr. L., at 102.

. . . . In reaching this conclusion, the court emphasized the post-1929 development of the aviation industry and the evolution of Anglo-American and Israeli law to allow recovery for psychic injury in certain circumstances. . . . Even if we were to agree that allowing recovery for purely psychic injury is desirable as a policy

goal, we cannot give effect to such policy without convincing evidence that the signatories' intent with respect to Article 17 would allow such recovery. . . .

Moreover, we believe our construction of Article 17 better accords with the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation. . . .

* * * *

b. Compensable damages

On January 16, 1996, the U.S. Supreme Court ruled in an action brought under Article 17 of the Warsaw Convention that the convention leaves the issue of determining compensable damages to be determined by domestic law under the forum's choice-of-law rules. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996). In that case, which concerned the death of a passenger on Korean Airlines Flight KE007 when it was shot down over the Sea of Japan by a Soviet military aircraft in 1983, the Court also determined that the applicable law was the Death on the High Seas Act, 46 U.S.C. App. §§ 761–68 ("DOHSA").

Petitioners in *Zicherman*, mother and sister of one of the passengers, Muriel Kole, sought damages that included loss of society following the relative's death in the shootdown. Petitioners prevailed on their claims in district court. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 807 F. Supp. 1073 (S.D.N.Y. 1992). On appeal, the U.S. Court of Appeals for the Second Circuit found that general maritime law supplied the substantive compensatory damages law to be applied and that, under such law, only dependents could recover for loss of society. *Zicherman v. Korean Air Lines Co.*, 43 F.3d 18 (2d Cir. 1994). It therefore vacated the award to the mother and remanded to the district court for determination as to whether the sister was a dependent.

The Supreme Court first examined the airline's contention that the Warsaw Convention itself did not allow loss-of-society

damages in the case. The Court found that Article 17 "leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice of law rules." 516 U.S. at 231. The parties had stipulated that if the issue of compensable harm was unresolved by the Warsaw Convention, it would be governed by the law of the United States. The Court concluded that "[b]ecause DOHSA permits only pecuniary damages, petitioners are not entitled to recover for loss of society. We therefore need not reach the question whether, under general maritime law, dependency is a prerequisite for loss-of-society damages." *Id.* Because the claims of mother and sister were based on loss of society, the Court affirmed the Second Circuit opinion as to the mother and vacated the opinion insofar as it remanded the sister's claim to allow her to establish dependency. *See also* discussion of the shootdown incident in *II Cumulative Digest 1981–88* at 2199–212.

Excerpts follow from the Court's analysis of Article 17 of the Warsaw Convention in determining that it did not resolve the issue of compensable harm but left that issue to domestic law (footnotes omitted).

---

* * * *

The first and principal question before us is whether loss of society of a relative is made recoverable by [Article 17].

It is obvious that the English word "damage" or "harm"—or in the official text of the Convention, the French word "*dommage*"—can be applied to an extremely wide range of phenomena, from the medical expenses incurred as a result of Kole's injuries (for which every legal system would provide tort compensation), to the mental distress of some stranger who reads about Kole's death in the paper (for which no legal system would provide tort compensation). It cannot seriously be maintained that Article 17 uses the term in this broadest sense, thus exploding tort liability beyond what any legal system in the world allows, to the farthest reaches of what could be denominated "harm." We therefore reject petitioners' initial proposal that we simply look to English

dictionary definitions of "damage" and apply that term's "plain meaning." Brief for Petitioners 7–9.

There are only two thinkable alternatives to that. First, what petitioners ultimately suggest: that "*dommage*" means what French law, in 1929, recognized as *legally cognizable* harm, which petitioners assert included not only "*dommage matériel*" (pecuniary harm of various sorts) but also "*dommage moral*" (non pecuniary harm of various sorts, including loss of society). In support of that approach, petitioners point out that in a prior case involving Article 17 we were guided by French legal usage: *Air France* v. *Saks*, 470 U.S. 392 (1985) (interpreting the term "*accident*"). See also *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530 (1991) (interpreting the Article 17 term "*lésion corporelle*"). What is at issue here, however, is not simply whether we will be guided by French legal usage *vel non*. Because, as earlier discussed, the dictionary meaning of the term "*dommage*" embraces harms that no legal system would compensate, it must be acknowledged that the term is to be understood in its distinctively *legal* sense—that is, to mean only *legally cognizable harm*. The nicer question, and the critical one here, is whether the word "*dommage*" establishes *as the content of the concept "legally cognizable harm"* what French law accepted as such in 1929. No case of ours provides precedent for the adoption of French law in such detail. In *Floyd*, we looked to French law to determine whether "*lésion corporelle*" indeed meant (as it had been translated) "bodily injury"—not to determine the subsequent question (equivalent to the question at issue here) whether "bodily injury" encompassed psychic injury. See 499 U.S., at 536–540. And in *Saks*, once we had determined that in French legal terminology the word "*accident*" referred to an unforeseen event, we did not further inquire whether French courts would consider the event at issue in the case unforeseen; we made that judgment for ourselves. See 470 U.S., at 405–407.

It is particularly implausible that "the shared expectations of the contracting parties," *id.*, at 399, were that their mere use of the French language would effect adoption of the precise rule applied in France as to what constitutes legally cognizable harm. Those involved in the negotiation and adoption of the Convention could not have been ignorant of the fact that the law on this point

varies widely from jurisdiction to jurisdiction, and even from statute to statute within a single jurisdiction. Just as we found it "unlikely" in *Floyd* that Convention signatories would have understood the general term "*lésion corporelle*" to confer a cause of action available under French law but unrecognized in many other nations, see 499 U. S., at 540, so also in the present case we find it unlikely that they would have understood Article 17's use of the general term "*dommage*" to require compensation for elements of harm recognized in France but unrecognized elsewhere, or to forbid compensation for elements of harm *unrecognized* in France but recognized elsewhere. Many signatory nations, including Czechoslovakia, Denmark, Germany, the Netherlands, the Soviet Union, and Sweden did not, even many years after the Warsaw Convention, recognize a cause of action for non pecuniary harm resulting from wrongful death, see 11 International Encyclopedia of Comparative Law: Torts, ch. 9, pp. 15–18 (A. Tunc ed. 1972); *Floyd, supra*, at 544–545, n. 10.

The other alternative, and the only one we think realistic, is to believe that "*dommage*" means (as it does in French legal usage) "legally cognizable harm," but that Article 17 leaves it to adjudicating courts to specify what harm is cognizable. That is not an unusual disposition. Even within our domestic law, many statutes that provide generally for "damages," or for reimbursement of "injury," leave it to the courts to decide what sorts of harms are compensable . . .

That this is the proper interpretation is confirmed by another provision of the Convention. Article 17 is expressly limited by Article 24, which as translated provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, *without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights*." 49 Stat. 3020 (emphasis added).

The most natural reading of this Article is that, in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for. Those questions are to be answered by the domestic law selected by the courts of the contracting states. Petitioners contend that, because Article 24 refers to the parties' "*respective* rights," this provision defers to domestic law only on the "procedural" issues of who has standing to sue and how the proceeds of a damages award under Article 17 should be divided among eligible claimants. It does not seem to us that the question of who is entitled to a damages award is procedural; and in any event limiting Article 24 to procedural issues would render it superfluous, since Article 28(2) provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted." 49 Stat. 3021. More importantly, petitioners' reading of Article 24(2) would produce a strange regime in which 1929 French law (embodied in the Convention) determines what harms arising out of international air accidents must be indemnified, while current domestic law determines who is entitled to the indemnity and how it is to be divided among claimants. When presented with an equally plausible reading of Article 24 that leads to a more comprehensible result—that the Convention left to domestic law the questions of who may recover and what compensatory damages are available to them—we decline to embrace a reading that would produce the mélange of French and domestic law proposed by petitioners.

Because a treaty ratified by the United States is not only the law of this land, see Const., Art. II, section 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history *(travaux préparatoires)* and the post-ratification understanding of the contracting parties. Both of these sources confirm that the compensable injury is to be determined by domestic law. In the drafting history, the only statements we know of that directly discuss the point were made by the *Comité International Technique d'Experts Juridiques Aériens* (CITEJA), which did the preparatory work for the two Conferences (1925 in Paris, 1929 in Warsaw) that produced the Warsaw Convention. . . . Both these statements make

clear that the questions of who may recover, and what compensatory damages they may receive, were regarded as intertwined; and that both were unresolved by the Convention and left to "private international law"—*i.e.*, to the area of jurisprudence we call "conflict of laws," dealing with the application of varying domestic laws to disputes that have an interstate or international component.

* * * *

4. United States-Canada Air Transport Agreement

On February 24, 1995, in Ottawa, Canada, representatives of the United States and of Canada signed an Air Transport Agreement that entered into force the same day. 1995 U.S.T. LEXIS 232. The agreement superseded the Air Transport Agreement, with exchange of notes, Jan. 17, 1966, as amended; the Nonscheduled Air Services Agreement, with annexes and exchanges of notes, May 8, 1974; the Agreement Concerning Regional, Local and Commuter Services, effected by exchange of notes, Aug. 21, 1984, as amended; the Agreement on Aviation Security, Nov. 21, 1986; and the Agreement Relating to Air Navigation, effected by exchange of notes, July 28, 1938. *See also* 89 Am. J. Int'l L. 589, 596 (1995).

Five annexes were attached to the Agreement. Annex I, Scheduled Air Transportation, covered passenger/combination route authorities and all-cargo services (with special provisions for the phase-in period described in Annex V); fifth freedom services (prohibited, except on routes as therein specified and with indicated limitations); blind sector (in transit) rights; route flexibility/change of aircraft; and intermodal services. Annex II set out provisions for slots (including free slots for Canada) at Chicago O'Hare and New York La Guardia Airports, and access (including nonstop air services) to (and from) Washington National Airport. Annex III covered charter air transportation. Annex IV provided for continuation of designations and license authorizations; and

Annex V set out details regarding the transition phase of the Agreement.

The Department of State summarized the principal features of the agreement in a background statement transmitted to Congress under the Case Act*, excerpted below.

See 89 Am. J. Int'l. L. 597 (1996).

---

* * * *

This agreement creates a liberal transborder structure over a three-year phase-in period to replace the current restrictive bilateral air services agreement, which has been in effect since 1966. The subject agreement evolved from a framework established through information consultations . . . [and] addresses longstanding Canadian concerns over the competitive challenge posed by the size and strength of U.S. carriers by granting Canadian carriers immediate access to major U.S. airports through a one-time allocation of take-off and landing slots at no cost. Access by U.S. carriers to Canada's three principal airports in Vancouver, Montreal and Toronto will be gradually expanded over the three-year phase-in. Following this transition, carriers will be permitted to respond to consumer demand with respect to routes, frequencies and prices, and carriers of both sides will be able to compete on an equal footing for the business of shippers and travellers.

Other key elements of the new agreement include open code sharing between U.S. and Canadian airlines to all U.S. and Canadian points, virtually unrestricted rights for airlines of both countries to operate all-cargo services between the U.S. and Canada, and a dispute resolution mechanism keyed to the particular nature of the bilateral aviation market. Under the agreement, limited customs facilities will be established so that nonstop service can be conducted between Washington National Airport and Canada

---

* The Case Act, Pub. L. No. 92–403, 86 Stat. 619 (1972), 1 U.S.C. § 112 (b) requires that international agreements other than treaties entered into by the United States be transmitted to Congress within 60 days after their execution.

as long as the flights originate at Canadian airports with U.S. Customs and INS preclearance facilities.

Under Article 1, each party grants to the other the following rights for the conduct of international air transportation by its airlines: the right to fly across its territory without landing; the right to make stops in its territory for nontraffic purposes; and the rights otherwise specified in the Agreement. Article 1 also provides that nothing therein shall be deemed to confer on the airline or airlines of one party the rights to take on board in the other's territory passengers, their baggage, cargo, or mail carried for compensation and destined for another point in the territory of that other party.

* * * *

Article 4, Fair Competition, follows:

1. Each Party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in providing the international air transportation governed by this Agreement.

2. Neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other Party, except as may be required for customs and other government inspection services, technical, operational, or environmental reasons under uniform and nondiscriminatory conditions consistent with Article 15 of the Convention [which provides for continuation of the two parties' program of joint preparation of agreed true origin and destination statistics for air passenger traffic over routes operated pursuant to the Agreement].

3. Neither Party shall impose on the other Party's designated airlines a first-refusal requirement, uplift ratio, no-objection fee, or any other requirement with respect to capacity, frequency or traffic that would be inconsistent with the purposes of this Agreement.

4. Neither Party shall require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party for approval, except as may be required on a non-discriminatory basis to enforce the uniform conditions foreseen by paragraph 2 of this Article or as may be specifically authorized in Annex III

[Charter Air Transportation] to this Agreement. If a Party requires filings for information purposes, it shall minimize the administrative burdens of filing requirements and procedures on air transportation intermediaries and on designated airlines of the other Party.

The provisions of Article 4 are subject to limitations during the transition period specified in Annex V (which is one year in respect of all-cargo services; two years in respect of passenger/combination services at Montreal and Vancouver; and three years in respect of passenger/combination services at Toronto).

* * * *

Article 8, User Charges, provides that (1) user charges for air navigation services/air traffic control must be just and reasonable, and assessed on terms not less favorable than the most favorable terms available to any other airline in providing similar international air transportation; (2) user charges for airport, aviation security, and related facilities and services shall be just, reasonable, not unjustly discriminatory, equitably apportioned among categories of users, and "[i]n any event . . . assessed . . . on terms not less favorable than the most favorable terms available to any other airline in providing similar international air transportation at the time the charges are assessed." . . .

* * * *

5. Civil Aviation Agreements with Japan and France

In 1998 the United States entered into agreements substantially liberalizing the U.S.-Japan and U.S.-France relationships in civil aviation. These agreements eliminated restrictions on airline operations for both passenger and cargo services as part of the U.S. policy of opening world aviation markets to competition.

Highlights of the United States-Japan Agreement (April 20, 1998), are discussed in the following excerpt from a February 2, 1998, fact sheet released by the State Department following the initialing of a detailed framework for an agreement on January 30, 1998.

The fact sheet is available at *www.clintonpresidentialcenter.org/legacy/013098-fact-sheet-on-japan-civil-aviation-agreement.htm*.

---

* * * *

- Non-incumbent "combination" carriers, Delta, American and Continental, gain the right to offer an additional 90 weekly round-trip flights between the U.S. and Japan, nearly tripling their access to this market. Combination carriers carry both passengers and cargo.
- Two new non-incumbent carriers will be able to enter the U.S.-Japan market, one immediately and another in two years.
- Non-incumbent all-cargo carriers, UPS and Polar Air Cargo, gain valuable new opportunities to transport cargo to destinations beyond Japan. An additional all-cargo carrier will be able to enter the market in four years.

This agreement eliminates restrictions and resolves disputes for incumbent carriers.

- This agreement lifts all restrictions on the number of flights operated and points served between the U.S. and Japan by incumbent combinations and all-cargo carriers—United Airlines, Northwest Airlines and Federal Express.
- This agreement resolves the long-standing dispute over our incumbent carriers' right to fly from Japan to other international points beyond Japan.

Code Sharing is permitted for the first time. U.S. and Japanese carriers can code share freely, U.S. carriers can code share among themselves on many operations to Japan and beyond, and U.S. carriers can code share with third-country carriers on operations to and beyond Japan.

Other new services will be available. Charter operations will increase in two years from the current 400 flights per year to 600 flights per year, rising eventually to 800 flights.

Distribution and pricing provisions will promote competition. U.S. carriers are guaranteed a fair and equal opportunity to contract with wholesalers and travel agents and to set up enterprises to

market their services directly to consumers. The parties have agreed to meet by May 1998 to consider further steps to liberalize pricing. **Liberalization will continue to move forward.** The parties will begin talks within three years regarding a fully liberalized agreement. If we do not reach that goal by 2002, supplemental rights will be available. For example, non-incumbent combination carriers will gain the right to operate up to 35 additional weekly round-trip flights between the U.S. and Japan.

* * * *

Highlights of the United States-France Agreement are discussed in the following excerpt from a Department of Transportation press release, dated June 18, 1998, on the signature of the U.S.-France aviation agreement.

The fact sheet is available at *www.dot.gov/affairs/1998/dot11798.htm*.

---

* * * *

Prior to the agreement, the U.S.-France market was the largest U.S. aviation market not governed by a bilateral agreement. . . . The agreement:

- Removes restrictions on the number of passenger airlines that may serve the market and the routes that they may serve.
- Allows, during the five-year transition period, U.S. passenger airlines to add nine new daily services from the United States.
- Removes limits on code-sharing services between U.S. and French airlines. Code sharing, a marketing arrangement whereby one airline puts its code on the flight of another airline, has become an increasingly important way for carriers to provide seamless service to passengers.
- Allows U.S. airlines to code-share to France with third country carriers, with restrictions only on code-share services to France via third countries. All other kinds of code sharing are open, with no limits on capacity, frequencies and cities served. Two alliances may immediately code

share to France via third countries, with additional alliances added during the transition and a completely unrestricted regime thereafter.
- Lifts all restrictions on airline pricing initiatives in two years.
- Allows U.S. cargo airlines to sharply increase service and competition between France and the United States and points beyond. The United States may designate two airlines in addition to Federal Express to serve the all-cargo market in 1998 and two others later in the transition period. The agreement removes all restrictions on the number of U.S.-France routes the designated all-cargo carriers may serve.

* * * *

6. Cuban Downing of U.S.-Registered Planes in International Airspace (Brothers To The Rescue Shoot Down)

On February 24, 1996, Cuban military aircraft shot down in international airspace north of Cuba two unarmed U.S.-registered civilian aircraft belonging to Brothers to the Rescue, a Miami-based humanitarian organization engaged in searching for and aiding Cuban refugees in the Straits of Florida. President Clinton told reporters later that day that he "condemn[ed] this action in the strongest possible terms" and had "directed the United States Coast Guard units in the area to conduct search and rescue operations . . . ordered United States military forces in the area to provide support to the search and rescue operations and to ensure that it is fully protected [and] instructed our interest section in Havana to seek an immediate explanation for this incident from the Cuban Government." 32 WEEKLY COMP. PRES. DOC. 374 (Mar. 4, 1996).

On February 26, the President also announced that he was ordering further U.S. measures, set forth below. *Id.* at 381.

---

* * * *

First, I am asking that Congress pass legislation that will provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States. . . .

Second, I will move promptly to reach agreement with the Congress on the pending Helms-Burton Cuba legislation so that it will enhance the effectiveness of the embargo in a way that advances the cause of democracy in Cuba.

Third, I have ordered that Radio Marti expand its reach. All the people of Cuba must be able to learn the truth about the regime in Havana-the isolation it has earned for itself through its contempt for basic human rights and international law.

Fourth, I am ordering that additional restrictions be put on travel in the United States by Cuban officials who reside here, and that visits by Cuban officials to our country be further limited.

Finally, all charter air travel from the United States to Cuba will be suspended indefinitely.

* * * *

On February 25, on instruction from the President, Ambassador Madeleine Albright, the U.S. Permanent Representative to the United Nations (and during February 1996, President of the UN Security Council), convened an emergency session of the Council. Following consideration of the matter by the Security Council, on February 27, 1996, Ambassador Albright, as its President, made a statement strongly deploring the incident, excerpted below. U.N. Doc. S/PRST/1996/9 (1996).

---

* * * *

The Security Council recalls that according to international law, as reflected in Article 3 bis of the International Convention on Civil Aviation of 7 December 1944 added by the Montreal Protocol of 10 May 1984, States must refrain from the use of weapons against civil aircraft in flight and must not endanger the lives of persons on board and the safety of aircraft. States are obliged to respect international law and human rights norms in all circumstances.

The Security Council requests that the International Civil Aviation Organization investigate this incident in its entirety and calls on the Governments concerned to cooperate fully with this investigation. The Council requests that the International Civil Aviation Organization report its findings to the Council as soon as possible. The Council will consider that report and any further information presented to it without delay.

* * * *

The Cuban-American community in Florida announced its intention to hold a wreath-laying ceremony near the site of the downing to commemorate the four victims. In a press briefing on February 29, 1996, White House Press Secretary Michael McCurry noted that the President had asked the administration to work with those involved to make sure that the event was dignified, peaceful and lawful. He added that the President would issue orders making clear that unauthorized entry by U.S. aircraft and vessels into Cuban territory was prohibited, that "firm legal action will face those that violate this prohibition." At the same time, and the United States expected "restraint and compliance with international standards from the Cubans" so that there would be no repeat of the tragic incident. The Press Secretary also reported on actions the President was taking "to guard the safety of our citizens and residents and to ensure that they abide by United States [and] international law."

The full text of the press statement, excerpted below, is available at *www.clintonpresidentialcenter.org/legacy/022996-press-briefing-by-mccurry-simon-emerson-fabiani.htm*.

---

* * * *

. . . First, the President has approved a strong warning to the Cuban government not to violate basic norms of international conduct. We will not tolerate the loss of American lives.

Second, the President has directed the Coast Guard to provide support to participants in the memorial ceremony Saturday in international territory. Coast Guard vessels and aircraft will be on

the site to help participants identify and reach the location where the planes were shot down. The Coast Guard will also be on hand to detect and warn against any unauthorized incursions into Cuban waters or air space. Coast Guard and FAA officials will be meeting with organizers of the memorial service today . . . in South Florida to offer exactly that type of assistance.

Third, the President is issuing a proclamation directing the Secretary of Transportation to take action to prevent United States vessels from entering Cuban territorial waters without permission. If we have information that a vessel intends to enter Cuban waters without authorization, it will not be permitted to leave and will be subject to immediate seizure. If an unauthorized U.S. vessel does leave and enters Cuban territorial waters, upon its return the vessel will be subject to seizure and its captain, owner and crew subject to fine and imprisonment.

Fourth, the President has asked the Secretary of Transportation to issue an emergency order directed at United States aircraft prohibiting unauthorized entry into Cuban air space and providing for swift and strong enforcement actions upon its return. Any person who violates Cuban air space will be subject to the maximum penalties permitted by law [*See* 61 Fed. Reg. 8702 (Mar. 5, 1996)].

* * * *

On March 1, 1996, President Clinton issued Proclamation 6867, "Declaration of a National Emergency and Invocation of Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels." 61 Fed. Reg. 8843 (Mar. 5, 1996), excerpted below.

Whereas, on February 24, 1996, Cuban military aircraft intercepted and destroyed two unarmed U.S.-registered civilian aircraft in international airspace north of Cuba;

Whereas the Government of Cuba has demonstrated a ready and reckless willingness to use excessive force, including deadly force, in the ostensible enforcement of its sovereignty;

Whereas, on July 13, 1995, persons in U.S.-registered vessels who entered into Cuban territorial waters suffered injury as a

result of the reckless use of force against them by the Cuban military; and

Whereas the entry of U.S.-registered vessels into Cuban territorial waters could again result in injury to, or loss of life of, persons engaged in that conduct, due to the potential use of excessive force, including deadly force, against them by the Cuban military, and could threaten a disturbance in international relations;

Now, Therefore, I, William J. Clinton, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 1 of title II of Public Law 65–24, ch. 30, June 15, 1917, as amended (50 U.S.C. 191), sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3, United States Code, find and do hereby proclaim that a national emergency does exist by reason of a disturbance or threatened disturbance of international relations. In order to address this national emergency and to secure the observance of the rights and obligations of the United States, I hereby authorize and direct the Secretary of Transportation (the "Secretary") to make and issue such rules and regulations as the Secretary may find appropriate to regulate the anchorage and movement of vessels, and delegate to the Secretary my authority to approve such rules and regulations, as authorized by the Act of June 15, 1917.

Section 1. The Secretary may make rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, which may be used, or is susceptible of being used, for voyage into Cuban territorial waters and that may create unsafe conditions and threaten a disturbance of international relations. Any rule or regulation issued pursuant to this proclamation may be effective immediately upon issuance as such rule or regulation shall involve a foreign affairs function of the United States.

Sec. 2. The Secretary is authorized to inspect any vessel, foreign or domestic, in the territorial waters of the United States, at any time, to place guards on any such vessel; and, with my consent expressly hereby granted, take full possession and control of any such vessel and remove the officers and crew, and all other persons not specifically authorized by the Secretary to go or remain on

board the vessel when necessary to secure the rights and obligations of the United States.

Sec. 3. The Secretary may request assistance from such departments, agencies, officers, or instrumentalities of the United States as the Secretary deems necessary to carry out the purposes of this proclamation. Such departments, agencies, officers, or instrumentalities shall, consistent with other provisions of law and to the extent practicable, provide requested assistance.

Sec. 4. The Secretary may seek assistance from State and local authorities in carrying out the purposes of this proclamation. Because State and local assistance may be essential for an effective response to this emergency, I urge all State and local officials to cooperate with Federal authorities and to take all actions within their lawful authority necessary to prevent the unauthorized departure of vessels intending to enter Cuban territorial waters.

* * * *

The Brothers to the Rescue incident increased bipartisan sentiment in Congress to pass strong sanctions legislation. President Clinton signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 ("LIBERTAD Act") on March 12, 1996. *See* Pub. L. No. 104–114, 110 Stat. 785 (1996). *See also* 90 Am. J. Int'l L. 442, 448 (1996). The LIBERTAD Act is discussed in B.4.c. below, and in Chapter 1.C.2.f., Chapter 8.B.2., and Chapter 16.A.3.b. Litigation arising from the incident is discussed in Chapter 10.A.3.d.(ii).

B. TRADE

1. Enforcement of Trade Agreements in the 1990s

In testimony to the Subcommittee on International Trade of the Senate Finance Committee, Susan G. Esserman, General Counsel of the Office of the U.S. Trade Representative, discussed U.S. implementation and enforcement of trade agreements in the 1990s. In her testimony, delivered on February 23, 1999, Ms. Esserman emphasized the importance of international trade for the U.S. economy and the U.S.

interest in promoting free trade and the rule of law. Topics included in Ms. Esserman's overview included enforcement through the dispute settlement and committee process of the World Trade Organization ("WTO"), bilateral trade-related agreements, and dispute consultations and arbitration under the North American Free Trade Agreement ("NAFTA").

The full text of the testimony, excerpted below, is available at *www.usconsulate.org.hk/uscn/trade/general/ustr/1999/0223.htm*.

---

* * * *

Full implementation of trade agreements is critical to securing their full benefits, to maintaining public confidence in an open trading system, and therefore to the success of trade policy generally. To ensure that agreements yield the benefits bargained for, we have developed an ongoing strategy of active use of the dispute settlement provision of our trade agreements, vigorous monitoring and enforcement of trade agreements, strategic application of U.S. trade laws, and continued engagement in multilateral, regional, bilateral and sectoral negotiations.

* * * *

—We assert U.S. rights through mechanisms in the World Trade Organization, including the stronger dispute settlement mechanism created in the Uruguay Round, and the WTO Committees and Bodies charged with monitoring implementation and surveillance of agreements and disciplines.

—We vigorously monitor and enforce our bilateral agreements.

—We invoke U.S. trade laws in conjunction with bilateral and WTO mechanisms to promote compliance.

—We provide technical assistance to trade partners, especially in developing countries to ensure that key Agreements like the Agreement on Basic Telecommunications and TRIPs are implemented on schedule.

—Through NAFTA's trilateral work program, tariff acceleration, and use or threat of NAFTA's dispute settlement mechanism, we seek to promote America's interests under the Agreement.

* * * *

One of our primary venues for enforcing agreements and asserting U.S. rights is the WTO's dispute settlement mechanism. To ensure that the United States secures the full benefits of the WTO Agreements, we insisted on a strong, binding and expeditious dispute settlement system for the WTO.

* * * *

The WTO dispute settlement system has proven valuable in achieving tangible gains for American companies and workers, and also as a deterrent—our trading partners know it is ready and available to us if they do not fulfill their obligations. We have been successful in reaching rapid resolution of our complaints through early settlement, and have also achieved substantial benefits from full litigation and resulting panel decisions which enforce our rights.

* * * *

One of our priorities in the Uruguay Round was to ensure that the WTO would be a forum for ongoing liberalization, implementation and consultation. Strict attention to the implementation of agreements by the Committees and Bodies that report to the WTO General Council has helped ensure the realization of this goal.

These Committees are charged with reviewing implementation and regulation of each WTO agreement. They thus often provide us with our first opportunity to raise concerns about implementation without having to begin the process of dispute settlement.

* * * *

These Bodies also give us a chance to ensure full implementation of commitments on schedule, which is especially important since most of the Agreements negotiated in the Uruguay Round that contain transition periods or phase-in provisions are to be fully implemented by the end of this year.

* * * *

[Domestic] trade laws—including Section 301, "Special 301" for intellectual property and Section 1377, as well as Super 301

and Title VII, which we will re-authorize by Executive Order—are of critical importance to ensure full implementation of both bilateral and multilateral agreements. They work in tandem with dispute settlement procedures, and also assist us in completing and enforcing agreements with trading partners that are not WTO members or in areas not covered by WTO rules.

Section 301 is an effective tool for securing compliance through the WTO dispute settlement system. Section 301 and the new WTO rules are stronger in combination than either would be alone. This is because the WTO provides us, for the first time, the automatic right to suspend trade benefits if a trading partner fails to implement a WTO panel report. This means we can use the leverage inherent in Section 301 in those situations across the full range of products and sectors covered by the WTO without the risk of running afoul of our own trade commitments or drawing counter-retaliation.

* * * *

Finally, let me address the North American Free Trade Agreement. This agreement governs a majority of our trade with our two largest export markets, and apart from the WTO is our only major trade agreement with a binding dispute settlement mechanism. On both counts, ensuring full implementation of this agreement is very important to us.

* * * *

To date, we have been able to address most NAFTA-related disputes through consultations, without resort to NAFTA arbitration panel procedures. Over the five-year history of the agreement, fewer than four matters per year have been referred to government-to-government consultations under NAFTA Chapter 20, and a total of only two matters have been submitted to Chapter 20 arbitration panels.

This infrequent use of panel procedures reflects the commitment of the three NAFTA governments to reach agreement on areas of dispute, and the strength of the NAFTA's institutions. These include working groups on each of NAFTA's substantive areas, frequent discussions among NAFTA coordinators, and meetings of the

NAFTA Free Trade Commission at both the Deputy and Ministerial levels. When issues have been referred to NAFTA consultations, the consultations and subsequent meetings of the Free Trade Commission have been able to focus the issues and draw political-level attention where needed, often resulting in a settlement without resort to arbitration.

* * * *

In summary, Mr. Chairman, the last few years have witnessed both a large expansion of our network of bilateral and multilateral agreements, and a strategic effort to ensure full enforcement of these agreements. We have devoted more resources to enforcement as the need has grown, and have effectively used the authority Congress has given us to concentrate on the trading partners and sectors of most importance to the United States. And our work has paid off in rising exports and improving job opportunities in the United States, and the advance of the rule of law abroad.

* * * *

2. World Trade Organization

a. Signature of Uruguay Round agreements establishing the World Trade Organization

On December 15, 1993, the United States joined over 100 other countries in concluding the Uruguay Round of Multilateral Trade Negotiations under the auspices of the General Agreement on Tariffs and Trade (the "GATT"). On April 15, 2004, U.S. Trade Representative Mickey Kantor and other government ministers signed the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" in Marrakesh, Morocco. The Final Act included the Agreement Establishing the World Trade Organization ("WTO"), *reprinted in* 33 I.L.M. 1 (1994). On January 1, 1995, the WTO was established.

On December 15, 1993, President William J. Clinton had notified Congress, in accordance with section 1103(a)(1) of

the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107, as amended, 19 U.S.C. § 2903(a)(1) (1988), of his intent to enter into the trade agreements resulting from the Uruguay Round. 58 Fed. Reg. 67,263 (Dec. 15, 1993). As explained in the President's notification,

> in accordance with the procedures in the [Omnibus Trade and Competitiveness] Act, the United States will not enter into the agreements outlined above until April 15, 1994. After the agreements have been signed, they will be submitted for congressional approval, together with whatever legislation and administrative actions may be necessary or appropriate to implement the agreements in the United States. The agreements will not take effect with respect to the United States, and will have no domestic legal force, until the Congress has approved them and enacted any appropriate implementing legislation.

An Executive Summary prepared by the Office of the U.S. Trade Representative accompanying the President's notification described the twenty-one agreements concluded in the following areas: (1) Market Access for Goods; (2) Agriculture; (3) Textiles and Clothing; (4) Safeguards; (5) Antidumping; (6) Subsidies and Countervailing Measures; (7) Trade-Related Investment Measures; (8) Import Licensing Procedures; (9) Customs Valuation; (10) Preshipment Inspection; (11) Rules of Origin; (12) Technical Barriers to Trade; (13) Sanitary and Phytosanitary Measures; (14) Services; (15) Trade-Related Intellectual Property Rights; (16) Dispute Settlement; (17) Establishment of the World Trade Organization; (18) GATT Articles; (19) Trade Policy Review Mechanism; (20) Ministerial Decisions and Declarations; and (21) Government Procurement. 58 Fed. Reg. 67,263 (Dec. 15, 1993).

Congress approved the results of the negotiations, including U.S. participation in the WTO in the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), signed into law by President Clinton December 8, 1994. The President issued Proclamation 6763 on

December 23, 1994, which, among other things, implemented tariff and other customs treatment resulting from the Uruguay Round. 60 Fed. Reg. 1007 (Jan. 4, 1995). *See* Chapter 4.A.2.a. for a discussion of the constitutionality of completing the Uruguay Round instruments through this Congressional procedure rather than through advice and consent to ratification of a treaty as that term is used in Article 2, section 2 of the Constitution.

The text of all of the Uruguay Round Agreements can be found on the World Trade Organization's website at *www.wto.org*. The Agreement on Trade-Related Aspects of Intellectual Property Rights is discussed in D.1. below. *See also* 88 Am. J. Int'l L. 312, 320 (1994).

Further excerpts below from President Clinton's notification to Congress describe the various key agreements. 58 Fed. Reg. 67,263.

---

* * * *

In section 1101 of the [Omnibus Trade and Competitiveness] Act the Congress set as the first overall U.S. negotiating objective for the Uruguay Round more open, equitable and reciprocal market access. I am particularly pleased to advise you that the Uruguay Round results will provide an unprecedented level of new market access opportunities for U.S. goods and services exports. In the attachment to this letter is a summary description of the agreements on market access for goods and services that we have achieved in the Round. Of special note are the number of areas where we and our major trading partners have each agreed to reduce tariffs on goods to zero. The schedules of commitments reflecting market access in services cover a wide range of service sectors that are of great interest to our exporting community.

The Agreement on Agriculture will achieve, as Congress directed, more open and fair conditions of trade in agricultural commodities by establishing specific commitments to reduce foreign export subsidies, tariffs and non-tariff barriers and internal supports.

The Agreement on Textiles and Clothing provides for trade in textiles and apparel to be fully integrated into the GATT for the

first time. As a result, trade in textiles will be subject to the same disciplines as other sectors. This transition will take place gradually over an extended period. At the same time, the agreement provides an improved safeguards mechanism. It also requires apparel exporting countries to lower specific tariff and non-tariff barriers, providing new market opportunities for U.S. exporters of textile and apparel goods. The agreement contributes to the achievement of the U.S. negotiating objectives of expanding the coverage of the GATT while getting developing countries to provide reciprocal benefits.

In fulfillment of the second overall U.S. negotiating objective, the reduction or elimination of barriers and other trade-distorting policies and practices, the Uruguay Round package includes a number of agreements to reduce or eliminate non-tariff barriers to trade. These agreements . . . address Safeguards, Antidumping, Subsidies and Countervailing Measures, Trade-Related Investment Measures, Import Licensing Procedures, Customs Valuation, Preshipment Inspection, Rules of Origin, Technical Barriers to Trade, and Sanitary and Phytosanitary Measures. The agreements strengthen existing GATT rules and, for the first time in the GATT, discipline non-tariff barriers in the areas of investment, rules of origin and preshipment inspection. The agreements preserve the ability of the United States to impose measures necessary to protect the health and safety of our citizens and our environment and to enforce vigorously our laws on unfair trade practices.

The Agreement on Government Procurement will provide new opportunities for U.S. exporters as a result of the decision to expand the coverage of the agreement to government procurement of services and construction; we will, however, only extend the full benefits of the agreement to those countries that provide satisfactory coverage of their own procurement. Negotiations on improvements in the Agreement on Trade in Civil Aircraft and on a Multilateral Steel Agreement are continuing. . . .

As a result of the Agreement on Trade-Related Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS), we will now have for the first time internationally agreed rules covering areas of trade of enormous importance to the United States. . . . GATS contains legally enforceable provisions

dealing with both cross-border trade and investment in services and sectoral annexes on financial services, labor movement, telecommunications and aviation services. More than 50 countries have submitted schedules of commitments on market access for services. The TRIPS agreement provides for the establishment of standards for the protection of a full range of intellectual property rights and for the enforcement of those standards both internationally and at the border.

The Uruguay Round has produced a number of other agreements that will create a more effective system of international trading disciplines and procedures.

The Understanding on Rules and Procedures Governing the Settlement of Disputes will provide for a more effective and expeditious dispute resolution mechanism and procedures which will enable better enforcement of United States rights. Congress identified the establishment of such a system as the first principal U.S. trade negotiating objective for the Round. The procedures complement U.S. laws for dealing with foreign unfair trade practices such as section 301 of the Trade Act of 1974.

The Agreement Establishing the World Trade Organization will facilitate the implementation of the trade agreements reached in the Uruguay Round by bringing them under one institutional umbrella, requiring full participation of all countries in the new trading system and providing a permanent forum to address new issues facing the international trading system. . . . Creation of the WTO will contribute to the achievement of the second principal U.S. negotiating objective of improving the operation of the GATT and multilateral trade agreements.

The U.S. objective of improving the operation of the GATT is also furthered by a number of understandings, decisions and declarations regarding the GATT and its operations. The Trade Policy Review Mechanism will enhance surveillance of members' trade policies. The Understandings Concerning Interpretation of Specific Articles of the General Agreement on Tariffs and Trade 1994 (GATT 1994) concern the Interpretation of Articles II:1(b), XVII, XXIV, XXVIII and XXXV, and Balance-of-Payments Provisions. There is also an Understanding in respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994.

The Ministerial Decisions and Declarations state the views and objectives of Uruguay Round participants on a number of issues relating to the operation of the global trading system, provide for the continuation of the improvements to the dispute settlement system that became effective in 1989 and deal with other matters concerning the dispute settlement system. The Ministerial Decisions and Declarations that are now proposed for adoption are described in the attachment. At this time, implementing legislation does not appear to be necessary for these instruments.

I will continue to consult closely with the Congress as we conclude the Round. There are a few areas of significance that we were unable to resolve at this time. In order to ensure more open, equitable and reciprocal market access, in certain agreements we have made U.S. obligations contingent on receiving satisfactory commitments from other countries, and we will continue to work to ensure that the best possible agreement for the United States is achieved. I will not enter into any agreement unless I am satisfied that U.S. interests are protected.

* * * *

b. Agreement on financial services

On October 6, 1995, at Geneva, the United States and other WTO member-countries entered into an Interim Agreement on Trade in Financial Services, done as the second protocol to the General Agreement on Trade in Services ("GATS"), *reprinted in* 35 I.L.M. 203 (1995). At the time that Uruguay Round negotiations concluded in 1994, the United States and a number of other developed countries had unresolved concerns about market access commitments in the financial services area and with developing country market access commitments in the financial services sector. Accordingly, while an interim set of financial services obligations and commitments were put into effect for six months after the adoption of the Uruguay Round WTO Agreements, negotiations on financial services continued through June 30, 1995. Although progress was made in improving market access

commitments, the United States was still not prepared to offer full Most Favored Nation ("MFN")* treatment and offered only partial MFN to other parties in this 1995 interim agreement.

This led to a GATS Council decision to engage in an additional round of negotiations, for sixty days, beginning on November 1, 1997. Excerpts from a December 13, 1997, joint statement by Treasury Secretary Rubin and U.S. Trade Representative Charlene Barshefsky on the conclusion of the 1997 WTO Financial Services negotiations follow. The text of the entire joint statement can be found at USTR's website at *www.treas.gov/press/releases/rr2112.htm*.

We are pleased to announce that the United States has led a successful effort to conclude multilateral negotiations that will open financial services markets to US suppliers of banking, securities, insurance and financial data services. The agreement that we secured . . . is dramatically improved from the one that concluded in 1995. . . . This deal covers 95% of the global financial services market as measured in revenue. With this deal, 102 WTO members now have market-opening commitments in the financial services sector. . . .

---

* A report by the Congressional Research Service described MFN status as follows:

"Normal trade relations" (NTR), or "most-favored-nation" (MFN), trade status is used to denote nondiscriminatory treatment of a trading partner. Only a few countries do not have NTR status in trade with the United States. In practice, duties on the imports from a country which has been granted NTR status are set at lower, concessional rates than those from countries that do not receive such treatment." In a footnote, the report explained that "MFN has been used in international agreements and until recently in U.S. law to denote the fundamental trade principle of non-discriminatory treatment. However, 'MFN' was replaced in U.S. law, on July 22, 1998, by the term 'normal trade relations' (P.L. 105–206). MFN is still used in international trade agreements." CRS Report for Congress: Permanent Normal Trade Relations (PNTR) Status for Russia and U.S.-Russian Economic Ties, RS21123 (Jan. 28, 2002).

* * * *

A well-functioning financial services industry is key to economic growth in any country, as we have seen in the United States. . . . This agreement levels the playing field in global financial markets, providing new opportunities for U.S. financial service firms.

At the same time, this agreement will foster the development of financial markets, especially in developing countries, helping lay the foundation for sustained growth. Many countries had already begun the process of financial sector liberalization, but in the past had hesitated to lock in those measures. This agreement locks in that progress and, in addition, substantially advances the process of market opening abroad.

Financial services, together with the Information Technology Agreement (ITA) and the agreement in the WTO to lock in market opening commitments on telecommunications services, now completes the triple play of solid global market opening agreements we have reached in the past year. All three cover sectors where the United States is the most competitive . . . [and] where the United States has minimal or non-existent trade barriers, but the rest of the world . . . present substantial entry barriers for our companies.

* * * *

c. Agreement on Basic Telecommunications Services

On February 15, 1997, the United States and 68 other countries entered into the Agreement on Basic Telecommunications Services ("Basic Telecom Agreement"), done as the fourth protocol to GATS. The United States had played an instrumental role in getting Uruguay Round negotiators to agree to extend negotiations on basic telecommunications services past the April 1994 conclusion of the Uruguay Round. The Agreement entered into effect on January 1, 1998. United States Trade Representative Barshefsky testified before the House Commerce Committee, Subcommittee on Telecommunications, Trade & Consumer Protection on March 19, 1997, regarding the achievements and requirements of the

Basic Telecom Agreement. Her testimony is excerpted below and the full text is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

The WTO Basic Telecom Agreement represents a change of profound importance. It is an achievement greater than we could have reasonably expected three years ago at Buenos Aires. A 60-year tradition of telecommunications monopolies and closed markets will give way to market opening, deregulation and competition—the principles championed in the United States and embodied in the 1996 Telecommunications Act. We did not expect at Buenos Aires that these principles would be adopted widely by both the industrialized nations and by so many other countries. The Basic Telecom Agreement was negotiated among 69 countries —both developed and developing—that account for over 99% of WTO member telecom revenues. It ensures that U.S. companies can compete against and invest in all existing carriers. Before this Agreement, only 17 percent of the top 20 telecom markets were open to U.S. companies; now they have access to nearly 100 percent of these markets. The range of services and technologies covered by this Agreement is breath-taking. From submarine cables to satellites, from wide-band networks to cellular phones, from business intranets to fixed wireless for rural and underserved regions, the market access opportunities cover the entire spectrum of innovative communications technologies pioneered by American industry and workers.

The Agreement has four parts: market access, investment, procompetitive regulatory principles and enforcement. With respect to market access, the Agreement provides U.S. companies market access for local, long-distance and international service through any means of network technology, either on a facilities basis or through resale of existing network capacity. On investment, the Agreement ensures that U.S. companies can compete against, acquire or hold a significant stake in telecom companies around the world. Finally, 65 countries adopted procompetitive regulatory principles based upon the landmark 1996 Telecommunications Act.

And lastly, this Agreement is fully enforceable through WTO dispute settlement [procedures], supplemented where necessary by U.S. trade laws.

* * * *

Scope of Market Access Commitments

* * * *

Our international long distance industry will gain access to serve over 52 markets in Europe, Asia, Latin American and Africa, and in 49 markets they will gain access to provide these and other services by satellite. U.S. industry will gain the right to use their own facilities and to work directly with their customers everywhere their customers go—providing seamless end-to-end services, instead of transferring calls to local providers at extra cost. From the European Community to Korea, from Japan to El Salvador, Mexico and Canada, countries have made these commitments. And the range of services that can be provided internationally includes all voice and data services, provided by fixed or by wireless service networks or both.

* * * *

This Agreement also provides market access and effective interconnection rights for the resale of telecom services. Almost every offer made in these negotiations to provide market access for facilities-based competition also included the opportunity to resell service and to interconnect with existing networks at reasonable rates, terms and conditions.

* * * *

Investment and regulatory commitments

* * * *

Our firms will gain not only the opportunity to compete but they will also benefit for the first time from fair rules and effective enforcement. Sixty-five countries representing 93% of the world market have bound themselves to enforceable regulatory principles based upon the framework for competition that this Committee

championed in the landmark Telecommunications Act of 1996. Fifty-five of these countries have agreed to a uniform, specific set of regulatory principles. The global adoption of these procompetition principles, known as the Reference Paper, is an extraordinary testimony to the compelling nature of Congress' vision in this area.

The Reference Paper commits foreign countries to establish independent regulatory bodies, guarantees that our companies will be able to interconnect with networks in foreign countries at reasonable prices, requires governments to take action to prevent anti-competitive practices such as cross-subsidization, and mandates transparency of government regulations and licensing. We will be able to enforce all of these rights, as well as the market access and investment commitments, at the WTO and through our own legislation. The Agreement takes effect on January 1, 1998. Countries remain free to improve further their offers and we will work to that end.

* * * *

d. U.S. reports to WTO committees

(1) Agriculture

In its 2000 Trade Policy Agenda and 1999 Annual Report to Congress, Chapter II at 65, USTR provided an assessment of the first five years of operation under the WTO Agreement on Agriculture, as excerpted below.

The full text of the report, issued in March 2000, is available through the U.S. Trade Representative Press Office. The WTO chapter of the report is available at *www.state.gov/s/l/c8185.htm*.

Status

The WTO Committee on Agriculture oversees implementation of and adherence to the Agreement on Agriculture. It provides a vital forum for consultation and, in many cases, resolution of issues resulting from the commitments made in the Uruguay Round. The

Committee is also charged with monitoring the follow-up to the 1995 Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least Developed and Net Food Importing Developing Countries. During 1999, the Committee concluded its work on the Analysis and Information Exchange (AIE) that had been mandated by the WTO's 1st Ministerial Conference in Singapore. The AIE was charged with reviewing issues arising out of the implementation of the Uruguay Round Agreement and identifying possible areas to address in the continuation of the agriculture reform process, mandated as part of the WTO's built-in agenda.

Assessment of the First Five Years of Operation

The Agreement on Agriculture represents a major step forward in bringing agriculture more fully under WTO disciplines. The creation of new trade rules and specific market-opening commitments has transformed the world trading environment in agriculture from one where trade was heavily distorted and basically outside effective GATT disciplines to a rules-based system that quantifies, caps and reduces trade-distorting protection and support. Prior to the establishment of the Agreement, Members were able to block imports of agricultural products, provide essentially unlimited production subsidies to farmers, and dump surplus production on world markets with the aid of export subsidies. As a consequence, U.S. farmers and ranchers were denied access to other countries' markets and were undercut by subsidized competition in world markets.

The WTO Agreement on Agriculture set out a framework that imposed disciplines in three critical areas affecting trade in agriculture.

1. First, the Agreement places limits on the use of export subsidies. Products that had not benefited from export subsidies in the past are banned from receiving them in the future. Where Members had provided export subsidies in the past, the future use of export subsidies was capped and reduced.
2. Second, the Agreement set agricultural trade on a more predictable basis by requiring the conversion of non-tariff barriers, such as quotas and import bans, into simple tariffs. Currently, trade in agricultural products can only be

restricted by tariffs. Quotas, discriminatory licensing, and other non-tariff measures are now prohibited. Also, all agricultural tariffs were "bound" in the WTO and made subject to reduction commitments; a decision by a Member to impose tariff rates above a binding would violate WTO obligations. Creating a "tariff-only" system for agricultural products is an important advance, yet too many high tariffs and administrative difficulties with tariff-rate quota systems that replaced the non-tariff barriers continue to impede international trade of food and fiber products.

3. Third, the Agreement calls for reduction commitments on trade-distorting domestic supports, while preserving criteria-based "green box" policies that can provide support to agriculture in a manner that minimizes distortions to trade. Governments have the right to support farmers if they so choose. However, it is important that this support be provided in a manner that causes minimal distortions to production and trade.

As a result, farmers all over the world benefit from access to new markets and improved access to existing markets, face less subsidized competition, and now have a solid framework for addressing agricultural trade disputes. Yet it is clear that full agricultural reform is a long-term endeavor. Hence, the Agreement also called for new negotiations on agriculture beginning in 1999, as part of the "built-in" agenda of the WTO.

The Committee on Agriculture has proven since its inception to be a vital instrument for the United States in monitoring and enforcing agricultural trade commitments that were undertaken by other countries in the Uruguay Round. Members agreed to provide annual notifications of progress in meeting their commitments in agriculture, and the Committee has met frequently to review the notifications and monitor activities of Members to ensure that trading partners honor their commitments.

Under the watchful eye of the Committee, Members have, for the most part, been in compliance with the agricultural commitments that they undertook in the WTO. However, there have been important exceptions where clear violations of Uruguay Round

commitments have adversely affected U.S. agricultural trade interests. In these situations, the Agriculture Committee has frequently served as an indispensable tool for resolving conflicts before they become formal WTO disputes. The following are some examples:

- Resolution of issues related to the use of export subsidies in Hungary, benefiting U.S. exports of grains, fruits and vegetables by nearly $10 million.
- Elimination of restrictions on beef imports by Switzerland that affected approximately $15 million in U.S. exports.
- Resolution of issues related to access for pork and poultry in the Philippines. In the case of pork, resolution of this issue meant additional U.S. exports of up to $70 million, and in the case of poultry, of up to $20 million.
- Resolving issues associated with Turkey's imposition of a tax on imported cotton, important to U.S. exports of more than $150 million.
- Resolution of issues related to the implementation of a tariff-rate quota on poultry in Costa Rica helped to triple U.S. exports to that country in 1998.
- Questioning Canada concerning a milk pricing scheme that appeared to be in violation of Canada's export subsidy commitments. Building on a process that began with the Committee's discussion, the United States eventually won a WTO dispute settlement case on this issue, benefiting U.S. exporters by reining in unfairly subsidized dairy exports from Canada.

Major Issues in 1999

In 1999, the Committee on Agriculture remained an effective forum for raising agricultural trade issues of concern to participating Members. The United States played a leading role in the Committee's activities, working with other countries to ensure broad-based compliance with WTO commitments on agriculture.

* * * *

The following are some of the more important specific issues that were raised in the Committee:

Notifications: The Committee reviewed more than 250 notifications detailing the implementation of market access commitments, particularly with regard to tariff-rate quota commitments and the special agricultural safeguards, and compliance with export subsidy and domestic support commitments. . . .

Member-specific issues: The Committee also provides the opportunity to clarify or resolve specific policies and issues of interest to Members. During 1999, issues raised included use of unused export subsidies from previous years in the current year, or the so-called "rollover" provisions (European Union, Turkey, United States); noncompliance with export subsidy commitments leading to modifications in the use of those measures (Poland, Thailand); domestic support programs (EU, the Republic of Korea, Thailand, Norway, United States, Czech Republic) inadequate implementation of tariff-rate quota commitments (Venezuela, South Africa, Czech Republic, the Republic of Korea, Japan); compliance with tariff bindings (Panama, Chile); and inappropriate application of agricultural safeguards (Republic of Korea). The United States also questioned the Republic of Korea about market access restrictions on U.S. beef; this issue is now in formal dispute settlement.

Analysis and Information Exchange. In addition to its work on the specific trade issues mentioned above, the Committee continued its work in the informal AIE forum, prompting a wide-ranging exchange on topics of relevance to the built-in agenda negotiations on agriculture. More than 80 papers on issues affecting agricultural trade reform were presented during the AIE process. The United States submitted papers on a number of trade issues, including the administration of tariff-rate quotas and trade in products involving new technologies. Issues raised by other Members included non-trade concerns, special and differential treatment for developing countries, export credits, and domestic support. Although the forum was curtailed in September 1999, as mandated by the Singapore Ministerial, the AIE process proved vital in preparing and identifying areas of interest for the new negotiations on agriculture.

* * * *

(2) Sanitary and phytosanitary measures

On December 8, 1997, USTR published a notice and request for comments on the three-year review of the Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement.") 62 Fed. Reg. 64,618 (Dec. 8, 1997). The notice described the agreement and U.S. views as excerpted below. In March 1998 the United States submitted its Preliminary Outline of Issues for Consideration by the SPS Committee as Part of the Triennial Review of the SPS Agreement, available at *www.state.gov/s/l/c8183.htm*.

* * * *

The United States was aware during the Uruguay Round that unjustified sanitary and phytosanitary (SPS) measures have often restricted U.S. agricultural exports, even after tariffs or other nontariff barriers have been reduced or eliminated. To address this problem, the SPS Agreement was negotiated to ensure that WTO members would not impose protectionist trade barriers disguised as SPS measures. The importance of the SPS Agreement to agricultural trade is reflected in Article 14 of the Agreement on Agriculture, which emphasizes that WTO members have agreed to give effect to the SPS Agreement.

The SPS Agreement reflects a careful balance of rights and obligations. The Agreement safeguards WTO members' rights to adopt and implement regulations to protect human, animal and plant life or health (including food safety and environmental measures), and to establish the level of protection of life and health they deem to be appropriate.

The United States has a strong interest in preserving these rights, which ensure the ability to maintain the U.S. standards of public health and environmental protection.

At the same time, the SPS Agreement establishes obligations designed to ensure that an SPS measure is in fact intended to protect against the risk asserted, rather than to serve as a disguised trade barrier. In particular, the Agreement requires that a measure adopted to protect human, animal and plant life and health be

based on science and a risk assessment, and that it be no more restrictive than is necessary to achieve the intended level of human, animal or plant health protection.

The same balance is sought in the SPS Agreement's provisions relating to international sanitary and phytosanitary standards, guidelines and recommendations. Recognizing that the harmonization of international standards may contribute both to improved protection of human, animal and plant life and health and to the removal of unnecessary trade barriers, the Agreement calls for each WTO member to use relevant international standards as a basis for establishing its SPS measures, subject to other provisions of the Agreement. At the same time, the Agreement makes clear that it does not require "downward harmonization," and that no WTO member is required to adopt an international standard if doing so would result in a lower level of human, animal or plant health protection than that government has determined to be appropriate.

In the SPS Committee, the United States has pushed aggressively for full and effective implementation of WTO members' commitments under the SPS Agreement. For example, the United States has provided strong leadership in promoting implementation of the Agreement's transparency and notification provisions, in order to ensure effective surveillance of WTO members' SPS measures. Members' notifications of new SPS measures and other important information are now available on the WTO's internet home page (http://www.wto.org). The SPS Agreement's notification procedures, which provide an opportunity for the United States to comment on other WTO members' draft SPS measures in advance, have proven to be increasingly useful in identifying potential trade problems and facilitating the resolution of differences before trade is actually affected.

In recent years, the United States has successfully resolved a number of bilateral trade problems associated with the application of SPS measures in key overseas markets. In these negotiations, reference to the requirements of the SPS Agreement has been an important factor in U.S. trading partners' decisions to eliminate or modify scientifically unjustified SPS measures. The United States has also made active use of the procedures of the WTO Dispute

Settlement Body (DSB) to push for the removal of scientifically unjustified SPS measures which have a major impact on U.S. exports.

* * * *

(3) Trade and environment

In its 2000 Trade Policy Agenda and 1999 Annual Report to Congress, Chapter II at 123, USTR reviewed the first five years of the CTE's existence and highlighted issues of 1999. The full text of the report, issued in March 2000, is available through the U.S. Trade Representative Press Office. The WTO chapter of the report is available at *www.state.gov/s/l/c8183.htm*.

Status

The Committee on Trade and Environment (CTE) was created by the WTO General Council on January 31, 1995 pursuant to the Marrakesh Ministerial Decision on Trade and Environment. The mandate of the CTE is to make appropriate recommendations to the Ministerial Conference as to whether, and if so what, changes are needed in the rules of the multilateral trading system to foster positive interaction between trade and environment measures and to avoid protectionist measures.

Assessment of the First Five Years of Operation

The CTE has played an important role in bringing together government officials from trade and environment ministries to build a better understanding of the complex links between trade and environment. Among other things, this has helped to address the serious problem of lack of coordination between trade and environment officials in many governments. In addition, the CTE has produced useful recommendations calling for transparency in ecolabeling and launching the creation of a data base of all environmental measures that have been notified under WTO transparency rules.

The CTE has also engaged in important analytical work, helping to identify areas where trade liberalization holds particular potential

for yielding environmental benefits. Win-win opportunities that have been identified thus far include the elimination or reduction of agriculture subsides that promote unsustainable farming practices and fisheries subsidies that contribute to over fishing, and the elimination of barriers to environmental goods and services.

Major Issues in 1999

The WTO Committee on Trade and Environment met three times during 1999, pursuant to its mandate. The United States contributed to this process by, inter alia, working to build a consensus that both important trade and environmental benefits can be achieved by addressing agricultural subsidies, fisheries subsidies that contribute to overfishing and the liberalization of trade in environmental goods and services. Multilateral Environmental Agreements (MEAs): Inclusion of trade measures in MEAs has been and will continue to be essential to meeting the objectives of certain agreements but may raise questions with respect to WTO obligations. Over the course of the year, the CTE helped strengthen WTO Members' understanding of MEAs and trade by holding the third in a series of meetings with representatives from a number of MEA Secretariats at which those representatives briefed the committee members on recent developments in their respective agreements. There continue to be sharp differences of view within the CTE on whether there is a need to clarify WTO rules in this area. The United States holds the view that the WTO broadly accommodates trade measures in MEAs.

Market Access: Work in this area continued to focus on the environmental implications of reducing or eliminating trade-distorting measures. There is a broad degree of consensus in the Committee that trade liberalization, in conjunction with appropriate environmental policies, can yield environmental benefits. Discussion continued over the course of the year on the potential for such a "double dividend" in the agriculture sector. The Committee also discussed in depth the potential environmental benefits of reducing or eliminating fisheries subsidies, drawing on a previously tabled paper on this subject by the United States. Further work in the area was taken up at the Third Ministerial. Discussion

also took place on the benefits of improving market access for environmental services and goods. The Committee also discussed the environmental implications of trade liberalization in other sectors, including forestry and energy.

TRIPS: The Committee had a brief discussion of the relationship between the TRIPS Agreement and the environment. As in the past, a few countries advanced arguments for consideration of changes to the TRIPS Agreement to address "contradictions" between the WTO and the Convention on Biological Diversity. The United States once again made clear its view that there are no contradictions between the WTO and the Convention on Biological Diversity.

Relations with NGOs: The United States, joined by several other Members, emphasized the need for further work to develop adequate mechanisms for involving NGOs in the work of the WTO and adequate public access to documents. Following through on this work, in the Third Ministerial process the United States proposed that the WTO General Council's 1996 agreement on Guidelines for Relations with NGOs be reviewed and substantially improved, and the United States continues to lead efforts at enhancing the WTO's transparency, including destruction of documents.

e. 50th Anniversary of the GATT

In a speech before the WTO at the Commemoration of the 50th Anniversary of the GATT, May 18, 1998, President Clinton reviewed the accomplishments of the world trading system since the end of World War II, and addressed the transformation the United States wished to see in the new millennium. 34 WEEKLY COMP. PRES. DOC. 926 (May 25, 1998).

The President focused on the need for harmonization in international trade in the areas of free trade, protection of labor and the environment, electronic commerce and accountability. Excerpts follow.

---

* * * *

The challenge of the millennial generation therefore is to create a world trading system attuned to the pace and scope of the new global economy, one that offers opportunity for all our people, and one that meets the profound environmental challenges we share.

We took the first, vital step when we created the World Trade Organization in 1995—a goal that had eluded our predecessors for nearly half a century. The Uruguay Round that founded the WTO amounted to the biggest tax cut in world history—$76 billion a year when fully implemented. And in just four years, world trade is up 25 per cent.

* * * *

Now, we must build on these achievements with a new vision of trade, to build a modern WTO ready for the 21st Century.

First, we must pursue an ever-more-open global trading system.

Today, let me state unequivocally that America is committed to open trade among all nations. Economic freedom and open trade have brought unprecedented prosperity in the 20th Century—they will widen the circle of opportunity in the 21st Century. In my own country, one third of the strong economic growth we have enjoyed these past five years was generated by exports. For every country engaged in trade, open markets dramatically widen the base of possible customers for our goods and services. We must press forward. Redoubling our efforts to tear down barriers to trade will spur growth in all our countries. It will create good jobs and boost incomes. It will bring new opportunities for our people. And it will advance the free flow of ideas, information and people that are the lifeblood of democracy *and* prosperity.

Globalization is not a policy choice—it is a fact. But all of us face a choice. We can work to shape these powerful forces of change to the benefit of our people. Or we can retreat behind walls of protection—and get left behind in the global economy. At a moment when, for the first time in human history, a majority of the world's people live under governments of their own choosing . . . when the argument over which is better—free enterprise or state socialism—has been won . . . when people on every continent seek to join the free market system, those of us who have benefited from that system and led it cannot turn our backs. For my part, I

am determined to pursue an aggressive market opening strategy in every region of the world. And I will continue to work with members of both parties in the Congress of the United States to secure fast-track negotiating authority.

Second, we must recognize that in the new economy, the way we conduct trade affects the lives and livelihoods, the health and the safety of families around the world.

* * * *

The WTO was created to lift the lives of ordinary citizens; it should listen to them. I propose the WTO, for the first time, provide a forum where business, labor, environmental and consumer groups can speak out and help guide the further evolution of the WTO. When this body convenes again, I believe that the world's trade ministers should sit down with representatives of the broad public to begin this discussion.

Third, we must do more to harmonize our goal of increasing trade with our goal of improving the environment and working conditions.

Enhanced trade can and should enhance—not undercut—the protection of the environment. Indeed, the WTO Agreement in its preamble explicitly adopts sustainable development as an objective of open trade, including a commitment to preserve the environment and to increase the capacity of doing so. Therefore, international trade rules must permit sovereign nations to exercise their right to set protective standards for health, safety and the environment and biodiversity. Nations have a right to pursue those protections—even when they are stronger than international norms. I am asking that a high-level meeting be convened, to bring together trade *and* environmental ministers, to provide strong direction and new energy to the WTO's environmental efforts in the years to come, as has been suggested by the European Commission.

Likewise, the WTO and the International Labour Organization should commit to work together, to make certain that open trade lifts living conditions, and respects the core labor standards that are essential not only to workers rights, but to human rights everywhere. I ask the two organizations' Secretariats to convene at a high level to discuss these issues. This weekend, G-8 leaders

voiced support for the ILO's adoption of a new declaration and a meaningful follow-up mechanism on core labor standards when the ILO Ministers meet next month in Geneva. I hope you will add your support. We must work hard to ensure the ILO is a vibrant institution. Today, I transmitted to the Senate for ratification the ILO Convention aimed at eliminating discrimination in the workplace.

* * * *

Fourth, we must modernize the WTO by opening its doors to the scrutiny and participation of the public.

* * * *

Today, when one nation challenges the trade practices of another, the proceeding takes place behind closed doors. I propose that all hearings by the WTO be open to the public, and all briefs by the parties be made publicly available. To achieve this end, we must change the rules of this organization. But each of us can do our part—now. The United States today formally offers to open up every panel that we are a party to—and I challenge every other nation to join us in making this happen.

Today, there is no mechanism for private citizens to provide input in these trade disputes. I propose that the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file 'amicus briefs', to help inform the panels in their deliberations.

Today, the public must wait weeks to read the reports of these panels. I propose that the decisions of these trade panels be made available to the public as soon as they are issued.

Fifth, we must have a trading system that taps the full potential of the Information Age.

* * * *

I ask the nations of the world to join the United States in a standstill on any tariffs to electronic transmissions sent across borders. We cannot allow discriminatory barriers to stunt the development of the most promising new economic opportunity in decades. Earlier today, at the Summit with the EU, we agreed to

deepen our collaboration in this area. And last week, Prime Minister Hashimoto and I agreed to move forward together, with a market-oriented private sector-led approach to enhance privacy, protect intellectual property, and encourage the free flow of information and commerce on the Internet. I hope we can build a consensus that this is the best way to harness the remarkable potential of this new means of communication.

Sixth, a trading system for the 21st Century must be comprised of governments that are open, honest, and fair in their practices.

* * * *

With its insistence on rules that are fair and open, the WTO plays a powerful role toward open and accountable government—but the WTO has not done enough. By next year, all Members of the WTO should agree that government purchases should be made through open and fair bidding. This single reform could open up $3 trillion of business to competition around the world. And I ask every nation in the world to adopt the anti-bribery convention developed by the OECD. Both these steps would promote investor confidence and stability.

Finally, we must develop an open global trading system that moves as fast as the marketplace.

In an era in which product life-cycles are measured in months, and information and money move around the globe in seconds, we can no longer afford to take seven years to finish a trade round, as happened during the Uruguay Round, or let decades pass between identifying and acting on a trade barrier. In the meantime, new industries arise, new trading blocs take shape, and governments invent new trade barriers every day.

We should explore what new type of trade negotiating round is best suited to the new economy. We should explore whether there is a way to tear down barriers without waiting for *every* issue in *every* sector to be resolved before *any* issue in *any* sector is resolved. We should do this in a way that is fair and balanced, that takes into account the needs of nations large and small, rich and poor. But I am confident we can go about the task of negotiating trade agreements in a way that is faster and better than today.

* * * *

f. WTO Millenium Round of trade negotiations

In November 1999, the United States hosted the Third Ministerial Conference of the World Trade Organization in Seattle, Washington ("Seattle Ministerial"). This meeting was to launch the "Millenium Round" of trade negotiations to build upon the Uruguay Round of trade negotiations that had culminated in the establishment of the WTO in 1995. While the Uruguay Round agreements had contemplated a built-in agenda of negotiations on agricultural and services trade, it was expected that a more wide-ranging set of negotiations would occur. In anticipation of the Seattle Ministerial, Ambassador Susan Esserman, Deputy U.S. Trade Representative, addressed the WTO General Council Session at Geneva, Switzerland on July 29, 1999, setting forth U.S. priorities for an agenda for the Millenium Round.

The full text of Ambassador Esserman's remarks, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Our consultations thus far have indicated that in the work ahead, we must give special focus to the built-in agenda, broadening market access, implementation of existing commitments and ensuring that our actions reinforce the shared commitment to further integrate countries into the system.

IMPLEMENTATION OF EXISTING COMMITMENTS

We agree with others on the need to give priority in the leadup and at Seattle to the issue of implementation. By the end of this year, Members must meet Uruguay Round commitments under the Agreements on Intellectual Property, TRIMs, Subsidies, and Customs Valuation. In succeeding years, final liberalization commitments under the Agreement on Clothing and Textiles as well as certain aspects of the TRIPS and Subsidies Agreement will phase in. Likewise, Uruguay Round tariff commitments will soon be realized in full. These commitments represent the balance of

concessions which allowed completion of the Uruguay Round and have helped realize its benefits since then. Their implementation is critical to confidence in the system, and to the credibility of any new negotiations.

* * * *

We also call upon those WTO Members which have not ratified the Basic Telecommunications and Financial Services Agreements to do so, in order to ensure that all Members can benefit from their commitments and that they can win the benefits of competition, transparency and technological progress these Agreements offer.

THE NEW ROUND

Second, we must develop a negotiating agenda that meets the major priorities WTO Members have laid out. While much consultation remains ahead as to specific objectives, we believe the core of the agenda should be market access concerns including agriculture, services and non-agricultural goods, with benchmarks to ensure that the negotiations remain on schedule.

Once consensus on the agenda is achieved, we can then adopt the appropriate structure for negotiations. It is clear, of course, that any final package must be broad enough to create a political consensus by addressing the market access priorities of all Members. This should be complemented and balanced by a work-program to address areas in which consensus does not yet exist for negotiations; and by a series of measures to improve the WTO's own functioning.

Specifically, our ideas would include the following.

1. Market Access

Market access negotiations should cover the built-in agenda of agriculture and services, and also address non-agricultural goods.

In *agriculture*, in liberalizing trade we have the potential to create broader opportunities for farmers, promote nutrition and food security through ensuring the broadest possible supplies of food, help improve productivity, enhance development, and address

trade-distorting measures which increase pressure on land, water and habitat. To secure this opportunity, we would hope to set objectives including:

—Completely eliminating, and prohibiting for the future, all remaining export subsidies as defined in the Agreement on Agriculture.
—Substantially reducing trade-distorting supports and strengthening rules that ensure all production-related support is subject to discipline, while preserving criteria-based "green box" policies that support agriculture while minimizing distortion to trade;
—Lower tariff rates and bind them, including but not limited to zero/zero initiatives;
—Improving administration of tariff-rate-quotas;
—Strengthening disciplines on the operation of state trading enterprises;
—Improved market access through a variety of means to the benefit of least-developed Members by all other WTO Members; and
—Addressing disciplines to ensure trade in agricultural biotechnology products is based on transparent, predictable and timely processes.

In *services*, the major accomplishment in the Uruguay Round was the General Agreement on Trade in Services itself. In many cases, however, actual sector-by-sector market-opening commitments simply preserved the status quo. Effective market access, and removal of restrictions, will both stimulate trade and help address many broader economic and social issues.

Examples include improving the efficiency of infrastructure sectors including communications, power, transport and distribution; easing commerce in goods, thus helping to create new opportunities for manufacturers and agricultural producers; and helping to foster competition and transparency in financial sectors. To realize these opportunities, we would hope to set objectives including the following:

—Liberalize restrictions in a broad range of services sectors;
—Ensure that GATS rules anticipate the development of new technologies;
—Prevent discrimination against particular modes of delivering services, such as electronic commerce or rights of establishment; and
—Develop disciplines to ensure transparency and good governance in regulations of services.

In *non-agricultural goods*, we can continue the progress of the past fifty years in raising living standards and promoting worldwide development by removing tariff and non-tariff barriers.

We want to engage in broad market access negotiations in the next Round. Here we would build upon the Accelerated Tariff Liberalization initiative, calling for liberalization of eight specific sectors, by maximizing opportunities for more broad-based market-opening. Specific objectives would include:

—Reduce existing tariff disparities;
—Provide recognition to Members for bound tariff reductions made as part of recent autonomous liberalization measures, and for WTO measures.
—Use of applied rates as the basis for negotiation, and incorporation of procedures to address non-tariff measures and other measures affecting conditions for imports; and
—Improve market access for least developed WTO Members by all other Members, through a variety of means.

2. Forward Work Program and Other Issues

Clearly, some Members have interests beyond this set of core issues. Others have noted great concern about the difficulty of fulfilling existing commitments. The built-in agenda provides for substantial reviews of existing Agreements, like that of TRIPs next year, which will be important to determining future decisions. We will review all suggestions carefully, and work with other delegations for an ambitious but manageable agenda, capable of completion within three years.

We may find that certain issues would be appropriate for a forward work-program that would help Members, including ourselves, more fully understand the implications of newer topics and build consensus for the future.

One especially important case is the question of the relationship between trade and core labor standards. As President Clinton has stated, the development of the trading system must come together with efforts to ensure respect for these standards, and its results must include benefits for working people in all nations. While the Singapore Declaration on core labor standards was an important first step, more attention to the intersection of trade and core labor standards is warranted as governments and industries wrestle with the complex issues of globalization and adjustment. As we stated in January, we believe a recommendation should be forwarded to the Ministers for the establishment of a forward work-program in the WTO to address trade issues (e.g. abusive child labor, the operation of export processing zones, etc.) relating to labor standards and where Members of the WTO would benefit from further information and analysis on this relationship and developments in the ILO. We further urge consideration of specific institutional links between the ILO and the WTO to help facilitate a common agenda on issues of concern to both organizations.

3. Institutional Reform

The past five years of experience with the WTO have also revealed areas in which the institution can be further strengthened. These would help Members take maximum advantage of the opportunities offered by international trade; ensure that the work of the WTO and international organizations in related fields is mutually supportive and does as much as possible to advance the larger vision of a more prosperous, sustainable and just world economy; and strengthen public support for the WTO.

Substantial achievements are possible in areas including:

Institutional reforms that can strengthen transparency, ensure citizen access and build public support for the WTO and its work. Here, objectives would include:

—Improving means for stakeholder contacts with delegations and the WTO; and
—Enhancing transparency in procedures to the maximum extent possible.

Capacity-building, to ensure that all Members can implement commitments, use dispute settlement effectively and take maximum advantage of market access opportunities. Specific areas here would include:

—Improve cooperation among international organizations in identifying and delivering technical assistance, and explore ways to improve coherence in the interaction among bilateral donors, international organizations and nongovernmental organizations;
—Build upon and expand the Integrated Framework concept;
—Ensure the most effective use of resources on technical assistance programs;
—Strengthen capacity-building efforts on regulatory and other infrastructure needs; and
—Explore a development partner program for the least-developed nations.

We have been consulting with delegations on these ideas in the last several weeks and look forward to continuing to develop a joint effort.

Trade facilitation, which will ensure that less developed economies and small businesses can take full advantage of a more open world economy. Here, objectives would include:

—Clarify and strengthen the transparency requirements of WTO Agreements;
—Helping to improve customs and other trade-related procedures, so as to increase transparency and facilitate more rapid release of goods;

4. Sustainable Development and Committee on Trade and the Environment

As we embark on this new Round, we must be guided by our shared commitment to sustainable development, including protection of the environment, as enshrined in the Preamble of the WTO. This would include a number of areas:

—First, it underlines the importance of institutional reforms.
—Second, pursuing trade liberalization in a way that is supportive of high environmental standards.
—Third, identifying and pursuing those areas of trade liberalization that hold particular promise for also yielding direct environmental benefits—so-called "win-win" opportunities. Examples include elimination of tariffs on environmental goods through the Accelerated Tariff Liberalization initiative; liberalization of trade in environmental services; and elimination of fishery subsidies that contribute to overcapacity. We can work together in an effort to identify other areas in which these two priorities of WTO Members complement and support one another.

To help in ensuring that we accomplish these objectives, we are tabling a number of proposals, including a proposal to use the Committee on Trade and the Environment as a forum to identify and discuss the environmental implications of issues under negotiation in the round.

* * * *

At the Seattle Ministerial,WTO members failed to reach agreement on an agenda for the Millenium Round. (Negotiations on agriculture and services, which were mandated by the WTO's "built-in agenda" did begin in early 2000.) The Seattle Ministerial was also the site of large anti-globalization protests. The Statement by Ambassador Charlene Barshefsky, the United States Trade Representative, at the closing plenary session of the Seattle Ministerial on December 3, 1999, following a decision to suspend, is excerpted below.

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

---

* * * *

Over the past four days, we engaged in intense discussion and negotiations on one of the core questions facing the world today: the creation of a global trading economy for the next century. The delegates have taken up some of the most profound and important issues and policy decisions imaginable, including issues that previous Rounds could not resolve, and matters that have not come before the trading system in the past. They took up these issues with good will and mutual respect, and made progress on many of them.

However, the issues before us are diverse, complex and often novel. And together with this, we found that the WTO has outgrown the processes appropriate to an earlier time. An increasing and necessary view, generally shared among the members, was that we needed a process which had a greater degree of internal transparency and inclusion to accommodate a larger and more diverse membership.

This is a very difficult combination to manage. It stretched both the substantive and procedural capacity of the Ministerial, and we found as time passed that divergences of opinion remained that would not be overcome rapidly. Our collective judgment, shared by the Director-General, the Working Group Chairs and Co-Chairs, and the membership generally, was that it would be best to take a time out, consult with one another, and find creative means to finish the job.

Therefore, Ministers have agreed to suspend the work of the Ministerial. During this time, the Director-General can consult with delegations and discuss creative ways in which we might bridge the remaining areas in which consensus does not yet exist, develop an improved process which is both efficient and fully inclusive, and prepare the way for successful conclusion. The Ministerial will then resume its work.

* * * *

g. Claims under the WTO's dispute resolution mechanisms

(1) Overview of U.S. participation in WTO dispute resolution system

The establishment of a binding system of dispute resolution to settle allegations that commitments under the WTO agreements had been violated was a principal negotiating objective of the United States during the Uruguay Round. Charlene Barshefsky, U.S. Trade Representative, described the WTO's dispute resolution system, and the U.S. experience during the first five years of its existence, in testimony before the Trade Subcommittee of the Senate Committee on Finance, June 20, 2000. Excerpts below include a review of key cases involving the United States during that period.

The full text of Ambassador Barshefsky's prepared testimony, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

U.S. TRADE INTERESTS AND ENFORCEMENT POLICY

In 1999, the United States was the world's largest exporting and importing nation, carrying on $2.2 trillion in two-way goods and services trade with the world. This represents a $1 trillion expansion of trade since 1992, contributing substantially to the remarkable record of growth, rising living standards and job creation the United States built in the 1990s. Thus far in the year 2000 as well, both exports and imports are growing rapidly.

This remarkable expansion of trade owes a great deal to the network of nearly 300 trade agreements the Clinton Administration has negotiated over the past seven years. Of special importance was the creation of the World Trade Organization in 1995. The WTO's creation deepened the achievements of its predecessor, the GATT, through a one-third cut in world tariff rates and the elimination of quotas, and broadened the GATT with new agreements covering agriculture, sanitary and phytosanitary measures, services, intellectual property, trade-related investment measures, and other issues—the vast majority of which apply to all of the WTO's 137 members.

Of course, to win the full economic benefit of the WTO and each other agreement we negotiate, both for America's concrete trade interests and the broader strengthening of the rule of law, we must ensure that our trading partners will fulfil the commitments they have made. And in this work—together with our creation of USTR's first special unit dedicated solely to monitoring and enforcement of agreements; and the use of our domestic trade laws and other measures—the WTO's dispute settlement mechanism is of central importance.

WTO DISPUTE SETTLEMENT UNDERSTANDING

In the Uruguay Round negotiations, Congress made a more effective GATT dispute settlement system a principal U.S. negotiating objective. The result is the WTO's Dispute Settlement Understanding, created at the foundation of the WTO itself, which enables us to assert our rights and protect our interests in the trading system more effectively than ever before. At the same time, the dispute settlement system fully respects American sovereignty, as panels have no power to order any WTO member to change its laws, nor to impose retaliation. The most important changes it makes vis-a-vis the previous GATT system include:

—Imposition of stringent time limits for each stage of the dispute settlement process, including the time for implementation of panel recommendations;
—Creation of an Appellate Body to review panel interpretations of WTO agreements and legal issues;
—Automatic adoption of panel or Appellate Body reports and of requests for retaliation in the absence of a consensus to reject the report or request; and
—Automatic authority for complaining parties to retaliate on request, including in sectors outside the subject of the dispute, if panel recommendations are not implemented or there is no mutually satisfactory solution to the matter.

In those cases where our trading partners are not fulfilling their commitments, in comparison to the dispute settlement options available under the WTO's predecessor, the General Agreement

on Tariffs and Trade, we have found the WTO dispute settlement mechanism to be more reliable, as it eliminates opportunities to block panel results; more comprehensive, in that it covers all the WTO agreements while the GATT system covered only goods; and more timely in securing results.

DISPUTE SETTLEMENT PROCEDURES

Before I review our experience in detail, let me set out the procedures the Dispute Settlement Understanding establishes. In essence, although there are opportunities to settle disputes at each stage of the process—and we take these opportunities whenever possible, consistent with our basic interests in the case—a completed WTO case can involve up to five stages and take as much as one year. The process is as follows:

First, having identified a probable violation of WTO obligations, we begin by requesting consultation with the government whose measure is in dispute. This is the initial step, and after the consultation request the parties are given sixty days before a complaining party may request establishment of a panel.

Second, if no settlement is reached in this period, we request formation of a panel. These panels generally have three members, who may not be citizens of either party to the dispute unless both parties agree. The panel hears arguments and reviews evidence over a period of six to nine months.

Third, on completing its review, the panel gives the parties to the dispute a complete draft of its report, including findings and conclusions. The parties may provide written comments on the draft and the panel must hold a meeting at any party's request to consider those comments.

Fourth, the panel completes and releases its report, which must be adopted by the Dispute Settlement Body within 60 days after it is issued unless one of the parties to the dispute files an appeal with the WTO Appellate Body.

Fifth, in the event of an appeal, a three-person appellate panel, drawn from an Appellate Body of seven independent experts, reviews the case and issues a finding within 60 to 90 days. Governments found in violation of their obligations have a "reasonable period of time" to comply, normally not to exceed 15 months.

Most cases are concluded at this point, and in many cases the party has complied in less than a year.

If governments do not comply with the panel or Appellate Body findings, complaining parties have the right to retaliate, in an amount equivalent to the damage done by the violation. This standard is equivalent to that in section 301 of the Trade Act of 1974, which permits the Trade Representative to apply retaliation equivalent in value to the burden or restriction being imposed on U.S. commerce.

EXPERIENCE WITH DSU TO DATE

Let me now turn to our experience with the dispute settlement mechanism in practice since 1995. Since 1995, WTO members have filed a total of 202 complaints on 159 distinct matters. Of these, the United States has filed 53 complaints. Our experience in these cases has helped dispel some early fears and misconceptions; develop ideas on further improvements and reforms to the system, both in terms of effectiveness and procedural transparency; and on the whole, confirmed that the Dispute Settlement Understanding is a fundamental improvement in the world trading system and in the enforcement of U.S. trade rights.

To illustrate this, let me now turn to a detailed review of the cases in which the United States has been involved since 1995.

CASES BROUGHT BY THE UNITED STATES

Since the WTO's creation, we have been the world's most active user of the WTO dispute settlement mechanism. Our goal in filing cases is two-fold: first, to protect U.S. rights in cases of high economic interest or precedential importance to American industries, farmers and workers; and second, to ensure that our trading partners understand the importance of compliance with WTO rules. And while we have not agreed with panel findings in every single case, we believe the record shows that the dispute settlement mechanism has enabled us to reach these goals.

Of the 53 cases we have filed to date, 28 have been brought to conclusion. Of these we have prevailed in 25, winning 13 cases in panel proceedings and successfully settling 12 others. In the vast

majority of cases, our trading partners have acted to eliminate the violations; in the only two cases where they have failed to do so, we have exercised our right to retaliate.

1. Favorable Settlement

Our hope in filing cases, of course, is to secure U.S. rights rather than to engage in prolonged litigation. Therefore, whenever possible we have sought to reach favorable settlements that eliminate the violation without having to resort to panel proceedings. We have been able to achieve this preferred result in 12 of the 28 cases resolved so far:

—*Australia: salmon import ban.* Australia recently eliminated its ban on imports of salmon from Canada and the United States after Canada successfully challenged Australia's ban in the WTO. The United States had sought its own consultations with Australia in November 1995 and participated in the Canadian litigation as an interested third party; and U.S. salmon exporters will benefit from the result.

—*Brazil: auto investment measures.* In August 1996 the United States requested consultations under WTO dispute settlement procedures concerning Brazil's local content requirements for automotive investment. The United States and Brazil reached a settlement agreement in March 1998.

—*European Union: market access for grains.* In July 1995 the United States invoked WTO dispute settlement procedures to enforce the EU's WTO obligations on imports of grains. Before a panel was established, we reached a settlement. The settlement ensured implementation of the EU's market access commitments on grains, including rice, and provided for consultations on the EU's "reference price system."

—*Greece: copyright protection.* In 1998 we held consultations with the Greek government because a significant number of television stations in Greece regularly broadcasted copyrighted motion pictures and television programs without the authorization of the copyright owners. Effective remedies against such copyright infringements were not provided. In September 1998, the Greek government enacted new legislation to crack down on pirate stations, and the rate of television piracy fell

significantly in 1999. We continue to monitor the situation, to ensure continued enforcement.

—*Hungary: agricultural export subsidies*. In March 1996 the United States, joined by five other countries, began a process of consultations with Hungary under WTO dispute settlement procedures concerning Hungary's lack of compliance with its scheduled commitments on agricultural export subsidies. We reached an agreement with Hungary and the WTO approved a temporary waiver that specifies a program to bring Hungary into compliance with its commitments.

—*Japan: protection of sound recordings*. As a result of WTO consultations, Japan changed its law to grant full copyright protection for sound recordings. The Recording Industry Association of America estimated the value of this case at $500 million in annual sales.

—*Korea: shelf-life standards for beef and pork*. The United States and Korea consulted under WTO dispute settlement procedures and reached a settlement in July 1995 addressing Korea's arbitrary, government-mandated shelf-life restrictions that were a barrier to U.S. exports of many food products, including beef and pork.

—*Pakistan: patent protection*. The United States used WTO dispute settlement procedures to enforce Pakistan's obligation under the TRIPS agreement to establish a "mailbox" mechanism for patent applications. In July 1996 the United States requested that the matter be referred to a panel. We subsequently settled this case in February 1997 after Pakistan issued an ordinance bringing its law into conformity with its TRIPS obligations.

—*Philippines: pork and poultry imports*. The United States used WTO dispute settlement to challenge tariff-rate quotas and other measures maintained by the Philippines on pork and poultry imports. Following WTO consultations, the Philippines agreed in February 1998 to reform its restrictive tariff-rate quotas and licensing practices.

—*Portugal: patent protection*. The United States invoked WTO dispute settlement procedures to challenge Portugal's patent law, which failed to provide the minimum twenty years of

patent protection required by the TRIPS agreement. As a result of the U.S. challenge, Portugal announced a series of changes to its system, to implement its WTO obligations. A settlement was notified to the WTO in October 1996.

—*Sweden: enforcement of intellectual property rights*. In May 1997 the United States requested consultations with Sweden concerning Sweden's failure to implement its obligations under the TRIPS agreement. The following year, Sweden passed legislation addressing U.S. concerns.

—*Turkey: theater box-office taxes*. The United States requested consultations in June 1996 under WTO procedures concerning Turkey's tax on box office receipts from foreign films. Turkey maintained a discriminatory "municipality" tax on box office revenues from showing foreign films, but not domestic films. The United States and Turkey reached a settlement in July 1997, and Turkey eliminated its discriminatory tax.

2. Panel Successes

When our trading partners have not been willing to negotiate settlements, we have pursued our cases to conclusion. This has occurred 13 times:

—*Argentina: Textiles*—Argentina has complied with a WTO ruling against its statistical tax on imports and specific duties on various textile, apparel and footwear items in excess of its tariff commitments.

—*Australian Leather*—We are very close to an agreement with Australia on actions it will take in response to WTO rulings against its export subsidies on automotive leather; and if we fail to reach agreement, the WTO will authorize us to retaliate.

—*Canada: Magazines*—Canada has eliminated barriers to U.S. magazines, and created new tax and investment benefits and opportunities for U.S. publishers to sell and distribute magazines in Canada.

—*Canada: Export Subsidies for Dairy*—Canada has reduced its subsidized exports of dairy products, coming into compliance with its WTO obligations on butter, skimmed milk powder, and an array of other dairy products; beginning in

the 2000–2001 marketing year, Canada will not be able to export more than 9,076 tons of subsidized cheese, which is less than half of the volume exported in recent years.

—*India: Non-Tariff Barriers*—India has eliminated import bans and other quantitative restrictions on 2,700 specific types of goods. This is among India's most significant modern trade policy reforms, opening new markets for U.S. producers of consumer goods, textiles, agricultural products, petrochemicals, high technology products and other industrial products.

—*India: Intellectual Property Rights*—India has complied with its WTO intellectual property rights obligations prior to providing patent protection for pharmaceutical and agricultural chemical inventions;

—*Indonesia: Autos*—Indonesia has eliminated its 1996 National Car Program, including local content requirements which discriminated against imports of U.S. automobiles;

—*Japan: Varietal Fruits*—Japan has eliminated restrictions on imports of apples, cherries and other fruit, which U.S. growers estimate will help them export more than $50 million a year of apples and other products to Japan;

—*Japan: Distilled Spirits*—Japan has eliminated discriminatory taxes on U.S. exports of distilled spirits. As a result, U.S. exports of these products in the year after implementation of the panel finding grew by 23%, or $14 million—faster growth than our exports to other markets, in spite of the Japanese recession;

—*Korea: Distilled Spirits*—Korea has eliminated discriminatory taxes on U.S. exports of distilled spirits.

—*Mexico: High-Fructose Corn Syrup*: The United States successfully challenged Mexico's HFCS antidumping determination in WTO dispute settlement panel proceedings. Mexico did not appeal the panel's findings, and has indicated it will comply with the rulings by September 22, 2000.

Finally, of course, two cases of particular concern involve European Union violations of WTO obligations on *beef* and *bananas*. These are unique in our 25 successfully concluded cases, in that the EU has failed to implement findings of both the dispute panel and the Appellate Body, failing to lift its unscientific ban on

imports of U.S. meat, and adopting a new banana import regime that perpetuates WTO violations previously found by a WTO panel and the Appellate Body. In response, the Administration has imposed retaliation consistent with our WTO rights, on products totaling $308 million worth of EU exports to the United States. We continue to work toward a positive resolution of these cases.

3. Unfavorable Panel Findings

Of the 28 cases completed where we were the plaintiff, WTO panels have not ruled in favor of the United States in three cases.

One case involved Europe's reclassification of local-area network computer equipment from one tariff category to another. The WTO findings in that case, however, were of no effect; we succeeded in negotiating the elimination of tariffs on both categories of goods through the multilateral Information Technology Agreement (ITA). The EU has met its obligation to remove the tariffs, and the equipment now enters the EU duty-free regardless of its classification.

In another case, we challenged various Japanese laws, regulations, and requirements affecting imports of photographic film and paper. The WTO panel in this case did not find sufficient evidence that Japanese Government measures were responsible for changes in the conditions of competition between imported and domestic photographic materials. Japan in this case made a number of assertions as to the openness of its photographic film and paper market, and we are actively monitoring the market to ensure that opportunities for U.S. photographic film and paper are in line with Japan's representations.

In a third case, just concluded yesterday, the United States decided not to appeal a panel finding that Korea's government procurement obligations did not cover an airport project which had not been explicitly included in Korea's coverage list. Nevertheless, the Korean Government has informed us that the entities procuring for that project intend to open remaining procurements to foreign bidders.

CASES BROUGHT AGAINST THE UNITED STATES

The United States has also been the subject of 39 complaints in the WTO, of which eight have completed all phases of litigation

and ten were resolved in a mutually satisfactory manner. Eleven others are presently inactive, while the rest remain in various stages of litigation. Of the eight completed complaints, in one case, a WTO panel upheld the WTO-consistency of Section 301 of the Trade Act of 1974; in the other seven, panels found some aspect of U.S. practice inconsistent with our WTO obligations. In such cases, we have respected our obligations, as we expect others to do. A review of the cases is as follows:

—*Section 301 (EU)*: The WTO panel found that Section 301 (the principal U.S. domestic trade law addressing foreign trade barriers) [19 U.S.C. §§ 2411–2420] is fully consistent with our WTO obligations, both as a legal matter and in terms of our administration of the statute. [The panel report was adopted January 27, 2000. WTO Doc. WT/DS152/R (Dec. 22, 1999).]

—*Reformulated Gasoline (Venezuela, Brazil)*: In a dispute regarding an Environmental Protection Agency (EPA) regulation on conventional and reformulated gasoline, a WTO panel found against one aspect of the regulation that treated domestic companies differently than their foreign competitors. In that case, the WTO Appellate Body took a broad view of the WTO's exception for conservation measures, thus affirming that clean air is an exhaustible natural resource covered by that exception. The WTO ruling recognized the U.S. right to impose special enforcement requirements on foreign refiners that sought treatment equivalent to U.S. refiners. The ability of the United States to achieve the environmental objective of that regulation was never in question, and EPA was able to issue a revised regulation that fully met its commitment to protect health and the environment while meeting U.S. obligations under the WTO. [*See* 62 Fed. Reg. 45,533 (Aug. 28, 1997).] No changes have been made to the Clean Air Act.

—*Shrimp/Turtle (India, Thailand, Malaysia, Philippines)*: In a dispute involving U.S. restrictions on imports of shrimp harvested in a manner harmful to endangered species of sea turtles (the "Shrimp-Turtle" law), the Appellate Body found our law to be fully within the scope of the WTO's exception

for conservation measures, and U.S. import restrictions on shrimp harvested in a manner harmful to sea turtles have remained fully in effect. The Appellate Body did, however, find problems with implementation of the law. For example, it noted that procedures for determining whether countries meet the law's requirements did not provide adequate due process, because exporting nations were not given formal opportunities to be heard, and were not given formal written explanations of adverse decisions; and that the application of the law to Asian countries had been discriminatory, as Western Hemisphere nations had been given substantially more time than Asian countries to comply with its requirements, and were afforded greater opportunities for technical assistance.

Since the decision, we have addressed these procedural issues in a manner which has enhanced rather than weakened sea turtle conservation policies. In July 1999 the State Department revised its procedures to provide more due process to countries applying for certification under the Shrimp-Turtle law. The United States is also now negotiating a comprehensive sea turtle conservation agreement with the countries of the Indian Ocean region, including the complaining countries, and has offered additional technical assistance. [In 2001 the WTO determined that the United States had fully complied with its 1998 decision. WTO Doc. WT/DS58/RW (June 15, 2001). *See Digest 2001* at 752–56.]

—*Textiles and Apparel (Costa Rica)*: A WTO panel concurred with Costa Rica's complaint about U.S. import restrictions on underwear. The panel finding, however, led to no policy changes, as the U.S. measure at issue was imposed in March 1995 for a two-year period, expiring one month after dispute settlement proceedings concluded.

—*Textiles and Apparel (India)*: A measure on wool shirts from India was unilaterally terminated by the U.S. interagency Committee on Implementation of Textile Agreements (which oversees the U.S. textile import program) due to changed commercial conditions. U.S. production in this category had increased and imports from India in this category had plummeted. The WTO panel did not recommend that the

United States make any changes, and no action by the United States was necessary.

—*DRAMs (Korea)*: In a dispute involving a Commerce Department antidumping order on dynamic random access memory chips (DRAMs) from Korea, we prevailed on all but one of the claims raised by Korea. Specifically, Korea won on its claim that the standard in Commerce's regulations (and, thus, the standard applied to the DRAMs order) for revoking an antidumping order should have been whether the retention of the order was "necessary" instead of whether it was "not likely" that dumping would continue or recur if the order were revoked. Commerce amended the regulation in question by incorporating the "necessary" standard from the Antidumping Agreement, made a redetermination of its revocation decision by applying this new regulation to the facts, and concluded that retention of the order was "necessary" in light of evidence showing that a resumption of dumping by the Korean exporters was likely.

—*Foreign Sales Corporation (EU)*: In a case challenging the Foreign Sales Corporation (FSC) provisions in U.S. tax law, the WTO Appellate Body ruled that the FSC tax exemption constitutes a prohibited export subsidy under the WTO Subsidies Agreement, and also violates the WTO Agreement on Agriculture. The panel and Appellate Body reports were adopted on March 20, 2000. In response, we have presented to the European Union a detailed proposal which we believe addresses the problem. We remain hopeful that we will be able to resolve our differences over the regime in a cooperative and constructive manner. [On May 7, 2003, the DSB authorized imposition of countermeasures against the United States up to $4.043 billion. United States—Foreign Sales Corporation ("FSC") tax provisions (DS108), available at *www.worldtradelaw.net/reports/wtopanels/us-fsc(panel)(21.5).pdf*. *See Digest 2003* at 660–61; *see also Digest 2001* at 653–63, *Digest 2002* at 677–91.]

—*Leaded Bar (EU)*: Finally, the EU prevailed in its case involving the Commerce Department's "change-in-ownership" methodology, as applied in three administrative reviews of its

countervailing duty order on leaded bars from the United Kingdom. The panel found Commerce's methodology to be inconsistent with the WTO Subsidies Agreement, and the WTO Appellate Body upheld that finding. Meanwhile, the countervailing duty order in question was revoked by operation of law, on January 1, 2000, under the Department of Commerce's "sunset review" procedures.

* * * *

(2) Cases concerning beef and bananas

As mentioned in Ambassador Barshefsky's testimony, two cases of particular concern to the United States during the period concerned European Union violations of WTO obligations on beef and bananas.

(i) EC regime for the importation, sale and distribution of bananas

In 1995 USTR initiated an investigation under U.S. law with respect to the European communities' ("EC") banana regime and requested consultations with the EC. At the request of the United States, Ecuador, Guatemala, Honduras, and Mexico, the WTO subsequently established a dispute settlement panel to examine the regime. On September 25, 1997, the WTO Dispute Settlement Body adopted the report of the panel and the WTO Appellate Body, concluding that the EC banana regime violated GATT and GATS. The WTO recommended that the EC bring the inconsistent measures into conformity with its obligations under those agreements by January 1, 1999. The United States sought further relief from the WTO when modifications adopted by the EC on that date did not cure the violations. On April 6, 1999, the WTO arbitrators concluded that the United States was being harmed by the EC's banana regime and the Dispute Settlement Body ("DSB") authorized the United States to

suspend concessions covering trade in an amount of $191.4 million because of the injury to U.S. economic interests caused by the European Union's failure to implement a WTO-consistent banana regime.

On April 11, 2001, the United States and the European Commission reached agreement to resolve the dispute. The new EC system took effect July 1, 2001, with a simultaneous lifting of sanctions by the United States. *See* 66 Fed. Reg. 35,689 (July 6, 2001). *See Digest 2001* at 649–51.

Excerpts below from the 1999 Federal Register notice implementing the suspension and imposing 100% ad valorem duties on certain articles describe the case and U.S. actions. 64 Fed. Reg. 19,209 (Apr. 19, 1999).

---

* * * *

. . . On September 27, 1995, the Office of the U.S. Trade Representative initiated an investigation pursuant to section 302(b)(1) of the Trade Act with respect to the EC banana regime and, in accordance with section 303(a) of the Trade Act, promptly requested consultations with the EC pursuant to the DSU and relevant provisions of several WTO agreements. [60 FR 52026]. The EC regime was designed, among other things, to take away a major part of the banana distribution business of U.S. companies. Subsequently the United States, Ecuador, Guatemala, Honduras, and Mexico jointly requested the establishment of a WTO dispute settlement panel to examine the regime. Both the panel and the WTO Appellate Body found the EC banana regime in violation of the General Agreement on Tariffs and Trade 1994 (GATT) and the General Agreement on Trade in Services (GATS). On September 25, 1997, the DSB adopted the report of the panel, as modified by the Appellate Body. The resulting DSB recommendations and rulings include, inter alia, the recommendation that the EC bring the measures found to be inconsistent with the GATT and the GATS into conformity with its obligations under those agreements. A WTO-appointed arbitrator subsequently determined that the "reasonable period of time" for the EC to implement the DSB recommendations and rulings would expire by January 1, 1999.

Based on the results of the WTO dispute settlement proceedings, the USTR on February 10, 1998, determined pursuant to section 304 of the Trade Act that the EC banana regime violates trade agreements. [63 FR 8248]. The USTR further determined that the EC's undertaking to implement all of the recommendations and rulings of the WTO reports by January 1, 1999 constituted for the purposes of section 301(a)(2)(B)(i) the taking of satisfactory measures to grant the rights of the United States under those trade agreements. Therefore, pursuant to section 301(a)(2), the USTR terminated the investigation without taking action under section 301 of the Trade Act. The USTR stated in the termination notice that it would monitor the EC's implementation of the DSB recommendations and rulings under section 306 of the Trade Act.

On January 1, 1999, modifications to the EC banana regime became effective (EC Regulations 1637/98 and 2362/98), and the EC claimed that these modifications brought its banana regime into conformity with its WTO obligations. However, these regulations perpetuate discriminatory aspects of the EC banana regime that were identified in the DSB's recommendations and rulings as inconsistent with WTO agreements. Therefore, on January 14, 1999, in accordance with U.S. rights under Article 22 of the DSU, the United States requested authorization from the DSB to suspend the application to the EC, and member States thereof, of tariff concessions and related obligations under the GATT covering trade in an amount of US $520 million. [www.ustr.org, Press Release 99-01]. On January 29, the EC objected to the level of suspension proposed by the United States and the matter was referred to arbitration pursuant to Article 22.6 of the DSU. Under DSU procedures, the arbitration should have been completed by March 2, 1999. However, on March 2 the arbitrators issued only an initial decision and requested further information from the parties. On March 3, USTR announced that the U.S. Customs Service would begin withholding liquidation and reviewing the sufficiency of bonds on imports of selected European products. The purpose of this announcement was to ensure that, upon issuance of the arbitrators' final decision, the United States would be in the same position to take action as it would have been had the arbitrators issued their decision by the March 2 deadline.

On April 6, the arbitrators issued their final decision determining that the level of nullification or impairment suffered by the United States as a result of the EC's WTO-inconsistent banana regime is $191.4 million per year and that the United States is entitled to suspend the application to the European Communities and its member States of tariff concessions and related obligations under the GATT covering trade up to that amount. A meeting of the DSB was then scheduled for April 19, 1999, at which the DSB, pursuant to Article 22.7 of the DSU, grant[ed] authorization for such suspension of concessions.

(ii) EC: Measures concerning meat and meat products (hormones) (WT/DS26, 48)

On May 20, 1996, the WTO Dispute Settlement Body established a panel in response to a challenge by the United States and Canada to a European Union ban on imports of meat from animals to which any of six hormones for growth promotional purposes had been administered. Effective July 29, 1999, USTR suspended the application of tariff concession and related obligations by imposing a 100% *ad valorem* rate of duty on three products of certain member states of the European Communities ("EC") as a result of the EC's failure to implement the subsequent recommendations and rulings of the WTO in the case. 64 Fed. Reg. 40,638 (July 27, 1999). As described in the Federal Register, "[t]his action constitute[d] the exercise of U.S. rights under Article 22 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and [was] taken pursuant to the authority granted to the USTR under section 301 of the Trade Act of 1974, as amended." Excerpts below from the Federal Register notice describe the case as of that date.

---

* * * *

. . . In December 1985, the EC adopted a directive on livestock production restricting the use of natural hormones to therapeutic purposes, banning the use of synthetic hormones, and prohibiting

imports of animals, and meat from animals, to which hormones had been administered. That directive was later declared invalid by the European Court of Justice on procedural grounds and had to be re-adopted by the Council, unchanged, in 1988 ("the Hormone Directive"). These measures, including the ban on the import of meat and meat products produced from animals to which certain hormones had been administered (the "hormone ban"), became effective January 1, 1989.

Following entry into force on January 1, 1995, of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"), the United States and, later, Canada, invoked formal WTO dispute settlement proceedings against the hormone ban. Prior to the establishment of the WTO panel, the EC replaced the Hormone Directive with another directive that re-codified and expanded the hormone ban. On May 20, 1996, the DSB established a dispute settlement panel ("the WTO panel") to examine the consistency of the hormone ban with the EC's WTO obligations.

On August 18, 1997, the WTO panel issued its report finding that the hormone ban is not based on scientific evidence, a risk assessment, or relevant international standards, in contravention of the EC's obligations under the SPS Agreement. Upon an appeal to the WTO Appellate Body, on January 16, 1998, the Appellate Body affirmed that the hormone ban is not consistent with the EC's obligations under the SPS Agreement. At a meeting held on February 13, 1998, the DSB adopted the Panel and Appellate Body reports regarding the EC's hormone ban. The EC subsequently requested four years to implement the DSB recommendations. The United States could not agree to this proposed implementation period, and the matter was referred to a WTO arbitrator. The arbitrator determined that the reasonable period of time for implementation was fifteen months, and would expire on May 13, 1999. The EC did not implement the DSB recommendations and rulings regarding its hormone ban by May 13, 1999. Accordingly, on May 17, 1999, and in accordance with U.S. rights under Article 22 of the DSU, the United States requested authorization from the DSB to suspend the application to the EC, and member States thereof, of tariff concessions and related obligations under the

GATT covering trade in an amount of $202 million. The EC objected to the level of suspension proposed by the United States, and claimed that the trade damage suffered by the United States was only $53 million. Pursuant to Article 22.6 of the DSU, the matter was referred to arbitration. The DSU provides that such arbitrations must be completed within 60 days of the end of the reasonable period of time for implementation, or in this case, by July 12, 1999.

The arbitrators issued their final decision on July 12, 1999, and determined that the level of nullification or impairment suffered by the United States as a result of the EC's WTO-inconsistent hormone ban was $116.8 million per year. Accordingly, upon DSB authorization, the United States is entitled under the DSU to suspend the application to the European Communities and its member States of tariff concessions and related obligations under the GATT covering trade up to that amount. A meeting of the DSB is scheduled for July 26, 1999, at which time the DSB, pursuant to Article 22.7 of the DSU, will grant authorization for such suspension of concessions.

(3) Claims filed against the United States

In addition to cases discussed in Ms. Barshefsky's testimony above, see discussion of dispute brought by the EU concerning the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 in 4.c. below.

3. North American Free Trade Agreement

a. Negotiation and entry into force

The North American Free Trade Agreement ("NAFTA") joined Mexico, Canada and the United States in a free trade agreement, removing barriers to trade and investment among the three countries. Negotiations on NAFTA were substantively concluded on August 12, 1992. *See* White House fact sheet issued August 12, 1992, at *http://bushlibrary.tamu.edu/*

research/papers/1992/92081201.html. On October 7, 1992, President George H.W. Bush, President Carlos Salinas of Mexico and Prime Minister Brian Mulroney of Canada initialed the NAFTA in San Antonio, Texas. President Bush signed the NAFTA in a ceremony at the Organization of American States building December 17, 1992. *See http://bushlibrary.tamu.edu/research/papers/1992/92121704.html.*

On December 8, 1993, President William J. Clinton signed the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057 (1993) ("NAFTA Act") into law. Proclamation No. 6641, issued by President Clinton on December 15, 1993, among other things, implemented the NAFTA with respect to the United States and incorporated in the Harmonized Tariff Schedule of the United States the tariff modifications and rules of origin to carry out or apply the NAFTA, pursuant to section 201 and 202 of the NAFTA Act, 19 U.S.C. §§ 3331 and 3332. 58 Fed. Reg. 66,867 (Dec. 20, 1993).

The full text of the NAFTA, which entered into force January 1, 1994, can be found at the website of the NAFTA Secretariat, *www.nafta-sec-alena.org, reprinted in* 32 I.L.M. 289 (1993).

A fact sheet released by the Department of State on August 30, 1993 described key provisions of the NAFTA, as excerpted below. The full text of the fact sheet and related documents are available at 4 Dep't St. Dispatch No. 37 at 622–628 (Sept. 13, 1993), *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

---

* * * *

Tariffs. NAFTA eliminates all tariffs on U.S., Mexican, and Canadian goods by 2008. Many will be removed immediately and others will be phased out over 5, 10, and 15 years.

Rules of Origin. Rules of origin define goods eligible for NAFTA treatment and prevent "free riding" by third countries. Only goods produced in North America qualify for NAFTA treatment. Goods

containing imported components qualify if they are transformed enough to result in a tariff classification change. In some cases, goods also must have a specified percentage of North American content. There is a special rule of origin for textiles and apparel.

Customs. NAFTA expands and improves on procedures in the U.S.-Canada FTA and provides for uniform regulations to ensure consistent interpretation, application, and administration of the rules of origin.

Quotas. NAFTA eliminates import and export quotas unless consistent with the GATT or explicitly mentioned in the agreement.

National Treatment. NAFTA reaffirms GATT principles preventing discrimination against imported goods.

Standards. NAFTA prohibits use of product standards as a trade barrier but preserves each country's right to establish and enforce its own product standards, particularly those designed to promote health and safety and to protect human, animal, and plant life and the environment.

Government Procurement. NAFTA opens new procurement markets in Mexico, particularly the petrochemical, heavy electrical, and pharmaceutical areas.

Safeguards. NAFTA partners can impose a safeguard action during the transition period if increased imports constitute a "substantial cause or threat" of "serious injury" to a domestic industry. This follows GATT practice.

Agriculture. NAFTA eliminates immediately or phases out tariffs on agricultural goods. It converts most quotas and other quantitative restrictions to tariff rate quotas, which allow a certain quantity of a product to enter duty-free. These tariff rate quotas will apply to U.S. exports of corn, dry beans, powdered milk, poultry, malted barley, animal fats, potatoes, and eggs. For some products—such as wheat, grapes, tobacco, other dairy products, and day-old chicks—quotas and other quantitative restrictions will be converted to tariffs, which then will be phased out. U.S. standards regarding food imports will be maintained. Special agricultural safeguards for certain import-sensitive products will be available to limit the impact of sudden import surges.

Energy. NAFTA lifts investment restrictions on most of the basic petrochemicals industry and on most electricity generating

facilities. It eliminates or phases out tariffs on oil and gas field equipment and on coal.

Autos. NAFTA provides for the immediate reduction of Mexican duties on vehicle imports and a timetable for their elimination. It eliminates Mexican quotas on new auto imports. It also removes tariffs on certain automotive parts and phases out others. It reduces the Mexican domestic-content requirement to zero over 10 years and reduces Mexico's trade balancing requirement.

Textiles and Apparel. NAFTA eliminates some tariffs immediately and phases out others over a 10-year period. It removes quotas on imports from Mexico that qualify under the rules of origin.

Financial Services. NAFTA allows investment by U.S. and Canadian firms in the Mexican banking market. It provides for the elimination of all restrictions on such investment by January 2000. U.S. and Canadian insurance firms with existing joint ventures in Mexico may increase their ownership to 100%. The agreement also permits U.S. insurance companies to issue reinsurance policies and establish subsidiaries in Mexico. It allows U.S. and Canadian companies to invest in the brokerage industry in Mexico.

Transportation. NAFTA eliminates, over a 5-year period, current restrictions on access by U.S. and Canadian trucking companies to Mexico. It gives charter and bus tour operators full access to the Mexican market. It allows U.S. and Canadian investment in Mexican bus and truck companies, in international cargo subsidiaries, and in Mexican port facilities. The agreement does not alter U.S. safety standards.

Telecommunications. NAFTA eliminates duties and nontariff barriers on most Mexican imports of telecommunications equipment—including private branch exchanges, cellular systems, satellite transmission, earth station equipment, and fiber optic transmission systems. It also eliminates restrictions on foreign investment in voice mail and other value-added and information services. North American firms will have access to and use of public telecommunications networks and services.

Investment. NAFTA provides for member state investors to receive the more favorable of national or MFN treatment in setting up operations or acquiring firms. It phases out most performance requirements over 10 years and states that NAFTA

partners may not impose new ones. The agreement guarantees the free transfer of capital and profits and that investors will be compensated at the fair market value of the investment in cases of expropriation.

Intellectual Property. NAFTA protects North American producers in two new areas: computer programs and compilations of individually protected material. It establishes a minimum 50-year term for the protection of sound recordings and motion pictures. The agreement requires companies to register both service marks and trademarks. It prohibits compulsory licensing or mandatory linking of trademarks. It provides protection for independently created industrial designs and for trade secrets and proprietary information.

Environment. NAFTA maintains existing federal and subfederal standards. It allows a country to prohibit entry of goods that do not meet its standards. The agreement states that parties, including states, may enact tougher standards and permits each country to impose environmental requirements on foreign investment.

Implementation. The governments will establish the Free Trade Commission to ensure that NAFTA is implemented properly. Commission working groups will monitor implementation of the various chapters of the agreement.

Dispute Settlement. NAFTA extends the dispute settlement provisions of the U.S.-Canada FTA to Mexico while providing new safeguards to ensure fairness. It establishes the North American Free Trade Commission and a Secretariat to administer the panel review system. The mechanism for resolution is as follows:

(1) Notification and consultation between parties;
(2) If no resolution, referral to the Commission;
(3) If necessary, referral to a panel of private sector experts; and
(4) Resolution or retaliation.

If the defending party does not comply with the panel ruling, the other party may suspend equivalent trade benefits until the dispute is resolved.

* * * *

b. Supplemental agreements to NAFTA

In 1993 Canada, Mexico, and the United States concluded three side agreements to NAFTA. These side agreements dealt with cooperation on the environment, with labor standards, and with trade restrictions in response to import surges. Excerpts below from USTR fact sheets, released August 13, 1993, describe the three agreements. The full texts of the fact sheets and related documents, including summaries of the labor and environmental agreements (as agreed by the parties) are available at 4 Dep't St. Dispatch No. 34 at 589–96 (Aug. 23, 1993), *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*. The North American Agreement on Environmental Cooperation can be found at *www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=English*. The North American Agreement on Labor Cooperation, *reprinted at* 32 I.L.M. 1480 (1993), is also available on the website of the Commission for Labor Cooperation, *www.naalc.org/english/agreement.shtml*.

NAFTA Supplemental: Agreement on Labor Cooperation

Historic Undertaking. This is the first labor agreement negotiated specifically to accompany and build on a trade agreement. . . . The Agreement on Labor Cooperation will promote improved labor conditions and strong enforcement of national labor laws in all three countries of North America.

Labor Commission. The Agreement creates a new Commission on Labor Cooperation, with each country represented on a Council by its top, cabinet-level labor official.

—The Council has a broad mandate to work cooperatively on labor issues, including occupational health and safety, child labor, benefits for workers, minimum wages, industrial relations, legislation on formation and operation of unions and the resolution of labor disputes, and many others.

—The Council will be able to obtain public advice and assistance in these activities.

* * * *

Labor Principles and Objectives. The objectives of the agreement include promotion of improved labor laws and standards, effective enforcement of these laws, encouraging competition based on rising productivity and quality, and the promotion of key labor principles that will be set out in an annex.

These principles include such vital issues as protection against child labor, the right to strike and to bargain collectively, freedom of association, minimum employment standards, including minimum wages, elimination of employment discrimination, and prevention of occupational accidents and diseases.

Transparency and Domestic Enforcement. Each country undertakes to ensure transparency of its laws and to enforce those laws through several means. . . .

Access to Fair Domestic Procedures. The Agreement establishes detailed requirements, consistent with U.S. law and process, to assure fair administrative and judicial review. . .

* * * *

Encouraging Effective Enforcement by Governments. The Agreement has several avenues to encourage effective national enforcement of labor laws.

* * * *

The intent of these many processes is to encourage voluntary improvement of enforcement through exposure of problems. Trade sanctions are truly a last resort, since the intent is to encourage parties to enforce their law, not to establish new trade barriers. Canada in fact has agreed to make dispute settlement panel judgements on fines and remedial actions automatically enforceable in its domestic court, which obviates any need for trade sanctions vis-a-vis Canada.

NAFTA Supplemental: Agreement on Environmental Cooperation

Historic Undertaking. This is the first environmental agreement negotiated specifically to accompany and build on a trade agreement. . . . The Agreement on Environmental Cooperation will

ensure that economic growth is consistent with goals of sustainable development.

New Independent Organization. The Agreement creates a new Commission on Environmental Cooperation. The three countries' top environmental officials (the EPA Administrator for the United States) will comprise the Commission's Council.

—A Joint Advisory Committee made up of nongovernmental organizations from all three countries will advise the Council in its deliberations.

* * * *

Environmental Obligations. The NAFTA partners commit themselves to undertake important environmental policies regarding the development, implementation, and enforcement of their environmental laws.

—Countries guarantee their citizens access to national courts to petition governments to undertake enforcement actions and to seek redress of harm.

—Countries will ensure the openness of judicial and administrative proceedings and transparent procedures for the creation of environmental laws and regulations.

—Canada, Mexico and the United States pledged to ensure that their laws and standards continue to provide high levels of environmental protection and to work cooperatively in enhancing protections.

—They have committed to effectively enforce those laws, a commitment backed up by a dispute settlement process.

—The agreement does not affect the rights of states and provinces under the NAFTA to maintain standards at levels higher than the federal governments.

—Countries are obligated to report on the state of their environments, and to promote environmental education, scientific research, and technological development.

—They will work toward limiting trade in toxic substances that they have banned domestically.

The Commission's Agenda. A major goal of the Commission is to broaden cooperative activities among the NAFTA partners. . . .

Public Participation and Dispute Settlement. Transparency is the hallmark of the agreement, and citizens of all three countries will be free to make submissions to the Commission on their concerns related to the full range of environmental issues.

* * * *

The dispute settlement process provides, in the end, for sanctions if countries have failed to correct problems of nonenforcement.

NAFTA Supplemental: Agreement on Import Surges

"Early Warning System". The understanding on import surges establishes a new mechanism for consultations among the NAFTA countries and for examining economic factors, including employment, in the region. It is meant to anticipate national trade measures, authorized under the NAFTA, to respond to increased imports.

For example, a country might call for consultations and a joint examination in the committee as a result of declining employment in a particular industry.

NAFTA Safeguard Provisions. The NAFTA itself contains several important provisions to safeguard a country's industry and workers against import surges.

—A bilateral safeguard mechanism permits the "snap-back" to pre-NAFTA or MFN tariff rates for up to three years—or four years for extremely sensitive products—if increased imports from Mexico are a substantial cause of or threaten serious injury to a domestic industry.

—A global safeguard mechanism allows the imposition of tariffs or quotas on imports from Mexico and/or Canada as part of a multilateral safeguard action when imports from either or both countries are a substantial cause of or threaten serious injury to a domestic industry.

—Sensitive agriculture products are handled specially in the form of tariff-rate quotas, where high MFN tariffs kick in above a specified quantity of imports.

—Sensitive textile and apparel products also have special safeguard provisions to respond to those industries' needs.

* * * *

Remarks by President Clinton on signing the side agreements in Washington D.C., September 14, 1993, excerpted below, are available at 4 Dep't St. Dispatch No. 37 at 622 (Sept. 13, 1993), *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

* * * *

The environmental agreement will, for the first time ever, apply trade sanctions against any of the countries that fails to enforce its own environmental laws. I might say to those who say that that's giving up our sovereignty, for people who have been asking us to ask that of Mexico: How do we have the right to ask that of Mexico if we don't demand it of ourselves? It's nothing but fair. This is the first time that there have ever been trade sanctions in the environmental law area. This ground-breaking agreement is one of the reasons why major environmental groups, ranging from the Audubon Society to the Natural Resources Defense Council, are supporting NAFTA.

The second agreement ensures that Mexico enforces its laws in areas that include worker health and safety, child labor, and the minimum wage. And I might say, this is the first time in the history of world trade agreements when any nation has ever been willing to tie its minimum wage to the growth in its own economy. What does that mean? It means that there will be an even more rapid closing of the gap between our two wage rates. And as the benefits of economic growth are spread in Mexico to working people, what will happen? They'll have more disposable income to buy more American products, and there will be less illegal immigration because more Mexicans will be able to support their children by staying home. This is a very important thing.

The third agreement answers one of the primary attacks on NAFTA that I've heard for a year, which is: Well, you can say all this, but something might happen that you can't foresee. Well,

that's a good thing; otherwise, we never would have had yesterday. I mean, I plead guilty to that. Something might happen that Carla Hills didn't foresee, or George Bush didn't foresee, or Mickey Kantor or Bill Clinton didn't foresee. That's true. Now, the third agreement protects our industries against unforeseen surges in exports from either one of our trading partners. And the flip side is also true. Economic change, as I said before, has often been cruel to the middle class, but we have to make change its friend. NAFTA will help to do that.

* * * *

Together, the efforts of two administrations now have created a trade agreement that moves beyond the traditional notions of free trade, seeking to ensure trade that pulls everybody up instead of dragging some down while others go up. We have put the environment at the center of this in future agreements. We have sought to avoid a debilitating contest for businesses where countries seek to lure them only by slashing wages or despoiling the environment.

* * * *

c. Claims under the dispute mechanisms of the NAFTA

Chapter 20 of the NAFTA included a government-to-government dispute settlement mechanism for settling disputes between the United States, Canada, and Mexico over the interpretation and application of the NAFTA. The NAFTA also included dispute resolution mechanisms that allow individuals to challenge decisions made by the NAFTA governments in the area of antidumping and countervailing duties (Chapter 19) and investment (Chapter 11). Information on past and pending disputes may be obtained from the U.S. section of the NAFTA Secretariat, which maintains case files on panel, committee, and tribunal proceedings. *See www.nafta-sec-alena.org.* Information on Chapter 11 disputes is also available on the Department of State website at *www.state.gov/s/l/c3439.htm.*

(1) Chapter 20: Interpretation or application disputes

Chapter 20 of the NAFTA set out detailed procedures for the resolution of disagreements that may arise between the NAFTA Parties over the interpretation or application of the agreement. The steps set out in Chapter 20 are intended to resolve disputes by agreement where possible. The process begins with government-to-government consultations. If the dispute is not resolved, a party may request a meeting of the NAFTA Free Trade Commission, comprised of the Trade Ministers of the parties. If the Commission is unable to resolve the dispute, a consulting party may call for the establishment of a five-member arbitral panel. The NAFTA Secretariat makes available decisions in Chapter 20 proceedings at *www.nafta-sec-alena.org/DefaultSite/index_e.aspx?ArticleID=76.*

Following consultations with Canada, on July 14, 1995, the United States requested the establishment of a Chapter 20 arbitral panel to resolve a dispute regarding Canada's application of customs duties to certain U.S. agricultural goods imported into Canada. The United States alleged that Canada increased its tariffs on these goods—which included poultry, dairy, eggs, margarine, and barley products—in 1995, contrary to NAFTA obligations. On December 2, 1996, the Chapter 20 panel found that Canada's application of customs duties to these U.S. agricultural goods conformed with Canada's obligations under the NAFTA. The decision of the panel is available at *www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=393. In the Matter of Tariffs applied by Canada to Certain U.S.-Origin Agricultural Products,* Secretariat File No. CDA-95-2008-01.

On December 18, 1995, Mexico sought consultations with the United States, pursuant to Chapter 20 dispute resolution procedures, regarding U.S. limitations on Mexican cross-border trucking services. After consultations and a meeting of the NAFTA Free Trade Commission failed to resolve the dispute, on September 22, 1998, Mexico filed a formal complaint against the United States under Chapter 20.

Mexico's complaint alleged that the United States had violated a number of NAFTA obligations by refusing to end restrictions on Mexican cross-border trucking services and investment in the U.S. trucking industry, while at the same time offering national treatment to Canadians. A panel decision of February 6, 2001, finding that the continued moratorium violated NAFTA, is available at *www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=394. In the Matter of Cross-Border Trucking Services,* Secretariat File No. USA-MEX-98-2008-01. *See also Digest 2002* at 666–70. On December 10, 1999, the United States requested consultation on the issue of Mexico's alleged reciprocal denial of access of U.S. cross-border trucking services. While consultations were later held, no panel was established.

On January 14, 1997, Mexico also requested a Chapter 20 panel to resolve a dispute with the United States over safeguard measures imposed by the United States on imports of certain broom corn brooms. In particular, the United States had imposed a three-year tariff increase on imports following an investigation by the U.S. International Trade Commission. The panel issued a decision on January 30, 1998. It found that, because of deficiencies in the U.S. International Trade Commission's findings, the U.S. safeguards measures were a continuing violation of U.S. obligations under the NAFTA. *See www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=394. In The Matter of The U.S. Safeguard Action Taken on Broomcorn Brooms from Mexico*, Secretariat File No. USA-97-2008-01.

(2) Chapter 19: Review of antidumping and countervailing duty determinations

Article 1904 established a mechanism to provide an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases, with review by independent binational panels. A panel is established when a request for panel review is filed with the

NAFTA Secretariat by an industry asking for a review of such a decision involving imports from a NAFTA country. These panels, made up of individuals from the importing and exporting NAFTA countries at issue, do not interpret international rules. They review the determinations of the government agencies for consistency with the national laws on antidumping and countervailing duties of the importing NAFTA country. Panel decisions are final and binding, and may not be appealed to domestic courts. Chapter 19 also included an extraordinary challenge mechanism, *see* NAFTA Article 1904.13, which can be used to appeal panel decisions in instances in which there are substantial allegations of legal error or gross misconduct by the panel. The U.S.-Canada Free Trade Agreement, which preceded the NAFTA, included a similar dispute resolution mechanism for the appeal of antidumping and countervailing duty decisions. Panel decisions in Chapter 19 cases, decisions by extraordinary challenge committees, and decisions rendered by U.S.-Canada Free Trade Agreement panels can be found on the NAFTA Secretariat's website at *www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=76*.

(3) Chapter 11: Investor-state dispute settlement

Chapter 11 contained a number of provisions designed to protect cross-border investors and facilitate the settlement of investment disputes. For example, each NAFTA Party must accord investors from the other NAFTA Parties national and most-favored-nation (i.e. non-discriminatory) treatment and may not expropriate investments of those investors except in accordance with international law. Chapter 11 permits an investor of one NAFTA Party to seek money damages for measures taken by one of the other NAFTA Parties that allegedly violate provisions of Chapter 11. Investors may initiate arbitration against the NAFTA Party under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules") or the Arbitration

(Additional Facility) Rules of the International Centre for Settlement of Investment Disputes ("ICSID Additional Facility Rules"). The Department of State is the lead agency representing the U.S. Government in Chapter 11 cases, with the exception of *The Loewen Group, Inc., v. United States* case, for which the Department of Justice served as the lead agency.

Chapter 11 cases have been filed against each of the NAFTA Parties. Links to publicly available pleadings and awards in Chapter 11 cases are available at *www.state.gov/s/l/c3439.htm*.

(i) Claims filed against the United States

Three claims were brought against the United States under Chapter 11 of the NAFTA during the 1990s.

The first claim filed against the United States under Chapter 11 was *The Loewen Group, Inc., v. United States*. *Loewen* was commenced against the United States with a notice of arbitration on October 30, 1998. The Loewen Group, Inc. ("TLGI"), then a Canadian corporation involved in the death-care industry, and Raymond L. Loewen, its chairman and CEO at the time of the events at issue, filed claims under the ICSID 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. On June 26, 2003, the tribunal dismissed the claims against the United States in their entirety on the grounds that Loewen's reorganization as a U.S. company deprived the tribunal of jurisdiction and that Loewen had failed to exhaust remedies reasonably

available under the domestic judicial system. *See Digest 2003* at 610–15. *See also Digest 2002* at 623–41; *Digest 2001* at 623–42. The notice of arbitration, pleadings filed by the United States and Loewen, and tribunal decisions in the case are available at *www.state.gov/s/l/c3755.htm*.

On September 1, 1999, the United States received a notice of arbitration in the *Mondev International Ltd. v. United States* claim. Mondev International Ltd., a Canadian real-estate development corporation, submitted a claim under the ICSID Additional Facility Rules on its own behalf for losses allegedly suffered by Lafayette Place Associates ("LPA"), a Massachusetts limited partnership it owns and controls. Mondev alleged losses arising from a decision by the Supreme Judicial Court of Massachusetts and from Massachusetts state law. Mondev alleged that Massachusetts' statutory immunization of the Boston Redevelopment Authority from intentional tort liability was incompatible with international law, and that a decision of the Supreme Judicial Court was arbitrary and capricious and amounted to a denial of justice. Mondev also alleged that the United States failed to meet its Chapter Eleven obligations by not according LPA national treatment (Art. 1102); by not according it treatment in accordance with international law (Art. 1105); and by expropriating its investment without compensation (Art. 1110). Mondev claimed damages of not less than $50 million. Following briefing and a hearing on competence and liability, the tribunal dismissed all claims against the United States. *See Digest 2002* at 607–16. The notice of arbitration, pleadings filed by the United States, and tribunal decisions in the case can be found at *www.state.gov/s/l/c3758.htm*.

On December 3, 1999, the United States received a notice of arbitration from Methanex Corporation, a Canadian marketer and distributor of methanol. Methanex submitted a claim to arbitration under the UNCITRAL 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

the regulations banning MTBE 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. On August 7, 2002, the tribunal issued a partial award finding that Methanex had not established jurisdiction. *See Digest 2002* at 616–23; *see also Digest 2001* at 574–611; *Digest 2003* at 615–36. The notice of arbitration, pleadings filed by the United States and Methanex, hearing transcripts, and tribunal decisions in the case can be found at *www.state.gov/s/l/c5818.htm*.

(ii) Claims by U.S. investors

Article 1128 of the NAFTA provides that "[o]n written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement." On November 9, 1999, the United States made a submission under Article 1128 in *Metalclad Corporation v. The United Mexican States*. The United States addressed two issues: 1) that the actions of local governments are subject to the NAFTA standards and 2) that the state parties intended that Article 1110(1) reflect customary international law as to categories of expropriation. The text of the U.S. submission is available at *www.state.gov/s/l/c3752.htm; see also* excerpts in *Digest 2000* at 679–83.

Two awards were issued in cases brought by U.S. claimants during the 1990s: *Robert Azinian v. The United Mexican States,* the first dispute under NAFTA to be resolved by an award on the merits, and *Ethyl Corp. v. Government of Canada*. The United States did not make submissions under Article 1128 in either case. Links in Spanish in *Azinian* are available at *www.state.gov/s/l/c3750.htm*; the tribunal's award on jurisdiction in *Ethyl Corp.,* issued June 24, 1998, is reprinted in 38 I.L.M. 708 (1999); s*ee also www.state.gov/s/l/c3745.htm*.

4. Other Trade-Related Issues

a. Free Trade Agreement of the Americas

(1) First Summit of the Americas: Adoption of Declaration of Principles and Plan of Action

The first steps toward the Free Trade Agreement of the Americas ("FTAA") were taken at a meeting at Miami in December of 1994. At this meeting, known as the Summit of the Americas, the United States and the heads of state and government of thirty-three other countries of the Americas agreed to a Declaration of Principles and a Plan of Action envisioning the unification of the economies of the Americas into a single free trade area. The agreement contemplated the conclusion of FTAA negotiations by the year 2005, and the Plan of Action set forth initial steps to be taken by the thirty-four countries. Excerpts from what came to be known as the Miami Declaration and Plan of Action relevant to the proposed FTAA are below. The Declaration of Principles and Plan of Action also envisioned actions related to democracy, poverty, sustainable development and the environment. The full texts of the Declaration of Principles and Plan of Action are available at *www.summit-americas.org/miamidec.htm* and *www.summit-americas.org/miamiplan.htm*.

Declaration of Principles

Partnership for Development and Prosperity: Democracy, Free Trade and Sustainable Development in the Americas

The elected Heads of State and Government of the Americas are committed to advance the prosperity, democratic values and institutions, and security of our Hemisphere. For the first time in history, the Americas are a community of democratic societies. Although faced with differing development challenges, the Americas are united in pursuing prosperity through open markets, hemispheric integration, and sustainable development. We are determined to

consolidate and advance closer bonds of cooperation and to transform our aspirations into concrete realities.

We reiterate our firm adherence to the principles of international law and the purposes and principles enshrined in the United Nations Charter and in the Charter of the Organization of American States (OAS), including the principles of the sovereign equality of states, non-intervention, self-determination, and the peaceful resolution of disputes. We recognize the heterogeneity and diversity of our resources and cultures, just as we are convinced that we can advance our shared interests and values by building strong partnerships.

* * * *

Summit of the Americas Plan of Action

The heads of state and government participating in the 1994 Summit of the Americas in Miami, Florida, desirous of furthering the broad objectives set forth in their Declaration of Principles and mindful of the need for practical progress on the vital tasks of enhancing democracy, promoting development, achieving economic integration and free trade, improving the lives of their people, and protecting the natural environment for future generations, affirm their commitment to this Plan of Action.

* * * *

II. PROMOTING PROSPERITY THROUGH ECONOMIC INTEGRATION AND FREE TRADE

9. Free Trade in the Americas

1) While pursuing economic integration and free trade in the Hemisphere, we reinforce our strong commitment to multilateral rules and disciplines. We endorse full and rapid implementation of the Uruguay Round, active multilateral negotiations in the World Trade Organization, bilateral and subregional trade agreements, and other trade arrangements that are consistent with the provisions of the GATT/WTO and that do not raise barriers to other nations.

2) Extraordinary achievements have been made by countries of the Hemisphere in trade liberalization and subregional integration. Free trade and increased economic integration are key factors

for sustainable development. This will be furthered as we strive to make our trade liberalization and environmental policies mutually supportive, taking into account efforts undertaken by the GATT/WTO and other international organizations. As economic integration in the Hemisphere proceeds, we will further secure the observance and promotion of worker rights, as defined by appropriate international conventions. We will avoid disguised restrictions on trade, in accordance with the GATT/WTO and other international obligations.

3) We will strive to maximize market openness through high levels of discipline as we build upon existing agreements in the Hemisphere. We also will strive for balanced and comprehensive agreements, including among others: tariffs and non-tariff barriers affecting trade in goods and services; agriculture; subsidies; investment; intellectual property rights; government procurement; technical barriers to trade; safeguards; rules of origin; antidumping and countervailing duties; sanitary and phytosanitary standards and procedures; dispute resolution; and competition policy.

4) We recognize that decisions on trade agreements remain a sovereign right of each nation. In addition, recognizing the importance of effective enforcement of international commitments, each nation will take the necessary action, in accordance with its own legislation and procedures, to implement the agreements in the areas covered by this Plan of Action.

5) As we work to achieve the "Free Trade Area of the Americas," opportunities such as technical assistance will be provided to facilitate the integration of the smaller economies and increase their level of development.

* * * *

(2) Second Summit of the Americas

Following the First Summit of the Americas, working groups from the relevant trade ministries and a series of ministerial meetings identified trade measures that would be affected by an FTAA and examined possible approaches to negotiations of an FTAA among all 34 countries.

In April 1998 a Second Summit of the Americas was held in Santiago, Chile. The excerpt below from the Santiago Declaration adopted at the Second Summit announced the formal launch of the FTAA negotiations and described the principles and objectives under which the negotiations would be conducted. The Declaration and Plan of Action are available at *www.summit-americas.org/chiledec.htm* and *www.summit-americas.org/chileplan.htm*.

We, the democratically-elected Heads of State and Government of the countries of the Americas, have met in Santiago, Chile, in order to continue the dialogue and strengthen the cooperation we began in Miami in December 1994. Since that time, significant progress has been made in the formulation and execution of joint plans and programs in order to take advantage of the great opportunities before us. We reaffirm our will to continue this most important undertaking, which requires sustained national efforts and dynamic international cooperation.

* * * *

Today, we direct our Ministers Responsible for Trade to begin negotiations for the FTAA, in accordance with the March 1998 Ministerial Declaration of San José. We reaffirm our determination to conclude the negotiation of the FTAA no later than 2005, and to make concrete progress by the end of the century. The FTAA agreement will be balanced, comprehensive, WTO-consistent and constitute a single undertaking.

We note with satisfaction the preparatory work by the Ministers Responsible for Trade over the past three years which has strengthened our trade policies, fostered understanding of our economic objectives and facilitated dialogue among all participating countries. We appreciate the significant contribution of the Inter-American Development Bank (IDB), the Organization of American States (OAS), and the United Nations Economic Commission for Latin America and the Caribbean (ECLAC), acting as the Tripartite Committee.

The FTAA negotiating process will be transparent, and take into account the differences in the levels of development and size of the economies in the Americas, in order to create the opportunities for the full participation by all countries. We encourage all segments of civil society to participate in and contribute to the process in a constructive manner, through our respective mechanisms of dialogue and consultation and by presenting their views through the mechanism created in the FTAA negotiating process. We believe that economic integration, investment, and free trade are key factors for raising standards of living, improving the working conditions of the people of the Americas and better protecting the environment. These issues will be taken into account as we proceed with the economic integration process in the Americas.

The region has made significant advances in both monetary and fiscal policy as well as in price stability and liberalizing our economies. The volatility of capital markets vindicates our decision to strengthen banking supervision in the Hemisphere and to establish regulations relating to disclosure and reporting of banking information.

* * * *

b. United States-Korean agreements on steel, meat and other food products, and automobiles

Trade disputes have often been the subject of bilateral negotiations. Such negotiations were used at times to resolve complaints of unfair trade practices involving a specific sector or product in order to terminate, on mutually agreeable terms, proceedings under U.S. domestic law or those before international bodies such as the WTO. Excerpted below are three USTR press releases, explaining the major components of agreements reached with the Government of Korea in 1995.

The press releases are available at *www.state.gov/s/l/c8183.htm*. The Department of Commerce's Trade Compliance Center's Trade and Related Agreements Database

("TARA"), available at *www.tcc.mac.doc.gov* lists such agreements still active and binding between the United States and its trading partners covering non-agricultural manufactured products and services.

On July 14, 1995, U.S. Trade Representative Mickey Kantor announced an agreement on steel sheet and pipe and tube products:

> the Government of Korea has agreed to the establishment of a consultative mechanism to discuss key economic trends and data concerning steel sheet and pipe and tube products. The Korean government will also notify the United States in advance of any government measure introduced to control steel production, pricing or exports, and make certain the Korean steel industry fully understands that the government no longer interferes in pricing or production. . . . The forum will meet periodically over the next twelve months, and may be renewed by mutual decision by both governments.

As a result, the press release indicated, "the [U.S.] Committee on Pipe and Tube Imports [which had] filed a Section 301 [of the Trade Act of 1974, 19 U.S.C. § 2411] petition against Korea, alleging that the Korean government restricts exports of steel sheet and pipe and tube, and controls prices of steel sheet . . . have decided to withdraw their petition . . . ."

On July 20, 1995, Ambassador Kantor announced agreement on barriers to U.S. food exports with South Korea. His press release is excerpted below.

---

* * * *

The dispute, which arose in early 1994, concerned Korea's government-mandated shelf-life standards which adversely affect a range of U.S. food exports, such as vacuum-packed beef and pork, frozen patties and sausages, poultry, and other products.

Last month, Korean authorities met with the United States in Geneva to explain Korea's laws and regulations concerning the

shelf-life of food products. Those discussions contributed to the final settlement, which will be forwarded to the Chairman of the Dispute Settlement Body in Geneva today.

Korea agreed to phaseout its current system and, similar to most other countries, allow manufacturers to set their own "use-by" dates. For chilled, vacuum-packed pork and beef and all frozen food, including beef, pork and poultry, Korea's new system will come into effect on July 1, 1996. For all dried, packaged, canned or bottled products, the manufacturer's use-by system will go into effect on October 1 of this year.

In the interim, Korea has established specific government mandated shelf-life dates that will allow trade to take place until the new system takes effect. The settlement also covers other concerns raised by the U.S. meat industry, including pork tendering procedures.

As a result of this settlement, the United States Government is terminating the investigation of the Korean restrictions affecting U.S. meat imports under Section 301 of the Trade Act of 1974. In addition, both sides agreed to begin work immediately on drafting a joint letter to the WTO Dispute Settlement Body, aimed at resolving another case regarding Korea's residue testing and inspection of imported agricultural products.

* * * *

On September 28, 1995, Ambassador Kantor announced that the U.S. and South Korea had reached agreement to increase market access for U.S. and foreign passenger vehicles into Korea. A fact sheet released on that date described the resulting memorandum of understanding as excerpted below.

General

The U.S. and Korea reached a Memorandum of Understanding (MOU) on autos on September 28, 1995. The MOU agreement contains provisions on Korea's auto tax system, standards and certification procedures, advertising, auto financing, consumer perceptions and future consultations.

Auto Taxes

Korea's annual vehicle registration tax, cited as the single most onerous barrier identified by the Big Three automakers, will be reduced for cars with larger engines as follows:

* * * *

Korea also will lower the special excise tax on all medium and large cars from 25 to 20 percent, a reduction of 20 percent.

These two tax cuts will reduce the tax burden on cars with larger engines by an average $2,800 per vehicle. This is a 15 percent reduction in the overall tax burden.

Standards and Certification Procedures

Korea will substantially reduce the amount of documentation required to secure safety approval for each new car model, saving U.S. manufacturers thousands of hours of labor for each model.

Korea will raise the threshold for required documentation and testing from 100 to 500 autos, effective immediately, and to 1000 autos by 1998. This change recognizes the high quality of U.S. automobiles and will allow U.S. manufacturers to introduce new models more easily.

To fulfill Korea's new pass-by noise standards, Korea will allow U.S. automakers to use internationally recognized noise test procedures at laboratories in the United States without further testing in Korea.

TV Advertising

By eliminating "locked time," Korea will, for the first time, give foreign firms equal access to TV advertising time. Currently, access is severely restricted for new entrants.

Consumer Perceptions

Korea's Trade Ministry will send a letter to the Korean Automobile Importers and Dealers Association (KAIDA) which will state that ownership of a foreign car, in and of itself, does not constitute grounds for a tax audit or other government harassment. Consumer fears of such harassment has dampened demand for foreign vehicles.

Consultative Mechanism

Korea agrees to further consultations to monitor market access for foreign autos. In monitoring the results of the MOU, the following quantitative and qualitative criteria will be used:

the change in the number and value of foreign autos sold in Korea, in total and by country of export;

specific official actions to improve consumer perception of imports;

implementation of all other measures set out in the MOU, including standards, certification and advertising measures, taxes and tariffs.

In addition, both governments will continue to consult on Korean taxation policies.

* * * *

c. U.S.-European Union understanding related to LIBERTAD Act

As discussed in Chapter 1.C.2.f., Title IV § 401 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104–114, 110 Stat. 785 (1996) (popularly known as "the Helms-Burton Act"), prohibited visa issuance to, and required exclusion of, any alien whom the Secretary of State determined had confiscated or directed the confiscation of property a claim to which is owned by a United States national, had converted such property for personal gain, had trafficked in such property, or was a corporate officer, principal or shareholder with a controlling interest of an entity which had been involved in the confiscation of or trafficking in such property. *See also* A.6. *supra.*

On May 3, 1996, the EU asked for WTO consultations concerning the Helms-Burton Act, as well as three pre-existing provisions of U.S. Cuban boycott legislation, regarding their consistency with the GATT and the GATS. On November 20, 1996, the DSB established a panel in response to the EU's request. In response to the appointment of the panel, USTR and the Department of Commerce announced that unless the dispute with the EU was resolved promptly, the United States would issue a formal statement to the effect that the panel was not competent to decide the matter inasmuch as the challenged measures reflected longstanding U.S. foreign policy and national security concerns regarding Cuba. *See* 1998 Trade Policy Agenda and 1997 Annual Report of

the President of the United States on the Trade Agreements Program, available through the Office of the U.S. Trade Representative Press Office. The WTO chapter of the report is available at *www.state.gov/s/l/c8183.htm*.

On April 11, 1997, Under Secretary of Commerce Stuart E. Eizenstat, Special Representative of the President and the Secretary of State for the Promotion of Democracy in Cuba, announced that the United States and the European Commission had reached an understanding that "serves a number of important U.S. interests." Under Secretary Eizenstat continued:

> It creates the first real opportunity to develop multilateral disciplines deterring and inhibiting investment in confiscated property and the first time the EU has agreed to develop such international norms. The agreement avoids placing our foreign policy interests before the WTO, an organization designed to facilitate trade, not arbitrate foreign policy disputes. It protects existing and future property claims in Cuba by U.S. citizens. And it better enables the U.S. and the EU to work together to further our ultimate goal of a democratic Cuba.

Mr. Eizenstat's statement is available at *www.state.gov/s/l/c8183.htm*. The understanding also addressed European Union concerns with the Iran-Libya Sanctions Act ("ILSA"), discussed in Chapter 16.A.4.a.

On April 25, 1997, the dispute panel chairman gave notice that the EC had formally requested the panel to suspend the panel proceedings. *See also* 91 Am. J. Int'l L. 493, 497 (1997). The text of the Understanding with the European Union, excerpted below, is available at *http://europa.eu.int/comm/external_relations/us/extraterritoriality/understanding_04_97.htm*.

Libertad Act

Both sides confirm their commitment to continue their efforts to promote democracy in Cuba. On the EU side, these efforts are set out in the Common Position adopted by the Council on 1 December 1996.

The U.S. reiterates its presumption of continued suspension of Title III during the remainder of the President's term so long as the EU and other allies continue their stepped up efforts to promote democracy in Cuba. Each side will encourage other countries to promote democracy and human rights in Cuba.

The EU and the U.S. agree to step up their efforts to develop agreed disciplines and principles for the strengthening of investment protection, bilaterally and in the context of the Multilateral Agreement on Investment (MAI) or other appropriate international fora. Recognizing that the standard of protection governing expropriation and nationalization embodied in international law and envisioned in the MAI should be respected by all States, these disciplines should inhibit and deter the future acquisition of investments from any State which has expropriated or nationalized such investments in contravention of international law, and subsequent dealings in covered investments. Similarly, and in parallel, the EU and U.S. will work together to address and resolve through agreed principles the issue of conflicting jurisdictions, including issues affecting investors of another party because of their investments in third countries.

The EU and U.S. agree to make best efforts to develop the above disciplines and principles in bilateral consultations before 15 October 1997, and to subsequently introduce jointly corresponding proposals in the MAI negotiations.

The U.S. Administration, at the same time as the above bilateral consultations commence, will begin to consult with Congress with a view to obtaining an amendment providing the President with the authority to waive Title IV of the Act once the bilateral consultations are completed and the EU has adhered to the agreed disciplines and principles. In the circumstances of such adherence it is expected that such a waiver would be granted.

In the meantime, the U.S. notes the President's continuing obligation to enforce Title IV. Consistent with the guidelines for implementation, the U.S. will apply rigorous standards to all evidence submitted to the Department of State for use in enforcing Title IV. The U.S. is committed to a thorough, deliberate process in order to ensure careful implementation of Title IV. This will involve discussions with all affected parties in order to consider all relevant information prior to Title IV actions.

Iran and Libya Sanctions Act (ILSA)

Both sides recognize that it is in their combined interests to work together to counter the threat to international security posed by Iran and Libya. In this regard, the U.S. notes the common agenda on terrorism being developed under the New Transatlantic Agenda and EU measures to inhibit the spread of weapons of mass destruction. The U.S. reiterates the President's commitment to implement ILSA. The U.S. intends to implement the Act in a deliberate and fair manner, taking into consideration its international obligations. Taking into account the measures taken by the EU, in particular those recently announced with respect to Iran, the U.S. will continue to work with the EU toward the objectives of meeting the terms 1) for granting EU Member States a waiver under Section 4.C. of the Act with regard to Iran, and 2) for granting companies from the EU waivers under Section 9.C. of the Act with regard to Libya.

WTO Case

In the light of all of the above, the EU agrees to the suspension of the proceedings of the WTO panel. The EU reserves all rights to resume the panel procedure, or begin new proceedings, if action is taken against EU companies or individuals under Title III or Title IV of the Libertad Act or if the waivers under ILSA referred to above are not granted or are withdrawn. The EU shall notify the United States at least seven days in advance of making a written submission to the panel, and upon delivery of such submission this Understanding shall cease to have effect.

This Understanding reflects the fact that the U.S. Administration is obligated to implement the Libertad Act and ILSA. The U.S. takes the position that the present Understanding conveys no legal commitment that waivers will be granted under ILSA.

d. Japan-United States joint statement on the Framework for a New Economic Partnership

On July 10, 1993, at the Tokyo Summit of the G-7, the United States and Japan agreed upon the establishment of the Japan-U.S. Framework for a New Economic Partnership.

The framework was designed to address friction over trade imbalances between the United States and Japan by, among other steps, allowing for the negotiation of a series of agreements between Japan and the United States in different sectors of the economy. The agreement also committed the United States to take steps to decrease the U.S. budget deficit, and Japan to increase imports of goods and services from the United States and elsewhere. The joint statement is excerpted below, and is available at *http://170.110.214.18/tcc/data/commerce_html/TCC_Documents/Japan_Framework/Japan_Framework.html.*

Reaffirming their understanding at their meeting of April 1993, the Prime Minister of Japan and the President of the United States agree to establish the Japan-United States Framework for a New Economic Partnership, as described below.

Basic Objectives

The Framework will serve as a new mechanism of consultations for Japan-United States economic relations. This new economic relationship must be balanced and mutually beneficial, and firmly rooted in the shared interest and responsibility of the United States and Japan to promote global growth, open markets, and a vital world trading system. These consultations will take place under the basic principle of two-way dialogue.

The Framework provides a structure for an ongoing set of consultations anchored in biannual meetings of the Heads of Government. The goals of this Framework are to deal with structural and sectoral issues in order substantially to increase access and sales of competitive foreign goods and services through market-opening and macroeconomic measures; to increase investment; and to promote international competitiveness; and to enhance bilateral economic cooperation between the United States and Japan.

Japan will actively pursue the medium-term objectives of promoting strong and sustainable domestic demand-led growth and increasing the market access of competitive foreign goods and services, intended to achieve, over the medium term, a highly

significant decrease in its current account surplus, and to promote a significant increase in global imports of goods and services, including from the United States. In this context, Japan will take measures including fiscal and monetary measures as necessary to realize these objectives.

The United States will also actively pursue the medium-term objectives of substantially reducing its fiscal deficit, promoting domestic saving, and strengthening its international competitiveness. Steady implementation of these efforts on both sides is expected to contribute to a significant reduction in both countries external imbalances.

The United States and Japan are committed to an open and multilateral trading system that benefits all nations. Benefits under this Framework will be on a Most Favored Nation basis.

Consultations will be limited to matters within the scope and responsibility of government.

The two Governments are committed to implement faithfully and expeditiously all agreed-upon measures taken pursuant to this Framework. Both Governments agree that tangible progress must be achieved under this Framework.

The two Governments will utilize this Framework as a principal means for addressing the sectoral and structural areas covered within it. If issues within these areas arise, both sides will make utmost efforts expeditiously to resolve differences through consultations under the Framework or, where appropriate, under applicable multilateral agreements.

* * * *

e. 1995 United States-Japan automobile trade agreement under the 1993 Framework for a New Economic Partnership

Consultations under the 1993 Framework, *supra*, resulted in the negotiation of several additional agreements. One of these agreements was a 1995 agreement on Measures by the Government of Japan and the Government of the United States of America Regarding Autos and Auto Parts ("1995 Auto Agreement"), *reprinted in* 34 I.L.M. 1482. This agreement

addressed concerns that the Japanese sector was not open to imports of autos and auto parts from the United States.

Excerpted below are the goals and general policies set forth in the 1995 Auto Agreement, available in full on the Department of Commerce's website at *www.mac.doc.gov/japan/source/menu/autos/usjfinal.html*. The 1995 Auto Agreement expired on December 31, 2000.

I. GOALS AND GENERAL POLICIES

A. The goals of the Framework for A New Economic Partnership (the "Framework") established by the "Joint Statement on the Japan-United States Framework for A New Economic Partnership" of the Heads of Governments of Japan and the United States of America (the "United States") on July 10, 1993 are to deal with structural and sectoral issues in order substantially to increase access and sales of competitive foreign goods and services through market opening and macroeconomic measures; to increase investment; to promote international competitiveness; and to enhance bilateral economic cooperation between the United States and Japan.

B. To accomplish these goals with respect to the Japanese autos and auto parts sector, the Government of Japan and the Government of the United States each has decided to implement the measures contained in this document, "Measures by the Government of Japan and the Government of the United States of America Regarding Autos and Auto Parts" (the "Measures") with the objective of achieving significantly expanded sales opportunities to result in a significant expansion of purchases of foreign parts by Japanese firms in Japan and through their transplants, as well as removing problems which affect market access, and encouraging imports of foreign autos and auto parts in Japan.

C. All measures described in this document (including measures related to changes in regulations) are to be taken consistent with laws and regulations applicable to each country and international law.

D. The Government of Japan and the Government of the United States affirm the principle that vehicle manufacturers, auto parts

suppliers and vehicle dealers should deal with suppliers based on the principles of free and open competition without adverse discrimination based on capital affiliation.

E. The Government of Japan and the Government of the United States reaffirm the principles of the Framework, including the principle that all measures of the Measures (including Sections II.A and IV.B) are to be taken on a most-favored-nation basis. In this regard, the Government of Japan is prepared to take similar measures in relation to any third countries.

* * * *

f. Natural rubber agreement

On June 19, 1996, President William J. Clinton transmitted the International Natural Rubber Agreement, 1995, to the Senate for advice and consent to ratification. S. Treaty Doc. No. 104–27 (1996); *see also* S. Exec. Rep. No. 104–21 (1996). The Senate provided advice and consent on September 25, 1996. 142 CONG. REC. 11248 (Sept. 25, 1996). The report of the Department of State submitting the agreement to the President described the agreement as "stabiliz[ing] natural rubber prices within predetermined, but flexible, ranges through operation of a buffer stock . . . ." The report also expressed the U.S. intention to move to a free market:

> While the International Natural Rubber Organization (INRO), established by the Agreement, has been useful, the U.S. Government believes that free markets are better able to serve the interest of both consumers and producers. For that reason we have announced our intention that INRA 1995 will be the last we join. U.S. participation in INRA 1995 responds directly to concerns expressed by U.S. rubber companies and unions that a transition period is needed to allow industry time to prepare for a free market in natural rubber and to allow for the further development of alternative institutions to manage market risk.

The agreement entered into force definitively February 14, 1997. *See also* 92 Am. J. Int'l L. 642, 648 (1996). The agreement was terminated effective October 13, 1999, in accordance with Resolution 212 (XXXXI) adopted by the International Natural Rubber Council at its forty-first session held in Kuala Lumpur September 30, 1999.

g. Other trade-related U.S. Government actions

(1) Fast track authority

Between 1974 and 1994, trade agreements were negotiated pursuant to legislation that conferred "fast track" authority on the President. Such legislation required the President to notify Congress before entry into a trade agreement, consult with congressional committees during the negotiations, and obtain approval of both the Senate and the House of Representatives before entering into the agreement. Once the agreement was reached, however, fast track authority confined congressional consideration of the legislation approving and implementing the trade agreement to a process with mandatory deadlines, no amendment, and limited debate.

Fast track authority expired in 1994, after the Uruguay Round WTO Agreements were reached (*see* B.2.a., *supra*), and was not renewed during the remainder of the 1990s. A more detailed summary of fast track authority developments during this period is available in a CRS Issue Brief for Congress, available at *http://fpc.state.gov/documents/organization/12409.pdf*.

(2) Most-favored-nation trade status

The Jackson-Vanik Amendment (sections 402 and 409 of the Trade Act of 1974, 19 U.S.C. §§ 2432, 2439) sets forth certain freedom of emigration criteria for certain countries (most Communist or formerly Communist states). Section

2432(a) makes countries ineligible for normal trade relations* and other benefits. That section provides:

> . . . To assure the continued dedication of the United States to fundamental human rights, and notwithstanding any other provision of law, . . . products from any nonmarket economy country shall not be eligible to receive nondiscriminatory treatment (normal trade relations), such country shall not participate in any program of the Government of the United States which extends credits or credit guarantees or investment guarantees, directly or indirectly, and the President of the United States shall not conclude any commercial agreement with any such country, . . . [when] the President determines that such country—
>
> (1) denies its citizens the right or opportunity to emigrate;
> (2) imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; or
> (3) imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice . . .

A nonmarket economy country is not subject to the measures in 2432(a) if the President determines that it is not violating freedom of emigration as enumerated in 2432(a)(1)-(3) or exercises Presidential waiver authority (upon a determination that a waiver will substantially promote the objectives of the Amendment and upon receipt of assurances that the emigration practices of the country will lead substantially to the achievement of those objectives).

During the period 1991–1999, the President issued waivers with respect to the following countries (waivers are subject to annual renewal):

---

* See Editors' note in B.2.b. above.

1991: Bulgaria, Mongolia, Romania

1992: Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan

1998: Vietnam

During the same period, the President determined that the following countries were in full compliance with the freedom of emigration requirements of Jackson-Vanik (full compliance determinations are not subject to renewal but require semi-annual reporting on continued compliance):

1991: Czechoslavakia (predating the January 1, 1993 split into the Czech Republic and the Slovak Republic)

1993: Bulgaria

1994: Russia

1995: Romania

1996: Mongolia

1997: Albania, Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan

During the same period, several countries were removed from coverage under Title IV of the Trade Act of 1974, which includes the Jackson-Vanik Amendment. In Pub. L. No. 102–182, December 4, 1991, Congress directly extended nondiscriminatory treatment to the products of Estonia, Latvia, and Lithuania, and terminated the application of Title IV to those countries (effective December 15, 1991).

Such "graduation" of several other countries from Title IV was handled through a two-step process: first, Congress passed legislation authorizing the President to terminate the application of Title IV to certain countries and extend nondiscriminatory treatment to their products, and then the President carried this out by presidential determination or proclamation. Pub. L. No. 102–182 authorized such action with regard to Czechoslovakia and Hungary, and in Presidential Determination No. 92–21 of April 10, 1992, the President determined that Title IV should no longer apply to

those countries. Bulgaria was addressed in Pub. L. No. 104–162, July 18, 1996, and Proclamation 6922 of September 27, 1996 (32 WEEKLY COMP. PRES. DOC. 1827 (Sept. 30, 1996)). Romania came next, the subject of Pub. L. No. 104–171, August 3, 1996, and Proclamation 6951 of November 7, 1996 (32 WEEKLY COMP. PRES. DOC. 2265 (Nov. 11, 1996)). Mongolia received similar treatment in Pub. L. No. 106–36, June 25, 1999, followed by Proclamation 7207 of July 1, 1999 (35 WEEKLY COMP. PRES. DOC. 1189 (July 5, 1999)).

China was originally granted a Presidential waiver on October 23, 1979, and that waiver was extended annually throughout the period 1991–1999. In 1993 President William J. Clinton waived the application of 2432(a) and (b) to China for the coming year, 58 Fed. Reg. 31,329 (June 1, 1993), and issued Executive Order 12,850 establishing conditions for further renewal in addition to the criteria that appear in the Jackson-Vanik Amendment. 58 Fed. Reg. 31,327 (June 1, 1993). Section 1 of the executive order added the following conditions to waiver recommendations by the Secretary of State to the President:

> (a) In making this recommendation the Secretary shall not recommend extension unless he determines that:
>
> —extension will substantially promote the freedom of emigration objectives of section 402 of the Act; and
>
> —China is complying with the 1992 bilateral agreement between the United States and China concerning prison labor.
>
> (b) In making this recommendation the Secretary shall also determine whether China has made overall, significant progress with respect to the following:
>
> —taking steps to begin adhering to the Universal Declaration of Human Rights;
>
> —releasing and providing an acceptable accounting for Chinese citizens imprisoned or detained for the non-violent expression of their political and religious

beliefs, including such expression of beliefs in connection with the Democracy Wall and Tiananmen Square movements;

—ensuring humane treatment of prisoners, such as by allowing access to prisons by international humanitarian and human rights organizations;

—protecting Tibet's distinctive religious and cultural heritage; and

—permitting international radio and television broadcasts into China.

At a press conference at Washington on May 26, 1994, President Clinton announced his decision that the United States would renew China's most-favored-nation ("MFN") trading status, pursuant to the criteria and procedure established in the executive order. The President agreed, he said, with the conclusion of Secretary of State Warren M. Christopher that China had not achieved "overall significant progress in all the areas outlined in the executive order relating to human rights and that serious human rights abuses continued in China." As indicated in excerpts below from his statement, President Clinton concluded, however, that renewal of the waiver to maintain China's MFN trading status offered "the best opportunity to lay the basis for long-term sustainable progress in human rights and for the advancement of . . . other [U.S.] interests with China." He also decided to de-link consideration of general human rights performance (apart from freedom of emigration) from the annual review of extension of the Jackson-Vanik waiver for China.

The full text of President Clinton's remarks is reprinted in 5 Dep't St. Dispatch No. 22 at 345 (1994), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html. See also* 88 Am. J. Int'l L. 745 (1994).

---

* * * *

I have received Secretary Christopher's letter . . . as required by last year's executive order, reporting to me on the conditions in

that executive order. . . . [C]learly, there was progress made in important areas, including the resolution of all emigration cases, the establishment of a memorandum of understanding with regard to how prison labor issues would be resolved, the adherence to the Universal Declaration of Human Rights, and other issues. Nevertheless, serious human rights abuses continue in China, including the arrest and detention of those who peacefully voice their opinions and the repression of Tibet's religious and cultural traditions.

The question for us now is, given the fact that there has been some progress but that not all the requirements of the executive order were met, how can we best advance the cause of human rights and the other profound interests the United States has in its relationship with China.

. . . Extending MFN will avoid isolating China and, instead, will permit us to engage the Chinese with not only economic contacts but with cultural, educational, and other contacts, and with a continuing aggressive effort in human rights—an approach that I believe will make it more likely that China will play a responsible role, both at home and abroad.

I am moving, therefore, to delink human rights from the annual extension of most-favored-nation trading status for China. That linkage has been constructive during the past year. But I believe, based on our aggressive contacts with the Chinese in the past several months, that we have reached the end of the usefulness of that policy, and it is time to take a new path toward the achievement of our constant objectives. We need to place our relationship into a larger and more productive framework.

In view of the continuing human rights abuses, I am extending the sanctions imposed by the United States as a result of the events in Tiananmen Square, and I am also banning the import of munitions, principally guns and ammunition, from China. I am also pursuing a new and vigorous American program to support those in China working to advance the cause of human rights and democracy.

This program will include increased broadcasts for Radio Free Asia and the Voice of America, increased support for non-governmental organizations working on human rights in China,

and the development with American business leaders of a voluntary set of principles for business activity in China. . . . Even as we engage the Chinese on military, political and economic issues, we intend to stay engaged with those in China who suffer from human rights abuses. The United States must remain a champion of their liberties.

I believe the question, therefore, is not whether we continue to support human rights in China, but how we can best support human rights in China and advance our other very significant issues and interests. . . . I believe the course I have chosen gives us the best chance of success on all fronts. . . .

To those who argue that in view of China's human rights abuses we should revoke MFN status . . . I am persuaded that the best path for advancing freedom in China is for the United States to intensify and broaden its engagement with that nation.

* * * *

A summary of Secretary of State Warren Christopher's report to the President, released by the White House Office of the Press Secretary, May 26, 1994, included a list of sanctions that would remain in place against China in light of its poor human rights performance. 5 Dep't St. Dispatch No. 22 at 346 (1994), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html.*

---

* * * *

At the same time, owing to China's failure to achieve "overall, significant progress" in the terms envisioned by Executive Order 12850, certain sanctions imposed following the 1989 Tiananmen Square tragedy will remain in force. The President will determine, in the course of ongoing review of China's human rights performance, whether and when it might be appropriate to lift these sanctions . . . [which] are:

(1) Suspension of weapons deliveries under both commercial and government programs;

(2) Denial of licenses for dual-use civilian technology items for the Chinese police or military;

(3) Suspension of consideration of licenses for U.S. Munitions List items;

(4) Ineligibility of China to participate in programs under the Trade and Development [Assistance Program], Overseas Private Investment Corporation (OPIC), and the U.S.-Asia Environment Partnership Program; and

(5) Withholding of U.S. support for World Bank and other multilateral development bank lending to China except for projects meeting basic human needs.

Imposition of Import Ban on Weapons and Ammunition

Under legal authority granted by the Arms Export Control Act to restrict arms imports on foreign policy grounds, there will be an immediate import ban on munitions from China, consisting primarily of arms and ammunition.

On November 15, 1999, the United States and China agreed on certain terms and conditions for China's accession to the World Trade Organization ("WTO"). On October 10, 2000, President Clinton signed into law Pub. L. No. 106–286, 141 Stat. 880, entitled "An Act to authorize extension of nondiscriminatory treatment (normal trade relations treatment) to the People's Republic of China, and to establish a framework for relations between the United States and the People's Republic of China." Pursuant to § 101(b) of the act, President George W. Bush certified to Congress on November 9, 2001, that the "terms and conditions for the accession of China to the WTO [*i.e.,* those agreed to by the WTO members as a whole] are at least equivalent to those agreed between the United States and China on November 15, 1999." China formally became a WTO member on December 11, 2001. On December 27, 2001, President George W. Bush issued Proclamation 7516, granting permanent normal trading relations status to the People's Republic of China and terminating application of Jackson-Vanik provisions to China, effective January 1, 2002. 67 Fed. Reg. 479 (Jan. 4, 2002); *see also* White House press statement at *www.whitehouse.gov/news/releases/2001/12/20011227–2.html.*

C. INVESTMENT

1. 1991 Statement on United States Foreign Direct Investment Policy

On December 26, 1991, President George H. W. Bush issued a statement reaffirming the United States position on foreign direct investment. The statement, the first issued since 1983, concerned U.S. policy on both foreign direct investment in the United States, and foreign direct investment by U.S. investors abroad, and is available at *http://bushlibrary.tamu.edu/research/papers/1991/91122605.html*.

A statement issued by the White House on the same date explained the U.S. policy and discussed elements of the U.S. trade and investment agenda at the time that reflected the U.S. policy in favor of the free flow of foreign direct investment.

The full text of the statement is available at *http://bushlibrary.tamu.edu/research/papers/1991/91122606.html*.

---

* * * *

1. Foreign Direct Investment in the United States

* * * *

The United States provides foreign investors fair, equitable, and nondiscriminatory treatment as a matter of both law and practice. While there are exceptions, generally related to national security, such exceptions are few; they limit foreign investment only in certain sectors, such as atomic energy, air and water transport, and telecommunications. These exceptions are consistent with our international obligations.

Consistent with this policy, the Exon-Florio Amendment to the Defense Production Act [50 U.S.C. App. § 2170] provides the President with authority to suspend or prohibit foreign mergers, acquisitions, and takeovers, where there is credible evidence of a threat to the national security.

2. U.S. Direct Investment Abroad

The United States believes that U.S. investment abroad should also receive fair, equitable, and nondiscriminatory treatment. The basic tenet of our policy is that U.S. investors should be accorded the better of national or most-favored-nation treatment. U.S. investors should receive the most favorable treatment offered by the host country to any investor, foreign or domestic, at the time of establishment and thereafter.

Accordingly, the United States continues to seek the reduction and elimination of practices by governments which restrict, distort, discriminate against, prohibit, or place unreasonable burdens on foreign direct investment.

* * * *

3. U.S. Initiatives

The United States has a number of initiatives underway to enhance the free flow of foreign direct investment in accordance with market forces.

—In the Uruguay round, the United States is negotiating key multilateral agreements to eliminate trade-related investment measures; to protect trade-related intellectual property; and to promote trade in services, an area where many investment rules have prohibited highly competitive U.S. service industries from doing business abroad.

—The United States, Canada, and Mexico are negotiating the North American free trade agreement, in which we are seeking to liberalize investment principles consistent with U.S. bilateral investment treaties.

—In the Enterprise for the Americas Initiative, the United States and its partners are working with the Inter-American Development Bank to help nations of Latin America and the Caribbean to liberalize their investment regimes. To assist in carrying out these reforms, the United States has spearheaded the formation of a multilateral investment fund for Latin America and the Caribbean, which will be administered by the Inter-American Development Bank. Japan, Canada, Spain, Portugal, and several of the largest Latin American countries have agreed to join the United States in contributing to this fund. Others are actively considering joining.

—The United States has signed bilateral investment treaties with 16 countries in Eastern Europe, Latin America, the Caribbean, Africa, and Asia and is negotiating such agreements with a number of other countries. These treaties represent important commitments to investment reform. They incorporate the principle of nondiscriminatory treatment; affirm international law standards for expropriation, including the principle of prompt, adequate, and effective compensation; provide for freedom of financial flows; and permit investors to take investment disputes to international arbitration.

—The United States is also vigorously promoting the adequate and effective protection of intellectual property rights. Such protection is essential for the flow of investment into both developed and developing countries.

—At the initiative of the United States, member countries of the Organization for Economic Cooperation and Development are studying ways to strengthen multilateral commitment to open, nondiscriminatory treatment of investment.

—The United States will continue to encourage Japan to remove its investment barriers as an important goal of the Structural Impediments Initiative talks.

* * * *

2. Bilateral Investment Treaties

During the 1990s, the United States concluded 35 bilateral investment treaties ("BITs"), twenty-two of which entered into force during the period. Set forth below is a fact sheet prepared by the State Department's Bureau of Economic and Business Affairs, explaining the key objectives and components of the U.S. BIT program.

The fact sheet is available at *www.state.gov/www/issues/economic/7treaty.html.*

The U.S. Bilateral Investment Treaty (BIT) program supports several key U.S. Government economic policy objectives, from

protection of U.S. interests overseas to promotion of market-oriented policies in other countries to promotion of U.S. exports.

The BIT program's basic aims are to:

- Protect U.S. investment abroad in those countries where U.S. investors' rights are not protected through existing agreements such as our treaties of Friendship, Commerce and Navigation;
- Encourage adoption in foreign countries of market-oriented domestic policies that treat private investment fairly; and
- Support the development of international law standards consistent with these objectives.

The U.S. Government also believes that adequate and effective protection for intellectual property rights is an essential element of an attractive investment climate. Consequently, prospective BIT partners are generally expected, at the time the BIT is signed, to make a commitment to implement all World Trade Organization (WTO) Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement obligations within a reasonable period of time.

The U.S. Government has placed a priority on negotiating BITs with countries undergoing economic reform and where we believe we can have a significant impact on the adoption of liberal policies on the treatment of foreign direct investment. BITs also complement and support our regional initiatives on investment liberalization in the Asia Pacific Economic Cooperation Forum (APEC) and the Free Trade Area of the Americas (FTAA). In addition, BITs lay the policy groundwork for broader multilateral initiatives in the Organization for Economic Cooperation and Development (OECD) and eventually, the World Trade Organization (WTO).

U.S. Bilateral Investment Treaties provide U.S. investors with six basic benefits:

First, our BITs ensure that U.S. companies are entitled to be treated as favorably as their competitors.

- U.S. investors are entitled to the better of national treatment or most favored nation (MFN) treatment when they seek

to initiate investment and throughout the life of that investment, subject to certain limited and specifically described exceptions listed in annexes or protocols to the treaties.

Second, BITs establish clear limits on the expropriation of investments and entitle U.S. investors to be fairly compensated.

- Expropriation can occur only in accordance with international law standards, that is, for a public purpose, in a nondiscriminatory manner, under due process of law, and accompanied by payment of prompt, adequate, and effective compensation.

Third, BITs provide U.S. investors the right to transfer funds into and out of the host country without delay using a market rate of exchange. This covers all transfers related to an investment, including interest, proceeds from liquidation, repatriated profits and infusions of additional financial resources after the initial investment has been made. Ensuring the right to transfer funds creates a predictable environment guided by market forces.

Fourth, BITs limit the ability of host governments to require U.S. investors to adopt inefficient and trade distorting practices. For example, performance requirements such as local content or export quotas are prohibited.

- This provision may also open up new markets for U.S. producers and increase U.S. exports. U.S. investors protected by BITs can purchase competitive U.S.-produced components without undue restriction on inputs in their production of various products.
- U.S. investors protected by BITs can also import other U.S.-produced products for distribution and sale in the local market. They cannot be forced, as a condition of establishment or operation, to export locally produced goods back to the U.S. market or to third-country markets.

Fifth, BITs give U.S. investors the right to submit an investment dispute with the treaty partner's government to international arbitration. There is no requirement to use that country's domestic courts.

Sixth, BITs give U.S. investors the right to engage the top managerial personnel of their choice, regardless of nationality.

* * * *

BITs that were negotiated and entered into force in the 1990s included treaties with the following countries (date of entry into force in parentheses): Albania (1998); Argentina (1994); Armenia (1996); Bulgaria (1994); Republic of Congo (1994); Czech Republic (1992); Ecuador (1997); Estonia (1997); Georgia (1997); Jamaica (1997); Kazakhstan (1994); Kyrgyzstan (1994); Latvia (1996); Moldova (1994); Mongolia (1997); Poland (1994); Romania (1994); Slovakia (1992); Sri Lanka (1993); Trinidad & Tobago (1996); Tunisia (1993); and Ukraine (1996).

A number of other BITs were negotiated and signed in the 1990s, but had not entered into force by the end of the decade. These include BITs with the following countries (date of signature in parentheses): Azerbaijan (1997); Bahrain (1999); Belarus (1994); Bolivia (1998); Croatia (1996); El Salvador (1999); Honduras (1995); Jordan (1997); Lithuania (1998); Mozambique (1998); Nicaragua (1995); Russia (1992); and Uzbekistan (1994).

A complete list of bilateral investment treaties and their current status can be found on the website of the State Department's Bureau of Economic and Business Affairs at *www.state.gov/e/eb/*. Excerpted below are materials discussing selected aspects of the BIT program in the 1990s.

a. Azerbaijan

The Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, was signed August 1, 1997, at Washington, the fourth such treaty signed between the United States and a Transcaucasian or Central Asian country. President William J. Clinton transmitted the treaty, with annex, together with an amendment to the treaty set forth in an exchange of diplomatic notes dated August 8 and August 25, 2000, to the Senate for advice and consent to ratification on

September 12, 2000. The accompanying September 8, 2000, report of the Department of State submitting the treaty to the President explained:

> The Treaty with Azerbaijan is based on the 1994 U.S. prototype BIT and satisfies the U.S. principal objectives in bilateral investment treaty negotiations:
>
> —All forms of U.S. investment in the territory of Azerbaijan are covered.
> —Covered investments receive the better of national treatment or most-favored-nation (MFN) treatment both while they are being established and thereafter, subject to certain specified exceptions.
> —Specified performance requirements may not be imposed upon or enforced against covered investments.
> —Expropriation is permitted only in accordance with customary international law standards.
> —Parties are obligated to permit the transfer, in a freely usable currency, of all funds related to a covered investment, subject to exceptions for specified purposes.
> —Investment disputes with the host government may be brought by investors, or by their covered investments, to binding international arbitration as an alternative to domestic courts.

Further excerpts from the report describe key provisions and the core principles of U.S. bilateral investment treaties during this period. The President's transmittal, including the Department of State report, is available in S. Treaty Doc. No. 106–47 (2000). The treaty entered into force August 2, 2001.

THE PRESIDENT: I have the honor to submit to you the Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed at Washington on August 1, 1997, together with an amendment to the Treaty set forth in an exchange of diplomatic notes dated August 8, 2000 and August 25, 2000. I recommend

that this Treaty, with Annex and the related diplomatic notes, be transmitted to the Senate for its advice and consent to ratification.

* * * *

Article I (Definitions)

* * * *

Investment, Covered Investment

The Treaty's definition of investment is broad, recognizing that investment can take a wide variety of forms. Every kind of investment is specifically incorporated in the definition; moreover, it is explicitly noted that investment may consist or take the form of any of a number of interests, claims, and rights.

The Treaty provides an illustrative list of the forms an investment may take. Establishing a subsidiary is a common way of making an investment. Other forms that an investment might take include equity and debt interests in a company; contractual rights; tangible, intangible, and intellectual property; and rights conferred pursuant to law, such as licenses and permits. Investment as defined by the Treaty generally excludes claims arising solely from trade transactions, such as a sale of goods across a border that does not otherwise involve an investment.

The Treaty defines "covered investment" as an investment of a national or company of a Party in the territory of the other Party. An investment of a national or company is one that the national or company owns or controls, either directly or indirectly. Indirect ownership or control could be through other, intermediate companies or persons, including those of third countries. Control is not specifically defined in the Treaty; ownership of over 50 percent of the voting stock of a company would normally convey control, but in many cases the requirement could be satisfied by less than that proportion, or by other arrangements.

The broad nature of the definitions of "investment," "company," and "company of a Party" means that investments can be covered by the Treaty even if ultimate control lies with non-Party nationals. A Party may, however, deny the benefits of the Treaty in the limited circumstances described in Article XII.

* * * *

Article II (Treatment of Investment)

Article II contains the Treaty's major obligations with respect to the treatment of covered investments.

Paragraph 1 generally ensures the better of national or MFN treatment in both the entry and post-entry phases of investment. It thus prohibits, outside of exceptions listed in the Annex, "screening" on the basis of nationality during the investment process, as well as nationality-based post-establishment measures. For purposes of the Treaty, "national treatment" means treatment no less favorable than that which a Party accords, in like situations, to investments in its territory of its own nationals or companies. For purposes of the Treaty, "MFN treatment" means treatment no less favorable than that which a Party accords, in like situations, to investments in its territory of nationals or companies of a third country. The Treaty obliges each Party to provide whichever of national treatment or MFN treatment is the most favorable. This is defined by the Treaty as "national and MFN treatment." Paragraph 1 explicitly states that the national and MFN treatment obligation will extend to state enterprises in their provision of goods and services to covered investments.

Paragraph 2 states that each Party may adopt or maintain exceptions to the national and MFN treatment standard with respect to the sectors or matters specified in the Annex. Further restrictive measures are permitted in each sector. (The specific exceptions are discussed in the section entitled "Annex" below.) In the Annex, Parties may take exceptions only to the obligation to provide national and MFN treatment; there are no sectoral exceptions to the rest of the Treaty's obligations. Finally, in adopting any exception under this provision, a Party may not require the divestment of a preexisting covered investment.

Paragraph 2 also states that a Party is not required to extend to covered investments national and MFN treatment with respect to procedures provided for in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights. This provision clarifies that certain procedural preferences

granted under intellectual property conventions, such as the Patent Cooperation Treaty, fall outside the BIT. This exception parallels those in the Uruguay Round's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the North American Free Trade Agreement (NAFTA).

Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law. The obligations to accord "fair and equitable treatment" and "full protection and security" are explicitly cited, as is each Party's obligation not to impair, through unreasonable and discriminatory means, the management, conduct, operation, and sale or other disposition of covered investments. The general reference to international law also implicitly incorporates other fundamental rules of customary international law regarding the treatment of foreign investment. However, this provision does not incorporate obligations based on other international agreements.

Paragraph 4 requires that each Party provide effective means of asserting claims and enforcing rights with respect to covered investments.

Paragraph 5 ensures the transparency of each Party's regulation of covered investments.

Article III (Expropriation)

Article III incorporates into the Treaty customary international law standards for expropriation. Article III also includes detailed provisions regarding the computation and payment, adequate, and effective compensation.

Paragraph 1 describes the obligations of the Parties with respect to expropriation and nationalization of a covered investment. These obligations apply to both direct expropriation and indirect expropriation through measures "tantamount to expropriation or nationalization" and thus apply to "creeping expropriations"—a series of measures that effectively amounts to an expropriation of a covered investment without taking title.

Paragraph 1 further bars all expropriations or nationalizations except those that are for a public purpose; carried out in a non-discriminatory manner; in accordance with due process of law; in accordance with the general principles of treatment provided

in Article II(3); and subject to "prompt, adequate, and effective compensation."

Paragraph 2, 3, and 4 more fully describe the meaning of "prompt, adequate, and effective compensation." The guiding principle is that the investor should be made whole.

* * * *

Article V (Transfers)

Article V Protects investors from certain government exchange controls that limit current and capital account transfers, as well as limits on inward transfers made by screening authorities and, in certain circumstances, limits on returns in kind.

In paragraph 1 each Party agrees to "permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory." Paragraph 1 also provides a list of transfers that must be allowed. The list is non-exclusive, and is intended to protect flows to both affiliated and non-affiliated entities.

Paragraph 2 provides that each Party must permit transfers to be made in a "freely usable currency" at the market rate of exchange prevailing on the date of transfer. "Freely usable" is a term used by the International Monetary Fund; at present there are five "freely usable" currencies; the U.S. dollar, Japanese yen, German mark, French franc, and British pound sterling.

In paragraph 3, each Party agrees to permit returns in kind to be made where such returns have been authorized by an investment authorization or written agreement between a Party and a covered investment or a national or company of the other Party.

Paragraph 4 recognizes that, notwithstanding the obligations of paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of laws relating to bankruptcy, insolvency, or the protection of the rights of creditors; securities; criminal or penal offenses; or ensuring compliance with orders or judgments in adjudicatory proceedings.

Article VI (Performance Requirements)

Article VI prohibits either Party from mandating or enforcing specified performance requirements as a condition for the

establishment, acquisition, expansion, management, conduct, or operation of a covered investment. The list of prohibited requirements is exhaustive and covers domestic content requirements and domestic purchase preferences, the "balancing" of imports or sales in relation to exports or foreign exchange earnings, requirements to export products or services, technology transfer requirements, and requirements relating to the conduct of research and development in the host country. Such requirements are major burdens on investors and impair their competitiveness.

The last sentence of Article VI makes clear that a Party may, however, impose conditions for the receipt or continued receipt of benefits and incentives.

* * * *

Article IX (Settlement of Disputes Between One Party and a National or Company of the Other Party)

Article IX sets forth several means by which disputes brought against a Party by an investor (specifically, a national or company of the other Party) may be resolved.

Article IX procedures apply to an "investment dispute," which is any dispute arising out of or relating to an investment authorization, an investment agreement, or an alleged breach of rights conferred, created, or recognized by the Treaty with respect to a covered investment.

In the event that an investment dispute cannot be settled amicably, paragraph 2 gives an investor an exclusive (with the exception in paragraph 3(b) concerning injunctive relief, explained below) choice among three options to settle the dispute. These three options are: (1) submitting the dispute to the courts or administrative tribunals of the Party that is a party to the dispute; (2) invoking dispute-resolution procedures previously agreed upon by the national or company and the host country government; or (3) invoking the dispute-resolution mechanisms identified in paragraph 3 of Article IX.

Under paragraph 3(a), the investor can submit an investment dispute to binding arbitration 3 months after the dispute arises; provided that the investor has not submitted the claim to a court or administrative tribunal of the Party or invoked a dispute

resolution procedure previously agreed upon. The investor may choose among the International Centre for Settlement of Investment Disputes (ICSID) (Convention Arbitration), the Additional Facility of ICSID (if Convention Arbitration is not available), ad hoc arbitration using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or any other arbitral institution or rules agreed upon by both parties to the dispute.

Before or during such arbitral proceedings, however, paragraph 3(b) provides that an investor may seek, without affecting its right to pursue arbitration under this Treaty, interim injunctive relief not involving the payment of damages from local courts or administrative tribunals of the Party that is a party to the dispute for the preservation of its rights and interests. This paragraph does not alter the power of the arbitral tribunals to recommend or order interim measures they may deem appropriate.

Paragraph 4 constitutes each Party's consent to the submission of investment disputes to binding arbitration in accordance with the choice of the investor.

Paragraph 5 provides that any non-ICSID Convention arbitration shall take place in a country that is a party to the United Nations Convention on the Recognition and Enforcement of Arbitral Awards. This provision facilitates enforcement of arbitral awards.

In addition, in paragraph 6, each Party commits to enforcing arbitral awards rendered pursuant to this Article. The Federal Arbitration Act (9 U.S.C. 1 et seq.) satisfies the requirement for the enforcement of non-ICSID Convention awards in the United States. The Convention on the Settlement of Investment Disputes Act of 1966 (22 U.S.C. 1650–1650a) provides for the enforcement of ICSID Convention awards.

Paragraph 7 ensures that a Party may not assert as a defense, or for any other reason, that the investor involved in the investment dispute has received or will receive reimbursement for the same damages under an insurance or guarantee contract.

Paragraph 8 provides that, for the purposes of this article, the nationality of a company in the host country will be determined by ownership or control, rather than by place of incorporation.

This provision allows a company that is a covered investment to bring a claim in its own name.

* * * *

Article XV (Application to Political Subdivisions and State Enterprises of the Parties)

Paragraph 1(a) makes clear that the obligations of the Treaty are applicable to all political subdivisions of the Parties, such as provincial, State, and local governments.

Paragraph 1(b) recognizes that under the U.S. federal system, States of the United States may, in some instances, treat out-of-State residents and corporations in a different manner than they treat in-State residents and corporations. The Treaty provides that the national treatment commitment, with respect to the States, means treatment no less favorable than that provided by a State to U.S. out-of-State residents and corporations.

Paragraph 2 extends a Party's obligations under the Treaty to its state enterprises in the exercise of any delegated governmental authority. This paragraph is designed to clarify that the exercise of governmental authority by a state enterprise must be consistent with a Party's obligations under the Treaty.

* * * *

Paragraph 4 stipulates that the Annex shall form an integral part of the Treaty.

Annex

U.S. bilateral investment treaties allow for exceptions to national and MFN treatment, where the Parties' domestic regimes do not afford national and MFN treatment, or where treatment in certain sectors or matters is negotiated in and governed by other agreements. Future derogations from the national treatment obligations of the Treaty are generally permitted only in the sectors or matters listed in the Annex, pursuant to Article II(2), and must be made on an MFN basis unless otherwise specified therein.

During a review of the Treaty in preparation for its submittal to the Senate for advice and consent to ratification, the Parties

determined that there was an ambiguity in the Annex. This ambiguity reflected a misunderstanding regarding whether Azerbaijan had taken an exception from its national and MFN treatment obligation for insurance services. To resolve this ambiguity, the Parties agreed in an exchange of notes to amend the Treaty. Specifically, as amended, the Annex now takes an explicit exception from the parties' respective national and MFN treatment obligations for insurance services, and in so doing, removes a U.S. commitment to limit its exception for insurance services. The Annex, as amended, is further described below.

Under a number of statutes, many of which have a long historical background, the U.S. federal government or States may not necessarily treat investments of nationals or companies of Azerbaijan as they do U.S. investments or investments from a third country. Paragraphs 1 and 2 of the Annex list the sectors or matters subject to U.S. exceptions.

The U.S. exceptions from its national treatment obligation are: atomic energy; customhouse brokers; licenses for broadcast, common carrier, or aeronautical radio stations; COMSAT; subsidies or grants, including government-supported loans, guarantees, and insurance; State and local measures exempt from Article 1102 of the North American Free Trade Agreement pursuant to Article 1108 thereof; and landing of submarine cables.

The U.S. exceptions from its national and MFN treatment obligation are: fisheries; air and maritime transport, and related activities; banking, insurance, securities, and other financial services; and one-way satellite transmissions of Direct-to-Home (DTH) and Direct Broadcasting Satellite (DBS) television services and of digital audio services.

The Treaty is the first to include a U.S. exception from its national and MFN treatment obligation for one-way satellite transmission of DTH and DBS television services and of digital audio services. This exception was added to the prototype BIT following conclusion of the 1997 WTO Basic Telecommunications Services Agreement to be consistent with the U.S. position taken with respect to that agreement. The Treaty is the first BIT negotiated after conclusion of the 1997 WTO Basic Telecommunications Services Agreement.

Paragraph 3 of the Annex lists Azerbaijan's exceptions from its national treatment obligation, which are: ownership of land, its subsoil, water, plant and animal life, and other natural resources; ownership of real estate (during the transition period to a market economy); ownership or control of television and radio broadcasting and other forms of mass media; air transportation; preparation of stocks and bond notes issued by Azerbaijan; fisheries; and construction of pipelines for transportation of hydrocarbons.

Paragraph 4 of the Annex lists Azerbaijan's exceptions from its national and MFN treatment obligation, which are: banking, insurance, securities, and other financial services.

As described above, Article II states the general obligation of the Parties to accord national and MFN treatment to covered investments except in those sectors or with respect to the matters specified in the Annex. Neither the United States nor Azerbaijan took an exception in their respective Annex entries with respect to all leasing of minerals or pipeline rights-of-way on government lands. Accordingly, this Treaty affects the implementation of the Mineral Lands Leasing Act (MLLA) (30 U.S.C. 181 et seq.) and 10 U.S.C. 7435, regarding Naval Petroleum Reserves, with respect to nationals and companies of Azerbaijan. The Treaty provides for resort to binding international arbitration to resolve disputes, rather than denial of mineral rights or rights to naval petroleum shares to investors of the other Party, as is the current process under the statute. U.S. domestic remedies, would, however, remain available for use in conjunction with the Treaty's provisions.

The MLLA and 10 U.S.C. 7435 direct that a foreign investor be denied access to leases for minerals on on-shore federal lands, leases of land within the Naval Petroleum and Oil Shale Reserves, and rights-of-way for oil or gas pipelines across on-shore federal lands, if U.S. investors are denied access to similar or like privileges in the foreign country.

Azerbaijan's extension of national treatment in these sectors will fully meet the objectives of the MLLA and 10 U.S.C. 7435. Azerbaijan was informed during negotiations that, were it to include this sector in its list of treatment exemptions, the United States would (consistent with the MLLA and 10 U.S.C. 7435) exclude the leasing of minerals or pipeline rights-of-way

on Government lands from the national and MFN treatment obligations of this Treaty.

* * * *

b. Argentina

On January 19, 1993, President George H.W. Bush transmitted to the Senate for its advice and consent to ratification the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, signed at Washington on November 14, 1991, and an amendment to the Protocol effected by an exchange of notes at Buenos Aires on August 24 and November 6, 1992. The treaty is reprinted in 31 I.L.M. 124 (1992).

In his letter of transmittal, the President observed that the Treaty was the first bilateral investment treaty with a Latin American country to be transmitted to the Senate since the announcement of his Enterprise for the Americas Initiative in June 1990. He noted that "[t]he treaty's standstill and rollback of Argentina's trade-distorting performance requirements are precedent-setting steps in opening markets for U.S. exports. In this regard, as well as in its approach to dispute settlement, the treaty will serve as a model for our negotiations with other South American countries."

The accompanying January 13, 1993, report of the Department of State submitting the treaty to the President for transmittal and included in the transmittal documents, S. Treaty Doc. No. 103–2 (1993), is excerpted below. *See also* 87 Am. J. Int'l L. 433 (1993).

---

* * * *

The bilateral investment treaty (BIT) with Argentina represents an important milestone in the BIT program. . . . Argentina, like many Latin American countries, has long subscribed to the Calvo Doctrine, which requires that aliens submit disputes arising in a

country to that country's local courts. The conclusion of this treaty, which contains an absolute right to international arbitration of investment disputes, removes U.S. investors from the restrictions of the Calvo Doctrine and should help pave the way for similar agreements with other Latin American states.

* * * *

As does the model BIT, the Argentina treaty allows sectoral exceptions to national and MFN treatment, as set forth in [the] protocol to the treaty. The U.S. exceptions are designed to protect governmental regulatory interests and to accommodate the derogations from national treatment and, in some cases, MFN treatment in existing state or federal law.

Sectors and matters which the U.S. excepts from national treatment are air transportation; ocean and coastal shipping; banking; insurance; energy and power production; custom house brokers; ownership and operation of broadcast or common carrier radio and television stations; ownership of real property; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; and use of land and natural resources. The United States also reserves the right to make or maintain limited exceptions to national treatment with respect to certain programs involving government grants, loans, and insurance.

U.S. exceptions from both national and MFN treatment which are based on reciprocity are mining on the public domain; maritime services and maritime- related services; and primary dealership in United States government securities.

The Argentine exceptions to national treatment are real estate in the Border Areas; air transportation; shipbuilding; nuclear energy centers; uranium mining; insurance; and fishing. "Mining" was included in Argentina's list of national treatment exceptions at the time the treaty was signed but was deleted by an amendment effected by exchange of notes August 24 and November 6, 1992. This will ensure that treaty protections will be extended to an additional sector of significant commercial interest to U.S. investors.

In no sectors of the Argentine economy are there restrictions on MFN treatment to be accorded to U.S. investments.

Regarding the obligation not to impose performance requirements, the Argentina treaty contains a protocol provision which recognizes that Argentina currently maintains performance requirements in the automotive industry. These performance requirements may not be intensified, and Argentina undertakes to exert its best efforts to eliminate them within the shortest possible period, and will ensure their elimination no later than eight years from the entry into force of the treaty. Pending such elimination, Argentina undertakes that these performance requirements shall not be applied in a manner that places existing investments at a competitive disadvantage to any new entrants in this industry.

Achieving such a roll-back of existing performance requirements is a landmark accomplishment and should serve as a model for agreements with other countries which maintain analogous requirements.

The treaty with Argentina addresses, for the first time in the U.S. BIT program, debt-equity conversion programs, under which an investor purchases debt of a country at a discount and receives local currency in an amount equivalent to the debt's face value. These programs normally require that the investor postpone repatriating the investment made with the local currency obtained in the conversion. Investors may choose to enter into such programs because they obtain more local currency than they otherwise would receive for a given amount of foreign exchange. The treaty's protocol provides that any deferral of transfers agreed to under debt-equity conversion programs would not be superseded by the treaty's guarantee of transfers without delay. This provision in the protocol was added at the suggestion of the United States. The United States has been generally supportive of debt-equity conversion programs as part of the overall solution to the debt problem and has considered them to be an important element in commercial bank financing programs which reduce debt and debt service.

* * * *

c. Czechoslovakia

On October 22, 1991, the United States and Czechoslovakia signed a bilateral investment treaty, one of a number of such treaties signed with Central and Eastern European countries in the 1990s as those countries transitioned to market economies. On June 2, 1992, President George H.W. Bush transmitted the Treaty, Protocol and related exchange of letters to the Senate for advice and consent to ratification. The treaty entered into force on December 19, 1992. After the breakup of Czechoslovakia in 1993, the treaty continued in effect for the successor states, the Czech Republic and Slovakia.

An excerpt from the letter from the report of the Department of State submitting the treaty to the President for transmittal to the Senate follows. *See* S. Treaty Doc. No. 102–31 (1992).

---

* * * *

This is the second U.S. treaty containing investment protections with a former Communist country of Central or East Europe, following the U.S.-Poland treaty concerning business and economic relations signed March 21, 1990. This Treaty will assist the Czech and Slovak Federal Republic (CSFR) in its transition to a market economy by creating favorable conditions for U.S. private investment, helping to attract such investment and, thus, strengthening the development of the private sector.

* * * *

The CSFR is privatizing many of its state-owned companies and decided that it could not ensure national treatment with respect to the privatization process. Therefore, in a related exchange of letters to the treaty, the CSFR states that prior approvals may be required when (i) U.S. nationals or companies acquire majority ownership of state companies, or (ii) U.S. nationals or companies acquire the equity interest of the CSFR in companies. The CSFR further undertakes to apply the approval process in a way not to

discourage or prohibit U.S. investment, to accord U.S. investment MFN treatment in this process, and to consult with the U.S. within two years of the treaty's entry into force with a view to phasing out this approval requirement.

This treaty, consistent with the other model BITs, does not oblige a Party to extend to the other Party's investments the advantages accorded to third country investments by virtue of binding obligations that derive from full membership in a free trade area or customs union. The Protocol confirms that such investment-related obligations may arise from economic relationships that include free trade areas and customs unions, notwithstanding that these relationships include trade obligations as well.

The BIT with the CSFR provides that an investment dispute between a Party and a national or company, including a dispute involving an investment authorization or the interpretation of an investment agreement, may be submitted to international arbitration six months after the dispute arose. Exhaustion of local remedies is not required. The treaty identifies several procedures for arbitration, at the investor's option: the International Centre for the Settlement of Investment Disputes ("ICSID"), upon CSFR adherence to the ICSID Convention; the ICSID Additional Facility; or ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

The BIT with the CSFR, as does the U.S.-Poland treaty, contains several provisions designed to resolve problems that U.S. business traditionally has faced in the centrally-controlled, non-market economies of Central and East Europe, and which may continue to impede U.S. investments during the transition to a market economy.

One such provision is a guarantee that nationals and companies of either Party receive non-discriminatory treatment with respect to an expanded and detailed list of activities associated with their investments. These include: access to registrations, licenses, and permits; access to financial institutions and credit markets; access to their funds held in financial institutions; the importation and installation of business equipment; advertising and the conduct of market studies; the appointment of commercial representatives; direct marketing; access to public utilities; and access to raw

materials. The right to non-discriminatory treatment in these activities requires that the CSFR grant U.S. nationals and companies treatment no less favorable than that granted to enterprises that remain under state ownership or control.

The treaty also provides, in a related exchange of letters, that the CSFR will designate an entity to assist U.S. nationals and companies overcome problems relating to bureaucracy and lack of knowledge. The entity's tasks will include providing up-to-date information on business and investment regulations, collecting and disseminating information regarding investment projects and financing, and coordinating with the CSFR agencies, at all levels, to facilitate U.S. investment.

* * * *

3. OPIC Investment Incentive Agreements

The Overseas Private Investment Corporation ("OPIC") was established as a development agency of the U.S. government in 1971. *See* 22 U.S.C. § 2191. OPIC, which operates on a self-sustaining basis, "helps U.S. businesses invest overseas, fosters economic development in new and emerging markets, complements the private sector in managing the risks associated with foreign direct investment, and supports U.S. foreign policy." *See www.opic.gov*. OPIC supports, insures, and finances U.S. investment projects in eligible countries that are financially sound, promise significant benefits to the development of the host country, and foster private initiative and competition. As of the end of 1999, OPIC supported investment projects in some 140 emerging and developing markets. *See* OPIC, 1999 Annual Report. Pursuant to statutory authority, the United States generally enters into bilateral investment incentive agreements with individual foreign governments in order for OPIC to operate insurance and guaranty programs covering American private investment in signatory countries. These executive agreements contain provisions for the subrogation of the U.S. government or OPIC to the rights of investors who may be compensated for

losses arising out of OPIC coverage, and for international arbitration between the United States and the foreign government of issues of public international law arising out of such coverage, including the question of the amount of compensation required in the case of expropriation. *See also* discussion of OPIC agreement with UNMIK, Chapter 17.B.3.b.(2).

a. Agreement with Russia

During the 1990s, OPIC signed a number of agreements to begin operations in Eastern Europe and the former Soviet Republics, as those economies transitioned to free markets. In remarks offered at the United States-Russia Business Summit on June 17, 1992, in Washington, D.C., President George H.W. Bush explained the role that OPIC investment incentive agreements played in U.S. support for the transition of Russia to a free market economy.

President Bush's remarks, excerpted below, are available at *http://bushlibrary.tamu.edu/research/papers/1992/92061700.html*.

---

* * * *

. . . [M]y message to this conference is simple: Neither Government programs nor multilateral assistance is going to get this job done. Neither of those can do it. Private sector participation in the economies of Russia and the other states, especially involvement by American business, is critical to the success of Russia's bold venture into free markets. And that participation must be on a vast scale, measured in billions of dollars, for the challenge to be met.

To that end, I'm pleased to announce that . . . OPIC is going to have an agreement between the U.S. and Russia, and that one enters into force today. This agreement's going to permit OPIC to provide investment insurance to American private investors. It's also going to provide additional financing and investor services for joint ventures in other products in the Federation. With OPIC

and Ex-Im, everyone wins. Russia can tap into the ingenuity of American business in our capital goods, our know-how, and our technology, which are indeed the best in the entire world. In my view that help will enable Russia to develop its food and health sectors, recover its energy resources, privatize state industries, and convert military plants to civilian production.

* * * *

b. Amended agreement with the German Democratic Republic

The United States had negotiated an investment incentive agreement in 1990 under which OPIC would operate in eastern Germany with the German Democratic Republic ("GDR"), but that agreement had not entered into force at the time the GDR was united with the Federal Republic of Germany ("FRG"). Upon reunification, necessary amendments were effected through an exchange of notes verbale in 1991. The notes confirmed the terms of the agreement negotiated with the GDR and provided that "[t]he OPIC Agreement shall be applicable in the territory of the former German Democratic Republic and Berlin (East)," with conforming amendments. The agreement entered into force on August 9, 1991. The text of the U.S. note is available at *www.state.gov/s/l/c8183.htm*.

c. Agreements with the Palestine Liberation Organization for the Benefit of the Palestinian Authority and with Israel

On September 12, 1994, Ruth R. Harkin, President and Chief Executive Officer of OPIC, signed agreements on encouragement of investment with both the PLO for the benefit of the Palestinian Authority and with Israel. Agreement on Encouragement of Investment Between the United States of America and the Palestine Liberation Organization for the Benefit of the Palestinian Authority Pursuant to the Agreement on the Gaza Strip and the Jericho Area and Agreement on Encouragement of Investment Between the United States

of America and Israel. Article I of each agreement provided that the term "Area" as used in the agreement means "areas for which arrangements are being established for Palestinian interim self-government, as set forth in Articles I and IV of the Declaration of Principles [on Interim Self-Government Arrangements, signed in Washington, D.C. on September 13, 1993.]" *See* Chapter 17.A.2.b.(2) and (4).

Article 5 of the OPIC-PLO agreement provided:

> (a) The PLO shall ensure that the Palestinian Authority acts in compliance with the terms of this Agreement.
> (b) The PLO shall seek to include in the Agreement establishing the Palestinian Council pursuant to the Declaration of Principles a provision continuing the provisions of this agreement in force and effect throughout the interim period provided for in the Declaration of Principles.

Article 5 of the OPIC-Israel agreement provided:

> The Government of the State of Israel shall agree in response to a request by the PLO to include in the Agreement establishing the Palestinian Council pursuant to the Declaration of Principles a provision continuing the provisions of this agreement in force and effect throughout the interim period provided for in the Declaration of Principles.

Article 6 of each agreement provided as follows:

> (a) This Agreement shall enter into force when signed by both Parties.
> (b) This Agreement shall be carried out consistent with the framework of the Declaration of Principles and its current and future implementing agreements to the full extent the [Palestinian Authority and its successors] [Israel] exercise authority relevant to this Agreement in the Area.
> (c) This Agreement shall continue in force until the end of the interim period provided for in the Declaration of Principles unless terminated by the Issuer by providing

written notice to the Palestinian Authority or its successor. After expiration or termination of this Agreement its provisions shall, with respect to Investment Support provided while the Agreement was in force, remain in force so long as such Investment Support remains outstanding, but in no case longer than twenty years after expiration of the Agreement.

4. OECD Multilateral Agreement on Investment Negotiations

Between 1995 and 1998, the United States and other member countries of the Organization for Economic Cooperation and Development ("OECD") engaged in negotiations that attempted to create an international treaty that would provide a broad multilateral framework for international investment – the Multilateral Agreement on Investment ("MAI"). The objective was to produce an agreement with high standards for investment regimes and investment protection, and with effective dispute settlement procedures. Documents related to the negotiation of the MAI are available at *www1.oecd.org/daf/mai/toc.htm*.

Excerpted below is testimony delivered by Assistant Secretary of State for Economic and Business Affairs Alan Larson, on March 6, 1998, to the U.S. House of Representatives International Relations Committee, Subcommittee on International Economic Policy and Trade. The testimony explained the standards outlined in the draft MAI, and U.S. policy concerns and objectives in reaching any final agreement.

The full text of the testimony is available at 9 Dep't St. Dispatch No. 3 at 30 (April 1998), *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

---

* * * *

The fundamental principle underlying this and other investment agreements is the principle of non-discrimination. Such agreements

do not generally call into question the sovereign right of governments to regulate as long as regulation does not single out or discriminate against investors based on their nationality.

Developing an international framework for treatment of foreign investment is not our only objective in the MAI. Another primary objective is to ensure that the MAI contributes to the achievement of our goal of fostering stronger global efforts to protect the environment, to respect internationally recognized core labor standards and to achieve sustainable development. Many important issues must be resolved, however, before we will have an agreement that will achieve these objectives.

The basic architecture of the MAI follows the familiar lines of the forty-one Bilateral Investment Treaties that American administrations have negotiated since the mid-eighties and of the investment chapter of the North American Free Trade Agreement. We are, of course, seeking to make improvements wherever we can. The main features of the MAI are expected to include;

—non-discrimination (the better of national or most-favored-nation treatment) for our investment abroad and the application of these principles not only after an investment is established but also when an investor is seeking to establish investments;

—disciplines on performance requirements that distort trade and investment;

—freedom to make any investment-related transfers, such as profits, capital, royalties and fees, whether into or out of the country where the investment takes place;

—international law standards for expropriation and compensation, consistent with U.S. legal principles and practice; and

—access to international arbitration for disputes between Parties and also for individual investors when they suffer specific harm from alleged breaches of the agreement.

We are negotiating with other members of the Organization for Economic Cooperation and Development. Our negotiating partners include twenty nine advanced countries of Europe, Asia and North America, together with the European Union. Taken together, these countries are the largest sources of, and the largest destinations for, flows of foreign investment. The OECD has a long track record of dealing with investment issues, as well as the

broader social and environmental issues that all modern economies must address. OECD countries tend to have high labor standards and good records on environmental protection.

While OECD countries provide an important critical mass for a multilateral investment agreement, we do not support a closed arrangement. Rather, the agreement will be open for accession by other countries willing and able to accept its obligations.

A number of developing and transition economies are following the negotiations closely and some have indicated an interest in being charter members. Argentina, Brazil, Chile, Hong Kong, and Slovakia are observers, while Latvia, Estonia and Lithuania have also indicated their interest in acceding to the MAI.

From the beginning, the United States has insisted that we will not support a MAI that does not result in a satisfactory balance of commitments and meaningful improvements in the access of American firms to foreign markets. At this time, we are unsatisfied with the commitments on the table. Some of our partners are seeking ambiguous and sweeping carve-outs, including proposals by the EU for a carve-out for "Regional Economic Integration Organizations" and proposals by several countries for a general carve-out for cultural industries. We also have significant objections to country specific exceptions requested by many of our negotiating partners. Dramatic improvements will be necessary, and this can come only through careful study and negotiation.

Negotiators also need to give detailed attention to provisions of the agreement dealing with regulatory and enforcement issues. From the beginning, the U.S. delegation has argued that the provisions of this proposed agreement simply cannot interfere with normal, non-discriminatory regulatory activities in such areas as health, safety and the environment. In particular, we want to ensure that the expropriation article of the MAI cannot be used inappropriately to challenge regulatory decisions. Other countries, initially skeptical of our proposals, are now more receptive. Hard work will be required to translate this receptivity into satisfactory legal text.

The U.S. is one of the most open economies in the world and generally places few restrictions on foreign investment. Thus, we have little to fear from new multilateral rules. Nevertheless, we

are determined to protect existing measures where we may wish, for important policy reasons, to reserve our right to discriminate or otherwise deviate from our MAI commitments.

We have, for example, taken exceptions to protect existing non-conforming measures at the state and local level. We have proposed other exceptions consistent with those we took in NAFTA and take in our Bilateral Investment Treaties (BITs). We have been careful to preserve our freedom of maneuver in the future in such areas as programs to support minorities. We have also proposed U.S. exceptions for subsidies and government procurement; these would protect future as well as existing programs which discriminate against foreign investors. However, these last two are areas where our trading partners hope for greater U.S. commitments.

Like our BITs and the investment chapter of NAFTA, the MAI envisions provisions for state-to-state and investor-state dispute settlement. Though rarely used in these agreements, dispute settlement provisions provide an important tool of last resort for U.S. business, especially in countries where legal protections and court systems are not well developed. This may have growing importance as MAI membership expands beyond the OECD members.

It is important to keep the dispute settlement issue in perspective. The U.S. has strong constitutional provisions and an effective court system that provide important protections to foreign investors. The U.S. has a good record of honoring its international commitments. No arbitration cases have been brought against the United States under our BITs or under the NAFTA investment chapter.

We are sensitive, however, to the fact that this is a multilateral agreement which would include our major investment partners. In the months ahead, we will take particular care to ensure that the provisions of the agreement are fully consistent with U.S. practice and are sufficiently precise to minimize the likelihood that they would be interpreted in unintended ways.

With respect to the interests of state and local governments, as they requested in the case of the NAFTA, we intend that our states and localities not be responsible for responding to complaints

about treatment alleged to be contrary to the obligations of the MAI. If such cases were to arise, the federal government would stand in to defend the case.

The Administration believes a well-designed MAI has the potential to advance American values in such areas as environmental protection and internationally recognized core labor standards. The OECD Secretariat has assembled considerable evidence suggesting that, as a general rule, foreign investment has a favorable impact on environment and labor standards abroad. Certainly, American companies generally take their high standards with them when they operate abroad. In addition, OECD nations have developed one of the few multilateral codes for business and these Guidelines for Multinational Enterprise are going to be associated with the MAI agreement.

The United States has made a series of proposals to strengthen the environmental provisions of the MAI. These proposals affirm the legitimacy of regulation to protect health, safety, and environment as long as it is otherwise consistent with the agreement. Additional proposals recognize the right of each Party to establish its own levels of domestic environmental protection and encourage environmental impact assessments for proposed investments involving a governmental action which is likely to have a significant adverse impact on health or the environment.

In addition, we have proposed language to preserve our right to regulate in general. For example, we have proposed language that further explains why the questions of national and most-favored-nation treatment need to be judged by comparing investors or investments that are "in like circumstances." We also have proposed language on transparency to provide for the verification of information to ensure compliance with a Party's laws and regulations. We are studying other proposals to further strengthen protection of the environment.

The United States is also giving attention to provisions that will be important to U.S. workers. In addition to the OECD Guidelines on Multinational Enterprises, we are seeking an affirmation of support for internationally-recognized core labor standards.

MAI negotiators agree that parties to the MAI should not engage in a "race to the bottom" by lowering their health, safety

and environmental standards, or retreat from their support for internationally recognized core labor standards, in order to attract an investment. There will need to be meaningful commitments in these areas. This is an exceptionally challenging topic and developing the best approach will take time and will require consultation with interested constituencies. OECD countries, however, broadly share U.S. values in these areas and the OECD has a long tradition of dealing with environmental and labor concerns. For these reasons, this negotiation provides a good opportunity to tackle a set of issues that our country simply must confront as we move into an ever more globalized economy.

Over the past several years, developing countries have become more interested in and receptive to foreign investment. They recognize the benefits of foreign investment to their economies and people. They know that private foreign investment flows now substantially outpace foreign assistance funds. The interest of developing countries in attracting foreign investment can be seen in the explosion of bilateral investment treaties globally since the beginning of the 1990s, from 435 in 1990 to some 1300 today. Investment discussions in UNCTAD, the WTO, APEC and the FTAA are all looking to the MAI as a model for multilateral rules. Several of the transition and advanced developing economies have expressed interest in acceding to the MAI, including the five observers and the Baltics. The value of an MAI will be significantly advanced if a wider group of countries adhere to its provisions.

In order to ensure that any non-OECD signatories of the MAI meet basic environmental and labor standards, we have suggested the possibility of "readiness criteria." These criteria would indicate the ability of new members to the agreement to meeting their commitments on labor and environment. We are studying what type of criteria might be appropriate.

* * * *

In April 1998 the negotiations produced a draft consolidated text and commentary. Following a six-month hiatus in negotiations, on October 14, 1998, French Prime Minister Lionel Jospin announced that France would not resume negotiations in the OECD framework and suggested that the

framework for a new negotiation should be the WTO. In remarks to the National Assembly of that date, Prime Minister Jospin identified four conditions that France had set in February 1998 as a basis for continuing negotiations and that led to this decision: (1) inclusion of an exception to MAI disciplines for investments in "cultural" sectors; (2) the need to address satisfactorily, within the MAI mechanism, extraterritorial U.S. laws that France refused to apply on French soil in other contexts and discussions; (3) respect for European integration processes; and (4) inclusion of appropriate social (labor) and environmental norms.

In his October 23, 1998, statement as chairman of the OECD Executive Committee in Special Session, Under Secretary of State Stuart Eizenstat reported the delegates' views as to the MAI, as follows:

> There was a consensus among delegates on the need for and value of a multilateral framework for investment. The goal should still be sought. At the same time, delegates noted that significant concerns have been raised during consultations on the MAI. They include issues of sovereignty, protection of labour rights and environment, culture and other important matters.
>
> Delegates agreed on the importance of devoting additional time to take stock of these concerns and to assess how to accomplish the goal we all share of developing a multilateral framework of rules for investment. In further consultations, it will be important to broaden the participation of non-OECD member countries and to engage in further discussions with representatives of civil society (business, labour, non-governmental organizations, consumer and other groups). These consultations should proceed with a view to deciding how best to reach the shared goal of a multilateral framework for investment and to deal effectively with the concerns that have been expressed.

OECD News Release, Paris, October 23, 1998. Available at *www1.oecd.org/media/release/nw98–101a.htm*.

The United States worked hard but unsuccessfully to maintain negotiations of the MAI in the OECD. The May 1999 OECD Secretary-General's Report to Ministers on International Investment, prepared by the OECD Committee on Investment and Multinational Enterprises ("CIME"), stated that "[n]egotiations are no longer taking place."

5. Debt Relief

a. Agreement with Vietnam regarding debt consolidation and rescheduling

As discussed in Chapter 9. A.2.j., on July 11, 1995, President William J. Clinton announced the normalization of diplomatic relations with Vietnam. Normalization included the lifting of trade barriers in response to cooperation from Vietnam on POW/MIA and other issues. On April 7, 1997, U.S. Secretary of the Treasury Robert E. Rubin and Vietnam Finance Minister Nguyen Sinh Hung signed a bilateral agreement entitled "Consolidation and Rescheduling of Certain Debts Owed to, Guaranteed by, or Insured by the United States and AID." The agreement committed Vietnam to repay the former government of South Vietnam's debt of $146 million. Sanctions imposed under the Brook Amendment (*see*, *e.g.*, Foreign Operations, Export Financing and Related Programs Appropriations Act, 1995, Pub. L. No. 103–306, § 512, and similar provisions enacted annually), which bars assistance to countries in arrears on official debt repayments, were lifted on June 23, 1997, when the debt rescheduling agreement came into effect. A press release from the Department of the Treasury's Office of Public Affairs, excerpted below, explains the significance of the agreement.

The full text of the press release is available at *www.ustreas.gov/press/releases/rr1587.htm*.

---

* * * *

This agreement, in part, implements the multilateral debt agreement Vietnam reached with the Paris Club of Western creditor countries in December 1993. As part of the Paris Club agreement, Vietnam acknowledged its responsibility for the economic and social debts of the Republic of Vietnam—the government in the south prior to April 30, 1975. The Paris Club agreement called on government creditors to provide formal relief on overdue debt payments as of year-end 1993.

The bilateral agreement between Vietnam and the United States covers the entire amount of economic debt outstanding to the United States. The loans involved were made by the United States on concessional terms from 1960–1975 to support the development of economic infrastructure and to finance the importation of agricultural and other commodities by Vietnam. In addition, the United States extended about $1 billion in economic grants during the same period.

Regular payments under the agreement will begin in July and extend until the year 2019.

b. Use of U.S. Exchange Stabilization Fund: Mexican debt assistance

In 1994 Mexico experienced severe economic problems, and the peso was devalued by 32 percent in December 1994. In response, the United States took action to create a financial support package to stabilize the peso and avert a liquidity crisis, in order to ensure orderly exchange arrangements and a stable system of exchange rates. A key part of this financial support package was the use of the Treasury Department's Exchange Stabilization Fund ("ESF" or "Fund") to provide loans and credits to Mexico. A memorandum of March 2, 1995, prepared by the Office of Legal Counsel ("OLC"), U.S. Department of Justice, confirmed that the fund could be used for this purpose. Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Edward S. Knight, General Counsel, Department of the Treasury, March 2, 1995, re: Use Of The

Exchange Stabilization Fund To Provide Loans And Credits To Mexico.

The full text of the OLC memorandum opinion, excerpted below (with footnotes omitted), is available at *www.usdoj.gov/olc/esf2.htm*.

On January 31, 1995, the President proposed to use the Treasury Department's Exchange Stabilization Fund (the "ESF" or the "fund") to provide $20 billion of loans and credits to Mexico as part of a financial support package for that country (the "support package"). On February 21, 1995, the Treasury Secretary (the "Secretary") signed a series of agreements with the Mexican government implementing the support package. . . . We would like to take this opportunity to set forth briefly the basis for our determination that your conclusion [that the President and the Secretary have the authority to use the ESF in connection with the support package] is correct.

I. Background

A. *The Support Package*

Under the support package, the loans and credits to Mexico from the ESF will take three forms: (i) short-term currency "swaps" through which Mexico will borrow U.S. dollars in exchange for Mexican pesos for 90 days; (ii) medium-term currency swaps through which Mexico will borrow U.S. dollars for up to five years; and (iii) guaranties through which the United States will back-up Mexico's obligations on government securities for up to ten years. The ESF loans and credits will supplement billions of dollars of financial assistance that will be provided to Mexico by the International Monetary Fund ("IMF") and other lenders. As a whole, the support package is intended to help Mexico resolve its serious economic problems, which, in turn, have resulted in a significant destabilization of the Mexican peso and have threatened to disrupt the international currency exchange system.

B. *The ESF*

The ESF was established by Congress in 1934 pursuant to section 10(a) of the Gold Reserve Act, which is now codified at 31 U.S.C. § 5302. The ESF "is under the exclusive control of the

Secretary," whose use of the fund is "[s]ubject to approval by the President." *Id.* § 5302(a)(2). Initially, the statute provided that the ESF was to be used "[f]or the purpose of stabilizing the exchange value of the dollar." Act of Jan. 30, 1934, ch. 6, § 10(a), 48 Stat. 337, 341 (1934). That is no longer the case. The provision governing the Secretary's use of the ESF now states:

Consistent with the obligations of the Government in the International Monetary Fund on orderly exchange arrangements and a stable system of exchange rates, the Secretary or an agency designated by the Secretary, with the approval of the President, may deal in gold, foreign exchange, and other instruments of credit and securities the Secretary considers necessary. However, a loan or credit to a foreign entity or government of a foreign country may be made for more than 6 months in any 12-month period only if the President gives Congress a written statement that unique or emergency circumstances require the loan or credit be for more than 6 months. 31 U.S.C. § 5302(b).

The first sentence of the current provision stems from 1976 amendments to section 10(a) of the Gold Reserve Act. Those amendments eliminated the requirement that the ESF be used "for the purpose of stabilizing the exchange value of the dollar," and provided instead that the fund was to be used consistent with U.S. obligations in the IMF. *See* Pub. L. No. 94–564, 90 Stat. 2660, 2661 (1976). The second sentence of the current provision stems from a 1977 amendment to section 10(a) of the Gold Reserve Act. *See* Pub. L. No. 95–147, 91 Stat. 1227, 1229 (1977). The intention of that amendment was to ensure that longer-term lending from the ESF was limited to "unique or exigent circumstances."

II. Statutory Analysis

In carrying out the support package, the Secretary will be "deal[ing] in gold, foreign exchange, and other instruments of credit and securities" within the meaning of 31 U.S.C. § 5302. The first question in the statutory analysis is whether use of the ESF in connection with the support package is "[c]onsistent with the obligations of the Government in the International Monetary Fund on orderly exchange arrangements and a stable system of exchange rates." We believe that it is. Again, the stated purpose of the support package is to stabilize the value of the Mexican

peso and prevent disruption of international currency exchange arrangements—which is entirely in keeping with U.S. obligations in the IMF. Moreover, since the statute states that the Secretary may use the ESF as he "considers necessary," it is up to the Secretary (subject to the President's approval) to decide when such action is consistent with U.S. obligations in the IMF. The Secretary's decisions in that regard "are final." 31 U.S.C. § 5302(a)(2). In short, in implementing the support package, the Secretary has exercised the discretion with which Congress has charged him.

The plain language of the statute also provides the President and the Secretary with the legal authority to use the ESF for the currency swaps of up to five years and the guaranties of up to ten years. The statute explicitly states that loans or credits with repayment terms of more than six months can be extended from the ESF "if the President gives Congress a written statement that unique or emergency circumstances require the loan or credit be for more than 6 months." When the support package was proposed on January 31, 1995, the President announced that he had determined that the financial crisis in Mexico constituted unique and emergency circumstances. The President made his announcement in a joint statement that he issued with the congressional leadership, who expressed their collective view that the use of the ESF in connection with the support package was both lawful and necessary [citing 31 WEEKLY COMP. PRES. DOC. 155 (Jan. 31, 1995)].

The authority of the President and the Secretary to use the ESF as a source of loans or credits of more than six months has been invoked once before in the years since the statute was amended in 1977 to provide expressly for such action. That came in 1982, when President Reagan, acting in response to an earlier instance of financial turmoil in Mexico, turned to the ESF to provide loans to Mexico with maturities of up to one-year. In accordance with the statutory requirements, President Reagan notified Congress in writing on September 8, 1982 that he had determined on August 24, 1982 that unique and exigent circumstances required that the ESF loan to Mexico have repayment terms in excess of six months. It is true that no prior precedents under the ESF involved loans or credits of maturity lengths and dollar amounts comparable to those

at issue in the support package. That said, such use of the ESF is clearly authorized by the language of the statute.

We find it telling that when Congress was considering what eventually became the 1977 amendment to section 10(a) of the Gold Reserve Act, it apparently gave some thought to restricting use of the ESF to short-term lending exclusively so that the ESF would not compete with the IMF—which was seen as the primary vehicle for longer-term lending. In fact, a question to that effect was posed to a Treasury Department official during the course of a Senate Banking Committee hearing that explored, among other things, the relationship between lending under the ESF and lending under the IMF [citing *Amendments of the Bretton Woods Agreements Act: Hearing Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 157 (1976)]. In response, the Treasury official stated:

> [A] statutory requirement that [the ESF] be used for short-term lending exclusively would not be appropriate and would unnecessarily impair U.S. flexibility, especially in unforeseen circumstances, in implementing our international monetary policy. . . . [I]t is conceivable that, in some instances, use of the ESF for a somewhat more extended period may be necessary. External factors (such as natural disasters, trade embargoes, unforeseen economic developments . . .) may lead a country which has obtained a short-term credit from the ESF to seek an extension of that credit. It is also conceivable that political assassination or other unanticipated catastrophic event might justify a longer extension of credit, and the possibility of ESF operations in such cases should not be excluded. In none of these cases would the ESF compete with the IMF, and in all of these cases it well may be in the U.S. interests to provide somewhat more extended ESF financing [*Id.* At 158].

That sentiment carried the day, and ultimately found its way into the statute through the 1977 amendment. The report of the

Senate Banking Committee on what turned out be that amendment puts its succinctly:

> The Committee recognizes that there may be circumstances where longer-term ESF credits may be necessary, and the amendment provides for that possibility. But the Committee intends, and the amendment expressly provides, that such longer-term financing be provided only where there are unique or exigent circumstances. As indicated by Treasury, these would include natural disasters, trade embargoes, unforeseen economic developments abroad, political assassinations, or other catastrophic events. In none of these cases should the ESF compete with the IMF, however, and every effort should be made to bring all medium and longer-term financing within the framework of the IMF or other appropriate multi-lateral facilities.

[citing S. Rep. No. 1295, 94th Cong., 2d Sess. 11 (1976)].

The Mexican economic crisis would appear to be a prime example of the type of unique or exigent circumstances that the Senate Banking Committee had in mind when crafting the 1977 amendment: according to some observers, Mexico's financial troubles were exacerbated by the shocking assassinations in 1994 of two key Mexican political leaders and the unanticipated strife in the Chiapas region of Mexico. Furthermore, the support package appears to honor the Committee's admonition that longer-term use of the ESF not "compete" with the IMF. It is our understanding that the loans and credits from the ESF complement the substantial financial assistance that the IMF and other lenders are furnishing to Mexico. Indeed, the Treasury Department has worked closely with the IMF in fashioning the support package.

Finally, it is worth noting that Congress plays an important oversight role with respect to use by the President and the Secretary of the ESF for loans of more than six months. As the Senate Banking Committee described Congress' function, "[t]he requirement that the President report to the Congress on any such longer-term financing will provide the Congress with an opportunity to scrutinize such longer-term ESF credits and take appropriate

steps to insure that they are consistent with U.S. interests and U.S. obligations under the IMF." In that role, Congress has, over the years, considered various proposals to cabin the authority of the President and the Secretary under the ESF statute. Those proposals have been repeatedly rejected, however. This history reflects the judgment of Congress that the President and the Secretary should retain the flexibility to use the ESF, as they consider necessary, to respond promptly to sudden and unexpected international financial crises that undermine the global currency exchange system and jeopardize vital U.S. economic interests.

D. INTELLECTUAL PROPERTY, INFORMATION TECHNOLOGY AND ELECTRONIC COMMERCE

1. WTO Agreement on Trade-Related Aspects of Intellectual Property Rights

a. The Agreement on Trade-Related Aspects of Intellectual Property Rights

As discussed in B.2., *supra*, on April 15, 1994, the United States joined other countries in concluding the Uruguay Round of Multilateral Trade Negotiations under the auspices of the General Agreement on Tariffs and Trade ("GATT"). Among the multilateral WTO agreements that the United States became a party to as a result of the Uruguay Round was the Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994 ("TRIPS Agreement"), *reprinted in* 33 I.L.M. 1197 (1994). The full text of the TRIPS Agreement can be found on the WTO website at *www.wto.org*.

Parties to the TRIPS Agreement must adhere to minimum standards of protection for intellectual property, offer such protections on a most-favored nation and national treatment basis, and submit to binding dispute resolution. A Council on Trade-Related Aspects of Intellectual Property Rights

monitors implementation of the TRIPS Agreement and provides a forum for WTO members to consult on intellectual property matters. In its 2000 Trade Policy Agenda and 1999 Annual Report to Congress, Chapter II at 116, USTR reviewed the first five years of the Council's existence and highlighted issues of 1999. The full text of the report, issued in March 2000, is available through the Office of the U.S. Trade Representative Press Office.

---

* * * *

Status

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) is a multilateral agreement that sets minimum standards of protection for copyrights and neighboring rights, trademarks, geographical indications, industrial designs, patents, integrated-circuit layout designs, and undisclosed information. Minimum standards are established by the TRIPS Agreement for the enforcement of intellectual property rights in civil actions for infringement and, at least in regard to copyright piracy and trademark counterfeiting, in criminal actions and actions at the border. The TRIPS Agreement requires as well that, with very limited exceptions, WTO Members must also provide national and most-favored-nation treatment to the nationals of other WTO Members in regard to the protection of intellectual property. In addition, the TRIPS Agreement is the first multilateral intellectual property agreement that is enforceable between governments through WTO dispute settlement provisions.

Although the TRIPS Agreement entered into force on January 1, 1995, most obligations are phased in based on a country's level of development (developed country Members were required to implement by January 1, 1996; developing country Members generally were to implement by January 1, 2000; and least-developed country Members must implement by January 1, 2006). The TRIPS Agreement also provides a general "standstill" obligation, and mandates that those Members that avail themselves of the transition period for providing patent protection for pharmaceuticals and agricultural chemicals must provide a "mailbox". This mailbox is

for filing patent applications claiming pharmaceutical and agricultural chemical inventions and providing exclusive marketing rights for such products in certain circumstances. All Members were obligated to provide "most-favored-nation" and national treatment beginning January 1, 1996.

Assessment of the First Five Years of Operation

The TRIPS Agreement has yielded enormous benefits for a broad range of U.S. industries, including producers of motion pictures, sound recordings, software, books, magazines, pharmaceuticals, agricultural chemicals, and consumer goods; and individuals, including authors, artists, composers, performers, and inventors and other innovators. As mentioned above, the Agreement establishes minimum standards for protection and enforcement of intellectual property rights of all kinds and provides for dispute settlement in the event that a WTO Member fails to fulfill its obligations fully and in a timely fashion. Much of the credit for ensuring that the benefits of the TRIPS Agreement are realized by U.S. industries should be given to the operation of the TRIPS Council.

During 1997 and 1998, the TRIPS Council conducted reviews of the implementation of obligations by developed country Members.

* * * *

Of particular importance to U.S. intellectual property right holders was the review of the enforcement obligations of the Agreement. During this review, the United States drew special attention to obligations such as that contained in Article 41.1 which requires Members to ensure that enforcement procedures sufficient to permit effective action against acts of infringement were available. Such procedures must include expeditious remedies which constitute a deterrent to further infringement. The United States stressed it was impossible to get a complete picture of the situation in a Member country without understanding how its enforcement remedies were applied in practice. If the procedures provided in legislative texts were not available in practice, they could not be effective or have the deterrent effect required by the Agreement.

The review of the provisions of Article 27.3(b) of the TRIPS Agreement during 1999 provided an opportunity for the developed country Members to compile information on the ways in which they have implemented any exceptions to patentability authorized by that section. The synoptic table compiled by the WTO Secretariat from the information provided by Members demonstrated that there is considerable uniformity in the protection afforded plants and animals among those Members that have implemented their obligations, even though the manner in which that protection is provided varies. The description of various regimes for protecting plants and animals also could assist developing country Members that were considering the best method to implement their obligations. In addition, the review provided an opportunity for the United States, along with other WTO Members, to submit papers that form the basis of discussion during Council meetings, helping to clarify issues related to the protection of plants and animals.

During 1998 and 1999, the TRIPS Council considered the articles of the Agreement, in particular those related to copyright and neighboring rights, for which emerging electronic commerce would likely have the greatest implications. The Council submitted a report to the General Council, identifying those articles and noting that the subject might be pursued further. The United States submitted a paper, as part of the review, giving its views on the implications of electronic commerce for the TRIPS Agreement.

Major Issues in 1999

In the TRIPS Council meetings in 1999, the United States continued to press for full and timely implementation of the TRIPS Agreement by all WTO Members. In a number of instances where WTO Members have not implemented their obligations fully, the United States has employed the WTO dispute settlement system to secure compliance. Since the WTO was created, the United States has filed 13 complaints under WTO dispute settlement procedures to challenge foreign government practices affecting U.S. creative works and protection of U.S. intellectual property rights. In 7 of those cases, we have already obtained favorable results, either by obtaining a satisfactory settlement or by prevailing in WTO dispute

settlement proceedings. We reached prompt settlements with Japan on protection of sound recordings, with Portugal and Pakistan on patent protection, with Sweden on enforcement of its intellectual property laws, and with Turkey on taxation of foreign films. We also got favorable results from WTO dispute settlement rulings against Canada on magazines and against India on exclusive marketing rights on pharmaceutical and agricultural chemical products. The remaining 6 cases are still pending, although progress has been made over the last year. These achievements demonstrate that the WTO dispute settlement mechanism has already had a significant impact on our ability to protect the creative works of U.S. citizens.

A commitment to full and timely implementation of TRIPS obligations by all WTO Members was evident in a TRIPS Council recommendation to Ministers at Singapore "reaffirming the importance of full implementation of the TRIPS Agreement within the applicable transition periods" and stating that "each WTO Member will take appropriate steps to apply the provisions of the Agreement." However, a series of recommendations for extending the transition period for developing country Members' implementation were made prior to the 1999 Ministerial. In spite of such efforts, however, more than 26 developing country Members have already volunteered to undergo an implementation review in the TRIPS Council during the year 2000 and the Council Chairman is consulting with other developing country Members to establish the schedule for 2001.

Geographical Indications: In addition to reviewing the implementation of obligations of the Agreement by new Members including the Kyrgyz Republic and Latvia, the TRIPS Council reviewed the responses to a questionnaire reviewing, in depth, developed and newly acceding Members' implementation of their obligations under section 3 of Part II of the TRIPS Agreement, i.e., obligations dealing with geographical indications. To facilitate this review, the WTO Secretariat prepared a synoptic table of the information contained in the responses. This information greatly enhanced Members' negotiations in the Council, as provided for in Article 23.4, on the establishment of a multilateral system for notification and registration of geographical indications for wines and spirits, aimed at facilitating the protection of such geographical

indications. The European Union submitted a proposal for such a system under which Members would notify the WTO of their geographical indications and other Members would have one year in which to oppose any such notified geographical indications. If not opposed, the notified geographical indications would be registered and all Members would be required to provide protection as required under Article 23. The United States, Canada, Chile and Japan introduced an alternative proposal under which Members would notify their geographical indications for wines and spirits for incorporation in a register available to all Members on the WTO website. Under this proposal, Members choosing to participate in the system would agree to consult the notifications made on the website when making decisions regarding registration of related trademarks or otherwise providing protection for geographical indications for wines and spirits. Implementation of this proposal would not place obligations on Members beyond those already provided under the TRIPS Agreement or place undue burdens on the WTO Secretariat. The Council discussed the two proposals during its meetings in 1999. This negotiation will continue in 2000.

Review of Current Exceptions to Patentability for Plants and Animals: The TRIPS Council also reviewed the provisions of Article 27.3(b) of the Agreement that permits Members to exclude from patentability plants and animals and essentially biological processes for producing plants and animals. Any Member including such exclusions in its patent law must ensure that micro-organisms and non-biological and microbiological processes are patentable. . . . During the discussion, the United States noted that the ability to patent micro-organisms and non-biological and microbiological processes, as well as plants and animals *per se*, has given rise to a whole new industry that has brought inestimable benefits in health care, agriculture, and protection of the environment. The United States submitted a paper giving its views of the importance of providing patent protection for plants and animals and responding to some of the concerns raised by other WTO Members. It is expected that the review will remain on the agenda of the TRIPS Council in 2000.

* * * *

Implementation: The United States continued to pursue implementation questions with a number of developed countries, including Denmark, regarding its failure to provide provisional relief in civil enforcement proceedings, and Ireland, for its failure to amend its copyright law to comply with TRIPS. Ireland passed a number of amendments to its existing copyright law to resolve major problems and was working to enact a comprehensive revision of its copyright law by the end of 1999. The United States continued to pursue a dispute settlement case with Greece regarding its failure to take appropriate action to stop television broadcast piracy in that country and considerable progress has been made in eliminating such piracy on the airwaves. The United States initiated dispute settlement procedures with the European Communities regarding its failure to provide protection for certain geographical indications of other WTO Members. Another was filed against Canada regarding its failure to ensure that all inventions protected by patent in Canada on January 1, 1996 had a term of protection that did not end before a period of twenty years measured from the date on which the patent application was filed. (The details of these cases are discussed in the Dispute Settlement Body section.)

* * * *

b. TRIPS and public health (HIV/AIDS)

As the TRIPS Agreement came into force, the application of TRIPS obligations toward drug patent-holders in the circumstance of legitimate public health crises such as HIV/AIDS became a matter of concern. In response to these concerns, on December 1, 1999, the U.S. Trade Representative ("USTR") Charlene Barshefsky and Secretary of Health and Human Services ("HHS") Donna E. Shalala announced their intention to develop a "cooperative approach on health-related intellectual property matters to ensure that the application of U.S. trade law related to intellectual property remains sufficiently flexible to respond to legitimate public health crises."

A joint USTR-HHS press release of that date, excerpted below, is available at *www.state.gov/s/l/c8183.htm.*

---

* * * *

Recognizing that health emergencies may require special measures, USTR and HHS are working together to establish a process for analyzing and evaluating health issues that arise in the application of U.S. trade-related intellectual property law and policy. When a foreign government expresses concern that U.S. trade law related to intellectual property significantly impedes its ability to address a health crisis in that country, USTR will seek and give full weight to the advice of HHS regarding the health considerations involved. This process will permit the application of U.S. trade-related intellectual property law to remain sufficiently flexible to react to public health crisis brought to the attention of USTR. It will also ensure that the minimum standards of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are respected.

* * * *

2. Multilateral Treaties Administered By the World Intellectual Property Organization

The World Intellectual Property Organization ("WIPO") is a specialized agency of the United Nations that promotes the protection of intellectual property. WIPO administers a number of multilateral treaties on intellectual property to which the United States is a party. Additional information on WIPO can be found on its website at *www.wipo.int.* In the 1990s, the United States signed several other important multilateral treaties on intellectual property rights under the auspices of WIPO, discussed below.

a. Trademark Law Treaty

On October 28, 1994, the United States signed the Trademark Law Treaty, done at Geneva, October 27, 1994. The President transmitted the Trademark Law Treaty to the United States Senate on January 29, 1998 for advice and consent to ratification. S. Treaty Doc. No. 105–35 (1998). The Senate gave its advice and consent June 26, 1998. Legislation to implement obligations to be undertaken by the United States pursuant to the Trademark Law Treaty was enacted in the Trademark Law Treaty Implementation Act of 1998 ("TLTIA"), Pub. L. No. 105–330, 112 Stat. 3064, signed into law on October 30, 1998. TLTIA made several changes to the Trademark Act of 1946, 15 U.S.C. §§ 1051 et seq. The treaty entered into force for the United States on August 12, 2000.

The full text of the treaty can be found on the WIPO website, at *www.wipo.int/treaties/en/index.html.* Further information on TLTIA is available on the U.S. Patent and Trademark Office website, at *www.uspto.gov/web/offices/com/sol/tmlwtrty/index.html.*

Excerpted below is the report of the Department of State submitting the treaty to President William J. Clinton for transmittal to the Senate for advice and consent to ratification. *See* S. Treaty Doc. No. 105–35.

The President: I have the honor to submit to you, with a view to its transmission to the Senate for advice and consent to ratification, the Trademark Law Treaty (hereinafter, the "Treaty") done at Geneva, October 27, 1994, with Regulations. The Treaty was signed by the United States on October 28, 1994. The Treaty will simplify the protection of trademarks and service marks for U.S. trademark owners by eliminating unnecessary formalities.

The Treaty entered into force on August 1, 1996. Seven countries are currently party to it. The provisions of the Treaty will make it easier for U.S. trademark owners to protect their valuable trademarks in those countries that become party to the

Treaty. The Treaty's most important contribution is that it eliminates many of the formal requirements that now exist in the trademark application and registration maintenance process of many countries. Those requirements cause considerable expense and delay for trademark owners. The Treaty also provides assurances to trademark applicants and to holders of trademark applications and registrations that a document filed by the trademark owner or his/her attorney, if completed properly, will be accepted by the trademark office of every member State.

In addition, the Treaty will bring a number of practical improvements to the trademark application and registration maintenance process.

Applicants will be able to file trademark applications for protection under multiple goods or services classifications; these applications will mature into multiple class registrations.

All member States will be obliged to accept applications for and register service marks as well as goods marks.

Trademark owners and applicants will be able to record a change, such as a change of address, assignment of trademark rights, or appointment of a representative, for all of a trademark's relevant applications or registrations, by filing a single request.

With two minor exceptions, applicants and registrants will no longer need to undertake the often cumbersome process of legalizing signatures.

Further, the duration of the initial period of registration and of each renewal period will be ten years.

* * * *

b. Copyright Treaty and Performances and Phonograms Treaty

On July 28, 1997, President William J. Clinton transmitted to the Senate for advice and consent to ratification (1) the WIPO Copyright Treaty and (2) the WIPO Performances and Phonograms Treaty. Both treaties were done at Geneva on December 20, 1996, at the conclusion of the WIPO Diplomatic Conference on Certain Copyright and Neighboring

Rights Questions (December 2–20, 1996). S. Treaty Doc. No. 105–17. The Senate gave advice and consent to ratification on October 21, 1998. 145 CONG. REC. S12,985 (Nov. 12, 1998). The treaties entered into force by their terms following deposit of thirty instruments of ratification or accession; for the Copyright Treaty this occurred March 6, 2002, for the Performances and Phonograms Treaty on May 20, 2002. *See also* 92 Am. J. Int'l L. 44, 54 (1998)

In his letter of transmittal, President Clinton stated that the two treaties

> ensure that international copyright rules will keep pace with technological change, thus affording important protection against piracy for U.S. rights holders in the areas of music, film, computer software, and information products. The terms of the Treaties are thus consistent with the United States policy of encouraging other countries to provide adequate and effective intellectual property protection.

The President also noted that legislation, which was being prepared, was required to implement certain provisions of the treaties and to ensure that parties to them were granted, under U.S. copyright law, the rights to which they were entitled under the treaties. The accompanying report of the Department of State, dated July 22, 1997, and included in S. Treaty Doc. 105–17, is excerpted below.

---

* * * *

Provisions common to the treaties

The Treaties respond to the challenges of protecting works in the realm of digital technology. In that regard both Treaties oblige parties to ensure that rights holders have the exclusive right to control on-demand transmissions of works to members of the public (Article 8, Copyright Treaty; Article 14, Performances and Phonograms Treaty). Both Treaties oblige parties to provide adequate legal protection against the circumvention of technologically based security measures, and to apply appropriate and

effective remedies against protection-defeating devices or services (Article 11, Copyright Treaty; Article 18, Performances and Phonograms Treaty). Both require the provision of effective remedies against the knowing removal or alteration of electronic rights-management information without authority, and against the related acts of distribution, importation for distribution and communication to the public with knowledge that such information has been removed or altered (Article 12, Copyright Treaty; Article 19, Performances and Phonograms Treaty).

Both Treaties oblige parties to adopt the measures necessary to ensure the application of the Treaties and to ensure that enforcement procedures are available under the parties' laws so as to permit effective action against any act of infringement of rights covered by the Treaties, including provision of expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements (Article 14, Copyright Treaty; Article 23, Performances and Phonograms Treaty).

In addition to these substantive obligations, each Treaty provides that not only WIPO member States, but also the European Community, as well as similar intergovernmental organizations, may become party to the Treaty. Admission of intergovernmental organizations other than the European Community will be subject to a decision by an Assembly created to administer each Treaty. To be eligible, such an organization must declare that it is competent in respect of, and have its own legislation binding on all its member States on, matters covered by the Treaty (Article 17, Copyright Treaty; Article 26, Performances and Phonograms Treaty).

Each party that is a State has a vote in the Assembly; intergovernmental organizations do not have an independent vote. However, an intergovernmental organization is permitted to participate in a vote on behalf of its member States that are party to the Treaty. There is no allowance for "split voting"; either an organization votes on behalf of all member State parties, or each member State party votes individually (Article 15(3), Copyright Treaty; Article 24(3), Performances and Phonograms Treaty).

In order to ensure that a party to one of the Treaties has recourse in the event of a dispute or non-compliance with treaty obligations by a party that is an intergovernmental organization

or a member State of such an organization, each Treaty provides that each contracting party bears all the obligations under the Treaty (Article 18, Copyright Treaty; Article 27, Performances and Phonograms Treaty).

Each Treaty enters into force three months after thirty instruments of ratification or accession by states have been deposited with the Director General of WIPO. This number makes it impossible for the European Community and its member States to be in a position to control the Assembly (Article 20, Copyright Treaty; Article 29, Performances and Phonograms Treaty).

WIPO Copyright Treaty

The WIPO Copyright Treaty provides in Article 1 that it is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, revised at Paris, July 24, 1971, as amended (the "Berne Convention"), to which the United States is a party (Article 1). Article 20 of the Berne Convention provides that the states party to the Berne Convention reserve the right to enter into special agreements among themselves insofar as the special agreements grant to authors more extensive rights than those granted under the Berne Convention.

The Copyright Treaty (Article 1(4)) requires that parties comply with the substantive obligations (Articles 1–21 and the Appendix) of the Berne Convention. Like the Berne Convention, the Copyright Treaty provides (Article 3) that parties may not impose formalities on the nationals of other parties as a condition for claiming protection under the Treaty.

In Articles 4 and 5, the Copyright Treaty clarifies, along the lines of Article 10 of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights done at Marrakesh, April 15, 1994 ("TRIPS Agreement"), that computer programs are protected as literary works under the Berne Convention, and that original compilations of data (databases) that incorporate copyrightable authorship are also protected.

The Copyright Treaty (Article 6) explicitly recognizes a right of distribution for all categories of works (which, under the Berne Convention and the TRIPS Agreement is granted explicitly only for cinematographic works).

As does the TRIPS Agreement, the Copyright Treaty (Article 7) provides for an exclusive post-first-sale right of rental for computer programs, cinematographic works and works embodied in phonograms; parties need not implement the rental right in respect of computer programs where the program itself is not the object of rental, and in the case of cinematographic works where rental does not lead to widespread copying impairing the right of reproduction.

The Copyright Treaty (Article 8) extends to all categories of works the right of communication to the public (which under the Berne Convention and the TRIPS Agreement is required only to a varying extent for different categories of works), and clarifies that this right covers making works available to the public by wire or wireless means, through an interactive, on-demand transmission.

The Copyright Treaty (Article 9) extends the term of protection of photographic works to 50 years after the death of the author, as is already the case for all other categories of literary works. It does so by stating that parties shall not apply the provisions of Article 7(4) of the Berne Convention, which allows parties to limit the term of protection for such works to a minimum term of twenty-five years from the making of the work.

The Copyright Treaty (Article 10) extends the application of the three-step test for exceptions established for the right of reproduction in Article 9(2) of the Berne Convention to all other rights (as in Article 13 of the TRIPS Agreement): limitations or exceptions to all rights may be made in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the interests of the author.

The Copyright Treaty (Article 22) does not allow any reservations to the obligations it sets forth.

WIPO Performances and Phonograms Treaty

Several important provisions of the WIPO Performances and Phonograms Treaty offer responses to the challenges of digital technology for performances and phonograms in digital form in the Internet and similar electronic networks. The relevant definitions (phonogram, fixation, producer of a phonogram, publication, broadcasting, communication to the public) are broad enough to

cover the requirements of digital technology (Article 2). "Moral rights" are provided under Article 5 for performers in respect of their live aural performances or performances fixed in phonograms (although these rights cover many kinds of modifications, they may be particularly relevant in the case of digital manipulations of performances fixed in phonograms). In Articles 10 and 14, this Treaty provides an exclusive right for both performers and producers of phonograms to authorize making available their fixed performances and phonograms, respectively, by wire or wireless means, in an interactive, on-demand manner.

The Performances and Phonograms Treaty (Article 4) obliges parties to grant national treatment in respect of the rights provided in the Treaty to nationals of other parties, except to the extent that another party makes use of reservations permitted under Article 15(3) of the Treaty. It also requires that protection not be subject to any formalities.

Other important provisions of the Treaty are described below. Also noted are differences and similarities with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done at Rome, October 26, 1961 ("Rome Convention"), to which the United States is not a party, and the TRIPS Agreement. The Performances and Phonograms Treaty has no direct relationship to the Rome Convention. It includes some of the provisions of the Convention by reference (the provisions on criteria of eligibility for protection and on the possibility to apply reciprocity in respect of the right to remuneration for broadcasting and communication to the public), but there is no obligation to apply the other provisions of the Rome Convention. There is no legal relationship between the Treaty and the TRIPS Agreement.

Article 6 of the Performances and Phonograms Treaty (Article 6) provides for the exclusive rights of performers to authorize the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast program, and the fixation of their unfixed performances (this generally corresponds to the standards in the Rome Convention and the TRIPS Agreement). This Treaty (Articles 7 and 11) also includes an exclusive right of reproduction for performers

in respect of their fixed performances and for producers of phonograms (in harmony with the Rome Convention and the TRIPS Agreement).

The Performances and Phonograms Treaty (Articles 8 and 12) provides recognition of a right of distribution (on which there is no provision in the Rome Convention or the TRIPS Agreement) for both performers and producers of phonograms.

The Performances and Phonograms Treaty (Articles 9 and 13) includes an exclusive post-first-sale right of rental for both performers and producers of phonograms; such a right is not granted in the Rome Convention, but is granted in the TRIPS Agreement explicitly for producers of phonograms and left to national legislation as far as performers are concerned. The Performances and Phonograms Treaty, furthermore, allows those countries where a system of equitable remuneration was applied on April 15, 1994, to maintain such a system, rather than provide an exclusive right (such a "grandfathering" clause is also included in the TRIPS Agreement).

The Performances and Phonograms Treaty (Article 15(1)) includes the right to a single equitable remuneration for performers and producers of phonograms for the broadcasting and communication to the public of phonograms published for commercial purposes or reproductions of such phonograms. Such a right is provided in the Rome Convention, but not in the TRIPS Agreement. Article 15(2) allows parties to establish in national legislation that the remuneration shall be claimed from the user by the performer or the producer of a phonogram, or both. Article 15(3) permits any party to declare, in a notification to the Director General of WIPO, that it will apply the provisions of Article 15(1) only in respect of certain uses or will otherwise limit their application or that it will not apply these provisions at all.

I recommend that, in accordance with Article 15(3), the United States include the following declaration in its instrument of ratification:

Pursuant to Article 15(3), the United States declares that it will apply the provisions of Article 15(1) only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception,

and for other retransmissions and digital phonorecord deliveries, as provided under United States law.

Article 16 of the Performances and Phonograms Treaty provides that limitations or exceptions to rights may be made in certain special cases that do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the interests of the performer or the producer of the phonogram. The same test is established in Article 9(2) of the Berne Convention, and is applied to the rights of performers and producers of phonograms under Article 13 of the TRIPS Agreement.

The Performances and Phonograms Treaty (Article 17) provides for a fifty-year term of protection for the rights of both performers and producers of phonograms (as in the TRIPS Agreement; the Rome Convention provides for only a twenty-year term).

Except for the remuneration right for broadcasting in Article 15(3), no reservations are allowed under the Performances and Phonograms Treaty (Article 21).

As provided in Article 22, this Treaty applies to performances that took place and phonograms that were fixed before the date of entry into force of the Treaty, provided that the term of protection has not expired, except that a party may limit the application of Article 5 concerning the moral rights of performers to performances after the entry into force of the Treaty.

Statements agreed to at the Diplomatic Conference are found as footnotes in the texts of the Treaties. These statements represent the negotiators' understanding of the language of the Treaties and can aid in the interpretation of certain articles. In particular, the agreed statements explain that computer storage of works and phonograms is covered by the Treaties, and that the provisions governing limitations and exceptions provide sufficient flexibility for countries to provide for and extend appropriate limitations on rights when adapting their laws to the digital environment.

* * * *

Implementing legislation for the obligations the United States would undertake in the two treaties was signed into law on October 28, 1998, in the Digital Millennium Copyright Act, Pub. L. No. 105–304, 17 U.S.C. § 101 et seq.

(as amended), 112 Stat. 2860. President Clinton's signing statement is available in full at 34 WEEKLY COMP. PRES. DOC. 2168 (Nov. 2, 1998).

3. Intellectual Property Agreements with the People's Republic of China

a. 1992 United States-China Memorandum of Understanding on Intellectual Property Rights

In May 1991 the U.S. Trade Representative initiated an investigation of China's protection of patents, copyrights, and trade secrets under the U.S. trade law applicable to intellectual property rights, § 302(b)(2)(A) of the Trade Act of 1974 as amended, 19 U.S.C. § 2412(b)(2)(A). 56 Fed. Reg. 24,878 (May 31, 1991). Excerpts below from the Federal Register notice explain the basis of the investigation of China as a "priority foreign country" under § 182 of the Trade Act.

---

* * * *

Section 182(a) of the Trade Act (19 U.S.C. 2242) requires the USTR to identify countries that deny adequate and effective protection of intellectual property rights or which deny fair and equitable market access to U.S. persons that rely on intellectual property protection. Accordingly, on April 26, 1991, the USTR identified the People's Republic of China as a priority foreign country under that provision. In identifying China as a priority foreign country, the USTR noted deficiencies in that country's intellectual property acts, policies and practices including: (1) Deficiencies in its patent law, in particular, the failure to provide product patent protection for chemicals, including pharmaceuticals and agrichemicals, (2) lack of copyright protection for U.S. works not first published in China, (3) deficient levels of protection under the copyright law and regulations that will come into effect on June 1, 1991, and (4) inadequate protection of trade secrets. Further, USTR noted the absence of effective enforcement of intellectual property rights in China, including rights in trademarks.

Section 302(b)(2)(A) of the Trade Act requires the USTR to initiate an investigation of any act, policy, or practice that was the basis of the identification of a country as a priority foreign country under the provisions of section 182(a)(2) of the Trade Act to determine whether such act, policy, or practice is actionable under section 301 of the Trade Act.

* * * *

On December 2, 1991, USTR issued Proposed Determinations Regarding the People's Republic of China's Intellectual Property Laws, Policies and Practices, with a request for public comment. 56 Fed. Reg. 61,278 (Dec. 2, 1991). Based on a proposed determination that China's acts, policies and practices "are unreasonable and constitute a burden or restriction" on U.S. commerce, USTR proposed to impose increased duties on certain products of the PRC. On January 17, 1992, China and the United States settled the dispute by entering into a memorandum of understanding ("MOU") on intellectual property issues. Key provisions of the 1992 MOU committed China to join relevant multilateral conventions and adopt compatible regulations. China also made commitments concerning patents and trade secrets.

The full text of the 1992 MOU, excerpted below, can be found on the Department of Commerce's website at *www.tcc.mac.doc.gov/cgi-bin/doit.cgi?204:64:190553307:191.htm*.

In the spirit of cooperation embodied in their bilateral Agreement on Trade Relations and consistent with the principles of the relevant international agreements, the Government of the People's Republic of China (Chinese Government) and the Government of the United States of America (U.S. Government) have reached a mutual understanding on the following provisions:

* * * *

Article 3

1. The Chinese Government will accede to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) (Paris 1971). The Chinese Government will submit a

bill authorizing accession to the Berne Convention to its legislative body by April 1, 1992 and will use its best efforts to have the bill enacted by June 30, 1992. Upon enactment of the authorizing bill, the Chinese Government's instrument of accession to the Berne Convention will be submitted to the World Intellectual Property Organization with accession to be effective by October 15, 1992.

2. The Chinese Government will accede to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention) and submit a bill to its legislative body authorizing accession by June 30, 1992. The Chinese Government will use its best efforts to have the bill enacted by February 1, 1993. The Chinese Government will deposit its instrument of ratification and the Convention will come into effect by June 1, 1993.

* * * *

4. In so far as China's copyright law and its implementing regulations are inconsistent with the Berne Convention, the Geneva Convention or this Memorandum of Understanding (MOU), the Chinese Government will issue new regulations to comply with these Conventions and the MOU by October 1, 1992. These new regulations will also clarify the existing regulations and in particular will explain that the exclusive right of distribution that applies to all works and sound recordings includes making copies available by rental and that this exclusive right survives the first sale of copies. Regulations implementing the Conventions and this MOU will prevail over regulations for domestic works where there is an inconsistency between the new regulations and existing regulations.

* * * *

9. The Chinese Government will recognize this MOU as an agreement under Article 2 of the Copyright Law of the People's Republic of China which shall provide a basis for protection of works, including computer programs, and sound recordings of U.S. nationals published outside of China until such time as China accedes to the Berne Convention and the Geneva Convention. Such protection shall become effective 60 days after signature of this MOU.

* * * *

Article 7

In recognition of the progress in improving the protection of intellectual property rights that the Chinese Government has made and of further progress that will result from the steps that the Chinese Government has agreed to take, and in the expectation that these commitments will be fully implemented, the U.S. Government will terminate the investigation initiated pursuant to the "special 301" [§ 301 of the Trade Act of 1974 as amended, 19 U.S.C. § 2411] provisions of U.S. trade law and China's designation as a priority foreign country will be revoked effective on the date of signature of this MOU.

* * * *

b. 1995 Intellectual Property Rights Enforcement Agreement

Building on the 1992 MOU, China and the United States entered into a second agreement in 1995. This agreement focused on enforcement of intellectual property rights, in the face of complaints that China was allowing widespread piracy of audio-visual and computer software materials. The 1995 Intellectual Property Rights ("IPR") Enforcement Agreement, which consisted of an exchange of letters and an action plan, committed China to take effective measures to substantially reduce IPR piracy, particularly of copyrighted, trademarked and patented products. Over the long term, China also committed in the action plan to create a new IPR enforcement structure, and to provide market access for audiovisual products, computer software, and books and periodicals from the United States. The full text of the 1995 IPR Enforcement Agreement can be found on the Department of Commerce's Trade Compliance Center's website, at *http://170.110.214.18/tcc/data/commerce_html/TCC_2/PRCIntellectual_(2).html*.

Excerpted below is testimony by U.S. Trade Representative Charlene Barshefsky to the Senate Foreign Relations

Committee, Subcommittee on East Asian and Pacific Affairs, November 29, 1995, describing key Chinese commitments under the 1995 IPR Enforcement Agreement and initial progress in fulfilling those commitments.

The full text of Ambassador Barshefsky's testimony is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

Intellectual Property Rights

On February 26, the United States and China reached a landmark agreement to halt rampant Chinese piracy of U.S. books, movies, computer software—piracy that had cost U.S. industries more than $1 billion a year. China also agreed to provide these leading edge industries—industries in which we enjoy a comparative advantage and on which we are staking much of our future—greater market access. This Agreement complemented the earlier 1992 IPR Memorandum of Understanding, in which China overhauled its IPR legal regime, and raised the standards of its copyright and patent regimes—among other areas.

In the IPR Enforcement Agreement, China promised to establish an effective system of intellectual property rights enforcement. As we defined that system during the negotiations, China pledged to take effective measures to halt piracy, make structural changes in its IPR enforcement regime that will ensure effective enforcement over time, and provide market access for audiovisual companies and for those that produce computer software. In more specific terms, the Chinese Government agreed that it would: initiate a 9 month Special Enforcement Period, during which intense raids would be undertaken; set up intra ministerial task forces and strike forces that include the police; vigorously attack large-scale producers and distributors of pirated materials; clean-up the CD factories that continue to produce pirated products; set up monitoring systems to check pirated production of CDs, audiovisual works, books and periodicals, and computer software; punish administratively or through application of criminal penalties serious offenders; establish an effective border enforcement regime; allow establishment of joint ventures immediately in two major

cities in China for audiovisual companies (with 13 cities to open by the year 2000); and permit the establishment, for example, of joint ventures for the production of computer software.

* * * *

Enforcement

Ten months after signing the Agreement, implementation is mixed. The Agreement is complex—more than 30 pages of dense text—and requires action at all levels of the Chinese Government. More important, the magnitude of the problem—large-scale production of pirated products often with local government tolerance or, sometimes, with the participation of Chinese Government agencies—requires a significant exertion of political will.

In that context, China has taken some significant steps to attack rampant piracy. Clearly, the environment within which anti-piracy efforts can be pursued is much improved now over even last year. The system is becoming more transparent—recently, all of China's IPR laws, regulations, and administrative guidance were published, and public knowledge and understanding of IPR laws and regulations is much better than it was. If anything, consciousness of the need to protect IPR is higher in China, Hong Kong and Taiwan than it is in many countries and regions because of our and the Chinese government's intense efforts.

Piracy at the retail level has been markedly reduced in many major Chinese cities—particularly along the booming southeast coast where U.S. losses have been the largest. According to Chinese Government statistics, since signature of the Agreement, Chinese enforcement officials have launched 3,200 raids, seized and destroyed as many as 2 million pirated CDs and LDs, 700,000 pirated videos, and 400,000 pirated books. China's procuratorate has separately launched investigations into more than 1,000 possible criminal copyright infringement cases, including 321 "serious cases"—those in which illegal profits exceed 100,000 RMB (about $12,000). By contrast, last year enforcement was virtually non-existent. There have also been some criminal convictions to date.

In addition, China has made many of the structural changes mandated by the Agreement. China has set up intraministerial

task forces in virtually all provincial capitals and many major cities, 30 in all. It has set up high-level, tough enforcement task forces in at least 18 provinces and major municipalities. In addition, China's courts have begun to render significant judgments against major IPR offenders. In a series of decisions rendered on cases brought by the Business Software Alliance, the Beijing Intermediate People's Court and other Chinese courts have ruled in favor of the BSA—levying fines of up to $60,000, and damages as well. China has now established IPR courts in Beijing, Guangzhou, Shenzhen and other major centers of piracy, and has begun an active program to train Chinese judges in the enforcement of IPR laws.

Despite these steps, China's overall implementation of the Agreement falls far short of the requirements of the Agreement. Despite improved enforcement efforts, U.S. industries still estimate that they lost $866 million as a result of China's piracy in 1995. Resolution of these issues is one of the Administration's top trade priorities . . .

* * * *

4. Information Technology and Electronic Commerce

a. WTO Singapore Ministerial Declaration on Trade in Information Technology Products

As noted in B.2. *supra*, following the establishment of the WTO in January 1995, WTO members continued to negotiate on a number of topics upon which agreement had not been reached on a multilateral basis. On December 13, 1996, the United States and 28 other participants at the WTO's Singapore Ministerial Conference reached agreement on trade in information technology products such as computers, semiconductors, and computer software. The Ministerial Declaration on Trade in Information Technology Products, which entered into force July 1, 1997, provided for participants to completely eliminate duties on IT products listed in an annex to the declaration by January 1, 2000. Developing country participants were granted extended periods for

some products. Excerpted below are key provisions of the declaration, which is available in full, with annexes, on the website of the World Trade Organization at *www.wto.org/english/docs_e/legal_e/legal_e.htm*, *reprinted in* 36 I.L.M. 375 (1997).

Ministers, Representing . . . Members of the World Trade Organization ("WTO"), and States or separate customs territories in the process of acceding to the WTO, which have agreed in Singapore on the expansion of world trade in information technology products and which account for well over 80 per cent of world trade in these products ("parties"):

* * * *

Declare as follows:

1. Each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products.

2. Pursuant to the modalities set forth in the Annex to this Declaration, each party shall bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following:

(a) all products classified (or classifiable) with Harmonized System (1996) ("HS") headings listed in Attachment A to the Annex to this Declaration; and

(b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A;

through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances.

3. Ministers express satisfaction about the large product coverage outlined in the Attachments to the Annex to this Declaration. They instruct their respective officials to make good faith efforts to finalize plurilateral technical discussions in Geneva on the basis

of these modalities, and instruct these officials to complete this work by 31 January 1997, so as to ensure the implementation of this Declaration by the largest number of participants.

* * * *

President Clinton issued Proclamation 7011 to implement the Singapore Declaration by proclaiming modification in the tariff categories and rates of duty set forth in the Harmonized Tariff Schedule, pursuant to his authority under § 111(b) of the Uruguay Round Agreements Act, 19 U.S.C. § 3521(b). 62 Fed. Reg. 35,909 (July 2, 1997).

b. European Union-United States: Joint statement on electronic commerce

During the 1990s electronic commerce became an international trade and commerce issue as well as a domestic policy issue. On December 5, 1997, the United States and the European Union issued a joint statement on electronic commerce. Excerpts below from the joint statement describe many of the key U.S. principles and objectives for expanding electronic commerce. The joint statement can be found at *www.qlinks.net/comdocs/eu-us.htm.*

---

* * * *

3. We agree to work towards the development of a global marketplace where competition and consumer choice drive economic activity, on the basis of the following guidelines:

That the expansion of global electronic commerce will be essentially market-led and driven by private initiative. It should take into account the interests of all stakeholders, in particular of consumers, libraries, schools and other public institutions, as well as the need to ensure the widest use possible of new technologies.

That the role of government is to provide a clear, consistent and predictable legal framework, to promote a pro-competitive environment in which electronic commerce can flourish and to ensure adequate protection of public interest objectives such as

privacy, intellectual property rights, prevention of fraud, consumer protection and public safety.

That industry self-regulation is important. Within the legal framework set by government, public interest objectives can, as appropriate, be served by international or mutually compatible codes of conduct, model contracts, guidelines, etc. agreed upon between industry and other private sector bodies.

That unnecessary existing legal and regulatory barriers should be eliminated and the emergence of new ones should be prevented. Where legislative action is deemed necessary, it should not be to the advantage or disadvantage of electronic commerce compared with other forms of commerce.

That taxes on electronic commerce should be clear, consistent, neutral and non discriminatory.

That it is important to enhance the awareness and confidence of citizens and SMEs in electronic commerce and to support the development of relevant skills and network literacy.

That interoperability, innovation and competition are important for the development of a global marketplace, and that, in this context, voluntary, consensus-based standards, preferably at an international level, can play an important role.

4. Specifically, we agree to work towards:

A global understanding, as soon as possible, that when goods are ordered electronically and delivered physically, there will be no additional import duties applied in relation to the use of electronic means; in all other cases relating to electronic commerce, the absence of duties on imports should remain.

The effective implementation by 1 January 1998 of the commitments on basic telecommunication services included in the schedules of commitments attached to the WTO General Agreement on Trade and Services (GATS) and the completion of the second phase of the Agreement on Information Technology Products by summer 1998.

The ratification and implementation, as soon as possible, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Ensuring the effective protection of privacy with regard to the processing of personal data on global information networks.

The creation of a global market-based system of registration, allocation and governance of Internet domain names which fully reflects the geographically and functionally diverse nature of the Internet.

5. Furthermore, we agree on:

Active support for the development, preferably on a global basis, of self-regulatory codes of conduct and technologies to gain consumer confidence in electronic commerce, and in doing so, to involve all market players, including those representing consumer interests.

Close co-operation and mutual assistance to ensure effective tax administration and to combat and prevent illegal activities on the Internet.

The important positive role that electronic commerce can play in developing a coherent approach to international work on trade facilitation.

Close co-operation in jointly defined areas of R&D and electronic commerce technologies, in the framework of the EU-US Science and Technology Agreement, as well as in appropriate business pilot projects.

Continuing substantive bilateral discussions at experts level, including, as appropriate, both government and private sector participants, on the issues mentioned above as well as other issues, such as government procurement; contract law and regulated professions; liability; commercial communication; electronic payments; encryption; electronic authentication/digital signatures; and filtering and rating technologies.

Close co-operation with a view to encouraging the exchange of statistical data on electronic commerce.

* * * *

c. United States-Ireland Joint Communiqué on Electronic Commerce

The United States also addressed electronic commerce issues in bilateral negotiations with a number of nations. For instance, the United States–Ireland Joint Communiqué

on Electronic Commerce, signed in September 1998 at Dublin, Ireland, included the following language on authentication and electronic signatures:

> Authentication/Electronic Signatures: Governments should support a global uniform commercial legal framework that recognises, facilitates, and enforces electronic transactions world-wide. A wide variety of authentication methods and technologies are developing rapidly. With respect to authentication and electronic signatures, efforts of the private sector in constructing rules and guidelines should be encouraged.
>
> The commercial legal framework should conform with the following principles:
>
> > the acceptability of electronic signatures for legal and commercial purposes;
> > the propriety and desirability of allowing parties to a transaction to determine the appropriate technological and business methods of authentication for their transaction; and
> > the fostering of mutual cross-border recognition of electronic authentication methods and a non-discriminatory approach to electronic signatures from other countries as a necessary step in the removal of artificial barriers to cross-border commercial transactions.

U.S. President William J. Clinton and Irish Prime Minister Bertie Ahern signed the joint communiqué with digital signatures. This was the first use of a digital signature by a U.S. President on an international instrument. The full text of the agreement is available at *http://act.iol.ie/eagreement.htm.*

E. ANTITRUST

1. Litigation Concerning Extraterritorial Jurisdiction

a. Extraterritorial application of antitrust law in civil matters—Hartford Fire Insurance Co. v. California

The U.S. Supreme Court in *Hartford Fire Insurance Co. v. California,* 509 U.S. 764 (1993), ruled on the scope and application of U.S. antitrust laws both domestically and extraterritorially. Nineteen states and private plaintiffs had filed civil complaints alleging that U.S. and foreign-based members of the insurance industry had violated Section 1 of the Sherman Act (15 U.S.C. § 1) by conspiring to restrict the terms of coverage of commercial general liability insurance available in the United States. The actions were consolidated for litigation. The Court described the history of the litigation as follows.

---

* * * *

The Sherman Act makes every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal. 26 Stat. 209, as amended, 15 U.S.C. § 1. These consolidated cases present questions about the application of that Act to the insurance industry, both here and abroad. The plaintiffs (respondents here) allege that both domestic and foreign defendants (petitioners here) violated the Sherman Act by engaging in various conspiracies to affect the American insurance market. A group of domestic defendants argues that the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. § 1011 *et seq*., precludes application of the Sherman Act to the conduct alleged; a group of foreign defendants argues that the principle of international comity requires the District Court to refrain from exercising jurisdiction over certain claims against it. We hold that most of the domestic defendants' alleged conduct is not immunized from antitrust liability by the McCarran-Ferguson Act, and that, even assuming it applies, the principle of international comity does not preclude District Court jurisdiction over the foreign conduct alleged.

* * * *

. . . After the actions had been consolidated for litigation in the Northern District of California, the defendants moved to dismiss for failure to state a cause of action, or, in the alternative, for summary judgment. The District Court granted the motions to dismiss. *In re Insurance Antitrust Litigation*, 723 F. Supp. 464 (1989). It held that the conduct alleged fell within the grant of antitrust immunity contained in § 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), because it amounted to "the business of insurance" and was "regulated by State Law" within the meaning of that section; none of the conduct, in the District Court's view, amounted to a "boycott" within the meaning of the § 3(b) exception to that grant of immunity. 15 U.S.C. § 1013(b). The District Court also dismissed the three claims that named only certain London-based defendants, invoking international comity and applying the Ninth Circuit's decision in *Timberlane Lumber Co.* v. *Bank of America, N. T. & S. A.*, 549 F.2d 597 (1976).

The Court of Appeals reversed. *In re Insurance Antitrust Litigation*, 938 F.2d 919 (CA9 1991). Although it held the conduct involved to be "the business of insurance" within the meaning of § 2(b), it concluded that the defendants could not claim McCarran-Ferguson Act antitrust immunity for two independent reasons. First, it held, the foreign reinsurers were beyond the regulatory jurisdiction of the States; because their activities could not be "regulated by State Law" within the meaning of § 2(b), they did not fall within that section's grant of immunity. Although the domestic insurers were "regulated by State Law," the court held, they forfeited their § 2(b) exemption when they conspired with the nonexempt foreign reinsurers. Second, the Court of Appeals held that, even if the conduct alleged fell within the scope of § 2(b), it also fell within the § 3(b) exception for "act[s] of boycott, coercion, or intimidation." Finally, as to the three claims brought solely against foreign defendants, the court applied its *Timberlane* analysis, but concluded that the principle of international comity was no bar to exercising Sherman Act jurisdiction.

* * * *

The Supreme Court granted certiorari to address the question of the scope of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), which provides antitrust immunity for insurers, and to address the "application of the Sherman Act to the foreign conduct at issue." Although the court concluded that "it was error for the Court of Appeals to hold the domestic insurers bereft of the McCarran-Ferguson Act exemption simply because they agreed or acted with foreign reinsurers," it affirmed the court of appeals conclusion that the conduct alleged in most claims fell within the "boycott" exception to McCarran-Ferguson Act antitrust immunity.

As to the claims against the foreign insurers, the Supreme Court held that international comity did not prevent Sherman Act jurisdiction over the foreign reinsurers. Excerpts below from the Court's opinion address this aspect of the case. (Footnotes have been omitted.)

---

* * * *

At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. See Tr. of Oral Arg. 37 ("Our position is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn't exist here. Our position is that there are certain circumstances, and that this is one of them, in which the interests of another State are sufficient that the exercise of that jurisdiction should be restrained") Although the proposition was perhaps not always free from doubt, see *American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909)*, it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582, n. 6, 106 S.Ct. 1348, 1354, n. 6, 89 L.Ed.2d 538 (1986)*; *United States v. Aluminum Co. of America, 148 F.2d 416, 444 (CA2 1945)* (L. Hand, J.); *Restatement (Third) of Foreign Relations Law of the United States § 415*, and Reporters' Note 3 (1987) (hereinafter Restatement (Third) Foreign Relations Law);

1 P. Areeda & D. Turner, Antitrust Law ¶ 236 (1978); cf. *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704, 82 S.Ct. 1404, 1413, 8 L.Ed.2d 777 (1962)*; *Steele v. Bulova Watch Co., 344 U.S. 280, 288, 73 S.Ct. 252, 256, 97 L.Ed. 319 (1952)*; *United States v. Sisal Sales Corp., 274 U.S. 268, 275–276, 47 S.Ct. 592, 593–594, 71 L.Ed. 1042 (1927)*. Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect. See *938 F.2d, at 933*.

According to the London reinsurers, the District Court should have declined to exercise such jurisdiction under the principle of international comity. The Court of Appeals agreed that courts should look to that principle in deciding whether to exercise jurisdiction under the Sherman Act. *Id., at 932*. This availed the London reinsurers nothing, however. To be sure, the Court of Appeals believed that "application of [American] antitrust laws to the London reinsurance market 'would lead to significant conflict with English law and policy,' " and that "[s]uch a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction." *Id., at 933* (citation omitted). But other factors, in the court's view, including the London reinsurers' express purpose to affect United States commerce and the substantial nature of the effect produced, outweighed the supposed conflict and required the exercise of jurisdiction in this litigation. *Id., at 934*.

When it enacted the [Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 96 Stat. 1246, 15 U.S.C. § 6a], Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. See *H.R.Rep. No. 97–686, p. 13 (1982)* ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction") (citing *Timberlane)*. We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign

conduct (or, as Justice SCALIA would put it, may conclude by the employment of comity analysis in the first instance that there is no jurisdiction), international comity would not counsel against exercising jurisdiction in the circumstances alleged here.

The only substantial question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 555, 107 S.Ct. 2542, 2562, 96 L.Ed.2d 461 (1987)* (BLACKMUN, J., concurring in part and dissenting in part). The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as *amicus curiae,* concurs. See Brief for Petitioners Merrett Underwriting Agency Management Ltd. et al. in No. 91–1128, pp. 22–27; Brief for Government of United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* 10–14. They assert that Parliament has established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. *Restatement (Third) Foreign Relations Law § 415*, Comment *j;* see *Continental Ore Co., supra, 370 U.S., at 706–707, 82 S.Ct., at 1414–1415.* No conflict exists, for these purposes, "where a person subject to regulation by two states can comply with the laws of both." *Restatement (Third) Foreign Relations Law § 403*, Comment *e.* Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, see Reply Brief for Petitioners Merrett Underwriting Agency Management Ltd. et al. in No. 91–1128, pp. 7–8, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law. See *Restatement (Third) Foreign Relations Law § 403*, Comment *e, § 415*, Comment *j.* We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

* * * *

b. Extraterritorial application of U.S. antitrust law in criminal matters: United States v. Nippon Paper Indus. Co.

In 1997 a U.S. court, for the first time, held that, where activities committed abroad had a substantial and intended effect within the United States, they may form a basis for criminal prosecution under the Sherman Act. *United States v. Nippon Paper Indus. Co.*, 109 F. 3d 1 (1st Cir. 1997). The First Circuit's opinion, excerpted below, described the facts in the case and provided the court's analysis in reversing dismissal of the indictment by the district court.

---

* * * *

In 1995, a federal grand jury handed up an indictment naming as a defendant Nippon Paper Industries Co., Ltd. (NPI), a Japanese manufacturer of facsimile paper. The indictment alleges that in 1990 NPI and certain unnamed coconspirators held a number of meetings in Japan which culminated in an agreement to fix the price of thermal fax paper throughout North America. NPI and other manufacturers who were privy to the scheme purportedly accomplished their objective by selling the paper in Japan to unaffiliated trading houses on condition that the latter charge specified (inflated) prices for the paper when they resold it in North America. The trading houses then shipped and sold the paper to their subsidiaries in the United States who in turn sold it to American consumers at swollen prices. The indictment further relates that, in 1990 alone, NPI sold thermal fax paper worth approximately $6,100,000 for eventual import into the United States; and that in order to ensure the success of the venture, NPI monitored the paper trail and confirmed that the prices charged to end users were those that it had arranged. These activities, the indictment posits, had a substantial adverse effect on commerce in the United States and unreasonably restrained trade in violation of Section One of the Sherman Act, 15 U.S.C. § 1 (1994).

* * * *

Our law has long presumed that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991) (citation omitted). In this context, the Supreme Court has charged inquiring courts with determining whether Congress has clearly expressed an affirmative desire to apply particular laws to conduct that occurs beyond the borders of the United States. See id.

* * * *

. . . In Hartford Fire Ins. Co. v. California, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993), the Court deemed it "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.". . . .

* * * *

Were this a civil case, our journey would be complete. But here the United States essays a criminal prosecution for solely extraterritorial conduct rather than a civil action. This is largely uncharted terrain; we are aware of no authority directly on point, and the parties have cited none.

Be that as it may, one datum sticks out like a sore thumb: in both criminal and civil cases, the claim that Section One [of the Sherman Act] applies extraterritorially is based on the same language in the same section of the same statute: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Words may sometimes be chameleons, possessing different shades of meaning in different contexts, see, e.g., Hanover Ins. Co. v. United States, 880 F.2d 1503, 1504 (1st Cir. 1989), cert. denied, 493 U.S. 1023, 107 L. Ed. 2d 745, 110 S. Ct. 726 (1990), but common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil.

. . . It is a fundamental interpretive principle that identical words or terms used in different parts of the same act are intended to have the same meaning . . . This principle—which the Court recently called "the basic canon of statutory construction," Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479, 120 L. Ed. 2d 379, 112 S. Ct. 2589 (1992)—operates not only when particular phrases appear in different sections of the same act, but also when they appear in different paragraphs or sentences of a single section. . . . It follows, therefore, that if the language upon which the indictment rests were the same as the language upon which civil liability rests but appeared in a different section of the Sherman Act, or in a different part of the same section, we would be under great pressure to follow the lead of the Hartford Fire Court and construe the two iterations of the language identically. Where, as here, the tie binds more tightly—that is, the text under consideration is not merely a duplicate appearing somewhere else in the statute, but is the original phrase in the original setting—the pressure escalates and the case for reading the language in a manner consonant with a prior Supreme Court interpretation is irresistible. . . .

* * * *

. . . . The words of Section One have not changed since the Hartford Fire Court found that they clearly evince Congress' intent to apply the Sherman Act extraterritorially in civil actions, and it would be disingenuous for us to pretend that the words had lost their clarity simply because this is a criminal proceeding. Thus, unless some special circumstance obtains in this case, there is no principled way in which we can uphold the order of dismissal.

NPI and its amicus, the Government of Japan, urge that special reasons exist for measuring Section One's reach differently in a criminal context. We have reviewed their exhortations and found them hollow. . . .

* * * *

3. The Restatement. NPI and the district court, 944 F. Supp. at 65, both sing the praises of the Restatement (Third) of Foreign Relations Law (1987), claiming that it supports a distinction

between civil and criminal cases on the issue of extraterritoriality. The passage to which they pin their hopes states:

> In the case of regulatory statutes that may give rise to both civil and criminal liability, such as the United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Id. at § 403 cmt. f. We believe that this statement merely reaffirms the classic presumption against extraterritoriality—no more, no less. After all, nothing in the text of the Restatement proper contradicts the government's interpretation of Section One. See, e.g., id. at § 402(1)(c) (explaining that, subject only to a general requirement of reasonableness, a state has jurisdiction to proscribe "conduct outside its territory that has or is intended to have substantial effect within its territory"); n5 id. at § 415(2) ("Any agreement in restraint of United States trade that is made outside of the United States . . . [is] subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce."). What is more, other comments indicate that a country's decision to prosecute wholly foreign conduct is discretionary. See, e.g., id. at § 403 rep. n.8.

* * * *

5. Comity. International comity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law. See Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 A. J. Int'l L. 280, 281 n.1 (1982). Comity is more an aspiration than a fixed rule, more a matter of grace than

a matter of obligation. In all events, its growth in the antitrust sphere has been stunted by Hartford Fire, in which the Court suggested that comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible. See Hartford Fire, 509 U.S. at 798–99; see also Kenneth W. Dam, Extraterritoriality in an Age of Globalization: The Hartford Fire Case, 1993 Sup. Ct. Rev. 289, 306–07 (1993). Accordingly, the Hartford Fire Court gave short shrift to the defendants' entreaty that the conduct leading to antitrust liability was perfectly legal in the United Kingdom. See Hartford Fire, 509 U.S. at 798–99.

In this case the defendant's comity-based argument is even more attenuated. The conduct with which NPI is charged is illegal under both Japanese and American laws, thereby alleviating any founded concern about NPI being whipsawed between separate sovereigns. And, moreover, to the extent that comity is informed by general principles of reasonableness, see Restatement (Third) of Foreign Relations Law § 403, the indictment lodged against NPI is well within the pale. In it, the government charges that the defendant orchestrated a conspiracy with the object of rigging prices in the United States. If the government can prove these charges, we see no tenable reason why principles of comity should shield NPI from prosecution. We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale. Thus, a ruling in NPI's favor would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect.

We need go no further. Hartford Fire definitively establishes that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States. We are bound to accept that holding. Under settled principles of statutory construction, we also are bound to apply it by interpreting Section One the same way in a criminal case. The

combined force of these commitments requires that we accept the government's cardinal argument, reverse the order of the district court, reinstate the indictment, and remand for further proceedings.

* * * *

On June 13, 1997, Nippon Paper Inc. filed a petition for writ of certiorari to the Supreme Court, which was denied. *Nippon Paper Indus. Co. v. United States*, 522 U.S. 1044 (1998). A brief filed by the United States, opposing the grant of certiorari, addressed the consistency of the First Circuit's opinion with international law, as excerpted below.

The full text of the U.S. brief is available at *www.usdoj.gov/osg/briefs/1996/w961987a.txt.*

---

* * * *

. . . [C]ontrary to the government of Japan's assertion (Amicus Br. 4–5), the First Circuit's decision fully comports with principles of international law. It is well settled that a government may impose civil or criminal sanctions for foreign conduct that is intended to cause and actually causes substantial effects within its territory. 1 Charles C. Hyde, International Law 238, at 798 (2d ed. 1945). That principle was firmly established at the time of the Sherman Act's adoption. See U.S. Department of State, Report on Extraterritorial Crime and The Cutting Case 23–24 (1887); accord 2 John B. Moore, A Digest of International Law 202, at 244 (1906) ("The principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable in the place where the evil is done, is recognized in the criminal jurisprudence of all countries."). Moreover, that principle long has been accepted by this Court, see e.g., Strassheim, 221 U.S. at 285 (Holmes, J.), and is embedded in the "substantial and intended effects" test of Alcoa and Hartford. Accordingly, international law does not support petitioner's contention that the Sherman Act's jurisdictional reach should differ in criminal and civil cases. See also Pet. App. 23a–28a (Lynch, J., concurring).

* * * *

2. Agreements with the European Communities Related to the Application of Competition Laws

a. 1991 Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Competition Laws

On September 23, 1991, the U.S. Government and the Commission of the European Communities entered into the Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Competition Laws. The stated purpose of the agreement was "to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws." Among other things, each party also agreed to "notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party."

The full text of the agreement, excerpted below, is available at *www.usdoj.gov/atr/public/international/docs/ec.htm*.

The Government of the United States of America and the Commission of the European Communities:

Recognizing that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the United States of America and the European Communities;

Noting that the Government of the United States of America and the Commission of the European Communities share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting further that from time to time differences may arise between the Parties concerning the application of their competition

laws to conduct or transactions that implicate significant interests of both Parties;

Having regard to the Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on June 5, 1986; and Having regard to the Declaration on US-EC Relations adopted on November 23, 1990;

Have agreed as follows:

Article I

PURPOSE AND DEFINITIONS

1. The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.

* * * *

Article II

NOTIFICATION

1. Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.

2. Enforcement activities as to which notification ordinarily will be appropriate include those that:

a. Are relevant to enforcement activities of the other Party;
b. Involve anticompetitive activities (other than a merger or acquisition) carried out in significant part in the other Party's territory;
c. Involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or one of its states or member states;
d. Involve conduct believed to have been required, encouraged or approved by the other Party; or
e. Involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.

* * * *

Article IV
COOPERATION AND COORDINATION IN ENFORCEMENT ACTIVITIES

1. The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.

2. In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:

a. the opportunity to make more efficient use of their resources devoted to the enforcement activities;
b. the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;
c. the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and
d. the possibility of reducing costs incurred by persons subject to the enforcement activities.

3. In any coordination arrangement, each Party shall conduct its enforcement activities expeditiously and, insofar as possible, consistently with the enforcement objectives of the other Party.

4. Subject to appropriate notice to the other Party, the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.

Article V
COOPERATION REGARDING ANTICOMPETITIVE ACTIVITIES IN THE TERRITORY OF ONE PARTY THAT ADVERSELY AFFECT THE INTERESTS OF THE OTHER PARTY

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's

competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.
2. If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide.

* * * *

ARTICLE VIII
CONFIDENTIALITY OF INFORMATION
1. Notwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party

a. is prohibited by the law of the Party possessing the information, or
b. would be incompatible with important interests of the Party possessing the information.

2. Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.

* * * *

b. 1998 European Communities-United States Positive Comity Agreement

On June 4, 1998, The United States of America and the European Communities also entered into the Agreement Between the Government of The United States of America

and The European Communities on The Application of Positive Comity Principles in The Enforcement of Their Competition Laws ("Positive Comity Agreement"). The Positive Comity Agreement outlined the procedures under which one party to the Agreement can ask another to use its antitrust laws to address anticompetitive conduct, and set forth a presumption that enforcement would be first attempted by the party in whose territory the majority of the anticompetitive conduct and impact was underway.

The full text of the Positive Comity Agreement is available at *www.usdoj.gov/atr/public/international/docs/1781.htm.* Attorney General Janet Reno and Federal Trade Commission Chairman Robert Pitofsky signed the agreement on behalf of the United States. Excerpts below from a Press Release issued by the Department of Justice explain the importance of the agreement. The full press release is available at *www.usdoj.gov/opa/pr/1998/June/255at.htm.html.*

---

* * * *

Under the agreement, the requesting government or party relies on its counterpart to take action under its own laws, consulting frequently in the process. A positive comity referral will lead to efficient enforcement as each side deals with conduct occurring primarily in its own territory, and should help to resolve disputes over access to foreign markets, the Department said.

* * * *

The existing 1991 antitrust cooperation agreement between the U.S. and the EC contains a provision allowing either side to ask the other to take antitrust enforcement action against practices that harm the requesting party's interests. The new agreement adds a presumption that positive comity will be used in certain situations, and provides details about each party's responsibilities.

Under the new agreement a requesting party will normally defer or suspend enforcement activities in favor of positive comity where anticompetitive conduct occurs in a foreign country but does not directly harm the requesting country's consumers. In

cases where the anticompetitive conduct does harm the requesting country's consumers, the requesting country will still defer or suspend enforcement activities when the conduct occurs principally in and is directed principally towards the other party's territory. This presumption assumes that the requested party will investigate and take appropriate remedial measures inconformity with its own laws. In conducting its investigation, the requested party would also report back to the requesting party on the status of the investigation, notify any changes in enforcement intentions, and comply with any reasonable suggestions of the requesting party.

Notwithstanding the presumption, the agreement contemplates that the parties may pursue separate and parallel enforcement activities where anticompetitive conduct, such as international price fixing cartels, affects both territories and justifies the imposition of penalties within both jurisdictions.

* * * *

Today's agreement allows a party at a later point to decide to initiate or resume its enforcement activities, provided it promptly informs the other party of its intentions and reasons. The agreement does not require a requested party to act if it concludes that enforcement of its laws is not appropriate.

The new agreement does not apply to merger enforcement, where statutory deadlines in the U.S. and EU make the suspension or deferral of investigations inappropriate. Nor does the agreement provide for exchange of confidential business information, unless the consent of the source of the information has been obtained.

* * * *

3. International Antitrust Enforcement Assistance Act (1994)

On November 2, 1994, the President signed into law the International Antitrust Enforcement Assistance Act ("IAEAA"), Pub. L. No. 103–438, 108 Stat 4597 (1994), codified at 15 U.S.C. §§ 6201–6210. New authority for the United States to provide assistance that would otherwise be prohibited from disclosure because of U.S. law made it possible for the

United States to receive reciprocal assistance. Section 7 of the act established a procedure for entering into comprehensive antitrust mutual assistance agreements, requiring publication in the Federal Register not less than 45 days in advance with a request for public comment, and publication again after an agreement was entered into, terminated or amended. When an agreement entered into under this procedure was in effect with a foreign country, the act authorized the Attorney General and the Federal Trade Commission to provide certain evidence and other assistance pursuant to the agreement. Section 2 authorized disclosure of evidence to assist the foreign antitrust authority "(1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or (2) in enforcing any of such foreign antitrust laws." Section 3 authorized the Attorney General and the FTC, in certain circumstances, to conduct investigations in response to a request by a foreign antitrust authority while § 4 authorized U.S. federal courts to order provision of testimony or production of documents or other evidence to assist a foreign antitrust authority in defined circumstances.

Section 5 set forth limitations on the types of information that may be disclosed to foreign antitrust authorities. These restrictions include a prohibition on disclosure of information relating to pre-merger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (§ 7A of the Clayton Act, 15 U.S.C. § 18a), as well as certain grand jury evidence and classified information. Section 8 conditioned the use of antitrust mutual assistance agreements, among other things, on a determination that the foreign antitrust authority would satisfy assurances, terms and conditions required to be included in the agreement under § 12 and comply with confidentiality requirements, provided that the assistance "is consistent with the public interest of the United States."

Assistant Attorney General Anne K. Bingaman testified before the U.S. House of Representatives, Committee on the

Judiciary, Subcommittee on Economic and Commercial Law, in support of the legislation on August 8, 1994. Excerpts below from Ms. Bingaman's prepared statement explained the need for the IAEAA.

The testimony is available in full at *International Antitrust Enforcement Assistance Act of 1994: Hearing on H.R. 4781 Before the Subcommittee on Economic and Commercial Law of the Committee on the Judiciary,* 103 Cong. 22–44 (1994) (statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Department of Justice.)

---

* * * *

A broad consensus has come out of this dialogue [in preparing the legislation]. First, there is agreement that more effective enforcement tools are needed to protect American businesses and consumers from anticompetitive conduct in the international arena. Second, there is agreement that these tools must and can be developed in a way that safeguards confidential business information obtained from American firms from misuse or improper disclosure abroad. H.R. 4781 has been carefully crafted to achieve these objectives. It has been endorsed by companies like American Airlines, Apple Computer, Bethlehem Steel, Chrysler, Inland Steel, USX Corp., Viacom and Xerox.

We live in a global economy, in which the subject matter of antitrust enforcement can be as geographically widespread as the firms and the business activity that affect our nation's markets. Nearly a quarter of the United States' GDP is accounted for by export and import trade, roughly double the figure after World War II.

Today, international considerations in antitrust enforcement are in the mainstream of our enforcement activity. The Antitrust Division currently has some thirty active Sherman Act matters with major international aspects—nearly double the number that were ongoing just one year ago. And the number that were ongoing a year ago was itself high by historical standards, reflecting the renewed emphasis on international enforcement that Jim Rill, my predecessor under President Bush, had already begun.

* * * *

More and more often, the evidence we need is located abroad. Unfortunately, evidence that is located abroad is far too often evidence that is beyond our reach—whether it is in the hands of private firms or individuals, or in the possession of a foreign antitrust enforcement agency. And when we cannot enforce our antitrust laws against foreign anticompetitive conduct because we cannot get the evidence, it is American consumers and American businesses that bear the cost.

The International Antitrust Enforcement Assistance Act would give us the tools we need to get foreign-located antitrust evidence that is beyond our reach today. The bill would enable the Justice Department and the Federal Trade Commission to enlist the help of foreign antitrust enforcers to get crucial antitrust evidence already in the foreign agencies' files, or in the possession of persons in their territory, by allowing us to offer reciprocal assistance in their antitrust investigations.

The Need for Foreign-Located Evidence

I noted a moment ago that the Antitrust Division currently has some thirty active Sherman Act investigations and cases with substantial international aspects. The most difficult challenge in these matters—and too often the biggest frustration—is getting information and documents from outside the United States. Many of these investigations involve straight-out cartel conduct aimed at American businesses and consumers. In several of these investigations, there is a serious possibility we will be unable to get the evidence to prosecute because crucial witnesses or documents are abroad and beyond our reach.

In some of these cases, only the U.S. is targeted and only U.S. antitrust laws are involved. Others of these cartels are aimed at both U.S. and foreign markets, and could be far more effectively investigated and prosecuted by joint action between U.S. and foreign antitrust authorities. In one such investigation recently, we seriously considered launching a coordinated investigation with a foreign antitrust authority; but we recognized that provisions in both our laws would have prevented our sharing the evidence

we obtained in our respective territories. We have good reason to believe the foreign antitrust authority involved could have obtained valuable evidence that was beyond our reach.

* * * *

. . . I know you are familiar with the parallel settlements last month of the U.S. and European Commission antitrust cases against Microsoft. It is absolutely clear that our cooperation with the European Commission in that case led to faster, more effective and consistent relief than would have been possible for either us or the European Commission working alone. . . .

But cooperation in the Microsoft case was possible only because Microsoft agreed that the Justice Department and the European Commission could share information Microsoft had provided to the two agencies. Cooperation with Canada in the plastic dinnerware and fax paper cartel cases was possible only because the U.S.-Canada MLAT came into play. With H.R. 4781 we will be able to expand this kind of cooperation, to come closer to the day when cartels can no longer prey on the American market from safe havens abroad.

All of the antitrust agreements we have entered into in the past with some of our foreign counterparts fall short, because they are limited by existing law. None of these agreements allows the enforcement agencies to share investigative information whose confidentiality is protected under national law. And none of them allows an antitrust agency to obtain information from private parties on a compulsory basis to assist an antitrust investigation in the other country. Even our 1991 agreement with the European Commission—the most recent of our existing antitrust agreements—would not have allowed us to discuss the evidence in our respective cases if Microsoft had not waived its objection to our doing so.

The vital importance of cooperation and access to foreign-located evidence has been recognized in other areas of economic law, where there are cooperative arrangements for access to foreign evidence that far surpass what can be done under present law in antitrust enforcement. Notably, in the securities area—where the internationalization of the securities marketplace beginning in

the 1980's highlighted the need for international cooperation in policing securities markets—the SEC has fifteen memoranda of understanding with its foreign counterparts under which it can obtain confidential investigative information and seek assistance in obtaining overseas evidence, in exchange for the SEC's agreement to reciprocate. Similar arrangements exist for tax law enforcement.

This is the kind of authority we need for antitrust—authority that will expand our ability to protect businesses and consumers from anticompetitive conduct, wherever it takes place, that violates our antitrust laws. We need to be able to ask our foreign counterparts for information in their investigative files. We need to be able to ask our foreign counterparts to obtain information for us from companies and individuals in their territory. And in order to get that kind of cooperation, we need legislation that will allow us to reciprocate.

* * * *

United States–Australia International Antitrust Assistance Agreement

On April 27, 1999, the Department of Justice announced that Attorney General Janet Reno, FTC Chairman Robert Pitofsky and Australian Treasurer Peter Costello had signed the first antitrust mutual assistance agreement under the IAEAA. As noted in a press statement of that date, the agreement had been published for public comment in April 1997 (62 Fed. Reg. 20,022 (Apr. 24, 1997), as corrected 62 Fed. Reg. 24,131 and 24,159 (both May 2, 1997)) and would become effective after publication in the Federal Register and consideration by the Australian Parliament. The press release is available at *www.usdoj.gov/atr/public/press_releases/1999/2382.htm*. The agreement was published May 5, 1999. 64 Fed. Reg. 24,178 (May 5, 1999) and is also available at *www.usdoj.gov/atr/public/international/docs/usaus57.htm*.

4. Bilateral Antitrust Cooperation Agreements

In addition to the antitrust mutual legal assistance agreements authorized by the IAEAA and the two EU agreements, *see* E.2. and 3. *supra,* the Attorney General and the Chairman of the Federal Trade Commission also signed a number of bilateral antitrust cooperation agreements during the 1990s. A new agreement was concluded with Canada in 1995 (replacing the existing 1984 agreement), and agreements were completed with Israel, Japan and Brazil during 1999. These agreements contained provisions for enforcement cooperation and coordination, "positive comity," notification of enforcement actions that might affect the other country, conflict avoidance and consultations with respect to enforcement actions, and effective confidentiality provisions. Texts of these agreements are available on the U.S. Department of Justice Antitrust Division's official web site at *www.usdoj.gov/atr/public/international/int_arrangements.htm*.

5. Antitrust Enforcement Guidelines for International Operations (1995)

In April 1995 the U.S. Department of Justice and the Federal Trade Commission revised, updated, and reissued guidelines for enforcement of the U.S. antitrust laws upon businesses with international operations. Excerpted below is the introduction to the guidelines, which explained the scope and intent of the guidelines, as well as the topics covered. The guidelines also provided a summary list of antitrust-related statutes that may be enforced upon international operations.

The full text of the guidelines are available at *www.usdoj.gov/atr/public/guidelines/internat.htm*.

---

1. INTRODUCTION

For more than a century, the U.S. antitrust laws have stood as the ultimate protector of the competitive process that underlies our free market economy. Through this process, which enhances

consumer choice and promotes competitive prices, society as a whole benefits from the best possible allocation of resources.

Although the federal antitrust laws have always applied to foreign commerce, that application is particularly important today. Throughout the world, the importance of antitrust law as a means to ensure open and free markets, protect consumers, and prevent conduct that impedes competition is becoming more apparent. The Department of Justice ("the Department") and the Federal Trade Commission ("the Commission" or "FTC") (when referred to collectively, "the Agencies"), as the federal agencies charged with the responsibility of enforcing the antitrust laws, thus have made it a high priority to enforce the antitrust laws with respect to international operations and to cooperate wherever appropriate with foreign authorities regarding such enforcement. In furtherance of this priority, the Agencies have revised and updated the Department's 1988 Antitrust Enforcement Guidelines for International Operations, which are hereby withdrawn.

The 1995 Antitrust Enforcement Guidelines for International Operations (hereinafter "Guidelines") are intended to provide antitrust guidance to businesses engaged in international operations on questions that relate specifically to the Agencies' international enforcement policy. They do not, therefore, provide a complete statement of the Agencies' general enforcement policies. The topics covered include the Agencies' subject matter jurisdiction over conduct and entities outside the United States and the considerations, issues, policies, and processes that govern their decision to exercise that jurisdiction; comity; mutual assistance in international antitrust enforcement; and the effects of foreign governmental involvement on the antitrust liability of private entities. In addition, the Guidelines discuss the relationship between antitrust and international trade initiatives. Finally, to illustrate how these principles may operate in certain contexts, the Guidelines include a number of examples.

As is the case with all guidelines, users should rely on qualified counsel to assist them in evaluating the antitrust risk associated with any contemplated transaction or activity. No set of guidelines can possibly indicate how the Agencies will assess the particular facts of every case. Persons seeking more specific advance

statements of enforcement intentions with respect to the matters treated in these Guidelines should use the Department's Business Review procedure, the Commission's Advisory Opinion procedure, or one of the more specific procedures described below for particular types of transactions.

* * * *

Cross-references

Legal analysis of Uruguay Round Agreements as congressional-executive agreement, **Chapter 4.A.2.a.**
Madrid Protocol: EU as eligible party, **Chapter 4.A.5.b.**
Applicability of 1946 FCN Treaty to Taiwan, **Chapter 4.B.2.a.**
Interpretation and applicability of Warsaw Convention, **Chapter 4.B.2.b. & 3.a.**
Expropriation claims under the FSIA, **Chapter 10.A.3.e.**
Economic sanctions, **Chapter 16.**
OPIC agreement with UNMIK, **Chapter 17.B.3.b.(2).**

Chapter 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA

1. United Nations Convention on the Law of the Sea

a. U.S. transmittal to Senate for advice and consent

On July 29, 1994, the United States signed the Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea ("1994 Agreement"), available at *www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm*. On October 7, 1994, President William J. Clinton transmitted the 1994 Agreement and the UN Convention on the Law of the Sea ("UNCLOS"), 1836 U.N.T.S.41, to the Senate for advice and consent to ratification of the 1994 Agreement and to accession to UNCLOS. S. Treaty Doc. No. 103–39 (1994). The text of UNCLOS is reprinted at 21 I.L.M. 1261 (1982), also available at *http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm*.

As noted in the excerpts below from the President's letter transmitting the instruments to the Senate and from the report of the Department of State submitting the instruments to the President, the United States had long been a strong supporter of the need for a widely accepted and comprehensive law of the sea convention. At the time UNCLOS was adopted in 1982, however, the United States decided not to sign because of objections to the regime it would

have established in Part XI for managing the development of seabed mineral resources beyond national jurisdiction, a view shared by other major industrialized nations. The changes to that regime contained in the 1994 Agreement were described in the President's letter as "meet[ing] the objections of the United States and other industrialized nations previously expressed to Part XI."

UNCLOS entered into force for States Parties on November 16, 1994. The 1994 Agreement provided for provisional application as of that date, pending its entry into force or until November 16, 1998, whichever was earlier. The 1994 Agreement entered into force definitively on July 28, 1996. The Senate Foreign Relations Committee held hearings on the two instruments on October 14 and 21, 2003, but at the time this volume was going to press neither had yet received the Senate's advice and consent.

Other documents referred to in the excerpts that follow, including an extensive commentary prepared by the Department of State on the provisions of the two instruments, are included in S. Treaty Doc. No. 103–39, *reprinted in* 34 I.L.M. 1393 (1995) and 6 Dep't St. Dispatch Supp.1 (Feb. 1995), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*. *See also Cumulative Digest 1981–1988* at 2006–14, *Digest 2001* at 675–76.

To the Senate of the United States:

I transmit herewith, for the advice and consent of the Senate to accession, the United Nations Convention on the Law of the Sea, with Annexes, done at Montego Bay, December 10, 1982 (the "Convention"), and, for the advice and consent of the Senate to ratification, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, with Annex, adopted at New York, July 28, 1994 (the "Agreement"), and signed by the United States, subject to ratification, on July 29, 1994. Also transmitted for the information of the Senate is the report of the Department of State with respect to the Convention and Agreement, as well as

Resolution II of Annex I and Annex II of the Final Act of the Third United Nations Conference on the Law of the Sea.

The United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea. Since the late 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea that will be respected by all countries. Each succeeding U.S. Administration has recognized this as the cornerstone of U.S. oceans policy. Following adoption of the Convention in 1982, it has been the policy of the United States to act in a manner consistent with its provisions relating to traditional uses of the oceans and to encourage other countries to do likewise.

* * * *

Notwithstanding [the] beneficial provisions of the Convention and bipartisan support for them, the United States decided not to sign the Convention in 1982 because of flaws in the regime it would have established for managing the development of mineral resources of the seabed beyond national jurisdiction (Part XI). . . .

. . . The Agreement, signed by the United States on July 29, 1994, fundamentally changes the deep seabed mining regime of the Convention. As described in the report of the Secretary of State, the Agreement meets the objections the United States and other industrialized nations previously expressed to Part XI. It promises to provide a stable and internationally recognized framework for mining to proceed in response to future demand for minerals.

Early adherence by the United States to the Convention and the Agreement is important to maintain a stable legal regime for all uses of the sea, which covers more than 70 percent of the surface of the globe. Maintenance of such stability is vital to U.S. national security and economic strength.

I therefore recommend that the Senate give early and favorable consideration to the Convention and to the Agreement and give its advice and consent to accession to the Convention and to ratification of the Agreement. Should the Senate give such advice and consent, I intend to exercise the options concerning dispute

settlement recommended in the accompanying report of the Secretary of State.

LETTER OF SUBMITTAL

* * * *

THE CONVENTION

The Convention provides a comprehensive framework with respect to uses of the oceans. It creates a structure for the governance and protection of all marine areas, including the airspace above and the seabed and subsoil below. After decades of dispute and negotiation, the Convention reflects consensus on the extent of jurisdiction that States may exercise off their coasts and allocates rights and duties among States. The Convention provides for a territorial sea of a maximum breadth of 12 nautical miles and coastal State sovereign rights over fisheries and other natural resources in an Exclusive Economic Zone (EEZ) that may extend to 200 nautical miles from the coast. In so doing, the Convention brings most fisheries under the jurisdiction of coastal States. (Some 90 percent of living marine resources are harvested within 200 nautical miles of the coast.) The Convention imposes on coastal States a duty to conserve these resources, as well as obligations upon all States to cooperate in the conservation of fisheries populations on the high seas and such populations that are found both on the high seas and within the EEZ (highly migratory stocks, such as tuna, as well as "straddling stocks"). In addition, it provides for special protective measures for anadromous species, such as salmon, and for marine mammals, such as whales.

The Convention also accords the coastal State sovereign rights over the exploration and development of non-living resources, including oil and gas, found in the seabed and subsoil of the continental shelf, which is defined to extend to 200 nautical miles from the coast or, where the continental margin extends beyond that limit, to the outer edge of the geological continental margin. It lays down specific criteria and procedures for determining the outer limit of the margin.

The Convention carefully balances the interests of States in controlling activities off their own coasts with those of all States in protecting the freedom to use ocean spaces without undue interference. It specifically preserves and elaborates the rights of military and commercial navigation and overflight in areas under coastal State jurisdiction and on the high seas beyond. It guarantees passage for all ships and aircraft through, under and over straits used for international navigation and archipelagos. It also guarantees the high seas freedoms of navigation, overflight and the laying and maintenance of submarine cables and pipelines in the EEZ and on the continental shelf.

For the non-living resources of the seabed beyond the limits of national jurisdiction (i.e., beyond the EEZ or continental margin, whichever is further seaward), the Convention establishes an international regime to govern exploration and exploitation of such resources. It defines the general conditions for access to deep seabed minerals by commercial entities and provides for the establishment of an international organization, the International Seabed Authority, to grant title to mine sites and establish necessary ground rules. The system was substantially modified by the 1994 Agreement, discussed below.

The Convention sets forth a comprehensive legal framework and basic obligations for protecting the marine environment from all sources of pollution, including pollution from vessels, from dumping, from seabed activities and from land-based activities. It creates a positive and unprecedented regime for marine environmental protection that will compel parties to come together to address issues of common and pressing concern. As such, the Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time.

The essential role of marine scientific research in understanding and managing the oceans is also secured. The Convention affirms the right of all States to conduct marine scientific research and sets forth obligations to promote and cooperate in such research. It confirms the rights of coastal States to require consent for such research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that coastal States exercise the consent authority in a predictable

and reasonable fashion to promote maximum access for research activities.

The Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, in providing options as to the appropriate means and fora for resolution of disputes, and comprehensive, in subjecting the bulk of the Convention's provisions to enforcement through binding mechanisms. The system also provides Parties the means of excluding from binding dispute settlement certain sensitive political and defense matters.

Further analysis of provisions of the Convention's 17 Parts, comprising 320 articles and nine Annexes, is set forth in the Commentary that is enclosed as part of this Report.

THE AGREEMENT

The achievement of a widely accepted and comprehensive law of the sea convention—to which the United States can become a Party—has been a consistent objective of successive U.S. administrations for the past quarter century. However, the United States decided not to sign the Convention upon its adoption in 1982 because of objections to the regime it would have established for managing the development of seabed mineral resources beyond national jurisdiction. While the other Parts of the Convention were judged beneficial for U.S. ocean policy interests, the United States determined the deep seabed regime of Part XI to be inadequate and in need of reform before the United States could consider becoming Party to the Convention.

Similar objections to Part XI also deterred all other major industrialized nations from adhering to the Convention. However, as a result of the important international political and economic changes of the last decade—including the end of the Cold War and growing reliance on free market principles—widespread recognition emerged that the seabed mining regime of the Convention required basic change in order to make it generally acceptable. As a result, informal negotiations were launched in 1990, under the auspices of the United Nations Secretary-General, that resulted in adoption of the Agreement on July 28, 1994.

The legally binding changes set forth in the Agreement meet the objections of the United States to Part XI of the Convention. The United States and all other major industrialized nations have signed the Agreement.

The provisions of the Agreement overhaul the decision-making procedures of Part XI to accord the United States, and others with major economic interests at stake, adequate influence over future decisions on possible deep seabed mining. The Agreement guarantees a seat for the United States on the critical executive body and requires a consensus of major contributors for financial decisions.

The Agreement restructures the deep seabed mining regime along free market principles and meets the U.S. goal of guaranteed access by U.S. firms to deep seabed minerals on the basis of reasonable terms and conditions. It eliminates mandatory transfer of technology and production controls. It scales back the structure of the organization to administer the mining regime and links the activation and operation of institutions to the actual development of concrete commercial interest in seabed mining. A future decision, which the United States and a few of its allies can block, is required before the organization's potential operating arm (the Enterprise) may be activated, and any activities on its part are subject to the same requirements that apply to private mining companies. States have no obligation to finance the Enterprise, and subsidies inconsistent with GATT are prohibited.

The Agreement provides for grandfathering the seabed mine site claims established on the basis of the exploration work already conducted by companies holding U.S. licenses on the basis of arrangements "similar to and no less favorable than" the best terms granted to previous claimants; further, it strengthens the provisions requiring consideration of the potential environmental impacts of deep seabed mining.

The Agreement provides for its provisional application from November 16, 1994, pending its entry into force. Without such a provision, the Convention would enter into force on that date with its objectionable seabed mining provisions unchanged. Provisional application may continue only for a limited period, pending entry into force. Provisional application would terminate on November 16, 1998, if the Agreement has not entered into

force due to failure of a sufficient number of industrialized States to become Parties. Further, the Agreement provides flexibility in allowing States to apply it provisionally in accordance with their domestic laws and regulations.

In signing the agreement on July 29, 1994, the United States indicated that it intends to apply the agreement provisionally pending ratification. Provisional application by the United States will permit the advancement of U.S. seabed mining interests by U.S. participation in the International Seabed Authority from the outset to ensure that the implementation of the regime is consistent with those interests, while doing so consistent with existing laws and regulations.

Further analysis of the Agreement and its Annex, including analysis of the provisions of Part XI of the Convention as modified by the Agreement, is also set forth in the Commentary that follows.

STATUS OF THE CONVENTION AND THE AGREEMENT

One hundred and fifty-two States signed the Convention during the two years it was open for signature. As of September 8, 1994, 65 States had deposited their instruments of ratification, accession or succession to the Convention. The Convention will enter into force for these States on November 16, 1994, and thereafter for other States 30 days after deposit of their instruments of ratification or accession.

The United States joined 120 other States in voting for adoption of the Agreement on July 28, 1994; there were no negative votes and seven abstentions. As of September 8, 1994, 50 States and the European Community have signed the Agreement, of which 19 had previously ratified the Convention. Eighteen developed States have signed the Agreement, including the United States, all the members of the European Community, Japan, Canada and Australia, as well as major developing countries, such as Brazil, China and India.

RELATION TO THE 1958 GENEVA CONVENTIONS

Article 311(1) of the LOS Convention provides that the Convention will prevail, as between States Parties, over the four Geneva

Conventions on the Law of the Sea of April 29, 1958, which are currently in force for the United States: the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, TIAS No. 5639, 516 U.N.T.S. 205 (entered into force September 10, 1964); the Convention on the High Seas, 13 U.S.T. 2312, TIAS No. 5200, 450 U.N.T.S. 82 (entered into force September 30, 1962); Convention on the Continental Shelf, 15 U.S.T. 471, TIAS No. 5578, 499 U.N.T.S. 311 (entered into force June 10, 1964); and the Convention on Fishing and Conservation of Living Resources of the High Seas, 17 U.S.T. 138, TIAS No. 5969, 559 U.N.T.S. 285 (entered into force March 20, 1966). Virtually all of the provisions of these Conventions are either repeated, modified, or replaced by the provisions of the LOS Convention.

DISPUTE SETTLEMENT

The Convention identifies four potential fora for binding dispute settlement:

> —The International Tribunal for the Law of the Sea constituted under Annex VI;
> —The International Court of Justice;
> —An arbitral tribunal constituted in accordance with Annex VII; and
> —A special arbitral tribunal constituted in accordance with Annex VIII for specified categories of disputes.

A State, when adhering to the Convention, or at any time thereafter, is able to choose, by written declaration, one or more of these means for the settlement of disputes under the Convention. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree. If a Party has failed to announce its choice of forum, it is deemed to have accepted arbitration in accordance with Annex VII. I recommend that the United States choose special arbitration for all the categories of disputes to which it may be applied and Annex VII arbitration for disputes not covered by

the above, and thus that the United States make the following declaration:

The Government of the United States of America declares, in accordance with paragraph 1 of Article 287, that it chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention:

> (A) a special arbitral tribunal constituted in accordance with Annex VIII for the settlement of disputes concerning the interpretation or application of the articles of the Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation, including pollution from vessels and by dumping, and (B) an arbitral tribunal constituted in accordance with Annex VII for the settlement of disputes not covered by the declaration in (A) above.

Subject to limited exceptions, the Convention excludes from binding dispute settlement disputes relating to the sovereign rights of coastal States with respect to the living resources in their EEZs. In addition, the Convention permits a State to opt out of binding dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the United Nations Security Council is exercising the functions assigned to it by the Charter of the United Nations.

I recommend that the United States elect to exclude all three of these categories of disputes from binding dispute settlement, and thus that the United States make the following declaration:

> The Government of the United States of America declares, in accordance with paragraph 1 of Article 298, that it does not accept the procedures provided for in section 2 of Part XV with respect to the categories of disputes set forth in subparagraphs (a), (b) and (c) of that paragraph.

* * * *

b. Strategic context of the law of the sea

On April 22, 1992, Rear Admiral William L. Schachte, Jr., Judge Advocate General's Corps, U.S. Navy, addressed the International Law of the Sea Conference in Valparaiso, Chile, on the status and importance of the 1982 Convention on the Law of the Sea. In particular, his remarks focused on the vital interests of national security, commercial relations, and global stability, as provided in excerpts below.

The full text of Rear Admiral Schachte's remarks is available at *www.state.gov/s/l/c8183.htm*.

* * * *

From a U.S. point of view, while the specific threats we will face in the years ahead undoubtedly will be different from those that have dominated our thinking over the past forty years, capable, vigilant forces will be required to deter aggression and, if deterrence fails, to defend vital interests. As stated in the recently published *National Security Strategy of the United States*, the foundations of this strategy are: ensuring strategic deterrence; exercising forward presence in key areas; responding effectively to crises; and retaining the national capacity to reconstitute forces should this ever be needed.[1]

Each of these foundations is dependent, in significant part, on exercising navigation and overflight rights and other traditional uses of the oceans in a manner that is consistent with the 1982 UN Convention on the Law of the Sea. (fn. omitted).

It is widely recognized by the international community that these provisions provide a fair balance between coastal and maritime interests, and this was also pointed out by President Reagan in his 1983 Ocean Policy Statement.[3] This balance includes

[1] National Security Strategy of the United States, The White House, August 1991. [Available from the U.S. Government Printing Office, Superintendent of Documents, Washington, DC]

* * * *

[3] Statement by the President on United States Ocean Policy, 19 Weekly Comp. Pres. Doc. 353–85 (1983); 22 I.L.M. 461 (1983).

the preservation of vital navigational freedoms relied upon by our naval forces and much of our commerce. Just as importantly, since the close of the Conference that produced the 1982 U.N. Convention on the Law of the Sea, the Convention has served as a basis for settling differences between nations and for persuading nations to adopt maritime regimes consistent with customary international law as reflected in the Convention. Thus, upholding the integrity of the Convention (aside from Part XI) is in the interest of both maritime and littoral nations. It is in their interest to ensure that the Convention remains the principal articulation of the law of the sea.

A case in point is how the exercise of the navigational rights and freedoms embodied in the 1982 Convention are used by naval forces. In many States, these rights and responsibilities are a prominent component of operating guidance and orders used by forces at all levels, who look to the Convention as an authoritative embodiment of rules for the maritime environment. For the United States, an example of the Convention's influence and impact is the Commander's Handbook on the Law of Naval Operations, a U.S. Navy and U.S. Marine Corps warfare publication, which addresses both the law of the sea and law of naval warfare.[4] For military lawyers, an Annotated version has been developed, containing legal analyses, citations, and supplementary annexes.[5]

Law of the Sea—Current Status

While the 1982 Convention has not entered into force, it continues to serve important functions. The Convention's most significant impact comes not from producing new law, but from restating and codifying existing law, especially in the navigation, overflight, and other traditional use articles. By serving as a single source of authority for the content and meaning of customary

[4] The Commander's Handbook on the Law of Naval Operations, Naval Warfare Publication 9, Rev. A/FMFM 1–10 (1989).

[5] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, Naval Warfare Publication 9, Rev. A/FMFM 1–10 (1989).

international law, it should guide the behavior of nations, promoting stability of expectations, and providing a framework for issue resolution.

Nothing illustrates this better than our recent experiences in the Persian Gulf. After Iraqi forces invaded Kuwait, the United States demonstrated its resolve by promptly moving forward naval forces already deployed in the region. In order to confront the Iraqi aggression, a massive deployment of troops followed, most arriving by sea. (fn. omitted) As a member of the coalition, the United States undertook its largest strategic sealift of supplies in history, with more than 250 ships carrying nearly 18.5 billion pounds of equipment and supplies to sustain DESERT SHIELD and DESERT STORM forces. (fn. omitted) Also, in the ten-month period starting in August 1990, the coalition's maritime interception force of more than 165 ships from 14 allied nations challenged more than 10,000 merchant vessels, boarding nearly 1,500 to inspect manifests and cargo holds and diverting over 75 vessels for violation of UN sanction guidelines. (fn. omitted) While enroute to the Gulf area and while performing their duties on arrival, coalition ships and aircraft repeatedly exercised the rights of innocent passage, transit passage, archipelagic sea lanes passage, and high seas freedoms confirmed by the 1982 Convention.

Thus, DESERT SHIELD and DESERT STORM demonstrated, in a very tangible way, the absolute necessity for successful power projection, which cannot be accomplished without seapower. And seapower relies on freedom of navigation and overflight—freedoms guaranteed as a matter of international law and reflected in the Convention.

Another example of the Convention's impact today is marine environmental protection. In this regard, many nations, including the United States, believe that the Convention reflects customary international law for protecting and preserving the marine environment and is the first comprehensive approach to addressing this important area. The Convention is comprehensive in that it: (1) addresses State responsibility to curb all sources of marine pollution, and (2) requires those efforts give due regard to important maritime uses such as marine scientific research. The Convention also codifies basic navigational rights such as innocent passage in

the territorial sea, high seas freedoms beyond the territorial sea, transit passage through straits and sea lanes passage through archipelagic waters.

Environmental regimes must be consistent with those rights. The Convention thus recognizes the delicate balance between protecting and preserving the environment and other competing interests, and provides the balanced framework for environmental norms that now are being further developed.

From a national security perspective, an important example of this balancing of interests is the special nature of sovereign immune vessels and aircraft set forth in Article 236. While this article excludes sovereign immune vessels and aircraft from the Convention's environmental provisions, it requires that each State ensure that such ships and aircraft act in a manner consistent with those provisions "so far as is reasonable and practicable" without impairing their operations or operational capabilities.

States cannot use or construe the sovereign immunity provision to avoid responsibility for protecting the environment. In fact, the U.S. Department of Defense and the U.S. Navy view Part XII and Article 236 of the Convention as a mandate to ensure continued responsibility for environmentally sound practices, and have included environmental awareness programs in Department of Defense activities as part of the national security mission. (fn. omitted) Examples include incorporation of hardware on board our ships to remove oil from bilge discharges, installing shipboard trash compactors, using recycled steel grit and plastic beads to remove old paint (instead of toxic chemical methods), and revising procurement practices (which has been successful in removing or reducing plastic packaging of over 70,000 items in our supply system).[10]

State practice also demonstrates widespread acknowledgement that the non-deep seabed mining provisions of the Convention reflect customary international law. For example, as of January,

---

[10] Statement by Assistant Secretary of the Navy (Installations & Environment) Jacqueline E. Schafer, S*tatement for the Record,* Senate Armed Services Committee, Subcommittee on Environmental Research and Development 3 (May 14, 1991).

1992, 133 States have established territorial seas not exceeding 12 miles, 33 States have adopted a 24-mile contiguous zone, and 82 States have established an exclusive economic zone extending 200 miles, measured from the baseline used to determine the breadth of the territorial sea.[11]

* * * *

2. Extension of U.S. Contiguous Zone

On September 2, 1999, President William J. Clinton issued Proclamation 7219 establishing the contiguous zone of the United States as extending to 24 nautical miles, consistent with international law, as excerpted below. 35 WEEKLY COMP. PRES. DOC. 1684 (Sept. 2, 1999); 64 Fed. Reg. 48,701 (Sept. 8, 1999).

See Chapter 4.B.3.b. for analysis of applicable treaty and customary international law.

---

* * * *

International law recognizes that coastal nations may establish zones contiguous to their territorial seas, known as contiguous zones.

The contiguous zone of the United States is a zone contiguous to the territorial sea of the United States, in which the United States may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations committed within its territory or territorial sea.

Extension of the contiguous zone of the United States to the limits permitted by international law will advance the law enforcement and public health interests of the United States.

---

[11] Ocean Policy News, January 1992, p. 5, Council on Ocean Law, Washington, DC.

Moreover, this extension is an important step in preventing the removal of cultural heritage found within 24 nautical miles of the baseline.

NOW, THEREFORE, I, WILLIAM J. CLINTON, by the authority vested in me as President by the Constitution of the United States, and in accordance with international law, do hereby proclaim the extension of the contiguous zone of the United States of America, including the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty, as follows:

The contiguous zone of the United States extends to 24 nautical miles from the baselines of the United States determined in accordance with international law, but in no case within the territorial sea of another nation.

In accordance with international law, reflected in the applicable provisions of the 1982 Convention on the Law of the Sea, within the contiguous zone of the United States the ships and aircraft of all countries enjoy the high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines, and compatible with the other provisions of international law reflected in the 1982 Convention on the Law of the Sea.

Nothing in this proclamation:

(a) amends existing Federal or State law;
(b) amends or otherwise alters the rights and duties of the United States or other nations in the Exclusive Economic Zone of the United States established by Proclamation 5030 of March 10, 1983; or
(c) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

3. Maritime Boundary Treaties

a. United States-Mexico

On October 22, 1997, the Senate Committee on Foreign Relations ("SFRC") reported favorably the Treaty on Maritime Boundaries between the United States of America and the United Mexican States, signed at Mexico City on May 4, 1978, and recommended that the Senate give its advice and consent to ratification. S. Exec. Rpt. No. 105–4 (1997). As explained in the SFRC report, the treaty "is intended to establish the maritime boundary between the United States and Mexico for the area between twelve and two hundred nautical miles off the coasts of the two countries in the Pacific Ocean and the Gulf of Mexico. The treaty was transmitted to the Senate by President Jimmy Carter on January 19, 1979. S. Treaty Doc. No. 96–6 (1979). It was originally favorably reported to the Senate on July 24, 1980, but was not considered by the full Senate at that time.

The SFRC report explained that, during the Committee's 1980 consideration of the treaty, three issues were raised: "(1) the method used to calculate the boundaries; (2) the allocation to Mexico of a large region in the Gulf of Mexico with an undetermined oil potential, and (3) the legality of the Administration establishing maritime boundaries on a provisional basis by means of executive agreements," as had been done since 1976 with Mexico. In 1997, the Committee concluded that ratification of the treaty would "advance the exploration and development of this area."

Answers to questions for the record posed to Ambassador Mary Beth West, Deputy Assistant Secretary, Bureau of Oceans, Environmental and International Scientific Affairs, U.S. Department of State, were included in S. Exec. Rpt. No. 105–4. Responses to questions on the issue of provisional applicability and concerning gaps not covered by the treaty, as well as oil potential are excerpted below.

The Senate gave advice and consent to ratification on October 23, 1997, and the treaty entered into force on

November 13, 1997. For a discussion of the subsequent Treaty Between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, signed at Washington on June 9, 2000 and entered into force on January 17, 2001, *see Digest 2000* at 697–700.

---

* * * *

Question 1. The exchange of notes accompanying the treaty stated that the two parties would recognize the provisional boundaries set forth in the notes "pending final determination by treaty of the Maritime Boundaries between the two countries off both coasts." The Committee opposed the "provisional" boundary in 1980. What is the legal basis for determining maritime boundaries by executive agreement? Doesn't the fact that the Administration, in its testimony before the Committee last week, cited the need for "legal certainty" as to the border between the U.S. and Mexico indicate that the "provisional" boundary is not an appropriate legal instrument for settling boundaries?

Answer. The Administration fully acknowledges and respects the role of the Senate in the treaty making process. The exchange of notes associated with this treaty, which stated that the two parties would recognize the provisional boundaries set forth in the notes pending final determination by treaty, was within executive power vested in the President, and did not prejudice the prerogatives of the Senate regarding the provision of advice and consent.

As a practical matter, the Administration has viewed the provisional boundary reflected in the exchange of notes as a transitional tool which, pending entry into force of the treaty, has facilitated the exercise of jurisdiction by each side in its respective 200-mile zone. It should be remembered that, at the time of the exchange of notes, the United States and Mexico had recently established their respective 200-mile zones. The provisional boundary dividing these zones has greatly reduced the likelihood of disputes concerning, inter alia, where fishing vessels of each country could operate.

Question 2. The maritime boundaries treaty with Mexico addressed only those areas in the Gulf where U.S. and Mexican claims overlapped, and as a result left a gap of about 129 miles between the eastward and westward boundaries where there was no overlap. That gap was justified in part on the basis that negotiations over the reach and allocation of the continental shelf were still in process in the Law of the Sea proceedings. Is Mexico prepared to negotiate a follow-on treaty delimiting the "gap" areas?

Answer. We have raised the issue of delimiting the continental shelf in the western gap with Mexican Government officials, and have been informed that their desire was first to get the 1978 Treaty in force. It is our intent, at the time instruments of ratification are exchanged for the 1978 treaty, to propose early talks to establish a continental shelf boundary in this 129-mile gap.

Question 3. Action on the treaty in 1980 was apparently forestalled because of concerns about the oil potential of the Gulf region ceded to Mexico. What is the oil potential of the Gulf Region claimed by Mexico? By the United States? What is the oil potential of the Pacific Region claimed by the United States? Of Mexico? Does the technology exist to exploit that potential? What is the realistic timetable for exploitation of these regions?

Answer. The resource potential in the boundary areas was discussed in the 1982 U.S. Geological Survey study submitted to the Committee. A more recent general assessment for the Gulf of Mexico by the Minerals Management Service (MMS) did not evaluate the specific boundary areas. The estimate for the area between 900 meters water depth and the Sigsbee Escarpment in the Gulf was between 3.0 and 5.4 billion barrels of oil and 34.2 and 39.4 trillion cubic feet of natural gas. Recent exploratory drilling elsewhere beyond the Sigsbee Escarpment has indicated that hydrocarbon accumulations do exist within these sediments. Thus, the area adjacent to the U.S.-Mexico boundary in the Gulf of Mexico is an area of high potential, as confirmed by recent industry interest.

* * * *

b. U.S.-U.K. treaties concerning the Caribbean

On March 9, 1994, President William J. Clinton transmitted two maritime boundary treaties with the United Kingdom to the Senate for advice and consent to ratification: Treaty Between the United States and the United Kingdom on the Delimitation in the Caribbean of a Maritime Boundary Relating to the U.S. Virgin Islands and Anguilla and the Treaty Between the United States and United Kingdom on the Delimitation in the Caribbean of a Maritime Boundary Relating to Puerto Rico/U.S. Virgin Islands and the British Virgin Islands, with Annex, both signed at London, November 5, 1993. 1913 U.N.T.S. 59 and 67, respectively. Excerpts below from the report of the Department of State submitting the treaties to the President and accompanying the President's letter of transmittal describe key elements of the treaties. *See* S. Treaty Doc. No. 103–23 (1994). Both treaties entered into force June 1, 1995. The treaties are also analyzed in Department of State publication Limits in the Seas No. 115 (1994), available at *www.law.fsu.edu/library/collection/LimitsinSeas/index.php.*

---

* * * *

THE PRESIDENT: I have the honor to submit to you, with a view to the transmittal to the Senate for its advice and consent to ratification, the Treaty between the United States and the United Kingdom on the Delimitation in the Caribbean of a Maritime Boundary Relating to the U.S. Virgin Islands and Anguilla and the Treaty between the United States and United Kingdom on the Delimitation in the Caribbean of a Maritime Boundary Relating to Puerto Rico/U.S. Virgin Islands and the British Virgin Islands, with Annex. Both treaties were signed at London, November 5, 1993. For the purpose of illustration only, the boundary lines have been drawn on maps attached to each treaty.

The maritime boundary treaties define the limits within which each Party may exercise territorial sea jurisdiction, fishery jurisdiction, or exclusive economic zone jurisdiction in areas where their

claimed territorial seas or 200 nautical mile zones would otherwise overlap.

On March 1, 1977, the United States enacted the Fishery Conservation and Management Act of 1976, which established a fisheries zone contiguous to the territorial sea of the United States, including the territorial sea around Puerto Rico and the U.S. Virgin Islands. The outer limit of the U.S.-claimed fishery zone adjacent to the United Kingdom fishery zone was a line equally distant from the territories of the United States and the United Kingdom. In 1983, this became the limit of the United States exclusive economic zone.

On March 9, 1977, by Proclamation of the Governor of the British Virgin Islands, a fisheries zone was established contiguous to the territorial sea of the British Virgin Islands. On November 6, 1981, by Proclamation No. 28, the United Kingdom extended the fishery limits of Anguilla to 200 nautical miles.

On March 27, 1979, the United States and United Kingdom signed a reciprocal fisheries agreement applying to the waters between the United States Caribbean territories and the British Virgin Islands. This agreement entered into force upon the exchange of instruments of ratification on March 10, 1983, following advice and consent to ratification by the Senate (TIAS 10545). In this agreement, the two Governments noted that they had a common approach based on the principle of equidistance regarding the limits of fishery jurisdiction as between the British Virgin Islands and the United States.

In 1980, both Governments agreed to undertake the technical work necessary to determine equidistant lines as the maritime boundaries between the United States and the British Virgin Islands and between the United States and Anguilla. During the 1980s, new coastline surveys were conducted on these islands in order to establish maritime boundaries based on the best available technology. Accurate delimitation of the boundaries called for determining the exact location of the base points on each coast from which to construct the equidistant line. This determination involved placing all geographical locations on a common datum, the North American Datum 1983 (NAD 83). The technical data was available by the early 1990s, and the technical calculations were completed by mid-1993.

In the calculation of the maritime boundary with the British Virgin Islands, simplification of the equidistant line was performed in order to reduce the number of boundary turning points from 126 to a more manageable 50 points.

* * * *

c. United States—Niue

On June 23, 1998, President William J. Clinton transmitted to the Senate for advice and consent to ratification the Treaty Between the Government of the United States of America and the Government of Niue on the Delimitation of a Maritime Boundary, signed in Wellington May 13, 1997. The treaty is also analyzed in Department of State publication Limits in the Seas No. 119 (1997), available at *www.law.fsu.edu/library/collection/LimitsinSeas/index.php*. The Senate gave advice and consent to ratification on August 1, 2002. The treaty entered into force October 8, 2004. Excerpts below from the Department of State report submitting the treaty to the President for transmittal to the Senate describe key aspects. *See* S. Treaty Doc. No. 105–53 (1998).

The President: I have the honor to submit to you, with a view to the transmittal to the Senate for its advice and consent to ratification, the Treaty between the Government of the United States and the Government of Niue on the Delimitation of a Maritime Boundary. This treaty was signed at Wellington, May 13, 1997. For the purpose of illustration only, the boundary has been drawn on a map attached to the treaty.

The maritime boundary treaty defines the limit within which each Party may exercise fishery and other exclusive economic zone (EEZ) jurisdiction in an area where their claimed 200 nautical mile zones would otherwise overlap.

On March 1, 1977, the United States enacted the Fishery Conservation and Management Act of 1976, which established a

fisheries zone contiguous to the territorial sea of the United States, including the territorial sea around American Samoa. As published in the Federal Register, the United States claimed a fishery zone adjacent to American Samoa as a line equally distant from American Samoa and its neighbors. In 1983, this became the limit of the United States exclusive economic zone.

The Government of Niue first claimed an exclusive economic zone by Act No. 38, effective April 1, 1978. It reiterated its EEZ claim when it enacted the Territorial Sea and Exclusive Economic Zone Act of 1996, which entered into force April 7, 1997.

In 1980, the United States concluded maritime boundary treaties with the Cook Islands and with New Zealand (on behalf of Tokelau) that established maritime boundaries to the east and to the north of American Samoa, respectively. Equidistant lines formed the bases for these boundaries. Following the exchange of instruments of ratification, the boundary treaty with New Zealand entered into force on September 3, 1983; the boundary treaty with the Cook Islands entered into force on September 8, 1983.

In the early 1980s, the Government of the United States and Niue agreed, in principle, that a maritime boundary should be established based on an equidistant line calculated from all relevant territories. No special circumstances exist in the boundary region. The water is deep in this area, and no particular resource issue was identified that required a deviation from an equidistant line.

Both Parties recognized, however, that new coastal geodetic positioning survey work was required for both the American Samoan islands and Niue in order to update existing information, and to place all relevant coastlines on a common datum. Technical work was conducted by both sides during the 1980s and early 1990s. Positioning of coastal areas was placed on the more accurate World Geodetic System 1984 ("WGS 84") and the North American Datum 1983 ("NAD 83"). For the purposes of calculating this boundary, both datums were considered identical.

Prior to signature of the treaty, the political status of Niue was also addressed. Niue is in free association with New Zealand. While Niue is self-governing on internal matters, it conducts its foreign affairs in conjunction with New Zealand. Niue has declared, and does manage, its exclusive economic zone. Therefore,

the United States requested, and received, confirmation from New Zealand that the Government of Niue had the competence to enter into this agreement with the United States.

* * * *

4. Maritime Rights and Freedoms of International Community

a. General

See discussion of UN Convention on the Law of the Sea as relevant to these issues in A.1., *supra*. *See also* J. Ashley Roach & Robert W. Smith, United States Responses to Excessive Maritime Claims (2d ed. 1996) (hereafter "Roach and Smith").

b. Legal divisions of oceans

(1) Contiguous zone claims

During the period 1991–1999, the United States protested claims to a contiguous zone that exceeded the rights permitted coastal states under international law, usually involving attempts to expand the competence of the contiguous zone to include protection of national security interests. Protests by the United States included those made to China in August 1992 and to Iran in June 1994. *See* Roach & Smith at 166–171.

(2) Historic bay claims

In April 1991 the United States delivered a diplomatic note protesting Australia's historic bay claims in South Australia. The substantive portions of the note, as set forth below, were contained in a telegram from the U.S. Department of State to the U.S. Embassy in Canberra, April 6, 1991.

The United States . . . refers to the proclamation of the Governor-General of the Commonwealth of Australia signed on 19 March 1987 and published in the Commonwealth of Australia Gazette No. S57, Tuesday, 31 March 1987, pages 2–4, in which the Governor-General states that he is "satisfied that the following bays, namely: Anxious Bay, Encounter Bay, Lacepede Bay and Rivoli Bay is an historic bay," and proclaims a series of straight baselines across the mouths of those bays which do not appear to meet the criterion for juridical bays.

The United States has reviewed the report of the Commonwealth/South Australian Committee dated February 1986, entitled "South Australian Historic Bays Issue," which the Australian Embassy has kindly provided in response to the request of the United States for evidence that these claims meet the internationally accepted criteria for establishing claims to historic bays.

These criteria require a claiming state to show: a) open, notorious and effective exercise of authority over the bay by the coastal state; b) continuous exercise of that authority; and c) acquiescence by foreign states in the exercise of that authority.

Prior to the issuance of the 19 March 1987 proclamation, the United States was not aware of any claim by the Government of Australia that these bays were historic nor was such a claim mentioned in the United Nations Secretariat Study on Historic Bays, published in 1957 as UN Document A/CONF.13/1 and in 1958 in Volume 1: Preparatory Documents of the First United Nations Conference on the Law of the Sea, UN Doc. A/CONF.13/37, at pages 1038, or in any other compilation of historic bay claims of which the Untied States is aware.

Having reviewed the evidence submitted by the Government of Australia to support these claims, the United States regrets that it is unable to agree that Anxious, Encounter, Lacepede and Rivoli Bays meet the requirements of international law for historic bays and reserves its rights and those of its nationals in that regard.

The United States notes that effective 20 November 1990 the Government of Australia extended its territorial sea from three to twelve nautical miles. The United Sates is of the view that, with the increased coastal state maritime jurisdiction now permitted under customary international law reflected in the 1982 United

Nations Convention on the Law of the Sea and other rules of international law reflected therein, no new claim to historic bay or historic waters is needed to meet resource and security interests of the coastal state.

The United States has under study the other straight baselines promulgated by the Government of Australia and this note is without prejudice to our views regarding them.

(3) Straight baselines

In a diplomatic note delivered in June 1991, the United States protested a new Egyptian presidential decree promulgating straight baselines from which to measure the breadth of the Egyptian territorial sea in the Mediterranean, the Gulf of Aqaba, and the Red Sea.

The substantive portions of the note, set forth below, were contained in a telegram of June 8, 1991, from the Department of State to the U.S. Embassy in Cairo.

---

* * * *

The United States . . . has the honor to refer to Presidential Decree No. 27 of 9 January 1990 entitled "Decree Concerning the Baselines of the Maritime Areas of the Arab Republic of Egypt, 9 January 1990." In this decree co-ordinates of latitude and longitude are listed which establish straight baselines from which the territorial sea of the Arab Republic of Egypt is to be measured. The United States believes that these baselines are not drawn in accordance with the customary rules of international law reflected in the 1982 United Nations Convention on the Law of the Sea (LOS Convention), which Egypt has ratified, for the following reasons.

In accordance with Article 5 of the LOS Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state. Article 7 of the LOS Convention provides that, as an exception to the normal baseline, in localities

in which the coastline is deeply indented and cut into, or where there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate basepoints may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

The United States observes that while the aforementioned decree establishes straight baselines along almost the entire coastline of the Arab Republic of Egypt in the Mediterranean, Gulf of Aqaba and Red Sea, the Egyptian coastline in all seas is generally smooth and gently undulating, and is neither deeply indented and cut into nor fringed with islands along its coast. Hence, in localities where neither criteria is met, the method of straight baselines may not be used; rather, in those areas the low water line, as depicted on official charts, must be used.

With regard to the coordinates referencing locations in the Gulf of Aqaba, Gulf of Suez and the Red Sea, the United States wishes to make the following observations.

The United States notes that the coastline in the vicinity of coordinates 1–32 located in the Gulf of Aqaba is neither masked by a fringe of islands nor is it deeply indented or cut into. The coastline in the vicinity of coordinates 32 and 33 also does not meet these criteria, nor does it constitute a juridical bay within the meaning of Article 10 of the LOS Convention. The United States observes that, whereas it would be possible to construct shorter baselines off the coast between coordinates 32 and 33 which could properly enclose juridical bays, such baselines were not drawn.

Baseline segments 33–36, from Ras Muhammed to the mainland northeast of Port Safaga also satisfy neither criterion.

Baseline segments 36–56 in the Red Sea fail to meet the criteria of areas in which the coastline in the vicinity is deeply indented and cut into, or in which there exists a

> fringe of islands along the coast. The coastline in this vicinity is in fact practically void of islands and is relatively free from indentations. Accordingly, the normal baseline—the low water line—must be used in this vicinity.

With regard to straight baseline segments located in the Mediterranean Sea, the United States wishes to make the following observations.

> The Mediterranean Coastline in the vicinity of baseline segments 1–25 is clearly neither deeply indented and cut into, nor is it fringed with islands along the coast. However, segments 25–28 enclose Abu Kir Bay, a juridical bay. The Mediterranean coastline in the vicinity of segments 28–39 is also neither deeply indented and cut into nor fringed with islands in its immediate vicinity. Baseline segments 39–41 are invalid for the same reason.
>
> Whereas the waters behind the barrier spit between baseline segments 41 and 49 could properly be constituted as internal waters, such can be accomplished by the barrier spit itself, joining by short baseline segments the barrier segments in those few areas in which it is not continuous.
>
> Baseline segments 49–55 are invalid since the coastline in that vicinity is also neither deeply indented and cut into nor fringed with islands.

For the above reasons, the United States cannot accept the validity in international law of the straight baselines mentioned above as constituting the baseline from which the territorial sea of the Arab Republic of Egypt is to be measured, and reserves its rights and those of its nationals in this regard.

The United States looks forward to the views of the Government of the Arab Republic of Egypt in response to the points raised above.

* * * *

During this period, the United States also protested or asserted rights as to the drawing of straight baselines by

other countries as inconsistent with applicable international law, including: to Denmark in 1991, concerning straight baselines around the Faroe Islands; to Iran in 1994 concerning its straight baseline in the Persian Gulf and Gulf of Oman; to Oman in 1991 concerning certain segments of its straight baselines; to Thailand in 1995 concerning its Announcement of June 12, 1970, as amended by Announcement No. 2 (1993), February 2, 1993; to Russia in 1992, concerning its straight baseline closing access to the Barents Sea port of Murmansk. *See* Roach & Smith at 73–146.

(4) Breadth of territorial sea

(i) Argentina

In July 1991 the United States requested an authoritative statement from the Government of Argentina as to the breadth of its territorial sea claim. At the time of the request, State Department records indicated that Argentina claimed a 200 nautical mile territorial sea by Law No. 17,094 of January 19, 1967, which the United States had protested. That law also stated that freedom of navigation and overflight beyond 12 nautical miles was not affected. Argentina had signed the UN Convention on the Law of the Sea on October 5, 1984, which established twelve nautical miles as the maximum breadth of the territorial sea and authorized coastal states to claim a 200 nautical mile exclusive economic zone. The Department's records did not indicate that Argentina had claimed an exclusive economic zone, ratified the LOS Convention, or otherwise modified its 200 nautical mile territorial sea claim.

A representative of the Ministry of Foreign Affairs of the Government of Argentina responded that "current GOA practice and doctrine was in full accord with UN Law of the Sea (LOS) Convention establishing 12 nm [nautical miles] as the territorial sea and a 200 nm exclusive economic zone. These criteria have been used in all official documents for

the last several years. . . ." Telegram of July 16, 1991, from U.S. Embassy Buenos Aires to Department of State.

(ii) Ecuador

On May 1, 1992, the Secretary of State sent a diplomatic note to chiefs of mission in Washington, D.C. of governments concerned with the International Convention for the Regulation of Whaling, regarding a reservation included in the instrument of adherence deposited with the United States by Ecuador on May 2, 1991. The text of the note is set forth below in full.

The Secretary of State presents his compliments to Their Excellencies and Messieurs and Mesdames the Chiefs of Mission of the Governments concerned with the International Convention for the Regulation of Whaling, signed at Washington on December 2, 1946, and has the honor to refer to his circular note of May 5, 1991 referring to the deposit with the Government of the United States of America on May 2, 1991, by Ecuador of an instrument of adherence which includes a reservation, which, in translation, reads as follows:

None of its provisions may affect or diminish the sovereign rights which Ecuador holds, has exercised, and exercises over its 200 nautical mile territorial sea, both insular and continental.

The Secretary of State wishes to state that, while the United States recognizes the right of Ecuador under international law to exercise fisheries jurisdiction within 200 nautical miles of its coast, the United States does not accept the reservation contained in the instrument of adherence by Ecuador, insofar as it asserts a claim to a territorial sea greater than 12 nautical miles, the maximum limit permitted under international law.

The Secretary of State would be grateful if the Chiefs of Mission would forward this information to their respective Governments.

c. U.S. freedom of navigation program

(1) International straits and navigational freedoms

At the twenty-sixth Law of the Sea Institute annual conference in Genoa, Italy, held from June 20–26, 1992, Rear Admiral William L. Schachte, Jr., Judge Advocate General's Corps, U.S. Navy, Department of Defense Representative for Ocean Policy Affairs, addressed issues presented by the building of bridges across straits used for international navigation. Excerpts from his prepared remarks set forth below addressed the practical problems that bridge-building across international straits pose for international maritime navigation, relevant aspects of the UN Law of the Sea Convention, and a U.S. suggestion for an international approach for appraising future proposals for the construction of bridges over international straits.

The full text of Rear Admiral Schachte's remarks is available at *www.state.gov/s/l/c8183.htm*.

* * * *

As you may know, Finland filed an application instituting proceedings before the International Court of Justice on May 17, 1991 in the Case entitled "Passage through the Great Belt (Finland v. Denmark)." Finland complains that the proposed bridge across the Great Belt (the only deep draught route through the Straits connecting the Baltic with the North Sea) would be a fixed span with 65 metres' clearance, preventing Finnish drilling rigs from being towed in their vertical position under the bridge and thus in Finland's view contrary to international law. . . .*

The United States is not a party to the ICJ case, but my government feels strongly that the basic rules codified in the LOS Convention control. Although the LOS Convention straits articles

* Editors' note: The ICJ removed the case from its list on September 10, 1992, based on a settlement of the dispute by Finland and Denmark. Order of 10 September 1992—Discontinuance, available at *www.icj-cij.org*.

do not *per se* address the issue of bridges across straits, the transit passage articles would clearly prohibit the unfettered, unilateral construction of a bridge across a strait used for international navigation (hereafter, an "international strait").

* * * *

II. CONVENTION NAVIGATIONAL REGIMES AND TERMS OF ART WITH EMPHASIS ON THEIR RELEVANCE TO TRANSIT PASSAGE AND APPLICABLE U.S. INTERPRETATIONS

Central to any meaningful understanding of the navigation rights and correlative duties of user and straits States is an appreciation of the rationale behind the terms of art and definitions in the navigation provisions of the LOS Convention, which in the US view reflect customary law. These terms and definitions are not dead verbiage. They must be grasped and applied carefully. They enable the practitioner to trace logically through complex factual situations which arise, such as the Great Belt. The LOS Convention provides excellent analytical tools to come up with a very logical, persuasive conclusion. I shall next discuss various words of art, necessary facts and official United States interpretive positions on which analysis of the various straits regimes depend.

a. Genesis of the Regime of Transit Passage

The regime of transit passage in straits used for international navigation arose from: (a) the emergence of 12 mile territorial sea claims; (b) the distinction between the right of innocent passage and high seas freedom of navigation; (c) geography; and (d) reality.

Even before the Third UN Law of the Sea Conference first convened in the early seventies, the critical importance and unique nature of international straits was recognized. These choke points form the lifeline between high seas areas. In order for the high seas freedoms of navigation and overflight to be preserved in international straits which would be overlapped by 12 mile territorial sea claims (displacing the earlier recognized 3 mile territorial sea norm), the navigational regime in international straits would have to share similar basic characteristics with these high seas freedoms.

General support existed in the Conference for a 12 mile territorial sea. Such support depended, however, on ensuring that in international straits less than 24 miles wide at their narrowest point, an adequate navigation regime be preserved to ensure essential elements of the right of freedom of navigation and overflight. The lesser navigational right of non-suspendable innocent passage was simply not enough.

Reality, in terms of fundamental international commerce and security interests, required open access through international straits. Regardless of the breadth of the strait, whether 5 or 24 miles, certain freedoms had to apply, such as continuous and expeditious transit in, under, and over the strait and its approaches. Any codification of the law of the sea had to reflect this state practice and political and military reality.

Before we proceed further, it is important to underscore that the regime of transit passage is crucial to the maintenance of world peace and order. By relieving littoral states of the political burdens associated with a role as gate keepers, the transit passage rules minimize the possibility of straits states being drawn into conflicts.

b. Innocent Passage

A separate concept, different from the right of transit passage through international straits, is innocent passage through a coastal state's territorial sea. . . .

* * * *

It is the United States' view that the enumerations in Articles 19 and 21 are all-inclusive, i.e. a ship may engage in any activity while engaged in innocent passage if it is not prejudicial or proscribed in Article 19(2), and a coastal State can only enact those laws and regulations which are contained in Article 21.

Perhaps the most important factor to be noted in this connection is the unwavering position of the United States and other major maritime powers that Article 21 does not permit a coastal State to require prior permission from, or notification to, a coastal State in order to exercise the right of innocent passage. A number of developing coastal States maintain that although the Convention is silent on this point, earlier customary international law permitted

a coastal State to require prior notification. They thus believe that this competence still exists. This is incorrect. The *travau preparatoires* of the Convention unequivocally indicates that such is not the case.

During the Sea-Bed Committee (1970–73) discussions which were intended to produce a draft convention text, many developing States prepared amendments to the predecessor of Article 21(1) which would recognize such a coastal State right. . . . The process culminated in a statement by the President of the Conference in Plenary that the sponsors of the amendment at his request had agreed not to press it to a vote. Although the erstwhile sponsors attempted to accomplish the same objective via declarations during the signing session, such declarations are *ultra vires* in that Article 31 of the LOS Convention prohibits declarations which exclude or modify the legal effect of provisions of the LOS Convention.

* * * *

c. Non-Suspendable Innocent Passage

Under Article 16(4) of the 1958 Convention, non-suspendable innocent passage applied to ships through straits used for international navigation between one part of the high seas and another part of the high seas or territorial sea of a foreign State. It was important because it recognized that in straits overlapped by opposite three mile wide territorial seas, the international community had unquestionable rights of navigation not subject to interference by the coastal nation. These rights have evolved into a regime guaranteeing transit in, under, and over international straits codified as "transit passage" in the LOS Convention. The more limited regime of non-suspendable innocent passage is now applicable to international straits governed by Article 38(1) of the LOS Convention . . . and Article 45(1)(b) . . .

The regime of non-suspendable innocent passage under current customary law of the sea is extremely limited in application. It has in almost all cases been superseded by the transit passage regime applying to straits connecting one part of the high seas or an exclusive economic zone with another part of the high seas or an exclusive economic zone. The dead end strait exception is only applicable in those few geographic instances in which high seas

or exclusive economic zone areas connect with a territorial seas area of one state by means of a strait bordered by one or more other states. Without the right of non-suspendable innocent passage, the state at the end of the cul-de-sac would effectively be "landlocked" with a territorial sea leading nowhere.

* * * *

d. Transit Passage

One of the two most important achievements of the drafters of the LOS Convention was the codification of the transit passage regime under Articles 37–44. The regime is applicable in straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The right of transit passage, unlike non-suspendable innocent passage, includes the right of overflight and submerged transit.

Following are some important United States interpretative positions applicable to the transit passage regime. First, the language referring to "straits which are used for international navigation" signifies all straits which are used or which may be used for navigation, i.e. straits which are capable of being used are included. This interpretation is not based solely on geography; prospective navigational use must be based on need, e.g., new commercial trade routes superseding the old, or a former trade route no longer suitable due to a change in tides or currents, environmental problems, change in depth, etc. Essentially, we place less emphasis on historical use and look instead to the susceptibility of the strait to international navigation.

Second, it is the United States' position that the right of transit passage applies not just to the waters of the straits themselves but to all normally used approaches to the straits. It would make no sense at all to have the right of overflight, for example, apply only within the cartographers' historical delineation of a certain strait, but not apply to restrictive geographical areas leading into/out of the strait, thereby effectively preventing exercise of the right of overflight.

It would defy navigational safety to require ships or aircraft to converge at the hypothetical "entrance" to the strait. It would

also effectively deny many aircraft the right of transit passage if the pilot had to zigzag around the territorial seas of rocks and islands during the approaches to a strait. For transit passage to have meaning, open over-water access through the approaches must be included.

Third, when the right of transit passage applies, it applies throughout the strait. The width of the transit corridor, in effect, is shore to shore (this is of course subject to any IMO-approved traffic separation scheme that may be in place).

It is perfectly legitimate for a strait state to avoid this shore-to-shore result by limiting its territorial sea claim. Japan, for example, has chosen to limit its territorial sea claim in five straits, thus creating a high seas corridor of similar convenience down the middle of those straits. In such a case, innocent passage applies within the territorial sea areas and high seas' freedom of navigation applies throughout the corridors. This is so because Article 36 provides that Part III does not apply when a high seas corridor exists through the strait: ". . . the other relevant Parts of this Convention, including the provisions regarding the freedom of navigation and overflight, apply."

* * * *

V. AN INTERNATIONAL APPROACH TO FUTURE BRIDGE PROPOSALS OVER STRAITS USED FOR INTERNATIONAL NAVIGATION

From the foregoing, it should be evident that the construction of a bridge across a strait used for international navigation, if not subject from its inception to certain internationally accepted safeguards and readily applicable standards, could destroy the carefully crafted balance of strait State/user States rights and obligations which form the essence of all the Convention's navigational articles. In crafting a reasonable international solution, we should look to the system whereby the international community, working through the International Maritime Organization as the "competent international organization," establishes sealanes and traffic separation schemes through international straits.

To designate a sealane or traffic separation scheme under that system a State would first submit a proposal to the International Maritime Organization with a view toward adoption by that body. To be adopted, the sealane or traffic separation scheme must conform to generally accepted international standards and regulations and the State must give "due publicity" to its proposal. Since sealanes and traffic separation schemes affect navigation, it is only reasonable and practical that similar steps be followed in the case of bridges.

This is particularly so since the United States does not believe that customary international law permits a State unilaterally and without prior international approval to construct a fixed bridge over an international strait which in many instances is the sole practical deep water route available. In order, therefore, to unify State practice, the United States suggests that all future construction plans for bridges over international straits be submitted to the International Maritime Organization.

Our suggestion consists of three elements. First, prior to referral of a proposal by a straits State of plans to construct a fixed bridge over a strait used for international navigation, the straits State should be required to provide actual notice of the proposal well in advance through the International Maritime Organization to all States. Second, all States which are then notified about the proposal by the International Maritime Organization would be given adequate opportunity to communicate their views to the proposing straits State which would be obliged to seek to accommodate such views.

As part of this process, the International Maritime Organization should first establish internationally recognized guidelines and standards to ensure that construction of bridges does not hamper or impede navigation through international straits. These guidelines and standards would in part be based on and vary with the type of international strait involved and other considerations, such as the nature and density of the traffic through such a strait, the availability of equally practicable alternate routes, and the associated additional costs, if any, of the proposed bridge construction.

Finally, the straits State initiating the bridge construction proposal could only proceed with actual construction upon determination by the International Maritime Organization that the proposal conforms to the established International Maritime Organization guidelines and standards.

By way of reference, the United States notes that Denmark gave notice to all States of its construction plans sixteen years ago and requested that interested States submit their views to it with a view to their accommodation. The only State to submit such views prior to construction was the former Soviet Union, which requested that the clearance of the main central span over the deep water channel be increased to 65 metres, a request Denmark duly incorporated into the final construction plans. The United States believes that notice through the International Maritime Organization would ensure the international community had effective notice of the opportunity to address so potentially serious a threat to effective international navigation.

The United States looks forward to working with other interested States to help develop these procedures within the International Maritime Organization. We believe that international acceptance of such a procedure which involves the International Maritime Organization and internationally recognized guidelines and standards that would apply to future bridge construction, would be the most equitable and effective means to address the issue. It would also reduce the potential for the establishment of adverse precedents in this field.

Recently we have been informed of suggestions to build bridges across other international straits. I wish to make it clear beyond any doubt that the United States would not acquiesce in the construction of such bridges unless internationally recognized procedures are already in place and complied with. To accept anything less after the international community worked so many years in the Law of the Sea Conference to establish a universally accepted navigation regime would place us all in unacceptable, uncertain dangers in a field in which the international community requires predictability, stability, and the orderly development of a universally endorsed body of traditional law of the sea norms.

(2) Right of transit by U.S. submarines through Dixon Entrance

In 1991 the United States informed Canada of intended transit through waters in Dixon Entrance by U.S. submarines proceeding to and from the Southeast Alaska Submarine Noise Measurement Facility ("SEAFAC") in Behm Canal, Alaska. The Dixon Entrance to Portland Channel is a body of water, some 27 miles wide at its western opening into the Pacific, that separates coastal areas of Alaska from those of British Columbia lying to the south. The Alaskan Boundary Tribunal, established by a 1903 U.S.-U.K. convention to settle boundary questions between the Territory of Alaska and British possessions, drew a line (known as the "A–B line") through the Dixon Entrance in an award of October 20, 1903. The United States and Canada subsequently disagreed as to the legal significance of the "A–B line" established in the award. *See* discussion in *Cumulative Digest 1981–1988* at 1928–30.

In a diplomatic note of November 13, 1991, the embassy of Canada referred to the "announcement of the Government of Canada's decision to consent to the transit of Canadian internal waters in Dixon Entrance." It indicated further that "this decision by the Government of Canada reflects Canada's support for the objective of the SEAFAC facility in keeping with the mutual defence interests of our two countries and the NATO policy of deterrence." At the same time, the note stated:

> This decision also reflects, and is entirely without prejudice to, Canada's long-standing position that the A–B Line determined by the 1903 Alaska Boundary Award constitutes the international boundary in Dixon Entrance, and that the waters of Dixon Entrance south of the A–B Line are internal waters of Canada.

The Department of State responded in a diplomatic note of December 24, 1991, contesting the Canadian view of the boundary and the need for consent, as excerpted below. The full text of the U.S. diplomatic note is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

U.S. submarines en route to and from the Behm Canal Facility will transit submerged in U.S.-claimed waters of the Dixon Entrance. Although Canada claims some of the same waters, the United States does not accept the Canadian position on the location of the maritime boundary. The U.S. view is that the maritime boundary in the Dixon Entrance should be a line equidistant between Canadian and U.S. land territories.

Consent of the Government of Canada was never sought for the transits of the submarines. Consequently, while, in view of U.S.-Canadian mutual defense interests, the United States did consult Canada concerning the transits, the United States cannot accept that its authority to transit these waters is premised on Canada's consent to those transits.

* * * *

In providing notice to Canada of its intention to transit Dixon Entrance, the United States also provided information on its policies and procedures for handling claims for damage or losses incurred by fishermen or other mariners as a result of U.S. Navy submarine transits. A letter from Alan J. Kreczko, Deputy Legal Adviser, U.S. Department of State, to the embassy of Canada, dated August 2, 1991, on these issues is set forth below in full.

In reference to our recent discussions concerning the transit by U.S. submarines through Dixon Entrance en route to and from Behm Canal, I am pleased to inform you of the following.

The United States Navy investigates all claims for damage or losses incurred by fishermen or other mariners as a result of U.S. Navy submarine transits. It is the policy of the U.S. Navy to settle admiralty claims fairly and promptly when legal liability exists. Administrative settlement of admiralty claims eliminates the expense and delay of litigation.

Fishermen or other mariners are entitled, under admiralty law principles, to recover the reasonable cost of repairs to damaged equipment, as well as the cost of replacement of lost equipment. The latter recovery is reduced by the depreciation based on the age of the lost equipment compared to its normal useful life. In addition, fishermen may recover lost profits (i.e., expected gross fishing receipts minus normal operating expenses) during a reasonable period of repair of damaged equipment or replacement of lost equipment.

Any claim for damages or losses incurred by Canadian fishermen or other mariners resulting from transit of Dixon Entrance by a U.S. submarine should be submitted to the Admiralty Division of the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332-2400 (703/325-9744). It should be noted that the U.S. submarines expect to transit Dixon Entrance much deeper than the fishing gear used in Dixon Entrance.

We believe there is no possibility of injury or death that might be caused by the transit of our submarines. In the event injury or death should result, claims would be handled in accordance with existing procedures under admiralty law principles or the NATO Status of Forces Agreement.

The appropriate Canadian authorities will be notified immediately in the unlikely event of an accident related to any weapons which might be carried aboard United States warships. Claims which might arise out of a weapons accident or incident will be dealt with through diplomatic channels in accordance with the customary procedures for the settlement of international claims under generally accepted principles of law and equity.

The existing United States policy regarding claims arising out of the operation of U.S. nuclear-powered warships is established by the Act of Congress attached to this letter.

The U.S. Navy will be giving at least 72 hours advance notification of the commencement and duration of operations at the Behm Canal Acoustic Measurement Facility to governmental officials in Ketchikan, and through Notices to Mariners and announcements by the Ketchikan radio stations and newspapers. The U.S. Navy will similarly inform Government of Canada officials at MARPAC Headquarters Esquimalt and DFO Prince Rupert.

As a matter of policy, the United States neither confirms nor denies the presence or absence of nuclear weapons on any of its ships. A further letter from Mr. Kreczko of August 30, 1991, provided the following information concerning nuclear accidents:

> Since the United States is also a party to the IAEA Convention on Early Notification of a Nuclear Accident, I am pleased to confirm that in the case of nuclear accidents involving nuclear ship propulsion plants the notification procedures set out in that Convention will be followed by the United States. . . .

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

(3) Right of innocent passage in territorial sea

(i) Restrictions on innocent passage of warships

During the period 1991–1999, the United States protested or asserted its right against restrictions on innocent passage of warships to Cape Verde in 1991, to Egypt in 1993, to Oman in 1991, to the Philippines in 1994, and to the United Arab Emirates in 1995. *See* Roach & Smith at 251–67.

(ii) Prior notice

In July 1991 the United States delivered a diplomatic note to the Government of Denmark protesting Denmark's requirement that foreign warships and other public vessels provide notice prior to transiting Denmark's territorial sea and requiring prior permission for passage of more than three warships at the same time (except for straits where prior notice is required) and straight baselines around the Faeroe Islands. The substantive provisions of the note are set forth below.

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Kingdom of Denmark and has the honor to refer to Ordinance Number 73 of 27 February 1976 and Ordinance Number 598 of 21 December 1976. Ordinance No. 73 mandates that warships and other public vessels provide notice prior to transiting Denmark's territorial sea (except in connection with passage of the Great Belt, Samsoe Belt or the Sound) and that prior permission for simultaneous passage is required whenever more than three warships transit the territorial sea (except that simultaneous passage of the Great Belt, Samsoe Belt or the Sound is allowed provided there is advance notification). Ordinance No. 598 establishes straight baselines completely surrounding the Faeroe Islands.

The Government of the United States wishes to remind the Government of Denmark that, as established in customary international law and as reflected in the 1982 United Nations Convention on the Law of the Sea, the right of innocent passage through the territorial sea may he exercised by all ships, regardless of number, type, or cargo, and may not in any case he subjected to a requirement of prior permission or notice to the coastal state.

The United States believes that the baselines around the Faeroe Islands are not drawn in accordance with the customary rules of international law reflected in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, to which both Denmark and the United States are party, and in the 1982 United Nations Convention on the Law of the Sea (LOS Convention), for the following reasons.

In accordance with Article 3 of the Territorial Sea Convention and with Article 5 of the LOS Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on the states large-scale charts officially recognized by the coastal state. Article 4 of the Territorial Sea Convention and Article 7 of the LOS Convention provide that, as an exception to the normal baseline, in localities where the coastline is deeply indented and cut into, or where there is a fringe of islands along the coast in its immediate vicinity the method of straight baselines joining appropriate basepoints may be employed

in drawing the baseline from which the breadth of the territorial sea is measured.

The United States observes that the baselines around the Faeroes are not straight baselines around individual islands, but are lines connecting the outermost islands and drying rocks of the Faeroes archipelago. Archipelagic states recognized under customary international law, as reflected in the LOS Convention, do not include mainland states, such as Denmark and the United States, which possess non-coastal archipelagos. Therefore, straight baselines cannot be drawn around mainland states' coastal archipelagos, such as the Faeroe Islands.

The United States also observes that straight baselines could be employed, consistent with international law, in certain localities of some of the Faeroe Islands which are deeply indented and cut into, or themselves fringed with islands along the coast. Furthermore, some of the islands contain juridical bays that could lawfully be enclosed by straight baselines. However, in localities where neither criterion is met, the method of straight baselines may not be used; rather, in those areas the low water line, as depicted on official charts, must be used.

The Government of the United States therefore wishes to emphasize its objections to the claims described above and made by ordinances No. 73 and 598 which are not valid in international law and reserves its rights and those of its nationals in this regard.

In a diplomatic note dated August 12, 1991, the United States protested requirements by Oman included in its instrument of ratification of UNCLOS, deposited August 17, 1989, concerning prior notice. Declaration Nos. 2 and 3 "guaranteed" the right of innocent passage, "subject to prior permission," to warships and "foreign nuclear-powered ships and ships carrying nuclear or other substances that are inherently dangerous or harmful to health or the environment." Submarines were also required to navigate on the surface and fly the flag of their home state. *See* UN, Multilateral Treaties Deposited, Chapter XXI, available at *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty6.asp*, and UNLOS Bull., No. 14, Dec.

1989, at 8–9. The U.S. diplomatic note stated, in relevant part:

> The Government of the United States wishes . . . to recall to the Government of Oman that, with regard to its Declaration Nos. 2 and 3, the right of innocent passage through the territorial sea may be exercised by all ships, regardless of type or cargo, and may not in any case be subjected to a requirement of prior permission of, or notice to, the coastal state. This right is also recognized in customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea.
>
> The United States Government notes that its warships have previously operated in Oman's territorial sea without the prior permission of the Government of Oman.

The note is available in U.S. Department of State publication Limits in the Seas No. 113, Annex 5, page 16, available at *www.law.fsu.edu/library/collection/LimitsinSeas/index.php*.

(iii) Temporary suspension of innocent passage

A coastal or island state may suspend innocent passage temporarily in specified areas of its territorial sea, when it is essential for the protection of its security. Such a suspension must be preceded by a published notice to the international community "and may not discriminate in form or in fact among foreign ships." *See* Territorial Sea Convention, article 16(3); UNCLOS, article 25(3). In a diplomatic note to Iran dated January 11, 1994, the United States objected to Iranian legislative provisions inconsistent with these requirements and to a requirement for prior authorization, as set forth below. The diplomatic note is included in an analysis of Iran's legislation available in Limits in the Seas No. 114, Annex 3, page 37, available at *www.law.fsu.edu/library/collection/LimitsinSeas/index.php*.

* * * *

The United States also notes that international law permits a coastal state to suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, and that such suspension may take effect only after having been duly published. Article 8 of Iran's 1993 Marine Areas Act cannot be accepted as removing the requirements that any suspension of innocent passage through parts of its territorial sea be temporary and that it take effect only after being duly published.

Article 9 of the 1993 Marine Areas Act impermissibly seeks to require foreign warships, and vessels carrying dangerous or noxious substances harmful to the environment, to obtain prior authorization from Iran to pass through Iran's territorial sea. Such a requirement has no foundation in the provisions of the 1982 Law of the Sea Convention, and the United States will continue to reject, as contrary to international law, any attempt to impose such a requirement on the exercise of the right of innocent passage of all ships.

(4) Flag state jurisdiction

(i) Boarding of U.S. vessel on the high seas

In a diplomatic note of June 26, 1991, the United States protested to the Government of El Salvador the non-consensual high seas boarding of the U.S. flag *Annabelle 2*. The substantive portions of the note are set forth below in full.

[The United States] has the honor to refer to the boarding by personnel from El Salvadoran gunboat GC-11 on 11 May 1991 of the U.S. flag trawler-yacht Annabelle 2 on the high seas without the consent of the master or the permission of the United States.

On May 11, 1991, the 103-foot Annabelle 2, homeport Philadelphia, Pennsylvania, was stopped and boarded in position 12-12N, 89-12W, approximately 68 nautical miles off the coast of El Salvador, by the El Salvador gunboat GC-11, for the purpose

of verifying that the Annabelle 2 was not running guns into El Salvador from Nicaragua.

The personnel from GC-11 boarded the Annabelle 2 without seeking or obtaining the consent of the master or the permission of the flag state. Further, the personnel conducting the boarding did not carry or offer identification to the master of the Annabelle 2, and found no evidence of gun-running after a half hour search.

As is well established in international law, a vessel on the high seas is under the exclusive jurisdiction of the flag state, and, except for situations (including hot pursuit) not involved in this case, may not be boarded without the consent of the master or the permission of the flag state.

Accordingly, the United States protests this unauthorized boarding of one of its flag vessels and requests assurances that the exclusive jurisdiction of the flag state will be respected by the authorities of El Salvador in the future.

The U.S. Embassy provided additional information set forth below concerning procedures for requesting permission from the United States to board certain U.S. flag vessels on the high seas when the master refuses to consent, contained in a telegram from the Department of State to the embassy, dated June 24, 1991.

---

* * * *

. . . This guidance applies only to vessels other than those entitled to sovereign immunity, i.e., warships or other government ships operated for non-commercial purposes. . . . [I]n the event the master consents to boarding, there is no need for USG consent, although there would be for enforcement action.

The general practice of states is reflected in Article 17 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which is in force for the United States and some 33 other states. El Salvador has not signed this Convention and is not a party to it, although we would encourage [it] to become a party. The procedures outlined below are, of course, available to all states, including those not party to the

Vienna Drug Convention, for whatever reason they desire to board a U.S. flag vessel on the high seas when they are not otherwise authorized to do so under international law.

Article 17 provides that when a state desires to board and search a foreign flag vessel exercising freedom of navigation in accordance with international law, it may make its request to the flag state, requesting confirmation of registry, and if confirmed, request authorization to take action regarding the vessel.

Under Article 17, the United States has designated the Department of State as the authority to receive and respond to such requests under that convention. . . .

* * * *

(ii) Special arrangement with the flag state: Saint Vincent and the Grenadines

As explained in a July 10, 1991, declaration by Bruce E. Leek, Bureau of International Narcotics Matters, Department of State, on July 1, 1991, the U.S. Coast Guard boarded the freighter M/V *Lucky Star*, with the consent of its master, and "discovered an estimated 100–140 tons of a cargo appearing to be Hashish and field-testing by standard means to be the same." On July 11, 1991, the Government of Saint Vincent and the Grenadines, through its attorneys, formally confirmed its registry of the M/V *Lucky Star*, and authorized

> appropriate United States authorities to board and search the LUCKY STAR and to enforce the laws of the United States of America pertaining to the seizure of contraband aboard the vessel, seizure of the vessel and possible criminal prosecution of the responsible parties. This authorization extends to the application of any applicable United States law which authorizes law enforcement action as to the vessel and crew on behalf of the United States.

In a press release of July 12, 1991, Bob Martinez, Director of the Office of National Drug Control Policy, announced

that U.S. agencies had "netted the largest hashish seizure in U.S. history. The estimated 100-ton cargo of hashish—worth about 2 billion dollars—was intercepted off Midway Island in the Pacific. . . . The hashish-bearing freighter—the "Lucky Star" had been operating outside of normal shipping channels, and was stopped on the high seas."

The authorization to board the *Lucky Star* and take law enforcement action was granted pursuant to a special arrangement, recorded in a diplomatic note from the Department of State to the embassy of Saint Vincent and the Grenadines dated July 11, 1991, and excerpted below.

The full text of the diplomatic note with attached Leeks declaration and correspondence confirming agreement is available at *www.state.gov/s/l/c8183.htm*.

The Department of State refers the Embassy of Saint Vincent and the Grenadines to Note No. 80 dated June 28, 1991, from the United States embassy at Bridgetown in which the United States sought verification of the registry of the M/V Lucky Star and permission of the Government of Saint Vincent and the Grenadines to detain the vessel, arrest the crew and enforce United States law on the grounds that a large quantity of hashish had been found on board the vessel.

The United States understands that the Government of Saint Vincent and the Grenadines has verified that the M/S Lucky Star is registered in Saint Vincent, and that, as it has done in previous cases involving its flag vessels suspected of engaging in the illicit traffic in narcotic drugs and psychotropic substances, desires to co-operate with the United States government to the fullest extent possible to suppress illicit traffic in narcotic drugs and psychotropic substances by sea. In conformity with the international law of the sea the attention of the embassy is referred to the detailed information regarding the results of the search of the vessel contained in the declaration of the maritime law enforcement officer, Bureau of International Narcotics Matters, which is attached to this note.

Based on the foregoing, the United States understands that the Government of Saint Vincent and the Grenadines wishes to enter

into a special arrangement with the Government of the United States regarding the enforcement of United States law against this vessel and the persons and cargo on board.

The United States acknowledges its duty, in taking action pursuant to such a special arrangement, to respect the sovereignty of Saint Vincent and the Grenadines, to take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of Saint Vincent and the Grenadines.

* * * *

(iii) U.S. maritime drug interdiction agreements

During the 1990s the United States began to enter into bilateral maritime law enforcement agreements for counter-narcotics operations pursuant to article 17 of the 1988 Convention for the Suppression of Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna, December 20, 1988. By 1999, twenty such agreements, to facilitate maritime law enforcement cooperation with flag and coastal States, had entered into force. While the agreements varied to some degree, they provided for all or some of the following types of authority, defined as set forth below for a typical agreement.

"*Shipboarding*": Standing authority or procedures for the USCG to stop, board and search foreign vessels suspected of illicit traffic located seaward of the territorial sea of any nation.

"*Shiprider*": Standing authority to embark law enforcement (L/E) officials on platforms of the parties, which officials may then authorize certain law enforcement actions.

"*Pursuit*": Standing authority or procedures for USG L/E assets to pursue fleeing vessels or aircraft suspected of illicit traffic into foreign waters or airspace. May also include authority to stop, board and search pursued vessels.

"*Entry-to-investigate*": Standing authority or procedures for USG L/E assets to enter foreign waters or airspace to investigate vessels

or aircraft located therein suspected of illicit traffic. May also include authority to stop, board and search such vessels.
"*Overflight*": Standing authority or procedures for USG L/E assets to fly in foreign airspace when in support of CD operations.
"*Relay Order-to-land*": Standing authority or procedures for USG L/E assets to relay an order to land in the host nation to aircraft suspected of illicit traffic.
"*International Maritime Interdiction Support*": Standing authority or procedures for USG L/E assets to moor or stay at national ports, entry of additional U.S. L/E officials (by ship and/or aircraft), entry of suspect vessels not flying U.S. or host nation flag, escort of persons from suspect vessels through and out of host nation (by ship and/or aircraft), and landing & temporarily remaining at international airports for logistics.

Countries with which bilateral maritime law enforcement agreements were signed during the 1990s are set forth below.

Agreement between the Government of the United States of America and the Government of **Antigua and Barbuda** concerning maritime counter-drug operations, signed at St. John's April 19, 1995; entered into force April 19, 1995. Amended by exchange of notes at St. John's June 3, 1996; entered into force June 3, 1996.

Agreement between the Government of the United States of America and the Government of **Bahamas** concerning a cooperative shiprider and overflight drug interdiction program, effected by exchange of notes at Nassau May 1 & 6, 1996; entered into force May 6, 1996.

Agreement between the Government of the United States of America and the Government of **Barbados** concerning cooperation in suppressing illicit maritime drug trafficking, signed at Bridgetown June 25, 1997; entered into force October 11, 1998.

Agreement between the Government of the United States of America and the Government of **Belize** concerning maritime counter-drug operations, signed at Belmopan December 23, 1992; entered into force December 23, 1992. TIAS 11914. Amended by

a Protocol signed at Belmopan April 25, 2000; entered into force April 25, 2000.

Agreement between the Government of the United States of America and the Government of **Colombia** to suppress illicit traffic by sea, signed at Bogota February 20, 1997; entered into force February 20, 1997.

Agreement between the Government of the United States of America and the Government of the Republic of **Costa Rica** concerning cooperation to suppress illicit traffic, signed at San Jose, December 1, 1998; entered into force November 19, 1999. Amended by the Protocol signed at San Jose July 2, 1999; entered into force on November 19, 1999.

Agreement between the Government of the United States of America and the Government of **Dominica** concerning maritime counter-drug operations, signed at Roseau April 19, 1995; entered into force April 19, 1995. TIAS 12630.

Agreement between the Government of the United States of America and the Government of the **Dominican Republic** concerning maritime counter-drug operations, signed at Santo Domingo March 23, 1995; entered into force March 23, 1995. TIAS 12620. Amended by the Protocol signed at Washington, D.C. May 20, 2003; entered into force May 20, 2003.

Agreement between the Government of the United States of America and the Government of **Grenada** concerning maritime counter-drug operations, signed at St George's May 16, 1995; entered into force May 16, 1995. TIAS 12648. Amended by exchange of notes at St. George's November 26, 1996; entered into force November 26, 1996.

Agreement between the United States of America and the Republic of **Haiti** concerning cooperation to suppress illicit maritime drug traffic, signed at Port au Prince October 17, 1997; entered into force September 5, 2002.

Agreement between the Government of the United States of America and the Government of **Jamaica** concerning cooperation in suppressing illicit maritime drug trafficking, signed at Kingston May 6, 1997; entered into force March 10, 1998.

Arrangement between the Government of the United States and the Government of **Panama** for Support and Assistance from

the U.S. Coast Guard for the National Maritime Service of the Ministry of Government and Justice, signed at Panama March 18, 1991; entered into force March 18, 1991. TIAS 11833.

Agreement between the Government of the United States of America and the Government of **St. Kitts and Nevis** concerning maritime counter-drug operations, signed at Basseterre April 13, 1995; entered into force April 13, 1995. Amended by exchange of notes at Bridgetown and Basseterre June 27, 1996; entered into force June 27, 1996.

Agreement between the Government of the United States of America and the Government of **St. Lucia** concerning maritime counter-drug operations, signed at Castries April 20, 1995; entered into force April 20, 1995. Amended by exchange of notes at Bridgetown and Castries June 5, 1996; entered into force June 5, 1996.

Agreement between the Government of the United States of America and the Government of **St. Vincent and the Grenadines** concerning maritime counter-drug operations, signed at Kingstown and Bridgetown, June 29 and July 4, 1995; entered into force July 4, 1995. TIAS 12676.

Agreement between the Government of the United States of America and the Government of **Suriname** concerning cooperation in maritime law enforcement, signed at Paramaribo December 1, 1998; entered into force August 26, 1999.

Agreement between the Government of the United States of America and the Government of **Trinidad and Tobago** concerning maritime counter-drug operations, signed at Port of Spain March 4, 1996; entered into force March 4, 1996.

Agreement between the Government of the United States of America and the Government of the **United Kingdom of Great Britain and Northern Ireland** concerning maritime and aerial operations to suppress illicit trafficking by sea in waters of the Caribbean and Bermuda, signed at Washington July 13, 1998; entered into force October 30, 2000.

Agreement between the Government of the United States of America and the Government of **Venezuela** to suppress illicit traffic in narcotic drugs and psychotropic substances by sea, signed at Caracas November 9, 1991; entered into force upon signature.

TIAS 11827. Amended by the Protocol signed at Caracas July 23, 1997; entered into force July 23, 1997.

Two memoranda of understanding and a forward operating location agreement were also in effect during the 1990s, as listed below.

Memorandum of Understanding between the Government of the United States of America and the Government of Great Britain and Northern Ireland, on behalf of the Government of the **British Virgin Islands**, concerning maritime narcotics interdiction operations, signed at Tortola February 6, 1990. Amended by exchange of notes on December 2 and 10, 1992. Terminated October 30, 2000.

Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland including the Government of the **Turks & Caicos Islands** (the Government of the United Kingdom), the Government of the **Bahamas** (the Government of the Bahamas) and the Government of the United States of America (the Government of the United States), signed at Washington July 12, 1990.

Agreement of Cooperation between the Government of the United States of America and the Government of the Republic of **Ecuador** concerning United States access to and use of installations at the Ecuadorian Air Force Base in Manta for aerial counternarcotics activities, signed at Quito November 12, 1999; entered into force November 17, 1999.

5. Salvage at Sea

a. CSS *Alabama*

(1) Confirmation of French recognition of U.S. title to artifacts

The CSS *Alabama* was built in England in 1862 for the Confederacy and had a successful career as a destroyer of Union commerce in the U.S. Civil War until she was sunk in

1864. When the vessel's wreck was discovered by French divers in 1984 seven miles off the coast of France, both France and the United States claimed title. In May 1989 the French embassy informed the U.S. Department of State that the French government had decided that title to the CSS *Alabama* and its artifacts belonged to the United States. On October 3, 1989, the United States and France signed an executive agreement concerning protection and study of the wreck and artifacts. Agreement between the Government of the French Republic and the Government of the United States of America concerning the wreck of the CSS *Alabama,* Paris, Oct. 3, 1989, TIAS No. 11687, U.N. LOS BULL. No. 20, at 26 (1992). Among other things, the agreement established a scientific committee to be composed of two representatives from each government and of experts designated by each. *See Digest 1989–1990* at 429–34.

At the first meeting of the scientific committee in Paris, June 11–13, 1991, a member of the French delegation suggested that although there was no doubt that the warship belonged to the United States, the question of ownership of the associated artifacts had not been resolved. In response to a request from the U.S. embassy in Paris for confirmation that the Government of France agreed that title to the artifacts associated with the wreck rested in the United States, the Office of Legal Affairs of the French Foreign Ministry responded in a diplomatic note of October 18, 1991, in which it referred to "the objects taken from the wreck of the CSS *Alabama*, which are the property of the United States Government."

(2) Ownership under U.S. law

On August 21, 1992, the U.S. Court of Appeals for the Third Circuit affirmed a lower court decision that a bell from the CSS *Alabama* belonged to the U.S. government. *United States v. Steinmetz,* 973 F.2d 212 (3d Cir. 1992). The bell had been recovered by a British diver in 1936 and was purchased by Steinmetz, a New Jersey antique dealer, from an antique

dealer in Hastings, England. When Steinmetz offered the bell for auction in New York in December 1990, the United States claimed ownership of the bell and filed a complaint in admiralty in the U.S. District Court for the District of New Jersey. Steinmetz counterclaimed for a determination that the bell was his property, and for payment of full market value or, in the alternative, compensation under theories of quantum meruit and/or unjust enrichment by the United States. The district court granted the U.S. motion for summary judgment. 763 F. Supp. 1293 (D.N.J. 1991). In affirming, the court of appeals held that the United States had succeeded to ownership by the Confederacy and that the United States had not abandoned title, which can only be accomplished by "explicit acts."

Excerpts below from the court of appeals opinion address the law of succession in this case.

---

* * * *

2. Property of the Confederacy

Having established that the Confederacy owned the ALABAMA, we are faced with the question whether the United States succeeded to its ownership after the Civil War.

State succession is not a well-defined legal doctrine. One commentator, noting the different treatment given to the law of state succession by different writers, has suggested that it be treated in "specialized contexts" because the "concepts of 'succession' and 'continuity' of states . . . are levels of abstraction unfitted to deal with specific issues." See Ian Brownlie, Principles of Public International Law 635 (1966).

* * * *

Steinmetz and the Amici contend that the succession doctrine is inapplicable to the Confederacy's property because under that doctrine the successor government taking the assets of the conquered government must also take on its debts, which the United States did not do with respect to the Confederacy. Indeed, section 4 of the Fourteenth Amendment explicitly provides:

> Neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, . . . but all such debts, obligations and claims shall be held illegal and void.

U.S. Const. amend. XIV, § 4.

As Steinmetz notes, the English courts that addressed this issue assumed that when the United States succeeded to the property of the Confederacy, it also succeeded to the debts and obligations attached to that property. Thus, those courts would not allow the United States to succeed to Confederate property without assuming the outstanding obligations as to that property. See McRae, 8 L.R.-Eq. at 69; Prioleau, 35 L.J. Chancery N.S. at 11. We are unable to find a United States case that so held. But even the English courts did not interpret the succession doctrine to require the United States to succeed to the Confederacy's debts unrelated to the particular property at issue.

Even though there may be some question as to the exact contours of the succession doctrine as applied by the United States after the Civil War, in the case of the ALABAMA there were no outstanding liabilities for which the United States might have been responsible had it asserted its title to the ALABAMA right after the war. Steinmetz does not allege that the ALABAMA was not fully paid for by the Confederacy.

It follows that whether or not historians would regard the international law of succession as applicable here (fn. omitted) the succession doctrine, as explicated and applied by the United States Supreme Court with respect to the Civil War, entitled the United States to all property acquired by the Confederacy. Therefore, we hold that, as a matter of law, the United States acquired title to the ALABAMA after the Civil War ended.

* * * *

b. Spanish naval shipwrecks

The requirement for express abandonment of a government-owned vessel as to the United States, noted above, was

found also to apply to Spanish ownership of two Royal Navy vessels shipwrecked in 1750 and 1802 off the coast of Virginia. *Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999*), aff'd in part, rev'd in part*, 221 F.3d 634 (4th Cir. 2000). Sea Hunt, Inc., a maritime salvage company based in Virginia, located two shipwrecked vessels, *Juno* and *La Galga*, near the coast of Assateague Island. It then obtained permits from the Virginia Marine Resources Commission, an agency of the Commonwealth of Virginia, to conduct salvage operations and recover historic artifacts from the wrecks. Virginia asserted a claim of ownership over the vessels under the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. §§ 2101–2106. Under § 2105, the United States asserts title to any abandoned shipwreck that is on or embedded in the submerged lands of a state of the United States, and automatically transfers title to the state in whose submerged lands the shipwreck is located.

On March 11, 1998, Sea Hunt filed its Verified Complaint in Admiralty In Rem in the U.S. District Court for the Eastern District of Virginia against the two wrecks. The district court ordered that a warrant be issued for the arrest of the shipwrecked vessels and artifacts, granting to Sea Hunt exclusive rights of salvage until further notice of the Court, and directing Sea Hunt to publish a general notice of the claim and to send specific notice to both the United States and Spain. Subsequently, the district court denied motions by the United States to intervene on its own behalf, 182 F.R.D. 206 (E.D. Va. 1998), and on behalf of Spain, filed under the Treaty of Friendship and General Relations Between the United States of America and Spain, 1902. 22 F. Supp. 2d 521 (E.D. Va. 1998). Spain intervened and moved for summary judgment on December 23, 1998. At a hearing on March 5, 1999, the district court granted a U.S. motion to file an *amicus* brief and statement of interest. *See* 47 F. Supp. 2d at 681–84.

The district court noted that "[t]itle over a shipwreck covered under the ASA is transferred to the State in whose waters the wreck is located . . . Thus, if this Court finds that *Juno* and *La Galga* have at any time been abandoned by

> Spain, then according to the ASA, the wrecks belong to Virginia. If, on the other hand, the Court finds that Spain has never abandoned *Juno* and *La Galga*, then Spain retains ownership over them." *Id.* at 685–86. In examining Fourth Circuit precedent as to the definition of "abandonment," the district court concluded that Sea Hunt would have to establish that Spain had "expressly abandoned" the vessels, as explained below.

---

* * * *

The statement of the law of abandonment by the Court in Columbus-America [Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993)] could not be clearer. Although the Court clearly allows for an inference of abandonment for shipwrecks which have been lost and undiscovered for some time, in a case where the original owner appears, abandonment may not be inferred, but must be proven, regardless of how long the ships have been lost, and regardless of the character of the vessel. The Columbus-America case makes no distinction between private vessels and public vessels such as warships. Because of the assertion of a universal rule of express abandonment, it is irrelevant in this case for the purpose of determining abandonment whether JUNO and LA GALGA were warships in the service of Spain at the time of their sinking.

* * * *

The implication of the Columbus-America rule in this case is that, whether or not JUNO and LA GALGA are considered warships, their owner, the Kingdom of Spain, has appeared to claim ownership to them, and therefore Sea Hunt, in pressing its claim for possession of the vessels under the law of finds, must show by "strong and convincing evidence" that the shipwrecks have been expressly abandoned by Spain. *Columbus-America*, 974 F.2d at 465. Unless Sea Hunt can do so, the Court must apply the law of salvage, which operates under the premise that "the original owners still retain their ownership interests in such property." *Id.* at 459.

In applying this rule to the two vessels at issue, the district court had concluded that *La Galga*, which sank in 1750, had been expressly abandoned by the 1763 Treaty between Great Britain, Spain and France, ending the Seven Years War, based on what it characterized as "a sweeping grant of territory and property from Spain to Great Britain" recorded in Article XX of that treaty. *Id.* at 689. As to *Juno*, which sank in 1793, the district court concluded that Spain had not expressly abandoned the shipwreck in the 1819 Treaty ending the conflict between Spain and the United States arising out of the War of 1812. The court found that Article 2 of that treaty, transferring territory from Spain to the United States, was "much narrower than Article XX of the 1763 Treaty," and that Spain thus retained title. *Id.* at 690.

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the legal rationale of the district court and its conclusion as to *Juno*. The Fourth Circuit disagreed with the district court's reading of the 1763 Treaty, however, and reversed as to *La Galga*. 221 F.3d 634 (4th Cir. 2000). In addition, as explained below, the Fourth Circuit concluded that sovereign vessels were entitled to special treatment under the ASA and that the ASA did not affect the meaning of "abandoned" under admiralty law. Furthermore, the court of appeals concluded that the United States had unique treaty obligations to respect the immunity of the Spanish vessels.

---

* * * *

The legislative history of the ASA suggests that sovereign vessels must be treated differently from privately owned ones. The House Report incorporates a State Department letter, which states, "the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment." H.R. Rep. No. 100–514(II), at 13 (1988), reprinted in 1988 U.S.C.C.A.N. at 381. . . .

Further, courts have held that the ASA "did not affect the meaning of 'abandoned,' which serves as a precondition for the invocation of the ASA's provisions." . . .

Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts. . . . This principle reflects the long standing admiralty rule that when "articles are lost at sea the title of the owner in them remains." . . .

* * * *

Finally, the express abandonment standard is required by Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain. Article X provides, "In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases." Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, 33 Stat. 2105. According to the United States Department of State, "this provision is unique" in that no other "friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded provision applying to State ships entitled to sovereign immunity." Statement of Interest, U.S. Dep't of State, P 13 (Dec. 18, 1998). This treaty requires that imperiled Spanish vessels shall receive the same immunities conferred upon similarly situated vessels of the United States.

United States vessels may only be abandoned by an express, unambiguous, and affirmative act. Article IV of the Constitution states, "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3. From this it follows that the Constitution precludes a finding of implied abandonment of federal lands and property—dispositions of federal property require some congressional action. "The United States cannot abandon its own property except by explicit acts." See *United States v. Steinmetz*, 973 F.2d 212, 222 (3d Cir. 1992). The Supreme Court has emphasized that the United States cannot be precluded from asserting its ownership rights by private property "principles similar to laches, estoppel or adverse possession." *United States v. California*, 332 U.S. 19, 39–40, 91 L. Ed. 1889, 67 S. Ct. 1658 (1947). The government "holds its interests here as elsewhere in trust for all the people," and thus cannot relinquish its property without express acts. *Id.* at 40. The House Report for

the ASA also relates the understanding that "U.S. warships and other public vessels . . . require an affirmative act of abandonment." H.R. Rep. No. 100–514(II), at 5 (1988), reprinted in 1988 U.S.C.C.A.N. at 374. Thus, one of the immunities granted to United States vessels is that they will not be considered abandoned without a clear and affirmative act by the government.

Under the terms of the 1902 Treaty, Spanish vessels can likewise be abandoned only by express renunciation. . . .

Applying the express abandonment standard to sovereign vessels also respects the legitimate interests of the executive branch. While the ASA confers title to abandoned shipwrecks to the states, it does not vitiate important national interests or undermine the well-established prerogatives of sovereign nations. . . .

* * * *

. . . Article XX [of the 1763 Treaty] does not contain "clear and convincing" evidence of express abandonment. While the language of Article XX encompasses a great deal of land and property, it does not mention vessels or shipwrecks, nor does Article XX refer to Spanish property in the sea or on the seabed. Such general treaty language does not come close to an "express declaration abandoning title," . . . and therefore cannot amount to clear and convincing evidence of an express abandonment.

B.

This view of the treaty is not ours alone. Both parties to Article XX of the 1763 Treaty agree that the Kingdom of Spain did not abandon LA GALGA. Such agreement is significant. When "the parties to a treaty both agree as to the meaning of a treaty provision . . . we must absent extraordinarily strong contrary evidence, defer to that interpretation.". . . .

* * * *

The United States has strenuously defended Spain's ownership over these vessels. The government maintains that this is required by our obligations under the 1902 Treaty as well as general principles of international comity. The United States "is the owner of military vessels, thousands of which have been lost at sea, along

with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea." Amicus Curiae Br. of U.S. at 1. Protection of the sacred sites of other nations thus assists in preventing the disturbance and exploitation of our own. Here the government's interest is rooted in customary international law. See 8 Digest of U.S. Practice in International Law 999, 1006 (1980) (noting that interference with sunken military vessels, "especially those with deceased individuals," is "improper" and that foreign governments' requests to have such views respected "should be honored").

It bears repeating that matters as sensitive as these implicate important interests of the executive branch. Courts cannot just turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner. Far from abandoning these shipwrecks, Spain has vigorously asserted its ownership rights in this proceeding. Nothing in the law of admiralty suggests that Spain has abandoned its dead by respecting their final resting place at sea.

c. Deadlight Fleet

At the end of World War II more than a hundred German submarines were surrendered to U.K. forces. Pursuant to agreements pertaining to disposal of German naval and merchant vessels, reached by the United Kingdom, the United States, and the USSR at the Potsdam Conference following the war, the United Kingdom sank most of the submarines, known as the Deadlight Fleet, in the North Sea. As also agreed, a limited number of the submarines were retained by the individual tripartite powers for purposes of experimentation rather than being destroyed.

In the early 1990s private parties began to inquire about the possibility of recovering some of the submarines, or parts thereof. On May 20, 1993, the United Kingdom indicated in a communication to the Department of State that it wished

to grant rights to salvage the submarines for their scrap metal and sought confirmation that the U.S. and Russian authorities had no objection to the UK proposals for the recovery of the submarines. Following an exchange of additional information, on April 13, 1994, the Department of State confirmed to the British Embassy that it had never acquired title to any of the submarines and had no objection to the salvage but sought to ensure that they would not be useable as weapons of war. The letter of that date from J. Ashley Roach, Office of Oceans, Environment and Science, Department of State Office of the Legal Adviser, to the British Embassy provided as follows.

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

---

* * * *

I have the honor to advise you that the United States is now in a position to respond favorably to the request of Her Majesty's Government, set out in the note attached to Ewan Buchanan's letter of 20 May 1993, that the United States confirm that it has no objection to the United Kingdom's allowing those ex-German submarines forming part of the so-called Deadlight Fleet sunk by the Royal Navy in 1945/46 pursuant to the recommendations of the Tripartite Naval Commission Recommending the Allocation of the German Surface Navy and the German Submarine Fleet of 6 December 1945, title to which passed to Her Majesty's Government at the end of the war, to be raised for scrap metal.

The United States is of the view that it never acquired title to any of the German Deadlight Fleet submarines not seized by U.S. forces at the end of World War II.

Since the purpose of the sinking of these submarines at sea was to ensure they not be useable in the future as weapons of war, the United States would be pleased to be assured that these submarines will be cut up before being raised.

. . . We think the foregoing is consistent with our shared views on the acquisition of title to enemy warships during wartime and loss of title to sunken warships.

d. Discovery of Japanese minisubmarine sunk off Pearl Harbor

In 1992 the wreck of a Japanese Type A minisubmarine that had been sunk in combat near Pearl Harbor, Hawaii, on December 7, 1941, was discovered and a salvage claim by the discoverer was filed in federal court in Hawaii. *Institute of Aeronautical Archaeological Research, Inc. v. Wreck of Type A "Midget" Japanese Submarine*, D. Hawaii, Civil No. 92-00522-SPK. A consent judgment and permanent injunction was issued on July 1, 1993, prohibiting "any action of any nature in relation to defendant sunken vessel" without the prior permission of the United States Government. An exchange of notes between the United States and the Embassy of Japan confirmed that the submarine was the property of the United States and that the Japanese government wished the United States to protect its interests. The U.S. note of January 12, 1993, which was confirmed in a reply note from the Embassy of Japan on the same date, is set forth below.

The Department of State refers to recent discussion between the United States and Japanese Governments regarding the recently discovered wreck of a Japanese Type A minisubmarine which was sunk in combat with United States naval forces near Pearl Harbor, Hawaii on December 7, 1941, and which is presently the subject of a salvage claim by the discoverer in the Federal District Court for the District of Hawaii.

At a scheduling conference on November 12, 1992, the United States Department of Justice entered an appearance and suggested that, in accordance with international law and United States salvage law, the owner of the wreck did not wish it to be salved or disturbed in any manner by the salvor. . . .

Since it is the view of the United States that the wreck and its associated artifacts are now the property of the United States, to assist the United States in preserving the rights and interests of the United States and Japan in this litigation, the Department would be grateful if the Government of Japan would confirm that it does

not object to the view of the United States that the wreck and its associated artifacts are now the property of the United States, that the wreck is a war grave, and its desire that the United States protect the interests of the Government of Japan and its citizens therein.

e. SS Empire Knight

In February 1944 the British steamship *Empire Knight*, en route to New York from St. John, New Brunswick, Canada, ran aground and sank off the coast of Maine, apparently as a result of a steering or navigational error by the ship's crew. The ship was UK-flagged, owned by a UK company, was under UK Government control, and was preparing to join a World War II convoy of supply ships from the United States to the United Kingdom. Included in its cargo were a number of flasks containing mercury. In the late 1990s the mercury was found to be leaking into the marine environment. U.S. agencies spent approximately $4 million on initial cleanup efforts and anticipated the need for further expensive efforts. The U.S. Department of Justice filed a case against the owner of the vessel, Buries Markes Ltd., to recover for these expenditures under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607(a). *United States v. Buries Markes Ltd*, Civ. No. 2:97cv00345 (D. Maine). The UK government informed the United States that it viewed the case as targeted against the U.K. Government, and that the vessel was entitled to sovereign immunity. Furthermore, it considered the case to be covered by the 1942 Knock-for-Knock Agreement between the United States and the United Kingdom of December 4, 1942, as amended, 56 Stat. 1780, E.A.S. No. 282. That agreement provides that each government "agrees to waive claims arising out of or in connection with negligent navigation . . . in respect of any vessel . . . owned by such Government against the other contracting Government . . . or in any case where such other Government represents that such claim if made would ultimately be borne by such other Government." The case was dismissed at the

request of the Department of Justice without prejudice on March 24, 1998, in an unpublished order, and was not refiled.

6. Legislation in the United States Concerning Gambling at Sea

a. Gambling Ship Act

(1) 1994 amendments

The Gambling Ship Act, as amended, 18 U.S.C. §§ 1081–1084 (2000), prohibits most gambling aboard American-flag vessels operated principally for gambling. The Act prohibits anyone "who is on an American vessel or is otherwise under or within the jurisdiction of the United States," from directly or indirectly owning or holding any interest in any gambling ship or participating in the operation of a gambling operation on a gambling ship "if such gambling ship is on the high seas, or is an American vessel or otherwise under or within the jurisdiction of the United States, and is not within the jurisdiction of any State." As enacted in 1948, the term "gambling ship" was defined to include all "vessel[s] used principally for the operation of one or more gambling establishments." 18 U.S.C. § 1081 (1984). The reference to "jurisdiction of any State," meaning a state of the United States, made clear that the statute did not preempt laws of states of the United States, making it possible for a state to authorize operation of such gambling ships, but only within the reach of that state's jurisdiction, i.e., within the territorial sea.

In 1994 the Gambling Ship Act was amended by creating an exception to the prohibition on gambling ships in certain circumstances. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 320501, 108 Stat. 1796, 2114–15 (1994). The definition of "gambling ship" in § 1081 was amended by providing that "[s]uch term does not include a vessel with respect to gambling aboard such vessel beyond the territorial waters of the United States during a covered voyage (as defined in section 4472 of the Internal Revenue Code of 1986 as in effect on January 1, 1994)." The

definition of "covered voyage" under § 4472 included a "voyage of . . . a commercial vessel transporting passengers engaged in gambling aboard the vessel beyond the territorial waters of the United States, during which passengers embark or disembark the vessel in the United States." 26 U.S.C. § 4472 (1997). A 1992 interpretive regulation of the Internal Revenue Service, effective for voyages beginning on or after January 1, 1990 (57 Fed. Reg. 33,636 (July 30, 1992)), provided:

> For purposes of sections 4471 and 4472, the territorial waters of the United States are those waters within the international boundary line between the United States and any contiguous foreign country or within 3 nautical miles (3.45 statute miles) from low tide on the coastline.

26 C.F.R. § 43.4472–1(e) (1997).

(2) Width of territorial sea under Gambling Ship Act

On January 29, 1999, the U.S. Court of Appeals for the Second Circuit affirmed a district court opinion holding that the definition of "territorial waters" as used in the Gambling Ship Act, as amended, 18 U.S.C. §§ 1081–1084 (2000), remained three, rather than twelve, nautical miles. *United States v. One Big Six Wheel*, 166 F.3d 498 (2d Cir. 1999). The case was brought as an *in rem* action against Big Six Wheel, a gambling device on a vessel used in gambling cruises embarking and returning to Brooklyn, New York. The gambling cruises were often known as "cruises-to-nowhere" because they proceeded more than three nautical miles from the coastline of the United States where they operated on the sea as casinos until they turned around and re-entered the three-mile limit. The Second Circuit opinion summarized the statutory issue and its relation to the 1988 Presidential Proclamation extending the territorial waters of the United States to twelve miles as set forth below.

---

* * * *

At one time, the Gambling Ship Act flatly prohibited gambling aboard American-flag vessels engaging in interstate and foreign commerce, anywhere. See *18 U.S.C.A. §§ 1081–1082* (West 1984). The existence of the cruise-to-nowhere industry depends upon a 1994 amendment to the Act, which created exceptions for vessels on certain cruises, defined by reference to a provision of the Internal Revenue Code as of 1994 that levies a tax on the gambling revenues of such cruises. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 320501, 108 Stat. 1796, 2114–15 (1994) (amending *18 U.S.C. § 1081*). In 1994, the Internal Revenue Code defined such cruises as (inter alia) those that return within 24 hours to their port of embarkation and conduct gambling (subject to federal taxation) "beyond the territorial waters of the United States." *26 U.S.C. § 4472* (1994). Under the corresponding Internal Revenue regulation in effect in 1994, the territorial waters of the United States extended to three nautical miles. See *26 C.F.R. § 43.4472–1(e)* (1994).

In August 1997, the United States Attorney for the Eastern District of New York notified Bay Casino that its operations were in violation of the Gambling Ship Act because its ships were not cruising twelve nautical miles to sea before opening the casino. The United States Attorney cited section 901(a) of AEDPA, which provides:

> The Congress declares that all the territorial sea of the United States, as defined by Presidential Proclamation 5928 of December 27, 1988 [extending U.S. territorial sea to twelve nautical miles[1]], for purposes of Federal criminal

[1] Presidential Proclamation 5928, signed by President Reagan, extended the territorial sea of the United States to twelve nautical miles in order to conform to international standards. See *43 U.S.C.A. § 1331* (West Supp. 1998). This Proclamation, however, explicitly refused to "extend[] or otherwise alter[] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations therefrom." Id. Therefore, it was not until the enactment of AEDPA in 1996 that the twelve nautical mile limit had any effect upon federal law—and even then, by its own language, only upon federal criminal jurisdiction.

> jurisdiction is part of the United States, subject to its sovereignty, and is within the special maritime and territorial jurisdiction of the United States for the purposes of title 18, United States Code [this title].

18 U.S.C.A. § 7, Hist. & Stat. Note (West Supp. 1998) (first alteration and footnote added).

* * * *

Section 901(a) alters United States boundaries, but not for all purposes. Although the increment of territorial waters is made "part of the United States," this occurs solely "for purposes of Federal criminal jurisdiction." 18 U.S.C.A. § 7, Hist. & Stat. Note. Although that same increment is implemented "for the purposes of title 18," that measure is itself limited to "the special maritime and territorial jurisdiction of the United States." Id. Therefore, section 901 is jurisdiction defining. As the district court observed, to infer more would be to "read the phrase 'for purposes of Federal criminal jurisdiction' out of the statute."

* * * *

. . . The 1994 amendment to § 1081 effected a narrowing of the previously absolute prohibition. And the term "territorial waters" used therein is not coextensive with the extent of the nation's criminal jurisdiction; rather, it specifies geographically where a certain kind of offshore gambling is a criminal activity and where it is licit. However one expands the territory in which one's conduct might be proscribed as an offense against the United States, that territorial expansion does not criminalize offshore gambling that the Gambling Ship Act itself does not forbid.

. . . Given the plain language of AEDPA and the Gambling Ship Act, we read both terms consistently. For purposes of the Gambling Ship Act, until Congress says otherwise, the "territorial waters" extend three nautical miles from the U.S. coastline.

* * * *

b. Johnson (Gambling Devices) Act

(1) 1991 amendments

The Johnson Act, first enacted in 1951, regulated gambling devices located, *inter alia*, on vessels not covered by the Gambling Ship Act because the ship on which they are found is not used "principally" for gambling purposes. 15 U.S.C. §§ 1171–1175. Prior to amendments enacted in 1992, the Act declared it unlawful "knowingly to transport any gambling device to any place in a State [of the United States] or a possession of the United States from any place outside of such State or possession" unless lawful under the relevant state's laws.

The United States-Flag Cruise Ship Competitiveness Act of 1991, Pub. L. No. 102–251, 106 Stat. 60, 61–62 (1992), amended the Johnson Act in order to allow U.S. flag cruise ships to offer gambling as their foreign flag counterparts were able to do under the law. An explanation of the amendment provided by Congressman Lent of New York at the time the House of Representatives adopted the final version of the legislation on January 28, 1992, is provided below. 138 CONG. REC. H 68, 72 (daily ed. Jan. 28, 1992).

---

* * * *

. . . . This legislation will permit U.S.-flag cruise vessels to offer gambling to their passengers when embarked on cruises on the high seas. Currently, foreign-flag cruise ships departing from U.S. ports offer gambling but it is against the law for a U.S. ship to have gambling onboard. This prohibition has limited opportunities for American interests to engage in the profitable cruise ship trade.

H.R. 3866 changes the law so that both American and foreign-flag cruise ships will operate under the same rules regarding gambling onboard.

* * * *

Mr. Speaker, the merchant marine and fisheries committee very carefully crafted this legislation as an amendment to the so-called gambling devices act. It will allow the possession and operation of gambling equipment on U.S.-flag vessels to the same extent that gambling is allowed on foreign-flag vessels. This bill does not affect in any way the current prohibitions in the gambling ship act, which make it illegal to operate a vessel that is principally engaged in gambling as a floating casino.

This bill preserves the right of a coastal state to enact legislation that prohibits gambling on a vessel that operates from a port of that state even if the vessel sails from that port out into international waters and then returns to the same port. The committee was aware that a number of coastal states do not want gambling on vessels in their waters and this legislation retains the right of states to continue to prohibit gambling.

* * * *

(2) Applicability of state legislation

In July 1993 Entertainment A-Float filed an action against the state of Connecticut for a declaratory judgment and injunctive relief, asking the court, among other things, to declare that "applicable federal law and treaties supersede and preempt Connecticut's gambling laws" which prohibited the possession of gaming devices within the state. *Entertainment A-Float v. State of Connecticut*, Civil Action No. 3:93CV0319 (D.C.Ct. 1993). Entertainment A-Float was the time charterer of the cruise ship *Europa Jet*, registered in the Bahamas. As described in the complaint, Entertainment A-Float was organized to operate "cruises 'to nowhere,' where vessels leave a port and sail for approximately six hours and return to the same port." The *Europa Jet* was described as an "entertainment cruise vessel, including, among other things, a casino." While in the territorial waters of the state of Connecticut, the casino and all gambling equipment would be "locked up, secured, and not available for use by the public."

> Specifically, plaintiff argued that a state law prohibiting the possession of gaming devices within the state could not be applied to the gambling equipment of a vessel registered under the laws of a foreign nation, "as the laws of a host nation may not apply to the equipment aboard a foreign vessel exercising rights of free passage under the treaties governing the law of the seas."
>
> In an affidavit dated September 3, 1993, J. Ashley Roach, attorney-adviser, Office of Oceans, Environment and Science, Office of the Legal Adviser, U.S. Department of State, refuted this assertion. After first noting that the United States was not a party to the 1982 UN Convention on the Law of the Sea and that, as of the time of the affidavit, the Convention had not yet entered into force for the states that had ratified or acceded to it, he explained the position of the United States on this question as set forth below.

---

* * * *

6. It is the position of the United States that the provisions of the Law of the Sea Convention with respect to traditional uses of the oceans generally confirm existing maritime law and practice and fairly balance the interests of all States, and that it is United States policy to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight—contained in the Convention. I *Public Papers of the Presidents: Ronald Reagan 1983*, at 378–79.

7. I understand that under United States law set out in title 15 of the U.S. Code, section 1175, it is unlawful, inter alia, to transport or possess any gambling device on board a vessel documented under the laws of a foreign country that is on a voyage that begins and ends in the same State without an intervening stop in another State or foreign country and the State in which the voyage begins and ends has enacted a statute the terms of which prohibit the use on that voyage of any gambling device.

8. I also understand that Connecticut has enacted a statute defining gambling as a crime against public policy, i.e., Connecticut General Statutes section 53–278a et seq.; that under section 53–

278c(d), it is a misdemeanor for any person to knowingly possess or transport any gambling device; that under section 53–278c(a), all gambling devices found in a "gambling premise" are subject to seizure; and that under section 53–278a(7), a gambling premise is defined to include any vessel intended to be used for "professional gambling", which under subsection (3) is defined to include offering to accept for profit money risked in gambling in slot machines. I further understand that this gambling statute does not contain express language as to the territorial scope of its application.

9. Under Article 18(1)(b) of the Law of the Sea Convention, "passage" includes navigation through the territorial sea for the purpose of proceeding to or from internal waters. (New London, Connecticut is located within the internal waters of the United States.) Under Article 21(1) of the Law of the Sea Convention, a coastal State may adopt laws and regulations, in conformity with the Law of the Sea Convention and other rules of international law, relating to the "innocent passage" through the territorial sea in respect of, inter alia, the safety of navigation and the regulation of maritime traffic, and the prevention of the infringement of the customs and fiscal laws and regulations of the coastal state. Article 21(2) of the Law of the Sea Convention provides that:

> 2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

10. It is the position of the United States that the prohibition in Article 21(2) of the Law of the Sea Convention applies to those measures taken by a coastal State to promote safety of navigation and to minimize to the fullest extent possible pollution from vessels (see Article 194(3)(b) of the Convention), and thus limits the power of a coastal State to make and enforce laws relating to the essential marine-related operating characteristics (such as machinery design, hull, structure, crew size and competence) and marine-related equipment (such as radars, depth sounders, and pollution-prevention equipment) of a foreign ship engaged in innocent passage through the U.S. territorial sea (including proceeding to or from U.S. internal

waters) *See* U.S. Department of State, *Digest of United States Practice in International Law 1977*, at 530 (1979). Nothing in the *travaux preparatoire* of Article 21 or Article 194(3)(b) refers to the presence of gambling equipment or paraphernalia aboard ships (of whatever flag) in ports and internal waters.

11. The Law of the Sea Convention contains no provision purporting, or effective, to interfere with the power of the United States or any one of the states of the union (including Connecticut) to prescribe, enforce, or adjudicate laws prohibiting the possession of gambling devices or paraphernalia aboard vessels of any flag or nationality within the internal waters (including ports) of the coastal State, including the United States or of any state of the union.

* * * *

B. OUTER SPACE

1. Committee on the Peaceful Uses of Outer Space

On October 28, 1992, Kenneth Hodgkins, U.S. Adviser to the 47th Session of the UN General Assembly, addressed the Special Political Committee, providing the views of the United States on Item 72, "International Cooperation in the Peaceful Uses of Outer Space." Among other things, he addressed the role and structure of COPUOS and safe use of nuclear power sources in outer space.

Mr. Hodgkins' comments, excerpted below, are available at *www.state.gov/s/l/c8183.htm*.

Mr. Chairman, the Forty-seventh session of the General Assembly is meeting at a time during which dramatic changes continue to take place in the world political scene. There is no doubt that these changes present real possibilities to broaden international cooperation. The challenge before us is to seek those opportunities which will strengthen the role of the Committee on the Peaceful Uses of Outer Space (COPUOUS) as the chief advocate in the

United Nations system for international cooperation in the peaceful uses of outer space. Bearing this in mind, at future sessions of COPUOS and its subcommittees, we must redouble our efforts to deepen the scientific and technical content of our deliberations, avoiding the infusion of issues, such as disarmament, which are more appropriately handled in other fora.

. . . [T]he past year has been a productive one for the Committee. This is no more evident than in our work celebrating the International Space Year (ISY).

* * * *

In addition to the work done through the UN Programme on Space Applications, concrete results were realized through the Space Agency Forum on International Space Year (SAFISY). SAFISY has grown to a membership of 21 space agencies and ministries from around the world and 10 affiliated members representing organizations with space interests. SAFISY has served as a forum to coordinate ISY activities in the field of earth science and technology, space science, and education and training. The projects include analysis of scientific data, conferences to report on scientific results, educational programs to inspire young people to pursue careers in math and science, and public outreach to stimulate interest in space.

In our view, the UN's involvement in the International Space Year is another sign that the process initiated several years ago of reinvigorating the work of COPUOS is on the right track. COPUOS members have long agreed that strengthening international cooperation in the exploration of outer space implies the need for the Committee and its Subcommittees to improve wherever necessary the methods and forms of their work. We have yet to see the sort of substantial changes that we believe are required to put COPUOS and its Subcommittees on a more effective footing. But we recognize that some real progress has been made, particularly in addressing the perennial problem of the Legal Subcommittee's organization of work. We applaud the action taken by the Subcommittee on agreeing to specific measures that will improve its efficiency. Next year, we will evaluate the future organization of work of the Legal Subcommittee, and we are

confident that the spirit of cooperation and compromise that has characterized our work over the past year will yield positive results.

In conclusion, let me turn to the principles on the use of nuclear power sources in space. As we stated at the 35th session of the United Nations Committee on Peaceful Uses of Outer Space, the United States appreciates the efforts of that Committee on the complex technical subject of principles related to the safe use of nuclear power sources in outer space, in particular the efforts to deal with U.S. concerns for technical validity. The United States did not block the consensus recommendation of the Committee to forward the principles to the General Assembly, nor will the United States oppose their adoption here. On some points, however, it remains our view that the principles related to safe use of nuclear power sources in outer space do not yet contain the clarity and technical validity appropriate to guide safe use of nuclear power sources in outer space. The United States has an approach on these points which it considers to be technically clearer and more valid and has a history of demonstrated safe and successful application of nuclear power sources. We will continue to apply that approach.

Principle 11 calls for review and revision of the principles within two years, and we strongly believe that this will be necessary. Our vote in favor of these principles is predicated on the understanding that Principle 3 will be revised. In fact, this review and revision should begin promptly at the next sessions of the Scientific and Technical and Legal Subcommittees of COPUOS. In this manner the Committee can ensure the principles related to safe use of nuclear power sources in outer apace are technically sound and are consistent with proven U.S. safety practices.

On November 12, 1996, Mr. Hodgkins provided the views of the United States in the Special Political and Decolonization Committee on recent developments in COPUOS and the U.S. space program. Excerpts below concern management of the Global Positioning System, U.S. policy concerning space nuclear reactors in Earth orbit and minimization of space debris, and the importance of international cooperation in the peaceful uses of outer space as well as comments on

the organization of work in COPUOS. The full text is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

The United States is strongly committed to the basic tenet of the 1967 Outer Space Treaty; namely, that the exploration and use of outer space should be carried out for the benefit and in the interests of all states. That commitment was further underscored with the release on March 29th of President Clinton's policy on the use and management of the Global Positioning System (GPS).

GPS was designed by the U.S. Department of Defense as dual-use system. The 24 satellite constellation makes it possible for users to determine their position and navigate anywhere in the world. Over the past several years, GPS has rapidly become an integral component of the emerging Global Information Infrastructure, with applications including mapping and surveying; international air traffic management; global change research; car navigation; weather prediction; earthquake monitoring; and recreational activities such as hiking and taking measurements at sporting events. The growing demand from military, civil, commercial and scientific users has generated a commercial GPS equipment and service industry that covers the world.

This policy opens the door for rapid growth in international civil, commercial and scientific use of GPS. It announced the U.S. Government's intention to terminate the current practice of degrading civil GPS signals within the next decade, providing a better signal for all users. The policy also reaffirms the U.S. commitment to providing the GPS Standard Positioning Service on a continuous, worldwide basis, free of direct user fees.

As we leave behind the East-West rivalries and enter the Third Millennium, the exploration of outer space will be a major source of technological advances. Recognizing this, President Clinton announced on September 19th a new national space policy that is the first post-Cold War assessment of American space goals and activities. The policy reaffirms our commitment to the exploration and use of outer space by all nations for peaceful purposes and for the benefit of all humanity. It calls on the U.S. space program to

enhance knowledge of the Earth, the solar system and the universe through human and robotic exploration and to promote international cooperation in space. The policy addresses two issues of particular interest to the Committee. Under this policy, space nuclear reactors will not be used in Earth orbit without specific approval by the President or his designee. Such requests for approval will take into account public safety, economic considerations, international treaty obligations, and U.S. national security and foreign policy interests. We believe that all countries planning to use space nuclear reactors should adopt an approval process which incorporates these elements. Of equal importance is what the policy says about space debris. It is in the interest of the U.S. Government to ensure that space debris minimization practices are applied by other spacefaring nations and international organizations. The President has directed that the U.S. will take a leadership role in international fora to adopt policies and practices aimed at debris minimization and will cooperate internationally in the exchange of information on debris research and the identification of debris mitigation options.

Mr. Chairman, my delegation would like to join previous speakers in expressing satisfaction with the positive developments that have occurred in the Committee on the Peaceful Uses of Outer apace and its subcommittees. The cooperative spirit in which we have worked over the past year is an encouraging sign that more can be accomplished in the future. We believe that the Committee is making real progress towards focusing its efforts on serving as an advocate for international cooperation in the peaceful uses of outer space in the United Nations system. This has not been easy and our most important accomplishments have come only after long and serious negotiations culminated by compromise on the part of all Member States. Although there are still skeptics, the positive results we see today demonstrate that the principle of consensus can work effectively.

In this regard, we are pleased to join consensus on the adoption of the "Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interests of All States, Taking into Particular Account the Needs of Developing Countries." After substantial debate, the Committee reached

agreement on a balanced text which represents an important statement on the scope and nature of international cooperation in outer space. The Declaration recognizes that States are free to cooperate in the exploration of outer space on a mutually acceptable basis and suggests that particular attention should be given to the benefit for and the interests of developing countries. It also recommends that the Committee should be strengthened in its role as a forum for the exchange of information on space cooperation and encourages States to contribute to the UN Programme on Space Applications. These are laudable goals which reflect, in part, the U.S. practice in conducting international space activities.

I wish to recall that my delegation and others have put forward detailed proposals over the past decade for improving the organization of work in COPUOS and its subcommittees. Indeed, the Committee has concluded that strengthening international cooperation in the peaceful exploration and use of outer space implies the need for the Committee itself to improve, whenever necessary, the methods and forms of its work. We have always taken this mandate seriously. That is why, when one takes stock of what has been achieved to date, we are gratified to see that many of these proposals have in fact been adopted. Of particular note has been the productive discussions in the Scientific and Technical Subcommittee, where space scientists and experts are now playing a central role in the work of that subcommittee.

On the other hand, we are convinced that more can be done on the question of working methods, particularly in the Legal Subcommittee. In this regard, we note that the Chairman of COPUOS, Ambassador Peter Hohenfellner, is conducting consultations on the methods of work and agendas of the Committee and its subcommittees. This is an important step forward in seeking those reforms which will make COPUOS a more effective and efficient body in the UN system. Within the context of these discussions, the U.S. places its highest priority on two results. First, there must be an unambiguous commitment by all member states to the principle of consensus in both substantive and procedural matters taken up by COPUOS. Second, it is imperative that significant reductions are made in the duration of sessions of the Legal Subcommittee and the Committee. We have demonstrated

that these two bodies can complete their work in less time, resulting in real savings in conference services.

* * * *

2. Use of the Global Positioning System

A fact sheet released by the Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, December 16, 1998, described the Global Positioning System ("GPS") as follows:

> The NAVSTAR Global Positioning System (GPS) is a constellation of 24 satellites developed, launched, and maintained by the United States Air Force that provides positioning, timing, and navigation signals free of charge to both military and civilian users worldwide. GPS is the heart of a Global Navigation Satellite System (GNSS), which includes augmentations systems being developed by the United States, Europe, and Japan.

The fact sheet is available at *www.state.gov/www/global/oes/space/9081216_fs_navstar.html*. *See also* U.S. policy on GPS in 1.b., *supra*.

a. U.S.-Japan Joint Statement

On September 22, 1998, President William J. Clinton and Japanese Prime Minister Keizo Obuchi issued the United States-Japan Joint Statement on Cooperation in the Use of the Global Position System, 34 WEEKLY COMP. PRES. DOC. 1862 (1998). The statement addressed cooperative activities to promote GPS as an international standard, prevent misuse of GPS, promote compatible operating standards, build awareness of the need for adequate GPS radio frequency allocation, and encourage trade and investment in GPS equipment.

On the basis of a series of discussions between representatives and experts of the Government of the United States and the Government of Japan, U.S. President William Clinton and Japanese Prime Minister Keizo Obuchi have issued this Joint Statement regarding cooperation in the use of the Global Positioning System (GPS) Standard Positioning Service for global positioning and other applications.

* * * *

Building a Cooperative Relationship

The United States Government intends to continue to provide the GPS Standard Positioning Service for peaceful civil, commercial, and scientific use on a continuous, worldwide basis, free of direct user fees.

The Government of Japan intends to work closely with the United States to promote broad and effective use of the GPS Standard Positioning Service as a worldwide positioning, navigation, and timing standard. Both Governments are convinced of the need to prevent the misuse of GPS and its augmentation systems without unduly disrupting or degrading civilian uses, as well as of the need to prepare for emergency situations. Both Governments intend to cooperate to promote and facilitate civilian uses of GPS. It is anticipated that cooperation will:

- promote compatibility of operating standards for GPS technologies, equipment, and services;
- help develop effective approaches toward providing adequate radio frequency allocations for GPS and other radio navigation systems;
- identify potential barriers to the growth of commercial applications of GPS and appropriate preventative measures;
- encourage trade and investment in GPS equipment and services as a means of enhancing the information infrastructure of the Asia-Pacific region; and
- facilitate exchange of information on GPS-related matters of interest to both countries, such as enhancement of global positioning, navigation, and timing technologies and capabilities.

The two Governments intend to work together as appropriate on GPS-related issues that arise in the International Civil Aviation Organization, the International Maritime Organization, the International Telecommunication Union, and Asia Pacific Economic Cooperation, or in other international organizations or meetings.

Cooperative Mechanism

The Government of the United States and the Government of Japan have decided to establish a mechanism for bilateral cooperation relating to the use of the GPS Standard Positioning Service . . .

The two Governments share the expectation that this mechanism will help the two Governments identify ways to deal with GPS-related issues that may arise as civilian use of GPS increases, and take actions as appropriate.

b. U.S.-European Union consultations

On December 16, 1998, Mary Beth West, Deputy Assistant Secretary for Oceans, Fisheries, and Space, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, and Mr. Matthias Ruete, Director for the Directorate General for Transportation, European Commission, issued a joint summary report for United States-European Union GPS and GNSS consultations.

The joint summary report, set forth in full below, is also available at *www.state.gov/www/global/oes/space/981216_useu_gps.html*.

The United States and Europe recognize the vital and growing reliance on satellite-based radio-positioning, navigation, and precision timing for commercial, civil, and scientific functions, including those related to safety-of-life.

In a series of exploratory discussions between the representatives and experts of the Government of the United States

and the European Tripartite Group—European Community, represented by the European Commission, European Space Agency and Eurocontrol—, the two sides have discussed a number of options for achieving a future Global Navigation Satellite System (GNSS). The United States believes that a GNSS based on GPS and its related augmentations—such as WAAS, EGNOS, MSAS, maritime DGPS, and Eurofix—would effectively meet the needs of global users. The European institutions are in the process of making a decision in early 1999 on the future direction and role of Europe in satellite-based radionavigation.

At the most recent meetings, an option under consideration by the European institutions was discussed. This option would involve the creation of a European component of GNSS that would provide signals-in-space which would be fully compatible and interoperable with GPS. With regard to this option, the United States presented a concept for further discussion based on the following:

- Use of common GPS time, geodesy, and signal structure standards
- Protection of current radionavigation spectrum from disruption and interference
- Seamless, global interoperability of future systems with GPS
- Open signal structure for basic civil services to assure full availability for safety-related services and to promote equal access for applications development and value-added services
- No direct user fees for basic civil and public safety services
- Ensuring open market driven competition for user equipment and applications
- Recognizing the national and international security issues of GPS and GNSS and protecting against misuse of the systems.

The United States Government intends to continue to provide the GPS Standard Positioning Service for peaceful civil, commercial, and scientific use on a continuous, worldwide basis free of direct user charges. With regard to a GPS-based system, the United States Government is prepared to consider in a cooperative agreement, opportunities for expanding European insight and input into

the operation, management, and modernization of GPS civil functions through appropriate mechanisms—e.g., civilian representation at the civil GPS augmentation centers. On a similar basis, Europe would consider, in line with the provisions above in this paragraph, equivalent U.S. treatment within a civil GNSS-2 created by Europe.

In the context of a cooperative agreement, structures for interface coordination could be established. These structures could be responsible for coordinating the technical characteristics of each system and may need to address policy issues, e.g., spectrum management and civil-military interfaces, so that their respective management structures can make informed decisions.

Both sides agree on the objective of achieving seamless global interoperability of satellite-based radionavigation systems. This implies both bilateral and multilateral cooperation on interoperability with ground and space-based augmentation systems (GBAS and SBAS) which might serve as contributions to the deployment of a future international integrity network. Further, this cooperation should support the development of appropriate radionavigation planning, as well as spectrum protection and planning, interface management, and the identification of and response to user requirements.

In order to clarify these options, both sides agree that technical meetings will take place in the near future. The two sides also intend to work together as appropriate on GNSS-related issues—e.g., certification, liability, and spectrum management—that arise in the International Civil Aviation Organization, the International Maritime Organization, the International Telecommunication Union, and in other international organizations or meetings.

On industrial issues, the two sides have concluded that there are opportunities for cooperation to promote the growth of trade in GNSS related products and services. This should include action to identify potential barriers to trade and appropriate measures to prevent or remove them.

In the spirit of the New Transatlantic Agenda, the two sides share the expectation that their consultations will help their respective authorities identify ways to deal with GPS/GNSS related issues that may arise as uses of GPS/GNSS increase.

3. Bilateral Agreements for Space Cooperation

a. Cross-waiver of liability agreement with Japan

On April 24, 1995, representatives of Japan and the United States signed the Agreement Between the Government of the United States of America and the Government of Japan Concerning Cross-Waiver of Liability for Cooperation in the Exploration and Use of Space for Peaceful Purposes, TIAS 12638. The agreement entered into force July 20, 1995. The purpose of the agreement, as provided in Article 1, "is to establish a framework for cross-waiver of liability in the interest of encouraging cooperation between the Government of the United States of America and the Government of Japan in joint activities for the exploration and use of space for peaceful purposes." Article 2 provided that the agreement "shall apply to joint activities listed in the Annex, ongoing at the time of entry into force of this Agreement or begun while this Agreement is in force." It also provided that the parties may revise the annex by mutual agreement. Article 3.2 (a) provided, among other things, that

> Each Party agrees to a cross-waiver of liability pursuant to which each Party waives all claims against [the other Party; a related entity of the other Party; and employees of the other Party or related entity] based on damage arising out of Protected Space Operations. . . . The cross-waiver shall apply to any claims for damage, whatever the legal basis for such claims, including but not limited to delict and tort (including negligence of every degree and kind) and contract. . . .

The term "Protected Space Operations" was defined in Article 3.1.(f) to mean "all activities pursuant to the joint activities listed in the Annex, including launch vehicle activities and payload activities on Earth, in outer space, or in transit between Earth and outer space. . . . [but] excludes activities on Earth which are conducted on return from space to

develop further a payload's product or process for use other than for the joint activity in question."

Article 3(2)(c) provided that

> This cross-waiver of liability shall be applicable to liability arising from the Convention on International Liability for Damage Caused by Space Objects. . . . where the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity or property damaged is damaged by virtue of its involvement in Protected Space Operations.

Article 3.2(d) set forth a number of exceptions to the cross waiver, including, among others, "claims made by a natural person, his/her estate, survivors, or subrogees for injury, other impairment of health or death of such natural person," claims for damage caused by willful misconduct, and intellectual property claims.

For a discussion of the President's authority to waive such claims by executive agreement, *see* Chapter 4.A.2.d.

b. Other agreements

During the 1990s the United States also entered into the U.S.-Argentina Agreement for Cooperation in the Civil Uses of Space, signed at Buenos Aires, August 6, 1991, as extended, TIAS 12214; the U.S.-Brazil Framework Agreement on Cooperation in the Peaceful Uses of Outer Space, with Annex, signed at Brasilia, March 1, 1996; and the U.S.-Russia Agreement Concerning Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes, with Annex, signed at Washington, June 17, 1992, as extended, TIAS 12457.

4. International Space Station Partners Agreement

On January 29, 1998, in Washington, D.C., the United States, Japan, Canada, Russia, and eleven members of the European

Space Agency—Belgium, Denmark, France, Germany, Italy, The Netherlands, Norway, Spain, Sweden, Switzerland and the United Kingdom—signed the Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station ("Intergovernmental Agreement" or "IGA"). A provisional arrangement, the Arrangement Concerning Application of the Space Station Intergovernmental Agreement Pending its Entry into Force, was signed at the same time by the government representatives. The parties to the provisional arrangement "undert[ook], to the fullest extent possible consistent with their domestic laws and regulations, to abide by the terms of the Intergovernmental Agreement until it enters into force or becomes operative with respect to each of them." The provisional arrangement entered into force on the date of signature.

The IGA committed the parties to a cooperative program to build, operate, and utilize a permanently manned civil space station. It was designed to supersede the Agreement on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station, done at Washington on September 29, 1988 (which had entered into force for the United States and Japan but not for any other space station partners), and to permit the Russian Federation to join the program. Secretary of State Madeleine K. Albright accepted the IGA for the United States on November 19, 1998, and it entered into force March 27, 2001, for Canada, Japan, the Russian Federation and the United States. Under Article 4 of the IGA "Cooperating Agencies" were responsible for implementing Space Station cooperation on behalf of the governments. NASA signed implementing memoranda of understanding with the Canadian Space Agency, the European Space Agency, the Russian Space Agency, and the Government of Japan. The preamble to the IGA "[r]ecognize[d] that [these MOUs were prepared] in

conjunction with their Governments' negotiation of this Agreement, and that the MOUs provide detailed provisions in implementation of this Agreement."

Excerpted below are Article 1, providing the object and scope of the agreement, and Article 2, reaffirming that the Space Station would be developed, operated and utilized in accordance with international law. Article 21 set forth the agreed territorial approach to intellectual property law on the Space Station flight elements based on registry of the elements, implemented in the United States pursuant to 35 U.S.C. § 105. (Article 16, the cross-waiver of liability provision of the IGA, excluded intellectual property claims.) Article 22 generally permitted a partner state to exercise criminal jurisdiction over personnel who are its nationals for misconduct occurring in space, and provided for mutual legal assistance in criminal matters.

The full text of the IGA is available at 1998 U.S.T. LEXIS 212. Remarks at the signing by Acting Secretary of State Strobe Talbott, who signed for the United States, and other representatives of the United States and other countries and agencies are available at *www.state.gov/www/global/oes/space/980129_space_agreement.html*.

---

* * * *

Article 1

Object and Scope

1. The object of this Agreement is to establish a long-term international cooperative framework among the Partners, on the basis of genuine partnership, for the detailed design, development, operation, and utilization of a permanently inhabited civil international Space Station for peaceful purposes, in accordance with international law. This civil international Space Station will enhance the scientific, technological, and commercial use of outer space. This Agreement specifically defines the civil international

Space Station program and the nature of this partnership, including the respective rights and obligations of the Partners in this cooperation. This Agreement further provides for mechanisms and arrangements designed to ensure that its object is fulfilled.

2. The Partners will join their efforts, under the lead role of the United States for overall management and coordination, to create an integrated international Space Station. The United States and Russia, drawing on their extensive experience in human space flight, will produce elements which serve as the foundation for the international Space Station. The European Partner and Japan will produce elements that will significantly enhance the Space Station's capabilities. Canada's contribution will be an essential part of the Space Station. This Agreement lists in the Annex the elements to be provided by the Partners to form the international Space Station.

3. The permanently inhabited civil international Space Station (hereinafter "the Space Station") will be a multi-use facility in low-earth orbit, with flight elements and Space Station-unique ground elements provided by all the Partners. By providing Space Station flight elements, each Partner acquires certain rights to use the Space Station and participates in its management in accordance with this Agreement, the MOUs, and implementing arrangements.

4. The Space Station is conceived as having an evolutionary character. The Partner States' rights and obligations regarding evolution shall be subject to specific provisions in accordance with Article 14.

Article 2

International Rights and Obligations

1. The Space Station shall be developed, operated, and utilized in accordance with international law, including the Outer Space Treaty, the Rescue Agreement, the Liability Convention, and the Registration Convention.
2. Nothing in this Agreement shall be interpreted as:
(a) modifying the rights and obligations of the Partner States found in the treaties listed in paragraph 1 above, either toward each other or toward other States, except as otherwise provided in Article 16;

(b) affecting the rights and obligations of the Partner States when exploring or using outer space, whether individually or in cooperation with other States, in activities unrelated to the Space Station; or
(c) constituting a basis for asserting a claim to national appropriation over outer space or over any portion of outer space.

* * * *

Article 21

Intellectual Property

1. For the purposes of this Agreement, "intellectual property" is understood to have the meaning of Article 2 of the Convention Establishing the World Intellectual Property Organization, done at Stockholm on 14 July 1967.
2. Subject to the provisions of this Article, for purposes of intellectual property law, an activity occurring in or on a Space Station flight element shall be deemed to have occurred only in the territory of the Partner State of that element's registry, except that for ESA-registered elements any European Partner State may deem the activity to have occurred within its territory. For avoidance of doubt, participation by a Partner State, its Cooperating Agency, or its related entities in an activity occurring in or on any other Partner's Space Station flight element shall not in and of itself alter or affect the jurisdiction over such activity provided for in the previous sentence.
3. In respect of an invention made in or on any Space Station flight element by a person who is not its national or resident, a Partner State shall not apply its laws concerning secrecy of inventions so as to prevent the filing of a patent application (for example, by imposing a delay or requiring prior authorization) in any other Partner State that provides for the protection of the secrecy of patent applications containing information that is classified or otherwise protected for national security purposes. This provision does not prejudice (a) the right of any Partner State in which a patent application is first filed to control the secrecy of such patent application or restrict its further filing; or (b) the right

of any other Partner State in which an application is subsequently filed to restrict, pursuant to any international obligation, the dissemination of an application.

[Paragraphs 4 and 5 address multiple concurrent jurisdiction on an ESA-registered element]

* * * *

6. The temporary presence in the territory of a Partner State of any articles, including the components of a flight element, in transit between any place on Earth and any flight element of the Space Station registered by another Partner State or ESA shall not in itself form the basis for any proceedings in the first Partner State for patent infringement.

Article 22

Criminal Jurisdiction

In view of the unique and unprecedented nature of this particular international cooperation in space:

1. Canada, the European Partner States, Japan, Russia, and the United States may exercise criminal jurisdiction over personnel in or on any flight element who are their respective nationals.
2. In a case involving misconduct on orbit that: (a) affects the life or safety of a national of another Partner State or (b) occurs in or on or causes damage to the flight element of another Partner State, the Partner State whose national is the alleged perpetrator shall, at the request of any affected Partner State, consult with such State concerning their respective prosecutorial interests. An affected Partner State may, following such consultation, exercise criminal jurisdiction over the alleged perpetrator provided that, within 90 days of the date of such consultation or within such other period as may be mutually agreed, the Partner State whose national is the alleged perpetrator either:

(1) concurs in such exercise of criminal jurisdiction, or

(2) fails to provide assurances that it will submit the case to its competent authorities for the purpose of prosecution.

3. If a Partner State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Partner State with which it has no extradition treaty, it may at its option consider this Agreement as the legal basis for extradition in respect of the alleged misconduct on orbit. Extradition shall be subject to the procedural provisions and the other conditions of the law of the requested Partner State.
4. Each Partner State shall, subject to its national laws and regulations, afford the other Partners assistance in connection with alleged misconduct on orbit.
5. This Article is not intended to limit the authorities and procedures for the maintenance of order and the conduct of crew activities in or on the Space Station which shall be established in the Code of Conduct pursuant to Article 11, and the Code of Conduct is not intended to limit the application of this Article.

* * * *

5. U.S. Legislation on Space Commercialization

On October 28, 1998, President William J. Clinton signed the Commercial Space Act of 1998, Pub. L. No. 105–303, 112 Stat. 2843, 42 U.S.C. § 14701 et seq. The act, "To encourage the development of a commercial space industry in the United States, and for other purposes," provided the following statement of policy concerning commercialization of the space station in § 101(a):

> The Congress declares that a priority goal of constructing the International Space Station is the economic development of Earth orbital space. The Congress further declares that free and competitive markets create the most efficient conditions for promoting economic development, and should therefore govern the economic development of Earth orbital space. The Congress further declares that the use of free market principles in operating, servicing, allocating the use of, and adding capabilities to the Space Station, and the resulting fullest possible engagement

> of commercial providers and participation of commercial users, will reduce Space Station operational costs for all partners and the Federal Government's share of the United States burden to fund operations.

Among other things, the act also required the federal government to "acquire space transportation services from United States commercial providers whenever such services are required in the course of its activities," with exceptions to be determined on a case-by-case basis.

Cross-references

Maritime interdiction of aliens, **Chapter 1.D.1.**
Claims for damages arising out of cooperative space activity, **Chapter 4.A.2.d.**
EU as eligible party to FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, **Chapter 4.A.5.a.**
Customary international law superseding 1958 Convention on the Territorial Sea and the Contiguous Zone, **Chapter 4.B.3.b.**
Amendments to International Maritime Organization Convention, **Chapter 7.D.**
Supreme Court interpretation of Carriage of Goods Sea Act, **Chapter 15.A.5.**
Role of Gore-Chernomyrdin Commission in space cooperation, **Chapter 18.C.6.c.**

Chapter 13

Environment and Other Transnational Scientific Issues

A. ENVIRONMENT

1. Sustainable Development

United Nations Conference on Environment and Development

The United Nations Conference on Environment and Development ("UNCED"), met June 3–14, 1992, in Rio de Janeiro, on the twentieth anniversary of the first Conference on the Human Environment held in Stockholm, Sweden. In addition to the instruments adopted at the culmination of the conference discussed below, *see* discussion of others adopted at UNCED in A.1.c. (climate change) and 5.a. (biological diversity).

(1) Rio Declaration on Environment and Development

The Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 874, ("Rio Declaration") sets forth 27 principles designed to help guide international action on the basis of environmental and economic responsibility. At the fourth and final meeting of the preparatory committee held in March 1992, a number of drafts of the Rio Declaration were tabled, including one from the United States. *See* Principles on General Rights and

Obligations, Preparatory Committee for the United Nations Conference on Environment and Development, Proposal Submitted by the U.S., U.N. GAOR 4th Sess., Agenda item 3, U.N. Doc. A/CONF.151/PC/WG.III/L.21 (1992).

At the time of its adoption at UNCED, the United States recorded interpretive statements for the record on principles 3, 7, 12, and 23. The preamble and those provisions of the Rio Declaration follow.

---

* * * *

Reaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and seeking to build upon it,

With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,

Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system,

Recognizing the integral and interdependent nature of the Earth, our home,

Proclaims that:

* * * *

Principle 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

* * * *

Principle 7

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in

view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

* * * *

Principle 12

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

* * * *

Principle 23

The environment and natural resources of people under oppression, domination and occupation shall be protected.

* * * *

The U.S. interpretive statements are set forth below.

Principle 3

The United States does not, by joining consensus on the Rio Declaration, change its long-standing opposition to the so-called "right to development." Development is not a right. On the contrary, development is a goal we all hold, which depends for its realization in large part on the promotion and protection of the human rights set out in the Universal Declaration of Human Rights.

The United States understands and accepts the thrust of Principle 3 to be that economic development goals and objectives must be pursued in such a way that the development and environmental needs of present and future generations are taken into account. The United States cannot agree to, and would disassociate

itself from, any interpretation of Principle 3 that accepts a "right to development," or otherwise goes beyond that understanding.

Principle 7

The United States understands and accepts that Principle 7 highlights the special leadership role of the developed countries, based on our industrial development, our experience with environmental protection policies and actions, and our 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 in the responsibilities of developing countries.

Principle 12

The United States understands that, in certain situations, trade measures may provide an effective and appropriate means of addressing environmental concerns, including long-term sustainable forest management concerns and environmental concerns outside national jurisdiction, subject to certain disciplines.

Principle 23

The United States understands that nothing in this Declaration prejudices or predetermines the status of any territories under occupation or the natural resources that appertain to such territories. The United States further understands that this Declaration does not prejudge negotiations to achieve a just and lasting peace in the Middle East, including issues relating to natural resources and their management. The United States also understands that this Declaration does not affect the rights and duties of occupying powers under the laws of war.

(2) Agenda 21

UNCED also adopted Agenda 21, described as follows in the introduction to the press summary of the document:

> On 22 December 1989, the United Nations General Assembly called for a global meeting that would devise

> strategies to halt and reverse the effects of environmental degradation "in the context of increased national and international efforts to promote sustainable and environmentally sound development in all countries."
>
> Agenda 21, adopted by the United Nations Conference on Environment and Development on 14 June 1992, is the international community's response to that request. It is a comprehensive programme of action to be implemented—from now and into the twenty-first century—by Governments, development agencies, United Nations organizations and independent sector groups in every area where human (economic) activity affects the environment.
>
> *See www.johannesburgsummit.org/html/basic_info/a21_final_summary.doc.*
>
> The text of Agenda 21 is available at *www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm.*
>
> The United States submitted the following interpretive statements on Agenda 21 for the record. The reference to Forest Principles is to A Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, also adopted at UNCED and *reprinted in* 31 I.L.M. 881 (1992).

Trade measures taken for environmental purposes

The United States accepts the references in Agenda 21 and the Forests Principles to trade measures taken for environmental purposes subject to the same understanding stated for Principle 12 of the Rio Declaration.

Technology Cooperation

The United States strongly believes that adequate and effective protection of intellectual property rights is an essential component of any international technology cooperation effort aimed at environmental protection and/or development assistance. Such

protection is essential to provide incentives for innovation in the development of environmentally sound and appropriate technologies, and to facilitate access to and transfer and dissemination of such technologies.

The United States understands the provisions of the Forest Principles and Agenda 21 regarding access to and transfer of technology to mean that, in the case of technologies and know-how subject to intellectual property rights, such access and transfer shall be on freely negotiated, mutually agreed terms that recognize and are consistent with the adequate and effective protection of those rights.

Biotechnology

The United States understands that biotechnology is in no way an intrinsically unsafe process. The United States accepts to consider the need for and feasibility of internationally agreed guidelines on safety in biotechnology releases, and to consider studying the feasibility of guidelines which could facilitate national legislation on liability and compensation, subject to this understanding.

Sharing of Benefits Derived from Biological and Genetic Resources

The United States understands the references to appropriate measures for the fair and equitable sharing of benefits derived from biological and genetic resources in Agenda 21 to mean such measures as may be mutually agreed between the sources and users of these resources, under conditions that recognize and are fully consistent with the adequate and effective protection of intellectual property rights. In addition, references to the sharing of benefits derived from the use of biological and genetic resources are understood to be without regard to the source of such resources.

Right to Socio-Economic Development on a Sustainable Basis

The United States understands the words "right to socio-economic development on a sustainable basis" in the Forests Principles on the same basis as stated for Principle 3 of the Rio Declaration.

ODA Targets

The United States is not among those countries that have affirmed an overseas development assistance target. Such a target would detract from the more important issues of the effectiveness and quality of aid and the policies in the recipient country. The United States emphasizes that, with respect to Chapter 33, paragraph 15, it is one of the "other developed countries" that "agree to make their best efforts to increase" their level of ODA, "in line with their support for reform efforts in developing countries." The United States has traditionally been the largest aid donor in volume terms and will continue to provide high-quality aid on a case-by-case basis, in a way that encourages reform efforts in developing countries.

2. NAFTA Side Agreement on Environment

The 1993 North American Agreement on Environmental Cooperation ("NAAEC") is discussed in Chapter 11.B.3.b.

3. Pollution and Related Issues

a. Amendments to 1987 Montreal protocol

During the 1990s the United States participated in the adoption of four amendments to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, *reprinted in* 26 I.L.M. 1541 (1987). The four amendments, discussed below, were adopted in Beijing (1999), entered into force December 23, 2003; Montreal (1997), entered into force November 10, 1999, for the United States December 23, 2003; Copenhagen (1992), entered into force June 14, 1994; and London (1990), entered into force August 10, 1992. *See also Digest 2003* at 777–78.

(1) Beijing amendment

On December 3, 1999, the United States participated in the adoption of the most recent of the amendments by the

Eleventh Meeting of the Parties to the Montreal Protocol at Beijing. The Beijing amendment tightened controls on certain substances as described below in excerpts from the report of the Department of State, submitting the amendment to the President for transmittal to the Senate for advice and consent to ratification. President William J. Clinton transmitted the amendment, with the report of the Department of State, on June 22, 2000. S. Treaty Doc. 106–32 (2000); *see* S. Exec. Rep. 107–10; it entered into force for the United States December 30, 2003. *See Digest 2003* at 777–81.

---

* * * *

The Montreal Protocol, which the United States ratified in 1988, is the most important international instrument for the protection of an essential component of the global environment, the stratospheric ozone layer. U.S. leadership in protecting the ozone layer, besides being critical to the success of this global environmental endeavor, works to safeguard public health. The gradual loss of the stratospheric ozone layer, which the Montreal Protocol seeks to reverse, has been causally linked to, for instance, a higher incidence of skin cancers, cataracts, and damage to ecosystems.

A multilateral regime such as that provided by the Protocol is necessary to control emissions of ozone-depleting substances because such emissions anywhere could affect the ozone layer globally. The Beijing Amendment and adjustments to the Protocol adopted in 1999 will, when implemented, constitute another major step forward in protecting public health and the environment from potential adverse effects of stratospheric ozone depletion.

* * * *

The principal features of the Beijing Amendment are:

—the addition of bromochloromethane as a controlled substance under the Montreal Protocol, along with associated control measures (such as a phaseout of production and consumption by January 1, 2002, subject to essential use decisions, and a ban on trade of this substance with non-Parties);

—the addition of a freeze in the level of production of hydrochlorofluorocarbons ("HCFCs") from January 1, 2004;
—the addition of a ban on trade with non-Parties in HCFCs from January 1, 2004; and
—the addition of reporting requirements on the annual use of methyl bromide for quarantine and preshipment purposes.

The United States will have the legal authority to implement its obligations under the Beijing Amendment under Title 6 of the Clean Air Act, as amended (including, e.g., sections 602, 604, 605, 606, 614, and 615). Certain new regulations will be required for the United States to carry out its obligations under the Amendment.

By its terms, the amendment will enter into force on January 1, 2001, provided that at least twenty Parties to the Montreal Protocol have deposited their instruments of ratification, acceptance or approval. In accordance with Article 2 of the Beijing Amendment, no State may deposit an instrument of ratification to the amendment unless it has previously or simultaneously become a party to the Montreal Amendment. Thus, U.S. ratification of the Beijing Amendment will require its previous or simultaneous ratification of the 1997 Montreal Amendment.

Ratification by the United States of both these amendments is important to demonstrate to the rest of the world the U.S. commitment to the preservation of the stratospheric ozone layer. Early ratification of the Beijing Amendment will also encourage the wide participation necessary for full realization of its goals. Ratification is consistent with U.S. foreign policy and environmental and economic interests.

* * * *

(2) Montreal amendment

The United States participated in the adoption of the Montreal amendment by the Ninth Meeting of the Parties to the Montreal Protocol and referred to in the submittal letter in

(1), *supra*, at Montreal on December 17, 1997. President Clinton transmitted the amendment to the Senate for advice and consent to ratification on September 16, 1999; it entered into force for the United States on December 30, 2003. Excerpts below from the accompanying September 10, 1999, report of the Department of State submitting the protocol to the President explain the expanded trade controls set forth in the amendment. S. Treaty Doc. No. 106–10 (1999), *see* S. Exec. Rep. No. 107–10 and *Digest 2003* at 777–81.

---

* * * *

The principal features of the 1997 Amendment are the expansion of trade controls to include methyl bromide and the addition of a licensing requirement for trade in certain controlled substances.

The trade provisions of the Montreal Protocol (Article 4) would be amended to treat methyl bromide in the same manner as other substances already controlled, that is, there would be a ban on trade in methyl bromide between a Party and a non-Party.

The licensing provision will require each Party to have in place a system for licensing the import and export of all new, used, recycled, and reclaimed controlled substances under the Montreal Protocol.

The main intent of the trade ban with non-Parties is to minimize, if not thwart, the possibility that States which are not bound by compliance obligations regarding methyl bromide could gain a competitive advantage over Montreal Protocol Parties who are bound. The licensing provision will support world law enforcement efforts to diminish any illegal trade in controlled substances.

The United States has the legal authority to implement its obligations under the 1997 Amendment under Title 6 of the Clean Air Act, as amended (including, e.g., sections 604, 605, 606, 614 and 615).

By its terms, the 1997 Amendment was to have entered into force on January 1, 1999, provided that at least twenty States, party to the Montreal Protocol, had deposited their instruments of ratification, acceptance or approval. However, because twenty States had not indicated their consent to be bound until August on

12, 1999, the Amendment will enter into force for those States on November 10, 1999. . . .

* * * *

(3) Copenhagen amendment

> The United States participated in the adoption of the Copenhagen amendment on November 25, 1992, at the Fourth Meeting of the Parties to the Montreal Protocol. President William J. Clinton transmitted the amendment to the Senate for advice and consent to ratification on July 20, 1993. Excerpts below from the accompanying June 23, 1993, report of the Department of State submitting the amendment to the President for transmittal describe the adjustment and amendment package negotiated under the auspices of the United Nations Environment Program ("UNEP"). S. Treaty Doc. 103–9 (1993); *see* S. Exec. Rep. 103–25. The Copenhagen amendment entered into force generally and for the United States June 14, 1994.

* * * *

The adjustments, which are being transmitted for the information of the Senate, were adopted by the Parties pursuant to Article 2(9) of the Protocol, and provide for accelerated phase-out schedules for substances already controlled. They provide for:

> —the phase-out of chlorofluorocarbons (CFCs), other fully halogenated CFCs, carbon tetrachloride, and methyl chloroform in 1996 (instead of 2000), subject to an exception for agreed essential uses; and
> —the phase-out of halons in 1994 (instead of 2000), subject to an exception for agreed essential uses.

The adjustments, which are not subject to ratification, will enter into force for all Parties to the Protocol on September 22, 1993.

The principal feature of the Amendment is the addition of new controlled substances, namely, HCFCs, HBFCs and methyl bromide.

—With respect to hydrochlorofluorocarbons (HCFCs), consumption would be capped in 1996, with interim cuts starting in 2004 leading to a total phase-out in 2030.
—With respect to hydrobromofluorocarbons (HBFCs), the phaseout date for production and consumption would be set for 1996, subject to an exception for agreed essential uses.
—With respect to methyl bromide, a widely used agricultural fumigant with a relatively high ozone-depleting potential, its production and consumption would be subject to a freeze in 1995 at 1991 levels with an exception for quarantines and preshipment uses.

The trade provisions of the Montreal Protocol (Article 4) would be amended to treat HBFCs in the same manner as the other substances already controlled. With respect to the other new controlled substances (HCFCs, methyl bromide), the Amendment calls for the Parties to consider, by January 1, 1996, whether to amend the Protocol to extend the trade provisions to such substances.

Regarding Parties operating under Article 5 of the Protocol (certain developing countries), the Amendment provides that, with respect to substances already controlled under the Protocol (i.e., CFCs, halons, other fully halogenated CFCs, carbon tetrachloride, and methyl chloroform), any acceleration of their respective phaseout schedules that goes beyond those contained in the London Amendment will apply (with a ten-year grace period) to such Parties after a review Meeting of the Parties, to take place not later than 1995, and will be based on the conclusions of that review. With respect to potential controls on new substances (i.e., HCFCs, HBFCs, and methyl bromide), the 1995 review Meeting of the Parties will decide, through the adjustment procedure, what base years, if any, control schedules, phase-out dates, if any, etc., will apply to Article 5 Parties.

Because of the addition of new controlled substances and new annexes listing such substances, the Amendment also contains appropriate conforming changes throughout the text of the Protocol (e.g., with respect to reporting requirements under Article 7).

The United States will have the legal authority to implement its obligations under the Amendment under Title 6 of the Clean Air Act, as amended (including, e.g., sections 602, 603, 604, 605, 606, 607, 614, and 615). Existing regulations will not be sufficient for the United States to carry out its obligations under the Amendment. As such, administrative rulemaking pursuant to the Environmental Protection Agency's statutory authority under the Clean Air Act, as amended, will be required.

* * * *

(4) London amendment

President George H. W. Bush transmitted the London amendment to the Senate for advice and consent to ratification on May 14, 1991. The United States signed this first amendment, adopted by the Second Meeting of the Parties to the Montreal Protocol, at London on June 29, 1990. Excerpts below from the accompanying May 3, 1991, report of the Department of State submitting the amendment to the President for transmittal describe the additions provided in the amendment. S. Treaty Doc. No. 102–4; *see* S. Exec. Rep. No. 102–21 (1993). *See also* 86 Am. J. Intl L. 124 (1992). The London amendment entered into force generally and for the United States August 10, 1992.

---

* * * *

The principal features of the Amendment involve the addition of new controlled substances and the establishment of a financial mechanism to assist developing countries to comply with the Protocol's control measure obligations.

With respect to new controlled substances, the Amendment sets forth the following control measures as Articles 2C, 2D and 2E of the Montreal Protocol:

—for production and consumption of fully halogenated CFCs other than those controlled under the original

Protocol, 20% reduction from 1989 levels in 1993, 85% reduction in 1997, and a phaseout in 2000;
—for production and consumption of carbon tetrachloride, 85% reduction from 1989 levels in 1995, and a phaseout in 2000;
—for production and consumption of methyl chloroform, freeze in 1993, 30% reduction in 1995, 70% reduction in 2000, and a phaseout in 2005.

With respect to financial assistance to developing countries, Article 10 of the Montreal Protocol was amended to establish a funding mechanism to meet the agreed incremental costs incurred by certain developing country Parties with low levels of consumption of controlled substances (hereinafter, "Article 5 Parties") in meeting their control measure obligations and to finance clearing-house functions (e.g., country studies, information dissemination). An Executive Committee, to be composed of seven members from Article 5 Parties and seven members from non-Article 5 Parties, is to develop and monitor implementation of the mechanism.

The funding mechanism is to be financed by voluntary contributions from non-Article 5 Parties based on the UN scale of assessment. Bilateral assistance can constitute up to 20 percent of a Party's contribution. The mechanism is to involve the World Bank for financing projects, UNEP for operating the technical clearing-house, and the United Nations Development Program (UNDP) for performing pre-investment studies. The Amendment explicitly provides that the funding mechanism is "without prejudice to any future arrangements . . . with respect to other environmental issues."

With respect to transfer of technology, Article 10A, which is added by the Amendment, elaborates Article 5(2) of the Montreal Protocol and provides that each Party is to take every practicable step, consistent with the programs supported by the financial mechanism, to ensure that the best available, environmentally safe substitutes and related technologies are expeditiously transferred to Article 5 Parties and that such transfers occur under fair and most favorable conditions.

The Amendment contains a new "grievance procedure" for Article 5 Parties. Recognizing the relationship between the effective implementation on financial/technical assistance and the ability of developing countries to meet their control measure obligations, the Amendment provides that if an Article 5 Party, having taken all practicable steps, considers that it is unable to implement any or all of the control measure obligations due to inadequate implementation of the provisions on financial and technical assistance, it may bring its case to the next Meeting of the Parties. The Parties are to decide upon appropriate action.

The trade control provisions of Article 4 of the Montreal Protocol have been amended to incorporate the newly controlled substances. Further, the Amendment provides that, for purposes of that Article, a "State not party to this Protocol" includes, with respect to a particular controlled substance, a State that has not agreed to be bound by the control measures in effect for that substance. Thus, if a Party to the Protocol were not to ratify the Amendment, it would be treated as a non-Party for purposes of trade controls on methyl chloroform, carbon tetrachloride, and other CFCs.

The reporting of data provisions contained in Article 7 of the Montreal Protocol have been amended to include reporting requirements for the newly controlled substances, as well as for transitional substances (HCFCs).

The Amendment also modifies the scheme pertaining to industrial rationalization. Under Article 2 of the Montreal Protocol, any Party may take advantage of limited increases in production (ten or fifteen percent) for purposes of industrial rationalization; only certain Parties may take advantage of unlimited increases in production for industrial rationalization. In both cases, there is a requirement that the Parties concerned do not exceed their combined production limits. The Amendment eliminates the provision allowing limited increases in production and permits all Parties to take advantage of unlimited increases in production for industrial rationalization (provided the Parties concerned do not exceed their combined production limits).

The Amendment also modifies the voting procedure in Article 2(9) for adjustments. The Montreal Protocol now provides that,

in the absence of consensus, such decisions are to be taken by a two-thirds majority vote of the Parties present and voting "representing at least fifty percent of the total consumption of the controlled substances of the Parties." The Amendment provides that the two-thirds majority vote must represent a majority of Article 5 Parties present and voting and a majority of non-Article 5 Parties present and voting.

The originally controlled CFCs and halons continue to be listed in Annex A of the Protocol. Newly controlled substances appear in Annex B. Transitional substances (HCFCs) are listed in Annex C. To accommodate this structure, the Amendment makes appropriate conforming changes throughout the text of the Montreal Protocol.

New legislation will not be required to implement the Amendment. The United States will have the authority to implement its obligations under the recently enacted Clean Air Act Amendments of 1990, P.L. 101–549 (Nov. 15, 1990). With respect to control measures, the Clean Air Act Amendments are generally more stringent than the Montreal Protocol Amendment's requirements. However, in any case where the Montreal Protocol Amendment's provisions were more stringent, Section 614(b) of the Clean Air Act, as amended by P.L. 101–549, provides that the more stringent provision would govern, and Section 615 grants the EPA Administrator authority to implement such provision. Section 615, patterned after former Section 157(b), grants the EPA Administrator general authority to regulate substances, practices, processes, or activities that he finds may reasonably be anticipated to affect the stratosphere, especially ozone in the stratosphere, if such effect may reasonably be anticipated to endanger public health or welfare.

Adjustments to the Montreal Protocol were also adopted by the Parties on June 29, 1990, pursuant to the tacit amendment procedure contained in Article 2(9) of the Protocol. The adjustments require:

> —for production and consumption of CFCs, a 50% reduction in 1995, an 85% reduction in 1997, and a phaseout in 2000 (Article 2A);

—for production and consumption of halons, a 50% reduction in 1995, and a phaseout (except for essential uses) in 2000 (Article 2B).

The adjustments, which were concluded by the United States as an executive agreement, entered into force for all Parties on March 7, 1991, six months after circulation by the depository. The informal consolidated text enclosed for the information of the Senate reflects the text of the Montreal Protocol as modified by the 1990 adjustments and amendments.

* * * *

b. U.S.-Canada air quality agreement

On March 13, 1991, President George H.W. Bush and Prime Minister Brian Mulroney signed the Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, with annexes, done at Ottawa, TIAS No. 11783. The agreement entered into force upon signature.

Excerpts from the preamble and Article III, set forth below, describe the significance to the two countries of the new agreement and its basic objective. The full text of the agreement and related materials is available at *www.epa.gov/airmarkets/usca/*.

The Government of the United States of America and the Government of Canada, hereinafter referred to as "the Parties",

Convinced that transboundary air pollution can cause significant harm to natural resources of vital environmental, cultural and economic importance, and to human health in both countries;

Desiring that emissions of air pollutants from sources within their countries not result in significant transboundary air pollution;

Convinced that transboundary air pollution can effectively be reduced through cooperative or coordinated action providing for controlling emissions of air pollutants in both countries;

* * * *

Noting their tradition of environmental cooperation as reflected in the Boundary Waters Treaty of 1909, the Trail Smelter Arbitration of 1941, the Great Lakes Water Quality Agreement of 1978, as amended, the Memorandum of Intent Concerning Transboundary Air Pollution of 1980, the 1986 Joint Report of the Special Envoys on Acid Rain, as well as the ECE Convention on Long-Range Transboundary Air Pollution of 1979;

Convinced that a healthy environment is essential to assure the well-being of present and future generations in the United States and Canada, as well as of the global community;
Have agreed as follows:

* * * *

Article III
General Air Quality Objective

1. The general objective of the Parties is to control transboundary air pollution between the two countries.
2. To this end, the Parties shall:
(a) in accordance with Article IV, establish specific objectives for emissions limitations or reductions of air pollutants and adopt the necessary programs and other measures to implement such specific objectives;
(b) in accordance with Article V, undertake environmental impact assessment, prior notification, and, as appropriate, mitigation measures;
(c) carry out coordinated or cooperative scientific and technical activities, and economic research, in accordance with Article VI, and exchange information, in accordance with Article VII;
(d) establish institutional arrangements, in accordance with Articles VIII and IX; and
(e) review and assess progress, consult, address issues of concern, and settle disputes, in accordance with Articles X, XI, XII and XIII.

* * * *

Under Articles VIII and IX, referred to in Article II.2(d), the parties agreed to "establish and maintain a bilateral Air

Quality Committee to assist in the implementation of this Agreement" and gave the International Joint Commission responsibilities for assisting in implementation. The International Joint Commission was established by the Boundary Waters Treaty of 1909, TS 548; 36 Stat. 2448.

Annex 1, entitled "Specific Objectives Concerning Sulphur Dioxide and Nitrogen Oxides," and Annex 2, "Scientific and Technical Activities and Economic Research," provide further details of the agreement and form an integral part of the treaty.

On December 7, 2000, the two countries signed the Protocol Between the Government of the United States of America and the Government of Canada Amending the "Agreement Between the Government of the United States of America and the Government of Canada on Air Quality." The protocol, which entered into force upon signature, was "intend[ed] to reduce the transboundary flow of tropospheric ozone and precursor emissions (NOx and VOC)," to help in attaining air quality goals. It added a new Annex 3, titled "Specific Objectives Concerning Ground-Level Ozone Precursors." *See www.ec.gc.ca/air/can_usa_e.html*.

For further information, including U.S.-Canada Air Quality Agreement Progress Reports prepared by the Air Quality Committee in 1996, 1998, 2000 and 2002, see *www.epa.gov/airmarkets/usca/*.

c. Persistent pollutants

(1) Persistent organic pollutants and heavy metals

In 1998 the United States joined other countries in negotiation of what was to become the Convention on Persistent Organic Pollutants, S. Treaty Doc. No. 107–5 (2002); *see also Digest 2002* at 771–77.

A press statement by the Office of the Spokesman, U.S. Department of State, July 10, 1998, described the state of the negotiations as of that date and announced the signing of two executive agreements. The two agreements were

both protocols to the 1979 Convention on Long-Range Transboundary Air Pollution, 1302 U.N.T.S. 245: the Protocol On Heavy Metals and the Protocol on Persistent Organic Pollutants, both signed at Aarhus, Denmark, June 24, 1998. The Protocol on Heavy Metals entered into force for the United States on December 29, 2003.

The press statement is available at *http://usembassy-australia.state.gov/hyper/WF980713/epf104.htm.*

---

* * * *

The United States participated in the first meeting of the Intergovernmental Negotiating Committee (INC) for a global agreement on persistent organic pollutants (POPs) June 29–July 3 in Montreal, Canada. The meeting was held under the auspices of the United Nations' Environment Program. Earlier in June, the United States signed regional agreements on persistent organic pollutants and heavy metals at a United Nations Economic Commission for Europe (UN/ECE) Ministerial Conference in Aarhus, Denmark.

The United States joined delegates from more than 100 countries and dozens of interested non-governmental organizations in Montreal to begin the development of an historic international agreement to create binding obligations governing a variety of toxic substances known as persistent organic pollutants (POPs). POPs pose both local, regional and global problems due to their toxic nature, ability to accumulate in human and animal tissue, and to travel long distances from their source of origin causing adverse effects to humans and the environment.

During the week-long INC session government delegations organized for the task of gathering information necessary to determine practical and effective obligations to manage the 12 specified POPs (PCBs (polychlorinated biphenyls), DDT, dioxins, furans, and eight other very toxic organochlorine pesticides (aldrin, dieldrin, endrin, chlordane, heptachlor, hexachlorobenzene, mirex, and toxaphene)). The United States anticipates a constructive negotiation in upcoming sessions that will result in an agreement by the year 2000 to protect human health and the environment.

In June, the United States joined top environment officials from 52 countries for the Environment for Europe Ministerial Conference in Aarhus, Denmark. Deputy Assistant Secretary for the Environment Rafe Pomerance on behalf of the United States signed two agreements on reducing air emissions of POPs and heavy metals. These agreements are binding protocols to the UN/ECE Convention on Long-Range Transboundary Air Pollution. While the measures enacted in the agreements are already addressed under U.S. environmental laws, the new protocols will greatly assist in reducing the global migration of highly toxic compounds from a range of sources.

The agreements include bans on the production and restrictions on the use of certain pesticides and PCBs (polychlorinated biphenyls). The agreements also include requirements to apply best available technologies to control air emissions of three heavy metals, cadmium, lead and mercury, to prevent their adverse effects on the environment and human health.

Participants in the Ministerial Conference included the New Independent States of the former Soviet Union and Central and Eastern Europe, the Russian Federation, Western Europe, Canada and the United States. Representatives of environmental non-governmental organizations participated fully in the June 23–25 Ministerial meeting.

(2) Persistent toxic substances in the Great Lakes

On April 7, 1997, Carol Browner, Administrator of the U.S. Environmental Protection Agency ("EPA") and Sergio Marchi, Minister of the Environment, Govenment of Canada, approved the Strategy for the Virtual Elimination of Persistent Toxic Substances in the Great Lakes. As explained by the EPA, "[t]he Great Lakes—Superior, Michigan, Huron, Erie and Ontario—are a dominant part of the physical and cultural heritage of North America. Shared with Canada and spanning more than 750 miles (1,200 kilometers) from west to east, these vast inland freshwater seas have provided water for consumption, transportation, power, recreation and a host of other uses." The excerpt below provides the stated purpose

of the strategy, which is available in full at *www.epa.gov/glnpo/p2/bns.html*.

---

* * * *

In keeping with the objective of the *Revised Great Lakes Water Quality Agreement of 1978, as amended by Protocol signed November 18, 1987* (1987 GLWQA) to restore and protect the Great Lakes, the purpose of this binational strategy (the Strategy) is to set forth a collaborative process by which Environment Canada (EC) and the United States Environmental Protection Agency (USEPA), in consultation with other federal departments and agencies, Great Lakes states, the Province of Ontario, Tribes, and First Nations, will work in cooperation with their public and private partners toward the goal of virtual elimination of persistent toxic substances resulting from human activity, particularly those which bioaccumulate, from the Great Lakes Basin, so as to protect and ensure the health and integrity of the Great Lakes ecosystem. In cases where this Strategy addresses a naturally-occurring substance, it is the anthropogenic sources of pollution that, when warranted, will be targeted for reduction through a life-cycle management approach so as to achieve naturally-occurring levels. An underlying tenet of this Strategy is that the governments cannot by their actions alone achieve the goal of virtual elimination. This Strategy challenges all sectors of society to participate and cooperate to ensure success. The goal of virtual elimination will be achieved through a variety of programs and actions, but the primary emphasis of this Strategy will be on pollution prevention. This Strategy reaffirms the two countries' commitment to the sound management of chemicals, as stated in *Agenda 21: A Global Action Plan for the 21st Century* and adopted at the 1992 United Nations Conference on Environment and Development. The Strategy will also be guided by the principles articulated by the International Joint Commission's (IJC) Virtual Elimination Task Force (VETF) in the *Seventh Biennial Report on Great Lakes Quality*. This Strategy has been developed under the auspices of the Binational Executive Committee (BEC), which is charged with coordinating the implementation of the binational aspects of the 1987 GLWQA.

The BEC is co-chaired by EC and USEPA, and includes members of the Great Lakes states, the Province of Ontario, and other federal departments and agencies in Canada and the United States (U.S.).

* * * *

d. Climate change

(1) Framework Convention on Climate Change

The Framework Convention on Climate Change ("Convention") was negotiated under the auspices of the Intergovernmental Negotiating Committee ("INC") established by the UN General Assembly for this purpose and opened for signature at UNCED (*see* 1.a., *supra*), *reprinted in* 31 I.L.M. 849 (1992). President George H. W. Bush signed the Convention at UNCED on June 12, 1992, and transmitted it to the Senate for advice and consent to ratification on September 8, 1992. S. Treaty Doc. No. 102–38; *see* S. Exec. Rep. 102–55 (1992). The Senate provided advice and consent to ratification on October 7, 1992, 138 CONG. REC. S17,150, and the Convention entered into force March 21, 1994. The United States was the first industrialized country to ratify the Convention.

The INC adopted the Convention text at its fifth session, second part, held at New York from April 30 to May 9, 1992. At that time, it approved a resolution on interim arrangements to extend the life of the INC until the Convention entered into force for the purpose of preparing for the first Conference of the Parties ("COP").

The Convention addressed net emissions of all greenhouse gases not controlled by the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, discussed in 3.a., *supra*. It imposed on all Parties general commitments to address climate change, including reporting requirements; it also required specified developed countries (referred to as "Annex I Parties") to adopt measures to address climate change and to report on the anticipated effect of such

measures on their respective emissions of greenhouse gases, with the non-binding aim of returning such emissions to 1990 levels by the year 2000. The August 28, 1992, report of the Department of State submitting the Convention to the President, which accompanied the transmittal, is excerpted below. The report is included in S. Treaty Doc. No. 102–38.

---

* * * *

The Convention is the product of nearly two years of negotiations under the auspices of the United Nations General Assembly. During the negotiations, the Department of State coordinated with all relevant federal agencies and met regularly with members of Congress, as well as with private sector and environmental groups.

The Convention reflects many elements promoted by the United States during the negotiations. It sets forth an action-oriented approach to climate change, with provision for reporting on, and review of, measures taken by Parties domestically and abroad to address climate change. The Convention embodies a comprehensive approach to climate change, promoting action related to all sources and sinks (such as forests) of all greenhouse gases (other than those controlled by the Montreal Protocol on Substances that Deplete the Ozone Layer). Encompassing greenhouse gas sinks will encourage efforts to conserve the Earth's forests, whose rapid destruction accounts for up to 30 percent of global net carbon dioxide (CO[2]) emissions and accelerates the loss of biodiversity. Further, encompassing all greenhouse gas sources and sinks, and allowing countries to undertake "joint implementation" of their national strategies, will allow countries to exploit diverse opportunities, significantly reducing the costs of limiting greenhouse gas emissions.

The Convention reflects the importance of cost-effectiveness of response measures, and allows joint action by two or more Parties in cooperation to limit global emissions. It calls for cooperation related to technology, scientific research and monitoring, information exchange, and education, training, and public awareness. Finally, the Convention establishes various institutions: a Conference of the Parties, a secretariat, a body for scientific and

technological advice, and a body to assist the Conference of the Parties in implementation of the Convention.

Efficient operation of the institutions established by the Convention will be critical to its success. While it is envisioned that the Intergovernmental Panel on Climate Change (IPCC) will continue as the primary forum for analysis of scientific and technical issues related to climate change, providing both regular assessments and requested scientific and technical advice, the body established by the Convention for scientific and technical advice will serve a key liaison function between scientific organizations such as the IPCC and the Conference of the Parties. It will interpret scientific and technical information and advise the Conference of the Parties. It will also monitor overall change in the composition of the atmosphere and its implications for the environment. The subsidiary body on implementation will consider the national action plans and information submitted by the Parties pursuant to the Convention to assess the global response to climate change and report to the Conference of the Parties. We believe that this body will play a critical role in the technical evaluation of national policies and measures and their effects at mitigating and adapting to climate change. Over time, we anticipate that this body will prove a vital forum for sharing information and experience and for promoting cooperative partnerships among Parties.

The Convention provides for industrialized countries to take the lead in addressing climate change. As such, these countries have enhanced reporting and review obligations under the Convention. Further, these countries are to provide technical and financial support to developing countries to enable them to prepare their reports, as well as to meet certain other costs of implementing the Convention.

Early ratification by the United States is important to demonstrate to the rest of the world the U.S. commitment to protection of the climate and is likely to encourage the wide participation necessary for realization of the Convention's goals. Ratification of the Convention is consistent with U.S. foreign policy and economic and environmental interests.

* * * *

(2) Kyoto Protocol

The first COP to the Framework Convention on Climate Change, meeting in Berlin in 1995, determined that the Convention's commitments were inadequate. In Decision 1/CP.1, referred to as the "Berlin Mandate," the COP agreed "to begin a process to enable it to take appropriate action for the period beyond 2000, including the strengthening of the commitments of the Parties included in Annex I to the Convention (Annex I Parties) in Article 4, paragraph 2(a) and (b), through the adoption of a protocol or another legal instrument." U.N. Doc. FCCC/CP/1995/7/Add.1 (June 6, 1995).

In January 1997 the United States submitted a draft protocol text that reflected a three-part framework for a target to limit and reduce greenhouse gas emissions among developed countries: 1) the target, set at an achievable level, should be binding; 2) countries should have flexibility nationally in implementation of the targets; and 3) the agreement must engage all countries, including developing countries, in next steps because finding a solution to the climate change problem would require a concerted global effort. In June 1997 the United States submitted an elaborated version of its January submission.

On October 22, 1997, President Clinton announced the position the United States would take in the negotiations at the third meeting of the Conference of the Parties ("COP3"), scheduled for December 1997, as excerpted below. 33 WEEKLY COMP. PRES. DOC. 1629 (Oct. 27, 1997). The June 1997 U.S. submission is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

In the international climate negotiations, the United States will pursue a comprehensive framework that includes three elements, which, taken together, will enable us to build a strong and robust global agreement. First, the United States proposes at Kyoto that

we commit to the binding and realistic target of returning to emissions of 1990 levels between 2008 and 2012. And we should not stop there. We should commit to reduce emissions below 1990 levels in the 5-year period thereafter, and we must work toward further reductions in the years ahead.

The industrialized nations tried to reduce emissions to 1990 levels once before with a voluntary approach, but regrettably, most of us, including especially the United States, fell short. We must find new resolve to achieve these reductions, and to do that we simply must commit to binding limits.

Second, we will embrace flexible mechanisms for meeting these limits. We propose an innovative, joint implementation system that allows a firm in one country to invest in a project that reduces emissions in another country and receive credit for those reductions at home. And we propose an international system of emissions trading. These innovations will cut worldwide pollution, keep costs low, and help developing countries protect their environment, too, without sacrificing their economic growth.

Third, both industrialized and developing countries must participate in meeting the challenge of climate change. The industrialized world must lead, but developing countries also must be engaged. The United States will not assume binding obligations unless key developing nations meaningfully participate in this effort.

. . . If the entire industrialized world reduces emissions over the next several decades but emissions from the developing world continue to grow at their current pace, concentrations of greenhouse gasses in the atmosphere will continue to climb. Developing countries have an opportunity to chart a different energy future consistent with their growth potential and their legitimate economic aspirations. . . . We can and we must work together on this problem in a way that benefits us all.

Here at home, we must move forward by unleashing the full power of free markets and technological innovations to meet the challenge of climate change. I propose a sweeping plan to provide incentives and lift roadblocks to help our companies and our citizens find new and creative ways of reducing greenhouse gas emissions:

First, we must enact tax cuts and make research and development investments worth up to $5 billion over the next 5 years, targeted incentives to encourage energy efficiency and the use of cleaner energy sources.

Second, we must urge companies to take early actions to reduce emissions by ensuring that they receive appropriate credit for showing the way.

Third, we must create a market system for reducing emissions wherever they can be achieved most inexpensively, here or abroad, a system that will draw on our successful experience with acid rain permit trading.

Fourth, we must reinvent how the Federal Government, the Nation's largest energy consumer, buys and uses energy. . . .

Fifth, we must unleash competition in the electricity industry, to remove outdated regulations and save Americans billions of dollars. We must do it in a way that leads to even greater progress in cleaning our air and delivers a significant down payment in reducing greenhouse gas emissions. . . .

Sixth, we must continue to encourage key industry sectors to prepare their own greenhouse gas reduction plans. And we must, along with State and local government, remove the barriers to the most energy efficient usage possible. . . .

This plan is sensible and sound. Since it's a long-term problem requiring a long-term solution, it will be phased in over time. . . .

* * * *

States meeting in COP3 in Kyoto, Japan, adopted a protocol (the "Kyoto Protocol") setting forth emissions limitation and reduction commitments to apply after 2000, *reprinted in* 37 I.L.M. 22 (1998). Excerpts below from a press conference by Stuart Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs, at the conclusion of COP3, December 11, 1997, provide the views of the United States on the protocol agreed to at the conference.

The full texts of the press conference and related materials are available at *www.state.gov/www/global/oes/kyoto_index.html. See, e.g.,* fact sheets released by the U.S. delegation to COP3 entitled "Six Greenhouse Gases" and "Joint Implementation: A Market-based Approach to a Global Problem."

---

* * * *.

Let me say at the outset that these negotiations may well have been the most complex international negotiations ever held. Few issues cut across as many complicated disciplines as climate change, and we had 160 nations, each with its own unique challenges and viewpoints.

Today we reached a historic agreement, a historic first step, in the Kyoto Protocol. It is, indeed, a significant first step in a truly global effort to address climate change. Generations from now, people will remember our work here for establishing the core elements of a strong, realistic and legally binding framework.

* * * *

Together with other industrialized nations, we reached a strong, comprehensive agreement stimulated by the dramatic and very difficult EU (European Union)-U.S.-Japan agreement, (which was) struck after three days of almost round-the-clock negotiations. And (it was) all the more striking because of the disparate natures of our economies and the very different ways in which we use energy. This historic agreement, which included also Australia and Canada, Russia, New Zealand, and other industrial nations, will achieve far greater reductions in greenhouse gases than most thought possible when our delegations arrived 10 days ago. By establishing this framework, industrial nations have demonstrated leadership in forging a legally-binding, lasting effort against this threat.

Agreement among the industrial nations did not come easily. Hard choices were made, and, in the spirit of compromise, a remarkable consensus was forged. In my many years as a negotiator, I've never seen so many parties move so far so quickly.

Considering the range of complex issues and that what we're building is very much a work in progress, we have truly taken a significant first step.

. . . [W]hen we work together to take meaningful steps to protect the planet for our children and grandchildren. We agreed to move well beyond our proposal to reduce emissions to 1990 levels by the years 2008 to 2012. In fact, we've committed to reduce our emissions by 7 percent by 2010, below 1990 levels, while the EU and Japan have reduced theirs by 8 and 6 percent, respectively.

We also forged an important consensus among industrial nations, for market-based mechanisms, such as international emissions trading. The rules and mechanisms governing these new institutions still have to be worked out. And I want to emphasize we have really only a framework here for those new mechanisms. And we believe this framework can be filled out by next year's conference.

We also agreed to cover all six greenhouse gases, a key U.S. goal, given the dramatic increases in new synthetic gases. Several industrialized nations agreed also, in concept, to form an umbrella for trading of the new emissions rights which will be created, which will consist of the U.S., Canada, Japan, New Zealand, Australia and Russia, and will be open to all countries who wish to work together to establish an emissions trading group.

We also had hoped to reach agreement on a series of ways to ensure the meaningful participation of developing countries. This is perhaps the single disappointment and regret. We did begin, in ways which I'll describe, to make a down payment, but we clearly didn't accomplish all we had wanted. By the opposition of some to a system of international emissions trading, a system was threatened that is critical to the ability of so many industrial nations to meet their strong reduction targets, targets they are now being asked to assume and are agreeing to do so, even though that system only involved industrial countries, and was universally endorsed by the industrial countries who would use it.

We were also unable to establish a mechanism that would have allowed developing nations to volunteer to take on binding targets because of the opposition of some developing countries.

Clearly, this opposition was not uniform, and it did not come from all developing countries. In fact, we made an important down payment in developing country participation in solving the global climate problem by establishing a Clean Development Mechanism for credit, which will help create a bridge between both industrialized and developing countries, harnessing private investment in clean energy technologies for credit back to industrial users. And we look forward to working with developing nations on launching this mechanism and on jointly finding other ways that developing nations can address this problem. We mustn't let the climate change problem become a divisive, North-South problem. This is genuinely a problem of global proportions. It is genuinely a problem which requires global solutions.

QUESTION: There's been a lot of speculation on how the U.S. Congress will react to this Protocol. But without trying to get into any prediction of whether they will approve it or how—I think the other question that is raised by a lot of the other delegations is, if it takes several years for the major players to endorse this, is that going to send out the wrong message to everyone involved who's trying to fight global warming?

UNDER SECRETARY EIZENSTAT: No. . . . [W]e view Kyoto not as the end of a process, but as a historic beginning of a process to deal with a long-term problem that ultimately must be solved not only by developed but by developing countries.

For the United States, with our system there is a two-step process. The first is the question of signature by the President. He alone can make the decision as to whether he will do so. . . .

Second is the question of eventual ratification [with advice and consent of] the U.S. Senate. The President has indicated that the United States would not take on legally binding targets until there was meaningful participation by developing countries. Clearly, despite the very important step taken through the Brazilian process of creating a Clean Development Mechanism for Credit, that meaningful participation has not yet been taken as a result of the steps that were done here. We hope, over time, they will.

* * * *

Prior to the completion of the Kyoto Protocol, on July 25, 1997, the U.S. Senate had passed S.Res. 98 (referred to as the "Byrd-Hagel resolution") by a vote of 95–0, expressing the sense of the Senate that:

> (1) the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997, or thereafter, which would—
>
> (A) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or
>
> (B) would result in serious harm to the economy of the United States; and
>
> (2) any such protocol or other agreement which would require the advice and consent of the Senate to ratification should be accompanied by a detailed explanation of any legislation or regulatory actions that may be required to implement the protocol or other agreement and should also be accompanied by an analysis of the detailed financial costs and other impacts on the economy of the United States which would be incurred by the implementation of the protocol or other agreement.

The Kyoto Protocol was opened for signature March 16, 1998. The United States signed the protocol on November 12, 1998. In light of the absence of requirements for emissions limitations by developing countries, President Clinton did not transmit it for advice and consent to ratification. On February 26, 1999, the President stated:

> We took a giant step forward in 1997, when we helped to forge the Kyoto agreement. Now we're working to persuade developing countries that they, too, can and must participate meaningfully in this effort without

forgoing growth. We are also trying to persuade a majority in the United States Congress that we can do the same thing.

35 PRES. WEEKLY COMP. DOC. 317 (Feb. 26, 1999).

In March 2001 the United States announced that it would not proceed with ratification of the Kyoto Protocol. *See Digest 2000* at 711–27 and *Digest 2001* at 730–38. In October 2004 Russia announced that it would ratify the Protocol; Russian ratification would enable the protocol to enter into force without the United States.

e. Hazardous substances

(1) Convention on Oil Pollution Preparedness, Response and Co-operation

On August 1, 1991, President George H. W. Bush transmitted to the Senate for advice and consent to ratification the International Convention on Oil Pollution Preparedness, Response and Co-operation, with Annex, adopted under the auspices of the International Maritime Organization ("IMO") November 30, 1990, and signed by the United States on that date. As indicated in excerpts below from the accompanying September 24, 1999, report of the Department of State submitting the treaty to the President, the treaty responded to the environmentally disastrous grounding of the *Exxon Valdez* on March 24, 1989, in Prince William Sound off Alaska and a U.S. initiative of July 1989. S. Treaty Doc. No. 102–11 (1991); *see* S. Exec. Rep. No. 102–16. The convention received the advice and consent of the Senate to ratification October 29, 1991, 137 CONG. REC. S15,398, and entered into force May 13, 1995. *See also* 86 Am.J. Int'l L. 110 (1992).

---

* * * *

The *Exxon Valdez* disaster vividly demonstrated that catastrophic oil spills have the potential to overwhelm the resources of any

single nation. The Convention will create a global network to coordinate pollution response resources to minimize damage from such disasters.

The Convention will increase the protection of the marine environment in a number of ways. First, it requires Parties to establish a national system for preparedness and response. This would include a national operational contact point, a national contingency plan with supporting regional and local contingency plans, oil pollution emergency plans for ships and offshore oil platforms, and reporting requirements for oil pollution incidents. Second, the Convention encourages all Parties to enter into bilateral and regional response agreements to prepare for and respond to oil pollution incidents. Finally, the Convention establishes a voluntary mechanism for more developed countries to provide technical assistance in the form of equipment and training to less developed nations.

The IMO, subject to its agreement and the availability of its resources, is delegated a central role in carrying out the purposes of the Convention, including the information services, education and training, technical services and technical assistance. For example it may act as a clearinghouse for information concerning the availability of pollution response resources of all types from any requesting nation.

The International Maritime Organization successfully utilized the global coordination provisions of the Convention to provide invaluable assistance to the Persian Gulf States in responding to the Iraqi oil release during the Gulf war.

The Convention was developed in response to your environmental initiative proposed at the Paris Economic Summit of July 1989. Paragraph 46 of the Joint Communique of the Summit of the Arch articulated that initiative as follows:

> We express our concern that national, regional and global capabilities to contain and alleviate the consequences of oil spills be improved. . . . We also ask the International Maritime Organization to put forward further proposals for preventive action.

* * * *

Article 1 of the Convention provides that Parties shall, individually or jointly, take all appropriate measures to prepare for and respond to an oil pollution incident. It includes a provision confirming that warships, naval auxiliaries or other ships owned or operated by a State and used, for the time being, only on government noncommercial service are exempt from the provisions of the Convention. The United States understands this principle of sovereign immunity extends to bareboat-chartered and demise-chartered ships managed or operated by contractors on behalf of the State.

* * * *

The Convention will require implementing legislation. Article 4(1)(b) requires all persons to report any observed event at sea involving a discharge of oil or the presence of oil, even if that person was not involved in the discharge. Under current U.S. law there is no authority to impose reporting requirements on persons not directly connected to an oil discharge. On the other hand, legislation is not expected to be needed to implement the shipboard response plan requirement set out in Article 3 of the Convention. The IMO has adopted an amendment to the International Convention for the Prevention of Pollution From Ships (MARPOL 73/78) containing an identical requirement. The amendment, which is expected to enter into force in November 1992, will be implemented by the U.S. under existing authority (33 U.S.C. 1903). In that event, no additional legislation regarding shipboard response plans would be required.

(2) Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

On September 11, 1998, the United States signed the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, with Annexes, done at Rotterdam September 30, 1998 ("Convention"). Excerpts below from the September 24, 1999, report of the Department of State to the President submitting the Convention for transmittal to the Senate for advice and

consent describe the U.S. interest in the Convention. The report accompanied the transmittal of the Convention by President William J. Clinton to the Senate. S. Treaty Doc. No. 106–21 (2000). The Senate Foreign Relations Committee held hearings on the Convention in June 2003.

---

* * * *

Advances in chemical synthesis and production in this century have been responsible for many important benefits currently enjoyed by modern society. The introduction and use of chemicals and pesticides into the environment, however, also carries with it inherent risks. The United States has made great strides to address these risks since the dangers of indiscriminate pesticide use were highlighted some thirty-five years ago. Each year, chemical manufacturers and developed-country governments such as the United States spend many millions of dollars to test and assess chemicals to ensure that they can be managed in a sound manner once they are introduced into commerce. The Environmental Protection Agency and other state and federal agencies employ a great number of experts to decide which chemicals can be used safely and to ensure their safe use.

Outside the developed world, however, countries simply do not have these resources at their disposal, and the United States and other developed countries have long recognized the critical role they play in sharing their experience and knowledge with developing countries and to help alert them to significant chemical risks. With the current pace of globalization and associated increases in chemical trade, the need to promote good risk-based decision-making is also increasing rapidly in many countries.

The Rotterdam Convention is a substantial new tool to promote this goal. The Convention establishes a procedure to promote shared responsibility in the international trade of certain hazardous chemicals through the exchange of information about these chemicals and the communication of national decisions about their import and export. Under the Convention, each Party agrees to inform the Secretariat of its national decisions regarding the import of certain listed chemicals, and each Party is required to

ensure that exports from its territory comply with those import decisions. This mechanism is known as the prior informed consent, or "PIC", procedure. The Convention also required each exporting Party to provide export notifications to importing Parties with respect to each chemical that the exporting Party has banned or severely restricted under its domestic law.

The Convention builds on voluntary guidelines for the exchange of information on chemicals in international trade and on a parallel international code of conduct for the distribution and use of pesticides (the "voluntary procedure"). The United States helped develop the voluntary procedure, which was designed to give developing countries information about risks posed by especially hazardous chemicals and to assist them in enforcing their decisions regarding trade in such chemicals. Over 150 countries currently participate in the voluntary procedure, which has been operational since 1992. Major chemical producers and environmental groups from the United States and abroad have supported the voluntary procedure and endorsed its being strengthened into binding obligations. The Convention includes in its original list of chemicals subject to the PIC procedure the 27 chemicals that were listed in the voluntary procedure at the time the Convention was concluded.

The United States played a leading role in negotiating the Convention, which was developed under the joint auspices of the Food and Agriculture Organization of the United Nations (FAO) and the United Nations Environment Program (UNEP). . . .

The following analysis reviews the Convention's key provisions and sets forth the proposed understanding of the United States with respect to several elements.

* * * *

ARTICLE 12 (EXPORT NOTIFICATION)

Article 12 requires a Party to provide an export notification to the importing Party when a chemical that is banned or severely restricted under the exporting Party's law is exported from its territory. The information required to be contained in these export notifications is set out in Annex V. The export notification shall be provided prior to the first export following adoption of the

regulatory action, and, thereafter, before the first export in any calendar year or after a major change in the regulatory status of the chemical. This article also requires importing Parties to acknowledge receipt of the first export notification. In the absence of such acknowledgement, exporting Parties are required to submit a second notification. The second notification does not need to be provided prior to export. This Article also provides that the export notification requirement may be waived by the importing Party.

These export notification obligations cease when a chemical has been listed in Annex III and the importing Party has provided an import decision response concerning that chemical. The requirement is based on the principle that importing Parties should be informed if they are receiving exports of chemicals that are banned or severely restricted in the country of export. Certain export notification requirements are already in place in the United States and certain other developed countries.

Article 12 does not expressly state whether the obligation to provide export notifications extends to exports of chemicals in a different category (i.e., pesticide or industrial chemical) from the one in which the exporting Party imposed a ban or severe restriction. At the behest of the United States, Canada, Mexico and the European Union, it was made clear during the negotiation, however, that the obligation in Article 12 would be fulfilled if a country only required notification of exports in the same category in which the ban or severe restriction had been taken. This category-based approach to export notification is consistent with the approach taken by the United States and several other countries in implementing the voluntary PIC procedure. In order to emphasize this point, I recommend that the following understanding be included in the U.S. instrument of ratification:

> It is the understanding of the United States of America that the notification obligation in Article 12 requires only that an exporting Party provide export notifications with respect to exports in the same category of chemicals in which the exporting Party has imposed a ban or severe restriction, and does not require notifications for exports of chemicals in a different category.

* * * *

ANNEX V—INFORMATION REQUIREMENTS FOR EXPORT NOTIFICATION

Annex V sets out the information that shall be contained in export notifications required under Article 12.

Although much of the Convention can be implemented in the United States under existing statutory authority, it is envisaged that certain changes in domestic law would be made before the United States would deposit its instrument of ratification. The United States would likely implement its obligations relating to the pesticide category of chemicals through the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and those relating to the industrial category through the Toxic Substances Control Act (TSCA). These statutes currently provide EPA with some limited authority over the export of particularly hazardous chemicals, but it is envisaged that additional legislative authority will be required to expeditiously and effectively meet all the Convention's requirements.

* * * *

(3) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

On May 20, 1991, President George H. W. Bush transmitted the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, with Annexes, done at Basel March 22, 1989 ("Basel Convention" or "Convention") to the Senate for advice and consent to ratification. Excerpts below from the President's transmittal letter and the accompanying report of the Department of State submitting the Convention to the President provide the views of the United States on the importance of the Convention in promoting safe trade in certain hazardous chemicals and the need for several understandings. S. Treaty Doc. No. 102–5 (1991); *see* S. Exec. Rep. 102–36 (1992). The

Senate provided advice and consent, with understandings as proposed, on August 11, 1992. 138 CONG. REC. S12,291. *See also* 28 I.L.M. 649 (1989). Necessary implementing legislation has not yet been enacted.

The United States is also party to a decision of the Organisation for Economic Co-operation and Development Council on the control of transfrontier movements of wastes destined for recovery operations, done at Paris March 30, 1992, in keeping with the Basel Convention. C(92)39/FINAL, TIAS No. 11880.

TRANSMITTAL LETTER

* * * *

The Convention, which was negotiated under the auspices of the United Nations Environment Program with the active participation of the United States, makes environmentally sound management the prerequisite to any transboundary movement of wastes. To that end, it bars transboundary movements unless every country involved has consented. Even when consent is obtained, shipments must be prohibited when either the country from which the wastes are exported or the country in which the wastes will be disposed have reason to believe that the shipment will not be handled in an environmentally sound manner. The Convention also provides for the environmentally sound management of wastes that are illegally transported.

Upon receiving the unanimous recommendation of interested agencies, I personally authorized signature of the Convention by the United States last March. The notice-and-consent regime it establishes advances environmental goals that the United States has long held. We were one of the first nations to enact legislation prohibiting exports of hazardous wastes without the consent of the importing country. In March 1989, as negotiations of this Convention were concluding, I announced that the Administration planned to seek statutory authority to ban exports of hazardous wastes except pursuant to a bilateral agreement providing for the environmentally sound management of the wastes. We now have

such agreements with Canada and Mexico. Proposed legislation supported by the Administration has recently been transmitted to the Congress.

SUBMITTAL LETTER

* * * *

Article 1 of the Convention describes its scope. The Convention governs movements of hazardous wastes, defined in Annexes I and III, as well as movements of household wastes and ash from the incineration of household wastes, which are listed in Annex II.

The Convention does not regulate movements of low-level radioactive wastes that are covered by other international control systems, such as the Code of Practice of the International Atomic Energy Agency (IAEA), to which the U.S. adheres; or wastes from the normal operations of ships, which are governed by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships. The United States is a party to that Protocol.

In accordance with customary international law, the Convention does not apply to sovereign immune vessels and aircraft. Because the Convention does not expressly make this exclusion, I recommend that the United States include the following understanding in its instrument of ratification:

> It is the understanding of the United States of America that, as the Convention does not apply to vessels and aircraft that are entitled to sovereign immunity under international law, in particular to any warship, naval auxiliary, and other vessels or aircraft owned or operated by a State and in use on government, non-commercial service, each state shall ensure that such vessels or aircraft act in a manner consistent with this Convention, so far as is practicable and reasonable, by adopting appropriate measures that do not impair the operation or operational capabilities of sovereign immune vessels.

Article 2 stipulates definitions of terms important in the Convention. They are straightforward. Nevertheless, the definition of "transit state" in Article 2(12)—states "through which" wastes are transported on their way from an exporting state for disposal in another state—requires clarification to avoid a potential conflict between the Convention and the law of the sea. Pursuant to Article 6, "transit states" must be notified and given an opportunity to consent to a waste shipment. The United States has consistently maintained that, under international law, notification to or authorization of coastal states is not required for passage through territorial seas and exclusive economic zones (EEZs). This is reflected in Article 4(12) of the Convention, which provides that the Convention does not affect "navigational rights and freedoms as provided for in international law."

To ensure that the meaning of this provision is clear, I recommend that the following understanding be included in the instrument of ratification:

> It is the understanding of the United States of America that a state is a "transit state" within the meaning of the Convention only if wastes are moved, or are planned to be moved, through its inland waterways, inland waters, or land territory.

* * * *

Article 3 requires parties to communicate their national definitions of wastes to an international Secretariat, which is to be created pursuant to Article 16.

The major substantive provisions of the Convention are contained in the next several articles. Article 4, in setting forth the general obligations of parties, requires that transboundary movements be prohibited unless all states concerned have consented. Parties also shall, as appropriate, ensure the availability of adequate domestic disposal facilities and reduce the generation of wastes. . . .

* * * *

Article 4(9)(a) requires that an exporting state allow transboundary movements of wastes for disposal only when it lacks the technical capacity, necessary facilities, capacity, or "suitable disposal sites" to dispose of the wastes in an "environmentally sound and efficient manner." The Convention does not define "efficient" or "suitable." The United States will consider the cost of disposal, including the comparative cost of environmentally sound disposal outside the United States, as one factor in deciding whether disposal sites in the United States are "suitable." I recommend that this be explained in the following understanding, to be included in the instrument of ratification:

> It is the understanding of the United States of America that an exporting state may decide that it lacks the capacity to dispose of wastes in an "environmentally sound and efficient manner" if disposal in the importing country would be both environmentally sound and economically efficient.

* * * *

Article 7 addresses notification to and consent of transit states that are not parties to the Convention. Articles 8 and 9 address wastes handled improperly. When wastes are not disposed of in accordance with the information provided to the governments of the exporting and importing states, Article 8 requires the exporting and transit states to allow the reimportation of those wastes by the private persons involved. Pursuant to Article 9, when a shipment violates the Convention or general principles of international law as "the result of conduct on the part" of the exporter or generator, the exporting state must ensure that the wastes are disposed of properly, either by requiring the private persons to arrange for proper disposal or by taking charge of the wastes itself. The importing state accepts the same obligations in the case of wastes deemed to be illegal "as the result of conduct on the part of the importer or disposer." When responsibility cannot be assigned, the states are to cooperate to manage the wastes in an environmentally sound manner.

I recommend that the United States include the following understanding of Article 9 when it deposits its instrument of ratification:

> It is the understanding of the United States of America that Article 9(2) does not create obligations for the exporting state with regard to cleanup, beyond taking such wastes back or otherwise disposing of them in accordance with the Convention. Further obligations may be determined by the parties pursuant to Article 12.

This understanding closely follows the language and structure of Article 9, as well as the intention of the negotiators. Article 9(2) does not discuss remedying environmental or health damages resulting from the illegal traffic. Article 12 calls upon the parties to cooperate in considering a protocol on liability and compensation for damage from the disposal of wastes. Because cleaning up wastes in another sovereign's territory could be both costly and politically sensitive, it would be unreasonable to interpret the general language of the Convention as creating such an obligation.

Article 11 provides that the Convention will not apply to transboundary movements that are governed by bilateral or regional arrangements that meet standards set forth in Article 11. Arrangements concluded after the Convention's entry into force must contain provisions that are "not less environmentally sound" than those in the Convention. Arrangements made before the Convention enters into force must be "compatible" with environmentally sound management of wastes. The United States currently has bilateral agreements with Canada and Mexico governing transboundary movements of hazardous wastes. The Convention will not apply to transboundary movements of hazardous wastes pursuant to those agreements.

In addition, the United States has many agreements that provide for U.S. Government activities and installations abroad, including, for example, military base agreements. Wastes generated by the United States under these agreements may be returned to the United States for disposal. Such movements are "transboundary movements" as that term is defined in Article 2(3) and therefore

fall under the Convention. Because the United States ensures the proper handling of the wastes when they are returned to the United States under its control, the agreements are "compatible" with environmentally sound management, as required by Article 11(2). Consequently, the Convention does not apply to such movements when they take place pursuant to these agreements concluded before the Convention. Agreements for U.S. Government operations abroad entered into after the Convention, in order to qualify as an agreement under Article 11(1), must contain provisions that are not less environmentally sound than those in the Convention. In accordance with current U.S. policy, U.S. Government installations abroad will be subject to the applicable law of the host country.

* * * *

Before the United States can deposit its instrument of ratification, changes in domestic law will be necessary. The primary changes include creating authority to prohibit shipments when the United States has reason to believe that the wastes will not be handled in an environmentally sound manner, as well as the authority to take charge of wastes found to be illegally transported when the responsible private parties do not arrange for the environmentally sound disposal of the wastes. Furthermore, current domestic law regulates only transboundary movements of hazardous wastes. The Convention, however, also governs movements of household wastes, ash from the incineration of those wastes, and wastes that are regarded as hazardous under the Convention but not under current U.S. law. All necessary changes are contained in the Administration's proposal for legislation to implement the Convention.

* * * *

f. Nuclear safety

(1) Convention on Nuclear Safety

On May 11, 1995, President William J. Clinton transmitted the Convention on Nuclear Safety, done at Vienna on September 20, 1994, to the Senate for advice and consent to

ratification. The Convention was adopted by a Diplomatic Conference convened by the International Atomic Energy Agency ("IAEA") in June 1994 and was opened for signature, and signed by the United States, in Vienna on September 20, 1994, during the IAEA General Conference. The Senate provided advice and consent on March 25, 1999, 145 CONG. REC. S3,572, and it entered into force for the United States July 10, 1999. Excerpts are provided below from the President's letter of transmittal and the accompanying May 1, 1995, report of the Department of State submitting the convention to the President. S. Treaty Doc. No. 104–6 (1994); S. Exec. Rep. No. 106–1.

TRANSMITTAL LETTER

* * * *

At the September 1991 General Conference of the IAEA, a resolution was adopted, with U.S. support, calling for the IAEA secretariat to develop elements for a possible International Convention on Nuclear Safety. From 1992 to 1994, the IAEA convened seven expert working group meetings, in which the United States participated. The IAEA Board of Governors approved a draft text at its meeting in February 1994, after which the IAEA convened a Diplomatic Conference attended by representatives of more than 80 countries in June 1994. The final text of the Convention resulted from that Conference.

The Convention establishes a legal obligation on the part of Parties to apply certain general safety principles to the construction, operation, and regulation of land-based civilian nuclear power plants under their jurisdiction. Parties to the Convention also agree to submit periodic reports on the steps they are taking to implement the obligations of the Convention. These reports will be reviewed and discussed at review meetings of the Parties, at which each Party will have an opportunity to discuss and seek clarification of reports submitted by other Parties.

The United States has initiated many steps to deal with nuclear safety, and has supported the effort to develop this Convention.

With its obligatory reporting and review procedures, requiring Parties to demonstrate in international meetings how they are complying with safety principles, the Convention should encourage countries to improve nuclear safety domestically and thus result in an increase in nuclear safety worldwide. I urge the Senate to act expeditiously in giving its advice and consent to ratification.

SUBMITTAL LETTER

* * * *

The Convention is a particularly important complement to bilateral and multilateral safety assistance programs for countries currently operating older Soviet-designed power reactors that present a greater safety risk than reactors of more recent design. It provides a crucial political mechanism to encourage these governments to support: (1) emerging domestic regulatory organizations and (2) other entities responsible for developing a domestic nuclear safety culture.

The Convention applies only to civilian nuclear power facilities, which pose the greatest safety risk because of the magnitude of stored energy and the inventory of radioactive isotopes. In the United States, all commercial nuclear reactors licensed by the Nuclear Regulatory Commission are included. The Experimental Breeder Reactor (EBR-II), which is under the jurisdiction of the Department of Energy, is also covered by the Convention. Other nuclear facilities and fuel-cycle activities, such as reprocessing and/or enrichment plants, are not covered by the Convention. The Preamble of the Convention does, however, recognize the need to develop a waste management convention at an appropriate time in the future. The Convention does not delineate standards the Contracting Parties must meet, but instead requires them to take appropriate steps intended to ensure the safety of nuclear installations.

The Convention encourages early participation through its elaboration as an incentive convention, under which countries apply fundamental principles rather than detailed safety standards, while they further develop their nuclear safety infrastructures

domestically. The goal is that over time, through processes of self-improvement, acceptance of the obligations under the Convention, and periodic reviews, all the Contracting Parties will attain a higher level of safety.

No implementing legislation will be necessary for the United States to comply with its obligations under the Convention.

* * * *

(2) Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management

The need for a waste management convention, mentioned in the Department of State's report in f.(1), *supra*, resulted in the Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management, opened for signature in Vienna under the auspices of IAEA on September 5, 1997, and signed by the United States on that date. President William J. Clinton transmitted the convention to the Senate for advice and consent to ratification on September 13, 2000. S. Treaty Doc. No. 106–48 (2000); *see* S. Exec. Rep. 108–5 (2003). It received advice and consent to ratification April 2, 2003, 149 CONG. REC. S4,730, and entered into force for the United States on July 14, 2003. Excerpts below from the July 13, 2000, report of the Department of State submitting the convention to the President, which was included with the transmittal, provide the views of the United States on the convention.

---

* * * *

This Convention is an important part of the efforts to raise the level of nuclear safety around the world. The Convention on Nuclear Safety (CNS), to which the United States became a Party on July 10, 1999, applies only to civilian nuclear power installations. Other nuclear facilities, spent fuel, and fuel-cycle activities are not covered under the CNS. The Preamble of the CNS does, however, recognize the need to develop a waste convention and

contains a preambulary statement affirming a commitment by the Parties to develop a similar convention on the safe management of radioactive waste.

To this end, a Group of Experts was constituted from approximately 50 countries to prepare a draft convention on spent nuclear fuel and radioactive waste. From 1995 to 1997, the International Atomic Energy Agency convened seven meetings of the Group in which the United States participated. A draft text was completed in March 1997 and submitted for review by the Board of Governors at its June 1997 meeting. The Board subsequently authorized the Director-General to convene a Diplomatic Conference in Vienna. The Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management was adopted on September 5, 1997. Secretary of Energy Pena signed the Convention for the United States on that date.

The Convention will enter into force 90 days after 25 states have ratified the Convention, 15 of which must have one operational nuclear power plant. A Preparatory Meeting is to be held no later than six months after entry into force. The first Review Meeting is to be held no later than 30 months after entry into force. The interval between review meetings is not to exceed three years. To date, the Convention has been signed by 41 countries and ratified by 15 countries. Of these 15 countries, 10 are states with at least one operational nuclear power reactor.

Structured similarly to the CNS, the Convention establishes a series of broad commitments with respect to the safe management of spent fuel and radioactive waste. The Convention does not delineate mandatory standards the Parties must meet, but instead Parties are to take appropriate steps to bring their activities into compliance with the obligations of the Convention.

Under the Convention, Parties will submit periodic national reports on the steps that they are taking to implement the obligations of the Convention. These reports will be reviewed and discussed at Review Meetings of the Parties, at which each Party will have an opportunity to discuss and seek clarification of reports submitted by other Parties. Although not reflected in the Convention text, as currently proposed the Parties are to be organized into subgroups of five to seven countries. The United States will

be assigned a group and will have the opportunity to review national reports of other countries assigned to this group. Parties also can comment on national reports of countries not in their review group.

The U.S. national report form and structure will be closely modeled after the national report submitted for the CNS. As required under the Convention, the report will include, inter alia, the U.S. legislative and regulatory framework, spent nuclear fuel and radioactive waste inventory data (from currently available Federal Government databases) and a listing of types of existing and proposed facilities, whether Federal, State, or private. The United States believes its management and safety practices meet all Convention commitments.

The Department of Energy is the lead agency for preparation of the report in coordination with the Nuclear Regulatory Commission, the Environmental Protection Agency, and the Department of State. An interagency working group was established for the purpose of coordinating Convention activities.

The scope of the Convention includes safety requirements for spent fuel management when the spent fuel results from the operation of civilian nuclear reactors; radioactive waste management resulting from civilian applications; disused sealed sources no longer needed; operational radiation protection; management of nuclear facilities; decommissioning; emergency preparedness; a legislative and regulatory framework; and transboundary movement. It does not include naturally occurring radioactive materials (NORM), unless a Party declares it as radioactive waste for the purposes of the Convention.

The scope of the Convention does not apply to a Party's military radioactive waste or spent nuclear fuel unless the Party declares it as spent nuclear fuel or radioactive waste for the purposes of the Convention.

The Convention would apply to military radioactive waste and spent nuclear fuel if and when such material is permanently transferred to and managed within exclusively civilian programs. The Convention contains provisions to ensure that national security is not compromised and that Parties have absolute discretion as to what information is reported on material from military sources.

In the United States, all military radioactive waste and spent nuclear fuel is normally transferred to civilian programs for disposal. The Convention will not, therefore, affect ongoing U.S. military operations in any way, nor will classified information be covered in the U.S. national report.

As does the CNS, this Convention encourages broad participation through its elaboration as an incentive process, under which Parties take appropriate steps to bring their activities into compliance with the obligations of the Convention. The goal is that over time, through processes of self-improvement, acceptance of the obligations under the Convention, and periodic reviews of their Convention-related activities, all the Parties will attain a higher level of safety with the management of their spent fuel and radioactive waste.

* * * *

Article 38 addresses dispute resolution. In the event of a disagreement between Parties concerning the interpretation or application of the Convention, the Parties must consult within the framework of a meeting of the Parties with a view to resolving the disagreement by consensus. If these consultations do not resolve the disagreement, then Article 38 provides that recourse can be made to the mediation, conciliation and arbitration mechanisms provided for in international law, including the rules and practices prevailing within the IAEA. During the Diplomatic Conference in 1997 that considered and adopted the Convention, it was made clear during the discussions leading to the adoption of the final text of Article 38 that the words "recourse can be made" were deliberately chosen to avoid any implication that the dispute resolution mechanisms referred to in the Article were mandatory. Thus, Article 38 does not commit the United States to binding mediation, conciliation or arbitration.

4. Protection of the Marine Environment and Marine Conservation

a. Marine wildlife

(1) U.S. fisheries policy

In remarks at the fifth North Pacific Rim Fisheries Conference, Anchorage, Alaska, December 1, 1999, R. Tucker Scully, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, outlined ongoing U.S. efforts to address the challenges of achieving sustainable fisheries. Mr. Scully addressed a number of the multilateral agreements discussed below. In addition, he noted that

> there has been a significant effort, centered largely in [the Food and Agriculture Organization of the United Nations] ("FAO"), to develop agreed guidelines and action plans to identify steps to facilitate and promote implementation of the international legal obligations to conserve fish, as well as steps to identify emerging issues requiring priority attention. These include: the FAO Code of Conduct for Responsible Fisheries [1996], as well as international plans of action to deal with seabird mortality in longline fisheries, conservation and management of shark species, and excess capacity in the world's fishing fleet. The FAO is also pursuing another initiative to crack down on illegal, unregulated and unreported ("IUU") fishing activities.

Further, Mr. Scully discussed "examples of innovative responses at the bilateral and regional levels," including among others the U.S.-Canada Pacific Salmon Agreement and the 1994 Convention for the Conservation and Management of the Pollock Resources of the Central Bering Sea, both discussed below.

Excerpts below from Mr. Scully's remarks discussed efforts to combat IUU fishing. The full text is available at

www.state.gov/www/policy_remarks/1999/991201_scully_fisheries.html.

---

* * * *

Finally, I would like to turn to recent steps taken to deal with fishing activities that undermine the effectiveness of regional fishery conservation organizations—what has become known as illegal, unregulated and unreported (IUU) fishing. In this instance, "illegal" refers to fishing by a vessel of a Party to the agreement in a manner that violates the terms of the agreement or conservation measures adopted under it. "Unregulated" refers to fishing by a vessel of a non-Party in a manner that obstructs achievement of the purposes of the agreement or measures adopted under it. "Unreported" can refer to either, but is included in the concept to emphasize the fact that unreported catches undercut the ability to undertake the assessments of fish populations necessary for sound management.

IUU fishing typically targets high value species and has become a major problem for Atlantic bluefin tuna and swordfish in the area of ICCAT—the International Commission for the Conservation of Atlantic Tuna—and for Patagonian toothfish, marketed in the United States as Chilean sea bass, in the area of CCAMLR—the Commission for the Conservation of Antarctic Marine Living Resources. The Members of both Commissions have developed innovative approaches to counter IUU fishing, approaches that seek to use trade or market access as a tool.

In 1994, ICCAT developed an action plan to deal with IUU fishing for bluefin tuna and has subsequently agreed upon such a plan for swordfish. In each instance, the plan provides for a process, including documentation of catch, for identifying non-Parties whose vessels are engaged in fishing activities that diminish the effectiveness of ICCAT conservation measures and for identifying Parties whose vessels are not complying with ICCAT conservation measures. Non-Parties or Parties so identified are accorded a one-year period to rectify the situation. If the situation is not rectified, the Commission will require ICCAT members to prohibit imports of bluefin tuna or swordfish products from the non-complying nation.

ICCAT has previously imposed such bans on imports of bluefin tuna from Belize, Honduras and Panama. At its recently concluded 1999 annual meeting, ICCAT, for the first time, authorized an import ban against a Party—against Equatorial Guinea in respect of bluefin tuna; and imposed import bans upon two non-Parties—Belize and Honduras—in respect of swordfish.

CCAMLR, at its 1999 annual meeting that wound up last month, reached agreement on an innovative vessel-based catch documentation system for Patagonian toothfish and the other toothfish species found in Antarctic waters. Developing a system was complicated by the fact that Patagonian toothfish, while concentrated in the area covered by CCAMLR, may also be caught outside of the area. (In fact, one of the challenges facing CCAMLR is the widespread practice of IUU vessels of harvesting toothfish in the CCAMLR area but portraying it as originating elsewhere.)

The CCAMLR catch documentation system is based on the requirement that each landing or transshipment of Dissostichus (toothfish) species generate a document that identifies where the catch was taken (specific areas within CCAMLR waters or FAO statistical area, if outside CCAMLR waters) and where the catch was landed or transshipped and its recipient. The specific elements of the CCAMLR system are:

> i) CCAMLR Parties will require that each of their vessels complete a Dissostichus catch document and obtain flag State certification of the document on each occasion that it lands or transships toothfish, wherever landed or transshipped;
> ii) CCAMLR Parties will require that any toothfish landed at its ports or transshipped to its vessels be accompanied by a Dissostichus catch document, completed by the vessel and certified by the flag State of the vessel, whether a Party or a non-Party to CCAMLR; and
> iii) CCAMLR Parties will require that each shipment of toothfish imported into its territory be accompanied by the Dissositchus catch document or documents, certified by the exporting State, that account for all of the shipment

* * * *

(2) Convention for the Conservation of Anadromous Stocks in the Northern Pacific

On May 19, 1992, President George H. W. Bush transmitted the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean to the Senate for advice and consent to ratification. S. Treaty Doc. No. 102–30 (1992); *see* S. Exec. Rep. No. 102–51 (1992). The convention was signed by the United States, Canada, Japan, and the Russian Federation on February 11, 1992, in Moscow. The Senate gave advice and consent to ratification on August 11, 1992, 138 CONG. REC. S12,291, and it entered into force on February 16, 1993. TIAS No. 11465. Excerpts below from the May 14, 1992, report of the Department of State submitting the convention to the President, which accompanied the transmittal, describe key aspects of the convention.

* * * *

The Convention has as its centerpiece a prohibition on high seas fishing for Pacific salmon, which will protect valuable migrating U.S.-origin salmonids. It also establishes a new international organization to promote the conservation of anadromous stocks (primarily Pacific salmon) throughout their migratory range in the high seas area of the North Pacific Ocean and its adjacent seas, as well as ecologically related species that interact with these resources, including various marine mammals, seabirds, and non-anadromous fish species. The new organization, which is to be known as the North Pacific Anadromous Fish Commission, will also serve as a needed venue for consultation and coordination of high seas fishery enforcement activities by the contracting parties.

Canada, Japan, the Russian Federation, and the United States are the primary States of origin for anadromous stocks in the North Pacific Ocean. These stocks intermingle extensively on the high seas beyond the 200-nautical mile zones of coastal States.

Customary international law, as reflected in Article 66 of the 1982 United Nations Convention on the Law of the Sea, prohibits fishing for salmon on the high seas, except where this would cause

economic dislocation for a State. Japan, however, has enjoyed a sanctioned high seas salmon fishery under a trilateral agreement with Canada and the United States, as well as under a bilateral accord with the Soviet Union (now the Russian Federation). The trilateral agreement, known as the International Convention for the High Seas Fisheries of the North Pacific Ocean, (the basic instrument for the International North Pacific Fisheries Commission—INPFC), gave the United States and Canada a means to limit Japanese interceptions of North American-origin salmon in a fishery ostensibly aimed at the harvest of Asian-origin salmon.

The United States has nevertheless maintained that any harvest of migrating Pacific salmon on the high seas is irrational due to the adverse effect it has on efforts of States of origin to conserve and manage such fish. In addition, U.S. Northwest and Alaska fishing interests have long desired the end of such high seas fishing so that the United States could accrue full social, economic and recreational benefits from the fish produced in our waters.

In February 1989, Soviet representatives informed U.S. officials that the Soviet Union would no longer allocate to Japan a high seas salmon quota for Soviet-origin fish, beginning in 1992. At that time, the Soviets also provided the United States with a draft international agreement outlining the establishment of a new organization for conserving North Pacific anadromous stocks. The Soviets explained that the new organization could come into effect once Japan's high seas salmon fishing ceased in the North Pacific.

In response to the proposal, the United States cooperated with the Soviet Union to produce a joint draft convention, which was presented to Canada and Japan for their consideration the following month. In July 1990, Canada contacted the United States to express its desire to work cooperatively in the development of the proposed new Convention and invited the United States, Japan, and the Soviet Union to a meeting in Ottawa, Canada, October 23–24, 1990, to begin discussions towards that end. Following that meeting, the four countries participated in a drafting group exercise in January 1991 to prepare a composite draft negotiating text of the Convention. Negotiations on this text were subsequently held in Washington, D.C., June 25–27, 1991, and at a final negotiating session held September 16–20, 1991, in Ottawa,

Canada, which resulted in ad referendum agreement on the new Convention.

Since the conclusion of those negotiations, the Soviet Union has dissolved. Consultations among Canada, Japan, the Russian Federation, and the United States produced agreement that the Russian Federation would replace the Soviet Union as a party to the Convention. The Russian Federation also agreed to serve as depositary for the Convention. The text of the Convention was subsequently modified to achieve these results.

It was understood throughout the negotiations that the new Convention would establish an organization that would supersede the INPFC. . . .

* * * *

(3) Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea

On August 9, 1994, President William J. Clinton transmitted to the Senate for advice and consent to ratification the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, with annex, done at Washington on June 16, 1994. The Convention was signed on that date by representatives of the People's Republic of China, the Republic of Korea, the Russian Federation, and the United States. Japan and the Republic of Poland, the other participating countries in the preparation of the agreement, signed at a later date. The convention entered into force for the United States on December 8, 1995. The July 9, 1994, report of the Department of State submitting the convention to the President and accompanying the transmittal explained the convention as excerpted below. S. Treaty Doc. No. 103–27 (1994); *see* S. Exec. Rep. 103–36.

---

* * * *

The Convention establishes an international regime for the conservation and management of pollock resources in the central

region of the Bering Sea in the North Pacific Ocean. It is a state-of-the-art fishing agreement that includes strong measures to conserve and manage the pollock resources enforced by effective compliance provisions. Among other things, the Convention requires that vessels fishing for pollock in the Convention Area carry scientific observers and use real-time satellite position-fixing transmitters while in the Bering Sea. Furthermore, all fishing vessels of any Party to the Convention may be boarded and inspected by authorized officials of any other Party for compliance with the Convention.

Pollock in the North Pacific Ocean and Bering Sea represent one of the most commercially important fishery resources in the world. The economic value of the U.S. pollock industry in Alaska, Washington, and Oregon is approximately $2 billion annually.

In the late 1980s, vessels of Japan, Korea, China, and Poland fished extensively and without restraint in the area of the central Bering Sea beyond the waters over which the United States and Russia exercise exclusive fishery management jurisdiction. This situation created severe conservation problems for pollock stocks in the adjacent U.S. and Russian waters. Catches of Aleutian Basin pollock in the central Bering Sea declined from a peak of nearly 1.5 million metric tons in 1989 to less than 11,000 tons in 1992. Anxiety also arose regarding possible adverse impacts on other ecologically related marine species.

In early 1991, a negotiating process on a multilateral agreement on fishing for pollock in the central Bering Sea began which ultimately required ten sessions over a three-year period to come to fruition. During the negotiations, all participating States voluntarily suspended fishing for Aleutian Basin pollock in the central Bering Sea and in the adjacent U.S. and Russian areas. Officials of the Department of Commerce, the U.S. Coast Guard, representatives of the U.S. fishing industry, state government officials of Alaska and Washington, and Congressional representatives strongly supported the U.S. negotiating effort. On February 11, 1994, representatives of the involved countries concluded their discussions and reached ad referendum agreement on a Convention on the Conservation and Management of Pollock Resources in the

Central Bering Sea, with Annex. The Convention was opened for signature at Washington on June 16, 1994.

* * * *

(4) Highly migratory fish

(i) U.S. inclusion of highly migratory tuna under U.S. EEZ jurisdiction

In 1990 the United States amended the Magnuson Fishery Conservation and Management Act ("MFCMA") to include highly migratory species among all other species over which it asserts sovereign rights and exclusive management authority while such species occur in the U.S. exclusive economic zone. Fishery Conservation Amendments of 1990, Pub. L. No. 101–627, 104 Stat. 4436. 16 U.S.C. § 1812. The amendment was effective January 1, 1992. In April 1991 the U.S. Mission to the United Nations transmitted a copy of the new legislation to the Special Representative to the Secretary General for the Law of the Sea with an aide memoire announcing the U.S. action. The aide memoire is set forth below in full.

The Permanent Representative of the United States of America to the United Nations presents his compliments to the Special Representative of the Secretary General for the Law of the Sea and would like to draw his attention to the enactment of amendments to the Magnuson Fishery Conservation and Management Act.

The most significant change in the United States law is the amendment to include highly migratory tuna as species of fish under United States jurisdiction throughout the exclusive economic zone. Accordingly, the United States now recognizes coastal state claims of jurisdiction over highly migratory species of tuna within the exclusive economic zone. Prior to this amendment, the United States only claimed, and recognized claims of other countries to, jurisdiction over tuna out to twelve nautical miles. This change

will make the U.S. position consistent with the overwhelming state practice subsequent to the 1982 United Nations Law of the Sea Convention, with regard to highly migratory species.

The effective date of enactment of the amendment is January 1, 1992. Upon that date the United States will assert management authority over such species in its exclusive economic zone. As a matter of international law, effective November 28, 1990, the United States recognized similar assertions by coastal nations regarding their exclusive economic zones.

(ii) UN agreement on straddling and highly migratory fish

On February 20, 1996, President William J. Clinton transmitted to the Senate for advice and consent to ratification the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, with annexes ("Agreement"), *reprinted in* 34 I.L.M 1542 (1995) The Agreement was adopted on August 4, 1995, at United Nations headquarters in New York by consensus of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and signed on behalf of the United States on December 4, 1995. The Senate provided advice and consent on June 27, 1996, and the Agreement entered into force December 11, 2001. *See Digest 2001* at 685–86.

The report of the Department of State submitting the Agreement to the President and accompanying the transmittal letter is excerpted below. S. Treaty Doc. No. 104–24 (1996); *see* S. Exec. Rep. No. 104–20.

---

* * * *

The Agreement has its origins in Agenda 21, the detailed plan of action adopted by the 1992 United Nations Conference on Environment and Development. Responding to the precipitous decline in a number of valuable fish stocks in the world's oceans,

Agenda 21 called for an intergovernmental conference to strengthen the conservation and management of straddling fish stocks and highly migratory fish stocks.

Straddling fish stocks are stocks which occur both within the exclusive economic zones (EEZs) of one or more coastal States and in adjacent high seas areas. Among these are valuable stocks of cod in the Northwest Atlantic Ocean and pollock in the Bering Sea. Highly migratory fish stocks are those which migrate extensively across the high seas and through the EEZs of many coastal States. Examples include tuna and swordfish.

The conference began under United Nations auspices in 1993 and successfully concluded in August 1995 with the adoption of the Agreement. . . .

The Agreement, as its title indicates, builds upon certain provisions of the 1982 United Nations Convention on the Law of the Sea ("the Convention") related to fisheries. In so doing, the Agreement reaffirms the central role of the Convention as the accepted foundation and framework for this critical body of international law. Although the United States need not become party to the Convention in order to become party to the Agreement, we would maximize our benefits from these two treaties if the United States were a party to both of them. The Convention was transmitted to the Senate for its advice and consent October 6, 1994 (Treaty Doc. 103–39).

The linkage between the two treaties is very strong. As discussed in more detail below, much of the text of the Agreement is drawn from, and elaborates upon, provisions of the Convention. Article 4 of the Agreement stipulates that the Agreement "shall be interpreted and applied in the context of and in a manner consistent with the Convention." Part VIII of the Agreement also provides that disputes arising between parties under the Agreement (as well as under regional fishery agreements) are subject to resolution in accordance with the dispute settlement provisions of the Convention.

As a practical matter, U.S. adherence to both treaties will best ensure that they are implemented in a manner consistent with U.S. fishery interests. A brief review of the fisheries provisions of the Convention demonstrates how closely tied the two treaties are.

The Convention permits coastal States to establish EEZs extending 200 nautical miles from their coastal baselines. Under Articles 56, 61 and 62 of the Convention, coastal States enjoy sovereign rights and exclusive jurisdiction to exploit, conserve and manage living marine resources within their EEZs, subject to general obligations to prevent overfishing and to allocate surplus resources, if any, to other nations. Because approximately 90 percent of living marine resources are harvested within 200 miles of shore, the Convention effectively gives coastal States full control over the large majority of marine fisheries.

Beyond the EEZs of any State, i.e., on the high seas, all States have the right for their nationals to engage in fishing. Articles 116–119 of the Convention qualify this right by making it subject to certain rights, duties and interests of coastal States, as well as to a general duty to conserve high seas resources and to cooperate with other States in conservation efforts. In fulfillment of these obligations, multilateral fishery agreements and organizations have been established to conserve and manage high seas fisheries in many regions of the world.

Certain species and categories of fish do not remain solely within EEZs or solely in the high seas, but rather migrate across the line that separates the EEZs from the high seas. For anadromous stocks (such as a salmon) and catadromous species (such as eels), Articles 66 and 67 of the Convention, respectively, essentially forbid high seas harvesting. For straddling stocks and highly migratory species, the Convention contains . . . general injunctions [in Articles 63(2), 64(1) and 64(2)].

These general provisions, while establishing an agreed framework for cooperation and conservation, have not proven sufficiently specific to curb overharvesting that has plagued several of the world's key fish resources. Indeed, since 1989, total marine catches have begun to decline. The United Nations Food and Agriculture Organization reports that about 70 percent of marine fish stocks are fully to heavily exploited, overexploited, depleted or slowly recovering. Of particular concern to the United States, the Aleutian Basin pollock stock collapsed in the late 1980's, while the stock of Western Atlantic bluefin tuna has become severely depleted.

The agreement gives the international community the chance to reverse these trends and to create mechanisms needed to ensure sustainable marine fisheries. Its 50 articles and two annexes strengthen and make more specific the provisions of the Convention, and back those provisions up with effective enforcement techniques and compulsory dispute settlement. . . .

* * * *

In conjunction with the transmittal of the Convention to the Senate in October 1994, I recommended that, for fishery disputes arising under the Convention, the United States choose a special arbitral tribunal constituted in accordance with Annex VIII of the Convention as the appropriate dispute settlement procedure. See Sen. Treaty Doc. 103–39, pp. ix–x. To be consistent, I recommend that the United States choose the same procedure for disputes arising under the Agreement.

* * * *

(5) Sea turtles

(i) Legislation and regulations

Section 609 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. Law No., 101–162, 103 Stat. 988 (1989), prohibited the importation of shrimp or products from shrimp "which have been harvested with commercial fishing technology which may affect adversely" certain species of sea turtles protected under U.S. law and regulations. Under § 609 the prohibition would not apply if the President determined and certified to the Congress not later than May 1, 1991 that:

> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or
(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

Section 609 also required the Secretary of State, in consultation with the Secretary of Commerce, among other things, to "initiate negotiations as soon as possible" (1) "for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such [protected] species of sea turtles" and (2) "with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles."

On January 10, 1991, the Department of State, by delegation from the President, published a notice of guidelines for determining comparability of foreign programs for the protection of turtles in shrimp trawl fishing operations beginning May 1, 1991. 56 Fed. Reg. 1051 (Jan. 10, 1991). The notice is excerpted below.

---

* * * *

The Department of State has determined that the import restriction does not apply to aquaculture shrimp, since the harvesting of such shrimp does not adversely affect sea turtles. The Department has also determined that the scope of section 609 is limited to the wider Caribbean/western Atlantic region. Section 609 refers to sea turtles whose conservation is the subject of U.S. regulations that require, among other things, that shrimp trawl vessels fishing in U.S. waters in certain areas of the Gulf of Mexico and Atlantic use Turtle Excluder Devices (TEDs) or reduced tow times during

certain seasons to reduce the incidental mortality of sea turtles in trawl operations. In passing section 609, Congress recognized that these conservation measures taken by U.S. shrimp fishermen would be of limited effectiveness unless a similar level of protection is afforded throughout the turtles' migratory range across the Gulf of Mexico, Caribbean and western central Atlantic (Wider Caribbean Region).

It has been determined that nations in the wider Caribbean with commercial shrimp trawl operations, through whose waters these sea turtles migrate, are: Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guiana, and Brazil.

The foundation of the U.S. program is the requirement that shrimp trawl vessels use approved TEDs in areas and at times when there is a likelihood of intercepting sea turtles. Vessels under 25 feet may use restricted tow times in lieu of the TEDs requirement. The goal of this program is to protect sea turtle populations from further decline by reducing their incidental mortality in shrimp trawl operations. The Department's guidelines recognize that other nations may have different distributions of sea turtles in their waters, and that there may be other methods of reducing sea turtle mortality in shrimp trawl operations. The guidelines do, however, contain a presumption in favor of TEDs because of their proven effectiveness in the U.S. fishery.

* * * *

The initial determination of comparability will be made by May 1, 1991. To be found comparable, a foreign nation's program must include the following elements.

1. No retention—a prohibition on the retention of incidentally caught sea turtles.
2. Resuscitation—a requirement that comatose incidentally caught sea turtles be resuscitated.
3. Reduction of Incidental Taking. At the time of requesting an initial positive determination, many affected nations may not have data on the incidental taking of sea turtle in their shrimp trawl fishery. This element will therefore be satisfied if there is either:

(a) A commitment to require all shrimp trawl vessels to use TEDs at all times (or reduce tow times if a vessel is under 25 feet). This requirement may be phased in over a period of not more than three years. The program description should establish a timetable during which TEDs use will be phased in; or
(b) A commitment to engage in a statistically reliable and verifiable scientific program to determine times and areas of turtle abundance and assess the impact of the shrimp trawl fishery on sea turtles; to develop and assess technologies to reduce the impact of the shrimp trawl fishery on sea turtles; and to require the use of fishing technologies and techniques that will reduce the incidental mortality of sea turtles in the shrimp trawl fishery to insignificant levels. A program will be found comparable if it contains these elements and if the period of assessment and implementation is not more than three years. The program description should establish a timetable by which each phase of the program is to be completed.

4. Enforcement. To be comparable, a program must include a credible enforcement effort that includes monitoring for compliance and appropriate sanctions.

* * * *

On May 1, 1991, the Department of State issued a press release announcing that it had certified that "thirteen countries in the wider Caribbean region have taken initial steps to protect sea turtles from capture and drowning in their shrimp fishing operations." The press release also explained the U.S. law and policy for the protection of sea turtles:

> Sea turtles and shrimp share similar habitats in tropical and sub-tropical waters and, as a result, the air breathing turtles are often caught in shrimp nets and drown. This incidental drowning has been identified as the principal threat to the survival of sea turtles in U.S. waters. To protect turtles, U.S. shrimpers are required to use a piece

> of equipment in their nets called the turtle excluder device (or TED). . . .
>
> The 1989 law is intended to extend the protection given to sea turtles under the U.S. regulations to other areas these turtles inhabit throughout the Gulf of Mexico, Caribbean and Western Central Atlantic (the wider Caribbean.) . . .

The full text of the press release as contained in a telegram from the Department to American embassies of affected countries, May 3, 1991, is available at *www.state.gov/s/l/c8183.htm*.

The guidelines for certification were amended February 18, 1993, to bring them into line with changes in regulations for the U.S. domestic program. 58 Fed. Reg. 9015 (Feb. 18, 1993). As explained in the February 18 notice, under the new domestic regulations, "all U.S. commercial shrimp trawl vessels in the waters of the Gulf of Mexico and the Atlantic Ocean from North Carolina to Texas must use TEDs at all times in all areas," with limited exemptions. *See* 57 Fed. Reg. 57,348 (Dec. 4, 1992). *See also* 58 Fed. Reg. 26,025 (Apr. 29, 1993).

On April 30, 1993, the Department of State certified eight countries under § 609 as having adopted comparable programs and that the fishing environment in two other countries did not pose a threat of the incidental taking of sea turtles. 58 Fed. Reg. 28,428 (May 13, 1993). The ban on shrimp imports to the United States remained in place for four countries that were not certified; two of those countries were subsequently certified. 58 Fed. Reg. 30,082 (May 25, 1993) and 58 Fed. Reg. 40,685 (July 29, 1993). The same countries were certified in 1994 (59 Fed. Reg. 25,697 (May 17, 1994) and 1995 (60 Fed. Reg. 24,962 (May 10, 1995) and 43,640 (Aug. 22, 1995).

Effective May 1, 1996, the guidelines for determining comparability were again revised, this time in response to a court order. 61 Fed. Reg. 17,342 (Apr. 19, 1996). Excerpts from the notice are set forth below.

---

* * * *

The Department of State had previously determined that Congress intended Section 609 to apply only to certain nations in the wider Caribbean/western Atlantic region. However, on December 29, 1995, Judge Thomas J. Aquilino, Jr., of the U.S. Court of International Trade, issued an order in *Earth Island Institute v. Christopher* (CIT 94-06-00321) requiring that Section 609 applies to shrimp harvested in all foreign nations.

* * * *

Shrimp Exporter's Declaration. The Department of State has determined that, in order to achieve effective implementation of Section 609 on a world-wide basis, beginning May 1, 1996, all shipments of shrimp and products of shrimp into the United States must be accompanied by a declaration (DSP-121, revised) attesting that the shrimp accompanying the declaration was harvested either under conditions that do not adversely affect sea turtles (as defined [in the notice]) or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609. All declarations must be signed by the exporter of the shrimp. A government official of the harvesting nation must also sign those declarations asserting that the accompanying shrimp was harvested under conditions that do not adversely affect sea turtles. . . .

> On April 30, 1996, the Department of State certified 36 countries as meeting the requirements of the law, including 15 countries that had shrimp fisheries only in cold waters with essentially no risk of taking sea turtles and 8 nations only harvesting shrimp using manual rather than mechanical means to retrieve nets. 61 Fed. Reg. 24,998 (May 17, 1996); *see also* 61 Fed. Reg. 43,395 (Aug. 22, 1996), 61 Fed. Reg. 59,482 (Nov. 22, 1996), 62 Fed. Reg. 4826 (Jan. 31, 1997), and 62 Fed. Reg. 19,157 (Apr. 18, 1997), certifying a total of five additional countries. For certification decisions under these new guidelines in 1997 and 1998, *see* 62 Fed. Reg. 29,759 (June 2, 1997), 63 Fed. Reg. 30,550 (June 4, 1998), and 63 Fed. Reg. 44,499 (Aug. 19, 1998). Certifications in 1999 are available at *http://secretary.state.gov/www/briefings/statements/1999/ps990503a.html, http://secretary.state.gov/*

www/briefings/statements/1999/ps990519b.html, and *http://secretary.state.gov/www/briefings/statements/1999/ps990702a.html.*

On June 4, 1998, the U.S. Court of Appeals for the Federal Circuit vacated the trial court's 1996 rulings that had prompted revisions to the guidelines in 1996, as discussed above. *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998). Effective August 28, 1998, the State Department reaffirmed the guidelines with certain modifications. 63 Fed. Reg. 46,094 (Aug. 28, 1998).

In October 1996 India, Malaysia, Thailand and Pakistan challenged § 609 under WTO dispute settlement procedures, claiming that it violated U.S. obligations under the WTO. The 2000 Trade Policy Agenda & 1999 Annual Report of the President of the United States on the Trade Agreements Program, available through the U.S. Trade Representative Press Office, described the proceedings through 1999 as set forth below. *See also* remarks by David Balton, Director of the Office of Marine Conservation, U.S. Department of State, "Setting the Record Straight on Sea Turtles and Shrimp," December 7, 1999, available at *www.state.gov/www/policy_remarks/1999/991207_balton_turtles.html.*

The United States prevailed on the central points of a challenge brought by India, Malaysia, Pakistan, and Thailand to U.S. restrictions on imports of shrimp and shrimp products harvested in a manner harmful to endangered species of sea turtles, under a special "shrimp-turtle" statute. (This case did not concern and did not affect the Endangered Species Act.) A dispute settlement panel found that these import restrictions were inconsistent with WTO rules. However, the United States appealed, and on October 12, 1998, the Appellate Body largely reversed the panel's ruling. The Appellate Body confirmed that WTO rules allow Members to condition access to their markets on compliance with certain policies such as environmental conservation and agreed that the U.S. "shrimp-turtle law" was a permissible measure adopted for the purpose of sea turtle conservation. The Appellate Body

also found that WTO rules permit panels to accept unsolicited amicus curiae briefs from non-governmental organizations. The Appellate Body, however, did find fault with certain aspects of the U.S. implementation of the shrimp-turtle law. In particular, it found that the State Department's procedures for determining whether countries meet the requirements of the law did not provide adequate due process, because exporting nations were not afforded formal opportunities to be heard, and were not given formal written explanations of adverse decisions. The Appellate Body also found that the United States had unfairly discriminated between the complaining countries and Western Hemisphere nations by not exerting as great an effort to negotiate a sea turtle conservation agreement with the complaining countries and by not providing them the same opportunities to receive technical assistance.

The United States informed the DSB of its intention to implement the rulings and recommendations of the DSB in a manner consistent not only with WTO obligations, but also with the firm commitment of the United States to protect endangered species of sea turtles. In this connection, the United States agreed to an implementation period of 13 months, which ended on December 6, 1999. After Congressional consultations and opportunities for input from all interested parties, in July 1999 the State Department revised its procedures to provide more due process to countries applying for certification under the shrimp-turtle law. In addition, the State Department is making progress in efforts to negotiate a sea turtle conservation agreement with the countries of the Indian Ocean region, including the complaining countries, and the United States is providing the complaining countries with additional technical assistance in the adoption of sea turtle conservation measures. Throughout the case, U.S. import restrictions on shrimp harvested in a manner harmful to sea turtles have remained fully in effect.

See Digest 2001 at 752–62 concerning the October 22, 2001, WTO Appellate Body conclusion that the United States had taken sufficient steps to address deficiencies found in the 1998 decision, U.S. litigation concerning implementation

of § 609, and progress on negotiation of an Indian Ocean sea turtle convention.

As noted in the summary above, in response to the WTO case, the United States once again revised the guidelines for implementation of § 609. 64 Fed. Reg. 36,946 (July 8, 1999). On October 20, 1999, the Department of State determined that the harvesting of shrimp in the Spencer Gulf of southern Australia did not pose a threat of the incidental taking of sea turtles and therefore the import prohibitions of § 609 did not apply to shrimp harvested in the Spencer Gulf. 64 Fed. Reg. 57,921 (Oct. 27, 1999).

(ii) Inter-American Convention for the Protection and Conservation of Sea Turtles, with annexes

On May 22, 1998, President William J. Clinton transmitted the Inter-American Convention for the Protection and Conservation of Sea Turtles, with annexes, done at Caracas December 1, 1996 ("Convention"), to the Senate for advice and consent to ratification. The United States signed the Convention, subject to ratification, on December 13, 1996, in Caracas, Venezuela. The Senate gave advice and consent to ratification on September 20, 2000, 146 CONG. REC. S8,866, and the Convention entered into force May 2, 2001.

The July 16, 1997, report of the Department of State submitting the Convention to the President and accompanying the transmittal is excerpted below. S. Treaty Doc. No. 105–48 (1998); *see* S. Exec. Rep. No. 106–18.

---

* * * *

All known species of sea turtles found in the Western hemisphere are threatened or endangered, some critically so. Because sea turtles migrate extensively, effective protection and conservation of these species require cooperation among States within their migratory range. Although the international community has banned trade in sea turtles and sea turtle products pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and

Flora ("CITES"), the Convention I am submitting is the first multilateral agreement that actually sets standards to protect and conserve sea turtles and their habitats.

Congress called for the negotiation of multilateral agreements for the protection and conservation of sea turtles in Section 609 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (Public Law 101–162). In close cooperation with Mexico, the United States led a three-year effort to negotiate the Convention with other Latin American and Caribbean nations. Substantive negotiations on the Convention concluded on September 5, 1996, at a meeting in Salvador da Bahia, Brazil. The Convention, once ratified and implemented, will enhance the conservation of sea turtles and harmonize standards for their protection throughout the Western Hemisphere.

More specifically, the Convention requires Parties to promote the protection and conservation of sea turtle populations and their habitats; to reduce the incidental capture, injury and mortality of sea turtles associated with commercial fisheries; to prohibit the intentional take of, and domestic and international trade in, sea turtles, their eggs, parts and products; and to foster international cooperation in the research and management of sea turtles. The Convention specifically obligates Parties to require the use of turtle excluder devices ("TEDs") by commercial shrimp trawl vessels in a manner comparable to the requirements in effect in the United States. The Convention also includes provisions on monitoring and compliance.

* * * *

. . . Pursuant to Article IV(3)(a), a Party may allow exceptions to the obligations relating to the intentional capture, retention and killing of, and domestic trade in, sea turtles solely to satisfy economic subsistence need of traditional communities, provided such exceptions do not undermine efforts to achieve the objective of the Convention. A Party considering such exceptions must take into account recommendations of the Consultative Committee of Experts, established under Article VII. Such a Party must also establish a management program that includes limits on levels of

intentional taking of sea turtles and report to the other Parties on this program.

This exception would not directly affect the United States, as U.S. law prohibits the intentional taking of sea turtles, for subsistence use or otherwise. However, traditional communities in certain other States in Latin America and the Caribbean do take sea turtles intentionally. If the Convention had prohibited this practice, few such States would have become party to it. The Convention instead creates a regime in which, for the first time, such takings will be circumscribed and monitored.

* * * *

Existing legislation, including the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq., and the Endangered Species Act, 16 U.S.C. § 1531 et seq., provide sufficient legislative authority to implement U.S. obligations under the Convention. Therefore, no new legislation is necessary in order for the United States to become party to the Convention.

* * * *

(6) U.S.-Canada Pacific salmon agreement

On June 30, 1999, the United States and Canada reached agreement through an exchange of notes on a ten-year accord to conserve and manage Pacific salmon found in the waters of both countries. The agreement included amendments to the Agreement Relating to and Amending Annexes I and IV of the Treaty Concerning Pacific Salmon of January 28, 1985, with attachments. The texts of the notes comprising the agreement are available at *www.state.gov/www/global/oes/oceans/990630_salmon_index.html*.

A joint statement of June 3, 1999, by Secretary of State Madeleine K. Albright and Canadian Foreign Minister Lloyd Axworthy announced the agreement and described it as follows:

> The comprehensive agreement, reached through vigorous diplomacy among the responsible parties, is designed to

> ensure the sustainability of the five Pacific salmon species through a combination of scientific cooperation, new funds to improve fisheries management and aid recovery of weakened salmon stocks, and necessary limits on salmon catches. . . .
>
> *See http://secretary.state.gov/www/statements/1999/990603.html.*
>
> A fact sheet released by the Department of State also on June 3 provided an overview of the agreement as excerpted below. The agreement was implemented by the Pacific Salmon Treaty Act, 16 U.S.C. §§ 3631–3644, enacted March 15, 1985, Pub. L. No. 99–5, 99 Stat. 7, and amended March 19, 1992, Pub. L. No. 102–251, 106 Stat. 66. The full text of the fact sheet is available at *www.state.gov/www/global/oes/oceans/fs_990603_salmon.html.*

---

* * * *

I. Fishery regimes. Most elements of the agreement are contained in several new "chapters" that replace earlier expired versions of Chapters 1–6 of Annex IV of the Pacific Salmon Treaty. Additionally, an understanding was reached regarding management of certain northern fisheries affecting coho salmon, a topic not specifically covered in previous agreements.

Most of the new fishery arrangements will be in effect for ten years, beginning in 1999. The arrangement concerning the US share of Fraser sockeye will be in effect for twelve years, also beginning in 1999. The governments would agree that the new fishery regimes are consistent with all the principles of the Pacific Salmon Treaty, and that compliance with those regimes constitutes satisfaction of all obligations under those principles.

Transboundary Rivers (Chapter 1). This agreement specifies arrangements for sockeye, coho, chinook, and pink salmon management for several rivers that flow from Canada to the Pacific Ocean through the Alaskan panhandle, including the Stikine, Taku and Alsek rivers. An attachment to the agreement describes programs and associated costs for joint enhancement of sockeye salmon in the Taku and Stikine rivers.

Northern British Columbia and Southeast Alaska (Chapter 2). This agreement addresses the management of sockeye and pink salmon fisheries in southeast Alaska and northern British Columbia. It specifies how the fisheries will be managed to achieve conservation and fair sharing of salmon stocks that intermingle in the border area. The fixed catch ceilings contained in the expired agreements are replaced with abundance-based provisions that allow harvests to vary from year to year depending on the abundance of salmon. Of particular note, because they resolve long-contentious issues, are agreements governing Alaska's purse seine fisheries near Noyes Island (District 104) and the gillnet fishery at Tree Point (District 101), and Canada's various marine net fisheries and its troll fishery for pink salmon in Canadian Area 1.

Chinook Salmon (Chapter 3). Because they pass through fisheries regulated by many jurisdictions in both Canada and the US, chinook salmon have been the focus of increasing concern and controversy in recent years. Although some chinook populations are relatively healthy, particularly the "far north migrating stocks" that tend to migrate to the marine waters near Alaska to grow and mature, others have been so diminished in recent years that they have been "listed" by the US federal government under the Endangered Species Act (ESA). Many factors in addition to harvest have contributed to the decline of these stocks. The conservation-based fishery regimes established by this new agreement will help to ensure the effectiveness of public and private investments in habitat restoration and other aspects of salmon recovery.

The new chinook regime encompasses marine and certain freshwater fisheries in Alaska, Canada, Washington, and Oregon. All chinook fisheries will be managed based on abundance, replacing the fixed catch quotas that applied in previous regimes. Two types of fisheries have been designated: (1) those that will be managed based on the aggregate abundance of chinook salmon present in the fishery, and (2) those that will be managed based on the status of individual stocks or stock groups in the fishery. . . .

* * * *

II. Regional bilateral funds. The agreement establishes two funds which would be managed bilaterally and which would address science, restoration, and enhancement needs relating to salmon production. The Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund ("Northern Fund") would address needs in northern and central British Columbia, southeast Alaska, and the Alsek, Taku and Stikine rivers. The Southern Boundary Restoration and Enhancement Fund ("Southern Fund") would address needs in southern British Columbia, the states of Washington and Oregon and the Snake River basin in Idaho.

The Northern and Southern funds would be constituted by an allocation of $75 million and $65 million dollars ($US), respectively, by the United States, provided over four years. Either country, as well as third parties, may contribute to the funds in the future upon agreement of the Parties.

For each of the regional funds, a bilateral committee composed of three representatives appointed by each of the two countries will be responsible for the approval of expenditure of moneys generated by the funds. . . .

The funds will be utilized for activities relating to the development of improved information for resource management (including data acquisition and improved scientific understanding of factors affecting salmon production); rehabilitation, restoration, and/or improvement of natural habitat to enhance the productivity and protection of Pacific salmon; and enhancement of wild stock production using low-technology methods.

III. Renewed Cooperation on Scientific and Institutional Matters. The agreement includes a commitment by the two countries to improve how scientific information is obtained, shared, and applied to the management of the resource. Among other things, the agreement encourages staff exchanges between the management agencies, bilateral workshops, and participation in the public domestic management processes of the other country.

Additionally, a new bilateral Committee on Scientific Cooperation has been established. . . .

IV. Habitat. The agreement highlights the importance of habitat protection and restoration to achieving the long-term objectives of the Parties relative to salmon. While the primary focus of the agreement is on setting provisions that govern the management of fisheries, it is well understood that achieving optimum production of salmon will depend on other initiatives as well. These include, but are not limited to, maintaining adequate water quality and quantity, the achievement of improved spawning success and migration corridors for adult and juvenile salmon, and other measures that maintain and increase the production of natural stocks. The PSC will be directed to report annually to the Parties to identify stocks for which measures beyond harvest controls are required and the non-fishing factors that limit production, options for addressing these factors, and progress of the Parties in implementing measures to improve production.

(7) Driftnet fishing

(i) Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific

On May 21, 1991, President George H. W. Bush transmitted to the Senate for advice and consent to ratification the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, done at Wellington, on November 24, 1989 ("Wellington Convention") and Protocol I, done at Noumea on October 20, 1990. The term "driftnet" was defined in the convention to mean "a gillnet or other net or a combination of nets which is more than 2.5 kilometres in length the purpose of which is to enmesh, entrap or entangle fish by drifting on the surface of or in the water."

Excerpts below from the report of the Department of State submitting the letter to the President, which accompanied the transmittal, include proposed understandings to accompany ratification. S. Treaty Doc. No. 102–7 (1991); *see* S. Exec. Rep. 102–20 (1991). The Senate gave advice and consent to ratification on November 26, 1991, 137 CONG.

REC. S18,226, subject to understandings in substantially the language proposed. The convention and protocol entered into force May 17, 1991, and for the United States on February 28, 1992. *See also* 85 Am. J. Int'l L. 668 (1991).

---

* * * *

The Wellington Convention is an important international agreement for the control of high seas driftnet fishing. During the past decade fleets from Japan, Taiwan, and Korea initiated driftnet fisheries for albacore tuna in the South Pacific. The significant increase in the size of the fisheries during the late 1980s raised alarms among the South Pacific states because of their impact on all marine resources in general, and on albacore stocks in particular. Scientific data, while not conclusive, indicated that albacore stocks were in danger of collapse if driftnet fishing continued to occur at these high levels. Serious concerns were also raised that the fishery was causing levels of mortality to populations of marine mammals, sea birds, and turtles that could not be sustained.

In response to this threat the South Pacific states concluded the Wellington Convention. The Convention applies to the area lying within 10 degrees North latitude and 50 degrees South latitude and 130 degrees East longitude and 120 degrees West longitude (Article 1), including the exclusive economic zones of the parties. The Convention is open for signature by the United States because the United States has territories in the Convention Area (American Samoa as well as certain unincorporated islands). The United States signed the Convention on November 14, 1990.

The primary obligations under the Convention are contained in Articles 2 and 3. Article 2 provides that parties shall prohibit their nationals and vessels from engaging in driftnet fishing activities in the Convention Area. Article 3 provides that parties shall not assist or encourage the use of driftnets within the Convention Area, and shall take measures consistent with international law to prohibit the use of driftnets or the transshipment of driftnet catches in waters under their fisheries jurisdiction within the Convention Area. Article 3 further provides that parties may take measures consistent with international law to prohibit the landing

and processing of driftnet catches within their territory, prohibit importation of driftnet caught fish whether processed or not, restrict port access and port servicing facilities to driftnet vessels, and prohibit the possession of driftnets on board fishing vessels.

* * * *

Under Article 10(1)(b), the Convention is open for signature by states "in respect of" territory in the Convention Area. It is the Department's view that in signing the Convention the United States signed not merely on behalf of American Samoa but on its own behalf, obligating itself to prohibit driftnet fishing in all waters under its fisheries jurisdiction in the Convention Area and by all United States nationals and vessels throughout the Convention Area. Because the language of Article 10 is ambiguous, I recommend that the United States include the following understanding in its instrument of ratification:

> The United States signed the Convention in its own name and on its own behalf because a portion of its exclusive economic zone is located within the Convention Area. It is the United States understanding that upon becoming a party to the Convention the United States will be obligated to prohibit driftnet fishing in all areas of its exclusive economic zone within the Convention Area, and to prohibit all United States nationals and vessels documented under United States laws from fishing with driftnets in the Convention Area.

There is one additional understanding I recommend the United States include in its instrument of ratification. The Convention provides for measures consistent with international law to restrict driftnet fishing activities by vessels within waters under the fisheries jurisdiction [of a Party]. It is the United States view that such measures may only be applied when consistent with navigation and other international transit rights as reflected in the 1982 Convention on the Law of the Sea. For example, it would be inconsistent with navigation and other international transit rights to prohibit a vessel that is merely transiting the United States exclusive economic zone from [possessing] a driftnet on board. It

would not, on the other hand, be inconsistent with navigation and other international transit rights, as reflected in the 1982 Convention on the Law of the Sea, to prohibit possession of a driftnet by a vessel permitted to fish in the United States exclusive economic zone under a governing international fisheries agreement, or to require that any driftnet gear be stowed during transit in a manner that makes it inoperable. The understanding should read as follows:

> Article 3 provides for measures consistent with international law to restrict driftnet fishing activities by vessels within areas under a party's fisheries jurisdiction. It is the United States understanding that such measures will only be applied when consistent with navigation and other international transit rights as reflected in the 1982 United Nations Convention on the Law of the Sea.

No additional legislation will be required to implement United States obligations under the Convention. Section 113 of Public Law 101–627 [Fishery Conservation Amendments of 1990, 104 Stat. 4436, 4453–4454] amends section 307(1) of the Magnuson Fisheries Conservation and Management Act (MFCMA) [16 U.S.C. § 1857(1)] to prohibit "driftnet fishing that is subject to the jurisdiction of the United States, including use of a fishing vessel of the United States to engage in such fishing beyond the exclusive economic zone of any nation." This provision prohibits driftnet fishing in the United States exclusive economic zone around American Samoa and the unincorporated islands in the Convention Area, and by United States nationals and vessels documented under United States laws anywhere in the Convention Area. In addition, because the MFCMA defines fishing broadly enough to include activities in support of catching fish, this provision serves to prohibit the transshipment of driftnet catch in the United States exclusive economic zone covered by the Convention.

Two Protocols were adopted on October 20, 1990, to supplement the Wellington Convention. In Protocol I, which is open to distant water fishing nations, parties agree to prohibit their nationals and vessels from driftnet fishing in the Convention Area.

In Protocol II, parties with exclusive economic zones contiguous with or adjacent to the Convention Area agree to prohibit driftnet fishing and transshipment of driftnet catch in areas under their fisheries jurisdiction.

The United States signed Protocol I on February 26, 1991. The obligations contained in Protocol I essentially duplicate those obligations that the United States would undertake in the Convention itself. Nevertheless, South Pacific states were keenly interested in the United States signing the Protocol both to show support for the Convention's principles and because it was felt that other distant water fishing nations would be more likely to sign the Protocol if the United States did.

The United States does not intend at this time to sign Protocol II.

Ratification of the Wellington Convention and Protocol I is consistent with United States policy on driftnet fishing. At the United Nations General Assembly in 1989 the United States cosponsored a resolution [GA Res. 44/225, dated Dec. 22, 1989], adopted by consensus, that recommended among other things a cessation of all driftnet fishing in the South Pacific by July 1, 1991. Moreover, section 107 of Public Law 101–627 provides that it is the policy of the Congress that the United States should support the Wellington Convention and secure a permanent ban on the use of large scale driftnets on the high seas of the world.

* * * *

(ii) Global moratorium

As noted in (i), *supra*, the United States had co-sponsored a resolution adopted by the UN General Assembly in 1989 recommending a cessation of driftnet fishing in the South Pacific by July 1, 1991. In December 1991 the United States co-sponsored a resolution for the first time calling for a moratorium. A/RES/46/215. Resolution 215 called upon all members to "[e]nsure that a global moratorium on all large-scale pelagic drift-net fishing is fully implemented on the high seas . . . by 31 December 1992."

(iii) High Seas Driftnet Fisheries Enforcement Act

On November 2, 1992, the United States enacted the High Seas Driftnet Fisheries Enforcement Act, Pub. L. No. 102–582, 106 Stat. 4901, 16 U.S.C. §§ 1826a–1826c. Subsections 101(a)(1) and (b)(1)of the act, 16 U.S.C. § 1826a(a)(1) and (b)(1), required the identification of "nations whose nationals or vessels conduct large-scale driftnet fishing beyond the exclusive economic zone of any nation." Paragraph (a)(2) required the Secretary of the Treasury to "(A) withhold or revoke the clearance [to proceed from a port or place in the United States in certain circumstances required by 46 App. U.S.C. § 91] for any large-scale driftnet fishing vessel that is documented under the laws of the United States or of a nation [identified on a list required] under paragraph (1); and (B) deny entry of that vessel to any place in the United States and to the navigable waters of the United States."

Subsection 101(b)(2) required the President to enter into consultations with governments of nations identified under (b)(1) "for the purpose of obtaining an agreement that will effect the immediate termination of large-scale driftnet fishing by the nationals or vessels of that nation beyond the exclusive economic zone of any nation." The President was also required to direct the prohibition of importation into the United States of fish and fish products and sport fishing equipment from an identified nation at the time of identification or if consultations were not satisfactorily concluded within ninety days. Finally, § 101a(a)(4) required the Secretary of Commerce to determine and certify to the President within six months any instances where the import prohibition was "insufficient to cause that nation to terminate [such] large-scale driftnet fishing" or where the nation had retaliated against the United States as a result of the prohibition. Such certification was deemed to be a certification under 22 U.S.C. § 1978(a), which authorized the President to direct the prohibition of "the bringing or the importation into the United States of any products from the offending country . . . to the extent that such prohibition is sanctioned

by the World Trade Organization . . . or the multilateral trade agreements. . . ."

In signing the legislation, President George H. W. Bush stressed U.S. support for the moratorium but also noted areas where the act must be construed consistent with the President's constitutional authority to conduct foreign relations and international law. 28 WEEKLY COMP. PRES. DOC. 2281 (Nov. 2, 1992).

[The High Seas Driftnet Fisheries Enforcement Act] calls for a number of measures in support of United Nations General Assembly Resolutions 44/225, 45/197, and 46/215, which pertain to large-scale driftnet fishing and its impact on the living marine resources of the world's oceans and seas. The Act also calls for measures to address unregulated fishing in the area of the Central Bering Sea that is beyond the jurisdiction of the United States and the Russian Federation.

As a principal cosponsor of all three Resolutions, the United States has demonstrated strong leadership to address the problems of wastefulness and harm to the ecosystem caused by this fishing technique. I am grateful for the cooperation and support of many concerned countries that contributed to the successful adoption of the Resolutions. The United States has a particular interest in the effective implementation of the Resolutions because of the threat that driftnet fishing poses to living marine resources on the high seas.

It was appropriate that the United Nations General Assembly, by its Resolution 46/215, called upon all members of the international community to ensure that a global moratorium on all large-scale driftnet fishing is fully implemented by December 31, 1992. The Resolution is consistent with our treaty commitments under the Wellington Convention done on November 24, 1989.

Through this Act, the United States reinforces its commitment to cooperate with all concerned nations to ensure that the moratorium is implemented on time. The United States urges that all nations take appropriate measures to prohibit their nationals and fishing vessels flying their flags from undertaking any activities

contrary to Resolution 46/215k, and to impose appropriate penalties for such activities.

For its part, the United States has already taken steps, through the enactment of Public Law 101–627 on November 28, 1990, to prohibit any U.S. national firm engaging in large-scale driftnet fishing in areas subject to the jurisdiction of the United States, as well as in areas beyond the 200-nautical mile exclusive economic zone of any nation.

With respect to problems posed by unregulated fishing in the Central Bering Sea, the United States is pleased with the success achieved with other concerned countries, including the Russian Federation, in securing an agreement voluntarily to suspend fishing in the area during 1993 and 1994. The Administration intends to continue actively to pursue a longer term conservation and management regime for this area.

* * * *

Some provisions of the Act could be construed to encroach upon the President's authority under the Constitution to conduct foreign relations, including the unfettered conduct of negotiations with foreign nations. To avoid constitutional questions that might otherwise arise, I will construe all of these provisions to be advisory, not mandatory. With respect to section 203, which states the "sense of the Congress" concerning trade negotiations, I note that my Administration has taken the initiative in bringing environmental issues into our overall trade agenda.

Finally, I note that section 101 of the bill will be interpreted in accord with the recognized principles of international law. Those principles recognize the right of innocent passage of ships of all states through the territorial sea, a right that shall not be hampered.

See also §§ 603–604, Fisheries Act of 1995, Public Law No. 104–43, 109 Stat. 392, 16 U.S.C. §§ 1826d–1826e, and President Clinton's signing statement of November 3, 1995, 31 WEEKLY COMP. PRES. DOC. 1984 (Nov. 3, 1995).

On May 4, 1995, several animal-rights and environmental groups filed a lawsuit in the Court of International Trade ("CIT") against the Secretaries of Commerce and State

alleging that the U.S. Government violated the High Seas Driftnet Fisheries Enforcement Act by failing to identify Italy as a nation whose nationals or vessels conducted large-scale driftnet fishing beyond the exclusive economic zone of any nation. Excerpts from a 1999 report to Congress (*see iv(B)* below) describe the resolution of the 1995 litigation as follows:

> The CIT decided in favor of the plaintiffs on 16 February 1996 and issued a judgment on 18 March 1996, ordering the Secretary of Commerce to identify Italy pursuant to the High Seas Driftnet Fisheries Enforcement Act. [*Humane Society of the United States v. Brown*, 901 F. Supp. 338 (C.I.T. 1996)]. Secretary Brown identified Italy as a large-scale high seas driftnet fishing nation on 28 March 1996. [61 FR 18721 (Apr. 29, 1996)]. Following the identification, the U.S. Government concluded an agreement with the Government of Italy to secure an immediate end to large-scale high seas driftnet fishing operations. Based on that agreement, Secretary Kantor certified on 07 January 1997, that Italy had terminated large-scale driftnet fishing. A more detailed account of the lawsuit and the 1996 U.S.-Italy driftnet agreement can be found in the 1996 NMFS driftnet report to the Congress.

A subsequent action, filed in 1998 with the CIT, is summarized in the same report as excerpted below (footnote omitted). The full text of the report is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

On 18 March 1998, the Humane Society of the United States, Humane Society International, and the Defenders of Wildlife filed in the Court of International Trade (CIT) a complaint for declaratory and injunctive relief against the President and the Secretaries of State and Commerce (*The Humane Society of the United States, et al. v. Clinton, et al.*, No. 98-03-00557). The

plaintiffs sought a declaration that the President violated the High Seas Driftnet Fisheries Enforcement Act by failing to impose trade restrictions against Italy for its failure to stop large-scale driftnet fishing by Italian nationals and vessels on the high seas. Alternatively, the plaintiffs sought a declaration that the Secretary of Commerce violated the Act by failing to issue a second identification of Italy as a country for which there is reason to believe its nationals or vessels are continuing to conduct large-scale driftnet fishing operations beyond the exclusive economic zone of any nation. The plaintiffs sought an injunction compelling the President and the Secretary of Commerce to comply with the above statutory duties. They claimed that Italy failed to effectively implement the 1996 U.S.-Italy driftnet agreement and that large-scale high seas driftnet fishing by nationals and vessels of Italy continued in 1997 and 1998.

The CIT issued a judgment on 05 March 1999 [*Humane Soc'y of the United States v. Clinton*, 44 F. Supp. 2d 260 (1999), *aff'd Humane Soc'y of the United States v. Clinton*, 236 F. 3d 1320 (Fed. Cir. 2001)] denying the plaintiffs' request for a writ of mandamus directing the President to impose trade sanctions on Italy pursuant to the Act. The CIT also refused to order the Secretary of Commerce to withdraw an earlier certification that Italy had ceased largescale driftnet fishing; a withdrawal would have led to the imposition of trade sanctions. However, the CIT found that because there was "ample evidence that the Secretary of Commerce had reason to believe that large-scale driftnet fishing continues on the high seas by Italian nationals or vessels, the Secretary's refusal to identify Italy a second time is arbitrary, capricious and not in accordance with the Driftnet Act." As a result, the CIT ordered the Secretary to identify Italy on or before 19 March 1999, as a nation for which there is reason to believe its nationals or vessels are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation, and notify the President and the nation of Italy of this identification.

The Secretary notified the President on 19 March 1999, that he had identified Italy pursuant to the High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. §1826a(b)(1)(B). . . . [64 Fed. Reg. 34,217 (June 25, 1999)].

As a result of the identification, the President began consultations with the Government of Italy on 17 April 1999 to obtain an agreement to effect the immediate termination of such activities. . . . On 15 July 1999, the United States and Italy formally agreed, via an exchange of diplomatic notes, on measures to end Italian large-scale high seas driftnet fishing. This action obviated the need to impose trade sanctions on Italian fish, fish products and sport fishing equipment pursuant to the Act. Copies of the diplomatic notes and a Department of State press release on the driftnet agreement are provided in Attachments 2 and 3, respectively.

The new driftnet agreement reiterated the Government of Italy's commitment to full implementation of the measures to combat large-scale high seas driftnet fishing in the 1996 U.S.-Italy driftnet agreement. As a result of Italy's driftnet vessel conversion program (a product of the 1996 agreement), almost 80 percent of Italy's driftnet fleet was converted to other fishing methods or scrapped. In an effort to induce the remaining driftnet vessels to apply for the program, Italy extended the application deadline to the end of June 1999.

Italy took a number of additional measures to strengthen the enforcement of its laws relating to driftnet fishing. . . .

Finally, Italy agreed to several new cooperative measures with the United States. The two countries are considering establishing direct communication links to relay real-time information from U.S. sources about possible Italian driftnet violations to the Italian Coast Guard. They will also promote the exchange of fisheries enforcement officers to observe fishing activities through the end of 2001. The Governments of the United States and Italy will conduct periodic consultations regarding the implementation of the United Nations global moratorium on large-scale high seas driftnet fishing. Such consultations will continue until the end of 2001, when a European Union ban on all driftnet fishing will enter into force.

* * * *

See also press statement by U.S. Department of State Spokesman, July 15, 1999, announcing the U.S.-Italy

agreement, available at *http://secretary.state.gov/www/briefings/statements/1999/ps990715c.html*.

On March 8, 1993, the U.S. Department of State Spokesman issued a press release announcing steps the United States would take in the event U.S. enforcement authorities "have reasonable grounds to believe that any foreign flag vessel encountered on the high seas is conducting, or has conducted, large-scale pelagic driftnet fishing operations in violation of the United Nations resolution," as set forth below. The full text of the press statement is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

1. U.S. authorities will contact the authorities of the territory whose flag the vessel is flying to seek confirmation that the vessel is in fact registered by those authorities. If the vessel is not flying a flag, U.S. authorities will contact the authorities of the territory in which the vessel claims to be registered to seek confirmation of the same information. The U.S. Government will expect a prompt response to such a request to facilitate enforcement operations.

2. If the contacted authorities verify that the vessel in question is registered in their territory, U.S. authorities will take appropriate action in accordance with agreements in force between the United States and those authorities or any other bilateral or multilateral arrangements that may be made to prevent large-scale pelagic driftnet fishing operations on the high seas inconsistent with the United Nations resolution. If there are no preexisting arrangements, the United States will seek a special arrangement to take law enforcement, or other appropriate action, on behalf of the authorities in whose territory the vessel is registered.

3. If the contacted authorities deny that the vessel in question is registered in their territory, or if the vessel refuses to reveal or claim a territory of registry, U.S. authorities will, consistent with Article 92 of the 1982 United Nations Convention on the Law of the Sea, treat the vessel as stateless. It is noted that, under customary international law and U.S. law, a stateless vessel conducting

large-scale pelagic driftnet fishing operations on the high seas would be subject to prosecution in the United States.

(iv) U.S. reports to the United Nations and to Congress

(A) Reports to the United Nations

UN General Assembly Decision 49/436 (1994), among other things, called for information relevant to implementation of Resolution 46/215 to be provided to the Secretary General, and requested the Secretary General to report to the General Assembly at its 50th session. Excerpts below from the submission of the United States dated June 1995 focus on areas of international cooperation. The full text of the submission is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

The United States attaches great importance to compliance with Resolution 46/215, and has taken measures individually and collectively to prevent large-scale pelagic driftnet fishing on the high seas, and has called upon all members of the international community to implement and comply with the resolution. The United States has urged all members of the international community, intergovernmental organizations, non-governmental organizations, and scientific institutions with expertise in relation to living marine resources to report to the Secretary-General any activity or conduct inconsistent with the terms of resolution 46/215.

* * * *

To monitor compliance with the driftnet moratorium in 1994, the U.S. Coast Guard and the U.S. National Marine Fisheries Service continued to carry out enforcement and surveillance activities in the North Pacific in areas of former large-scale driftnet fishing. . . . No large-scale high seas driftnet activity was sighted by U.S. enforcement patrols in 1994.

All U.S. Coast Guard Operations were coordinated with enforcement officials of Japan, Canada, and Russia. In addition, direct lines of communication have been established between the Coast Guard and the Russian Federation Border Guard to facilitate sharing of information.

In December 1994, the United States and the People's Republic of China extended for two years a Memorandum of Understanding designed to ensure effective cooperation and implementation of Resolution 46/215. Under the terms of the agreement, originally signed on December 3, 1993, enforcement officials of either country may board and inspect vessels flying the U.S. or PRC flag in the North Pacific Ocean found using or equipped to use large-scale high seas pelagic driftnets inconsistent with the provisions of Resolution 46/215.

The agreement also provides for enforcement officials of either country to ride on board high seas driftnet fishery enforcement vessels of the other country. The U.S. Coast Guard will carry PRC shipriders on two high seas fishery enforcement patrols this year in areas of former large-scale high seas driftnet fishing activity. During one of these patrols, the U.S. Coast Guard and the Russian Federal Border Service will conduct a coordinated high seas driftnet fishing surveillance operation.

The U.S. Coast Guard's high-seas enforcement plan for 1995 will include over 110 days of cutter patrols, and an estimated 215 hours of airborne surveillance from U.S. Coast Guard air patrols based in Alaska and Hawaii. These flights will be coordinated with similar enforcement efforts by Canada to provide maximum patrol-area coverage.

In two European fisheries, questions have been raised regarding the use of large-scale driftnets on the high seas. Environmental groups charged last year that fishermen of several European Union (EU) member nations continued to conduct large-scale, high seas driftnet fishing.

The countries concerned have been conducting diligent enforcement in the fishery, and the United States expects that these efforts, in addition to the framework established by international law, EU regulations, and EU member state regulations, are sufficient to ensure full compliance with Resolution 46/215.

* * * *

(B) Reports to Congress

Section 206(e) of the Magnuson-Stevens Fishery Conservation and Management Act requires that the Secretary of Commerce, after consultation with the Secretary of State and the Secretary of Transportation, submit a report describing and evaluating the steps taken by the United States to carry out the provisions of § 206 regarding foreign large-scale high seas driftnet fishing. The annual report, first submitted in 1989, describes actions taken by the United States each calendar year to implement the global driftnet moratorium called for by United Nations General Assembly Resolution 46/215 and to secure a permanent ban on the use of large-scale driftnets by persons or vessels fishing beyond the exclusive economic zone of any nation. The current report and information on obtaining copies of prior year reports are available at *www.nmfs.noaa.gov/sfa/international/Congress_Reports.htm*.

(8) FAO Agreement to Promote Compliance With International Conservation and Management Measures by Fishing Vessels on the High Seas

(i) Transmittal for advice and consent

On April 25, 1994, President William J. Clinton transmitted the Food and Agriculture Organization ("FAO") Agreement to Promote Compliance With International Conservation and Management Measures by Fishing Vessels on the High Seas to the Senate for advice and consent to ratification. The agreement was adopted at Rome by consensus by the Conference of the FAO on November 24, 1993. Although negotiations originally focused on the problem of "reflagging" fishing vessels as a means to avoid agreed fishing rules, the

agreement as adopted had a broader reach, imposing a set of specific duties for all flag states to ensure that their vessels do not undermine conservation rules. The United States ratified the agreement December 19, 1995; it entered into force on April 24, 2003. Excerpts below from the April 5, 1994 report of the Department of State submitting the convention to the President and accompanying the transmittal describe key aspects of the treaty and the U.S. role in its negotiation. S. Treaty Doc. No. 103–24 (1994); *see* S. Exec. Rep. 103–32 (1994). *See also* 90 Am. J. Int'l L. 267 (1996).

---

* * * *

The negotiation of this Agreement began as a response to a growing threat to the integrity of multilateral organizations concerned with the conservation and management of living marine resources. Fishing vessels flying the flag of a State participating in such organizations have increasingly reflagged to non-member States as a means to avoid fishing restrictions that would otherwise apply. Agenda 21, adopted by the United Nations Conference on Environment and Development, called upon States to take effective action to deter such reflagging. Other international conferences and fora echoed this call until, in November 1992, largely on the initiative of the United States, the FAO Council decided to conclude a treaty under FAO auspices on "reflagging" as expeditiously as possible.

In the course of the negotiations that ensued, information became available to show that reflagging was only part of a larger problem. A growing number of newly built high seas fishing vessels are registered directly (i.e., without reflagging) in States that are not members of the major multilateral fisheries organizations, precisely because these States are not bound by the restrictions adopted by those organizations. Accordingly, the United States agreed with the large majority of States participating in the negotiations to expand the original concept of the treaty to address the problems caused by this practice.

The Agreement that resulted has two primary objectives: (1) to impose upon all States whose fishing vessels operate on the

high seas an array of obligations designed to make the activities of those vessels consistent with conservation and management needs; and (2) to increase the transparency of all high seas fishing operations through the collection and dissemination of data. Thus, while the Agreement is still sometimes called the "Flagging" or "Reflagging" Agreement, these are essentially misnomers. The actual agreement deals with a much broader range of issues, as discussed below.

Article I defines a number of critical terms for purposes of the Agreement, including "fishing vessel" and "international conservation and management measure." Article I(b) defines the latter term to mean

> measures to conserve or manage one or more species of living marine resources that are adopted and applied in accordance with the relevant rules of international law as reflected in the 1982 United Nations Convention on the Law of the Sea. Such measures may be adopted either by global, regional or sub-regional fisheries organizations, subject to the rights and obligations of their members, or by treaties or other international agreements.

One feature of this key definition deserves comment. Negotiators of the Agreement intended this definition to include, in part, the measures that are adopted periodically by international fisheries organizations, such as the International Commission for the Conservation of Atlantic Tunas (ICCAT) or the North Atlantic Salmon Conservation Organization (NASCO). In some cases, the treaties establishing these organizations allow Parties to "opt-out" of specific measures adopted by the organizations by filing timely objections. While the exercise of such opt-out rights has caused some controversy (e.g., between Canada and the European Union ("EU") regarding measures adopted by the Northwest Atlantic Fisheries Organization), the negotiators decided not to affect these pre-existing rights through operation of this Agreement. The phrase "subject to the rights and obligations of their members" is intended to preserve these pre-existing rights. Hence, should an ICCAT member that is also a party to this Agreement exercise its right

under the treaty establishing ICCAT to opt out of a particular ICCAT measure, it would not be bound by this Agreement to observe that measure.

Article II, which describes more specifically the fishing vessels to which the Agreement applies, strikes a balance between the goal of comprehensive coverage and the desire not to impose undue administrative burdens on States with large numbers of high seas fishing vessels. Under Article II(1), the Agreement generally applies to all fishing vessels that are used or intended for fishing on the high seas. Article II(2), however, allows a Party to exempt its fishing vessels less than 24 meters in length from most of the administrative requirements of the Agreement, subject to certain important limitations. A Party that exercises its right to make such an exemption must nevertheless prohibit each of its high seas fishing vessels, regardless of length, from engaging in any activity that undermines the effectiveness of international conservation and management measures and must take enforcement action with respect to vessels that violate this prohibition (Article II(2)(b)).

* * * *

Article III sets forth a broad range of obligations for Parties whose fishing vessels operate on the high seas. Such Parties must

(1) ensure that such vessels do not undermine international conservation and management measures (P1);
(2) prohibit such vessels from fishing on the high seas without specific authorization from the appropriate authority of the Party (P2);
(3) not issue such an authorization unless it can exercise responsibility with respect to such vessel (P3);
(4) not issue such an authorization to a reflagged vessel that has previously undermined the effectiveness of international conservation and management measures, unless certain conditions are met (e.g., real change of ownership and control) (P5);
(5) ensure that such vessels are marked in accordance with recognized international standards (P6);

(6) ensure that such vessels provide to it sufficient information on its fishing operations (P7); and
(7) take enforcement measures in respect of such vessels that contravene the requirements of the Agreement (P8).

* * * *

(ii) Implementing legislation

On November 3, 1995, President William J. Clinton signed into law the Fisheries Act of 1995. Pub. L. No. 104–43, 109 Stat. 366, 16 U.S.C. § 501 note (1995). Title I of that act, the High Seas Fishing Compliance Act of 1995, had as its stated purpose to implement the FAO agreement and "to establish a system of permitting, reporting, and regulation for vessels of the United States fishing on the high seas." Section 106 of this title, 16 U.S.C. § 5505, provided that it was unlawful for any person subject to the jurisdiction of the United States:

> (1) to use a high seas fishing vessel on the high seas in contravention of international conservation and management measures described in section 105(e);
>
> (2) to use a high seas fishing vessel on the high seas, unless the vessel has on board a valid permit issued under section 104;
>
> (3) to use a high seas fishing vessel in violation of the conditions or restrictions of a permit issued under section 104;
>
> (4) to falsify any information required to be reported, communicated, or recorded pursuant to this title or any regulation issued under this title, or to fail to submit in a timely fashion any required information, or to fail to report to the Secretary immediately any change in circumstances that has the effect of rendering any such information false, incomplete, or misleading;
>
> (5) to refuse to permit an authorized officer to board a high seas fishing vessel subject to such person's control for purposes of conducting any search or inspection in

> connection with the enforcement of this title or any regulation issued under this title;
>
> * * * *
>
> (9) to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any living marine resource taken or retained in violation of this title or any regulation or permit issued under this title; . . . .

Civil penalties and permit sanctions were set forth in § 108, 16 U.S.C. § 5507.

Section 109, 16 U.S.C. § 5508, established criminal penalties for a person committing certain of the enumerated acts, including those included in paragraph 9 of § 106. Section 110, 16 U.S.C. § 5509, provided for forfeiture of high seas fishing vessels committing prohibited acts, with some exceptions, pursuant to a civil proceeding.

(9) International fishery agreements: Amendments to Magnuson Fishery Conservation and Management Act

The Magnuson Fishery Conservation and Management Act, Pub. L. No. 94–265, 90 Stat. 331, 16 U.S.C. § 1821 (1976) ("MFCMA"), was enacted "to provide for the conservation and management of the fisheries, and for other purposes." Section 202 of the MFCMA requires and/or authorizes negotiation of certain international fishery agreements.

In 1992 Congress added a new subsection (g) to § 202 authorizing the Secretary of State, in consultation with the Secretary of Commerce, to negotiate and conclude a fishery agreement with Russia, on certain conditions. Pub. L. No. 102–251, 106 Stat. 60 (1992). Negotiations were ongoing as this volume was being prepared. The 1992 act also amended other provisions of the MFCMA "effective on the date on which the Agreement between the United States and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990, enters into force for the United States."

The 1990 agreement received Senate advice and consent to ratification September 16, 1991. 137 CONG. REC. S13,009) (*see* S. Treaty Doc. No. 101–22 (1990); S. Exec. Rep. 102–13 (1991)) but has not yet been approved by the Duma. Nevertheless, because the agreement is applied provisionally pursuant to an exchange of notes at the time of signing, TIAS No. 11451, the amendments were effective on the effective date of the act.

The Sustainable Fisheries Act, Pub. L. No. 104–297, 110 Stat. 3559 (1996), further amended § 202 by adding a new subsection (h) requiring the Secretary of State, in cooperation with the Secretary of Commerce, to "seek to secure an international agreement to establish standards and measures for bycatch reduction that are comparable to the standards and measures applicable to United States fishermen for such purposes in any fishery regulated pursuant to this Act for which the Secretary, in consultation with the Secretary of State, determines that such an international agreement is necessary and appropriate." The new subsection made any such agreement subject to approval by both Houses of Congress under procedures set forth in § 203, as amended by Pub. L. No. 104–297. In signing the legislation, President William J. Clinton stated, as to the mandate to obtain international agreements on bycatch reduction, "[u]nder our Constitution, it is the President who articulates the Nation's foreign policy and who determines the timing and subject matter of our negotiations with foreign nations. Accordingly, in keeping with past practice, I shall treat this provision as advisory, not mandatory." 32 WEEKLY COMP. PRES. DOC. 2040 (Oct. 14, 1996).

(10) Dolphin conservation

During the 1990s the United States participated actively in efforts to improve protection of dolphins. As explained by the National Oceanic and Atmospheric Administration ("NOAA"):

> in the 1950s fishermen discovered that large, mature yellowfin tuna in the eastern tropical Pacific Ocean (ETP) aggregated beneath schools of certain dolphin stocks. Since that discovery, the predominant tuna fishing method in the ETP has been to encircle schools of dolphins with a fishing net, or "purse seine," to capture the tuna concentrated below. Hundreds of thousands of dolphins died in the early years of this fishery.

See, e.g, www.nmfs.noaa.gov/prot_res/readingrm/tunadolphin/background.pdf.

In 1972 the United States enacted the Marine Mammal Protection Act ("MMPA"), Pub. L. No. 92–522, 86 Stat. 1027, 16 U.S.C. § 1361 (1972). Among other things, the MMPA imposed a moratorium on the taking and importation of marine mammals and marine mammal products, with certain exceptions. The MMPA was amended in 1988 to add language specifying criteria to be met for the importation of tuna. Pub. L. No. 100–711, 102 Stat. 4755 (1988). In 1990 Congress enacted the Dolphin Protection Consumer Information Act ("DPCIA"), Title IX, Pub. L. No. 101–617, 104 Stat. 4436, 16 U.S.C. § 1385, effective May 1991. This act made it a violation of § 5 of the Federal Trade Commission Act (15 U.S.C. § 45)

> for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "dolphin safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product contains tuna harvested—
>
> (A) on the high seas by a vessel engaged in driftnet fishing;
> (B) outside the eastern tropical Pacific Ocean by a vessel using purse seine nets [under certain circumstances];
> (C) in the eastern tropical Pacific Ocean by a vessel using a purse seine net unless the tuna meet the requirements for being considered dolphin safe under paragraph (2); or

> (D) by a vessel in a fishery other than one described in subparagraph (A), (B), or (C) that is identified by the Secretary as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determines that such an observer statement is necessary.

In 1992 Congress enacted the International Dolphin Conservation Act of 1992 ("IDCA"), "to amend the Marine Mammal Protection Act of 1972 to authorize the Secretary of State to enter into international agreements to establish a global moratorium to prohibit harvesting of tuna through the use of purse seine nets deployed on or to encircle dolphins or other marine mammals, and for other purposes." New § 302 authorized such international agreements "of at least 5 years duration" under specified terms. Section 305 prohibited the Secretary of the Treasury from banning the importation of yellowfin tuna or yellowfin tuna products from any country committing to implement a similar moratorium of at least 5 years beginning March 1, 1994, and to take additional steps to reduce dolphin mortality. Section 307 provided civil or criminal penalties for committing certain specified acts, including "(1) for any person, after June 1, 1994, to sell, purchase, offer for sale, transport, or ship, in the United States, any tuna or tuna product that is not dolphin safe" [and] (2) for any person or vessel that is subject to the jurisdiction of the United States, intentionally to set a purse seine net on or to encircle any marine mammal during any tuna fishing operation after February 28, 1994," with certain exceptions.

Excerpts below from a 2003 report to Congress describe international efforts beginning in 1992 and subsequent U.S. legislation to address this issue. The full text of the report is available at *www.state.gov/s/l/c8183.htm*.

* * * *

The La Jolla Agreement and the Panama Declaration. In the fall of 1992, nations participating in the ETP tuna fishery signed the La Jolla Agreement, which established the IDCP and placed voluntary limits on the maximum number of dolphins that could be incidentally killed annually in the fishery, lowering the annual limit over seven years, with a goal of eliminating dolphin mortality in the fishery. In 1991, the year before the Agreement was negotiated, dolphin mortalities totaled 27,127. The goal of the La Jolla Agreement was to reduce dolphin mortalities from 19,500 in 1993 to below 5,000 per year by 1999. In 1993, the first year of the program, dolphin mortalities fell to 3,601.

Even with this success, the U.S. market remained closed to tuna caught under the program. In hopes of resolving this issue, the United States, nine other nations fishing in the ETP, and five prominent environmental non-governmental organizations came together in 1995 and negotiated the Panama Declaration. The Panama Declaration established a framework to go even further to protect dolphin populations in the ETP. Under the Panama Declaration, the countries participating in the fishery agreed to negotiate a legally binding agreement that would build on the success of the La Jolla Agreement and strengthen it in several ways. In addition to strengthening efforts to protect dolphins, the signatories to the Panama Declaration committed themselves to reduce bycatch in commercial fisheries and included provisions for additional protection for individual stocks of dolphins and for other living marine resources to achieve an ecosystem approach to management of the fishery. Furthermore, the efforts of the [Inter-American Tropical Tuna Commission ("IATTC")] and the nations that negotiated the Panama Declaration resulted in 100 percent observer coverage of large vessels of the tuna purse seine fishery in the ETP by 1995. This level of observer coverage is unprecedented in any multinational fishery in the world. The nations that signed the Panama Declaration anticipated that the United States would amend the MMPA to allow the import of yellowfin tuna into the United States from nations that are participating in, and are in

compliance with, the IDCP. In fact, the commitment of the fishing countries to strengthen the La Jolla Agreement as outlined above was predicated on such changes to U.S. law.

Marine Mammal Protection Act Amendments of 1997 and the Agreement on the International Dolphin Conservation Program. In recognition of the international successes of and in response to the Panama Declaration, Congress passed the [International Dolphin Conservation Program Act ("IDCPA")] in 1997, which amended the MMPA to implement the provisions of the Panama Declaration. Specifically, the amendments, 1) allow for lifting the embargoes for countries fishing in compliance with the IDCP; 2) lift the ban on the sale of tuna that is not dolphin-safe under certain conditions; and 3) allow for a change in the definition of dolphin-safe to include tuna caught in accordance with the IDCP, providing that no dolphins were killed or seriously injured in catching the tuna. . . . With the amendments in place and in anticipation of a change in the definition of dolphin-safe, the nations participating in the tuna purse seine fishery in the ETP came together in February 1998 and successfully negotiated the [International Dolphin Conservation Program Agreement ("Agreement")], a legally-binding international instrument for dolphin conservation and ecosystem management in the ETP. The Agreement built upon previous voluntary dolphin protection commitments that had been adopted by the ETP tuna fishing nations beginning in the early 1990s and was designed to strengthen the dolphin protection measures already in place and afford nations harvesting tuna in the ETP in compliance with those measures access to the U.S. tuna market. To date, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, United States, Vanuatu, and Venezuela have ratified the Agreement. Bolivia, Colombia, and the European Union are applying the Agreement provisionally. The IATTC staff provide Secretariat support to the Agreement and perform other functions that are set forth in the Agreement or are agreed upon pursuant to the Agreement. The Agreement Area comprises the area of the Pacific Ocean bounded by the coastline of North, Central, and South America and by the 40.N parallel from the coast of North America to its intersection with the lS0.W meridian; the lS0.W

meridian to its intersection with the 40.S parallel; and the 40.S parallel to its intersection with the coast of South America.

The Agreement on the International Dolphin Conservation Program. The Agreement is unique in many ways. There is no other international agreement for which detailed information on every set of every fishing trip is available and used to monitor compliance with agreed to conservation and management measures. The Agreement has a number of features that make it the most closely monitored and most strictly enforced agreement for the conservation of marine resources anywhere in the world, including:

> 100 percent observer coverage on large vessels (for the purposes of the IDCP, vessels with carrying capacities greater than 400 short tons or 363.8 metric tons, or Class 6); review of data by IATTC Secretariat staff from every set by large vessels; an International Review Panel (IRP) that identifies possible infractions to the provisions of the Agreement, and where the IRP believes that an infraction may have occurred, referral of the incident to the flag state for review and action; and requirement for the flag state to report back to the IRP on the results of its investigation of possible infractions.

The Agreement is widely recognized as the best-monitored, best-enforced, and most transparent agreement for the conservation and management of living marine resources in the world today. Indeed, the Agreement itself requires that the Parties promote transparency in its implementation, including through public participation, as appropriate. Participation in the forum in which the implementation of the Agreement is monitored is not limited to member nations. Industry representatives and non-governmental conservation organizations also attend and actively participate in meetings of the Parties and the IRP and support the overall process. The intergovernmental organizations and non-governmental organizations are also given timely access to relevant information, subject to procedural rules on access to such information that the Parties may adopt. . . .

* * * *

The Agreement on the International Dolphin Conservation Program discussed in the report was concluded as a congressionally-authorized executive agreement, done pursuant to the International Dolphin Conservation Program Act of 1997, Pub. L. No. 105–42, 111 Stat. 1122 (1997), 16 U.S.C. §§ 1361 et seq., also discussed in the excerpts. Secretary of State Madeleine K. Albright signed the agreement on May 21, 1998 and signed the instrument of acceptance on July 21, 1998.

A fact sheet issued by NOAA provided further information on the International Dolphin Conservation Program Act, as excerpted below. The full text of the fact sheet is available at *www.nmfs.noaa.gov/prot_res/readingrm/tunadolphin/idcpa_fact_sheet.htm*.

Key provisions of the IDCPA include:

- Allowing U.S. fishing vessels to participate in the ETP yellowfin tuna fishery on equivalent terms with the flag vessels of other IDCP signatory nations;
- Permitting U.S. citizens crewing on the vessels of other nations in the fishery to incidentally take marine mammals during fishing operations outside the U.S. exclusive economic zone;
- Requiring the development of an official dolphin-safe mark that could be used to indicate that a tuna product is "dolphin-safe;"
- Conducting specified research to address the question of whether intentional chase and encirclement by the tuna fishery is having a significant adverse impact on any depleted dolphin stock;
- Requiring the development of a domestic tracking and verification program to track tuna harvested from the ETP by U.S. and foreign vessels. The program will track both dolphin-safe and non-dolphin-safe tuna from capture to final sale and is an expansion of the current program for tracking tuna.

The IDCPA did not become effective until the following two certifications were made: (1) The Secretary of Commerce certified that research had begun on the effects of intentional chase and encirclement on ETP dolphins, and that funds were available to complete the first year of the study, and (2) the Secretary of State certified to Congress that a binding legal instrument establishing the IDCP has been adopted and is in force.

- Research: On July 27, 1998, the Secretary of Commerce made the required certification on the research program. As required by the IDCPA, data gathered has been used in determining whether intentional encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the ETP. This information, along with individual opinions rendered from members of two Expert Panels, input from the Inter-American Tropical Tuna Commission and the U.S. Marine Mammal Commission, and other relevant information have been provided to the Secretary for consideration in making a decision.

* * * *

- IDCPA effective date: On March 3, 1999, the Secretary of State provided the required certification to Congress that the Agreement on the IDCP had been adopted and was in force. Consequently, the IDCPA became effective on that date.

* * * *

On May 7, 1999 the National Marine Fisheries Service, NOAA, Department of Commerce ("NMFS"), by delegation, made an initial finding under the IDCPA that "there is insufficient evidence that chase and encirclement by the tuna purse seine fishery 'is having a significant adverse impact' on depleted dolphin stocks in the ETP." 64 Fed. Reg. 24,590 (May 7, 1999). Further explanation from the Federal Register is excerpted below.

---

* * * *

Section 304(a) of the Marine Mammal Protection Act (MMPA), as revised by the IDCPA, requires the NMFS, in consultation with the Marine Mammal Commission 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." The law requires the study to consist of abundance surveys and stress studies to address the question of whether encirclement is having a significant adverse impact on depleted dolphin stocks.

Under the IDCPA, the dolphin-safe labeling standard could change depending upon the results of this study. The IDCPA states that the Secretary of Commerce shall make [an initial] finding in March 1999, based on the initial results of the study regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets "is having a significant adverse impact" on any depleted dolphin stock in the ETP. The authority to make this determination has been delegated to the NMFS. Unless there is an initial finding that the best scientific information available in March 1999 supports a scientific conclusion that the fishery is causing a "significant adverse impact," the new dolphin-safe labeling standard in paragraph (h)(1) of the Dolphin Protection Consumer Information Act (DPCIA) (i.e., that no dolphins were killed or seriously injured during the sets in which the tuna were caught) automatically replaces the prior labeling standard, which permitted no intentional encirclement of dolphins during the trip in which the tuna was caught. . . .

* * * *

> Based on this initial finding, the Federal Register notice explained that, effective February 2, 2000, "the new dolphinsafe labeling standard in paragraph (h)(1) of the [DPCIA] (i.e., that no dolphins were killed or seriously injured during the sets in which the tuna were caught) automatically replaces the prior labeling standard, which permitted no intentional encirclement of dolphins during the trip in which the tuna was caught."
>
> A number of environmental groups challenged this result, and the issue was ultimately decided by the Court of Appeals

for the Ninth Circuit. On July 23, 2001, the court found that the Secretary was statutorily required to make a determination "whether or not" the fishery was having such an impact on dolphins, based on whatever evidence was available, and that by relying on "insufficiency of evidence," he had acted contrary to law and abused his discretion. As a result, the pre-existing labeling standard for "dolphin-safe tuna" remained in effect. *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001). *See Digest 2001* at 748–52. *See also Digest 2002* at 794–96, concerning the Secretary's final finding on the same issue and the stay of implementation of that finding in litigation challenging it. *See also Earth Island v. Evans*, 2004 U.S. Dist. LEXIS 15729 (N.D. Cal. 2004).

b. South Pacific Regional Environment Programme

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 ("SPREP"), done at Apia, June 16, 1993. S. Treaty Doc. No. 105–32 (1993); *see* S. Exec. Rep. No. 107–7. The Senate provided advice and consent on September 5, 2002, 148 CONG. REC. S8,326; the convention had not entered into force for the United States at the time of this writing.

As the President explained in the letter of transmittal:

> [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.

See also 92 Am. J. Int'l L. 243, 249 (1998); *Digest 2002* at 790–91.

c. Coral reefs

In 1994 the United States, Australia, France, Japan, Jamaica, the Philippines, Sweden, the United Kingdom, the World Bank, and UNEP founded the International Coral Reef Initiative ("ICRI") to protect coral reefs, often referred to as the "rainforests of the sea," and related ecosystems. On May 6, 1997, Under Secretary of State for Global Affairs Timothy E. Wirth testified before the House Subcommittee on Fisheries Conservation, Wildlife and Oceans on House Resolution 87 (then pending but not adopted), expressing the sense of the House that there should be global action to condemn coral reef fisheries that are harmful to coral reef ecosystems and to promote the development of sustainable coral reef fishing practices worldwide. Excerpts below from Mr. Wirth's prepared testimony describe the U.S. participation in the ICRI.

The full text of the testimony is available at *www.state.gov/www/global/oes/oceans/970506.html.*

---

* * * *

While the benefits provided by coral reefs are well known, the threats they currently face are not. While coral reef ecosystems are adapted to respond to natural system stresses or perturbations, they are unprepared for the impact of increasing levels of human activity. Scientists estimate that more than two-thirds of the earth's coral reefs are threatened or in decline. Damaged or destroyed reefs can be found along the shores of more than 93 countries, including the United States and its territories.

To combat the serious threats to coral reefs worldwide, I was pleased to announce the establishment of the International Coral Reef Initiative (ICRI) in 1994. The Department of State hosted the ICRI Secretariat until 1996 and continues to play a central

role in the Initiative. ICRI was designed as a partnership of local communities, scientists, conservation groups, resource users, private interests, and governments working to protect and manage coral reef resources including associated ecosystems such as sea grass beds and mangroves. It has grown rapidly over the past three years from a small group of founding partners to a large consortium in which over 73 countries participate. By design, project ownership and leadership is intentionally shared at regional, national, or local levels. With this strategy, local resource users and the private sector can play a major role in implementing market-based management initiatives which are designed to promote the sustainable utilization of coral reef resources.

As recognized in H. Res. 87, unsustainable fishing practices are one of the most detrimental of all human activities impacting our reefs. These practices include fishing techniques that destroy the reef itself or encourage excessive harvest of available stocks. Corals, the foundation of reef ecosystems, grow slowly and are easily damaged. Scientists estimate that in some areas it may take over 600 years for new coral to reach the size of the corals that have been destroyed by human activities.

* * * *

It was a great pleasure to serve as the Honorary Workshop Chairman when ICRI's strategic plans, the Call to Action and Framework for Action, were rolled out in the Philippines in 1995. These documents endorsed strategies to encourage sustainable coral reef management practices world-wide. These include measures to prevent illegal fishing practices, achieve sustainable fisheries and to protect the ecological systems that support them. ICRI partners encourage the implementation of the FAO Code of Conduct for Responsible Fisheries and the development and promotion of mechanisms for regulating international trade in species that are illegally harvested, endangered or threatened.

* * * *

On June 11, 1998, President William J. Clinton issued an executive order, "Coral Reef Protection," establishing a policy of protecting and enhancing the conditions of coral reef

ecosystems. Section 5(d) of the executive order addressed international cooperation in these issues as follows:

> (d) International Cooperation. The Secretary of State and the Administrator of the Agency for International Development, in cooperation with other members of the Coral Reef Task Force and drawing upon their expertise, shall assess the U.S. role in international trade and protection of coral reef species and implement appropriate strategies and actions to promote conservation and sustainable use of coral reef resources worldwide. Such actions shall include expanded collaboration with other International Coral Reef Initiative ("ICRI") partners, especially governments, to implement the ICRI through its Framework for Action and the Global Coral Reef Monitoring Network at regional, national, and local levels.

5. Other Conservation Issues

a. Biodiversity

(1) Convention on Biological Diversity

The Convention on Biological Diversity, with annexes, done at Rio de Janeiro, June 5, 1992, was negotiated under the auspices of the United Nations Environment Programme ("UNEP"), *reprinted in* 31 I.L.M. 818 (1992). It was opened for signature at the UN Conference on Environment and Development (*see* A.1.a. *supra*) on June 5 and signed by the United States on that date. On November 19, 1993, President William J. Clinton transmitted the convention to the Senate for advice and consent to ratification. The Senate Foreign Relations Committee reported the convention favorably to the Senate on July 11, 1994. S. Exec. Rep. 103–30 (1994). No action has been taken by the Senate on the convention.

Excerpts below from the letter of transmittal set forth the views of the United States on the convention. Additional excerpts from the accompanying report of the Department

of State submitting the convention to the President address the issue of a biosafety protocol and set forth understandings recommended to be included in the U.S. instrument of ratification. S. Treaty Doc. No. 103–20 (1993). *See also* fact sheet released by the Department of State January 5, 1999, indicating continued support for the convention, available at *www.state.gov/www/global/oes/fs-biodiversity_990105.html.*

LETTER OF TRANSMITTAL

* * * *

The final text of the Convention was adopted in Nairobi by the Intergovernmental Negotiating Committee for a Convention on Biological Diversity (INC) on May 22, 1992. The INC was preceded by three technical meetings of an Ad Hoc Working Group of Experts on Biological Diversity and two meetings of an Ad Hoc Working Group of Legal and Technical Experts. Five sessions of the INC were held, from June 1991 to May 1992. The Convention was opened for signature at the United Nations Conference on Environment and Development in Rio de Janeiro on June 5, 1992.

The Convention is a comprehensive agreement, addressing the many facets of biological diversity. It will play a major role in stemming the loss of the earth's species, their habitats, and ecosystems through the Convention's obligations to conserve biodiversity and sustainably use its components as well as its provisions that facilitate access to genetic resources and access to and transfer of technology so crucial to long-term sustainable development of the earth's biological resources. The Convention will also create a much needed forum for focusing international activities and setting global priorities on biological diversity.

The objectives of the Convention as set forth therein are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources. These objectives are implemented through specific provisions that address, inter alia, identification and monitoring, in situ and ex situ conservation,

sustainable use, research and training, public education and awareness, impact assessment, access to genetic resources, access to and transfer of technology, technical and scientific cooperation, handling of biotechnology and distribution of its benefits, and financing.

Economic incentives will help all Parties achieve the environmental benefits of conservation and sustainable use of biological diversity. The Administration thus supports the concept that benefits stemming from the use of genetic resources should flow back to those nations that act to conserve biological diversity and provide access to their genetic resources. We will strive to realize this objective of the Convention. As recognized in the Convention, the adequate and effective protection of intellectual property rights is another important economic incentive that encourages the development of innovative technologies, improving all Parties' ability to conserve and sustainably use biological resources. The Administration will therefore strongly resist any actions taken by Parties to the Convention that lead to inadequate levels of protection of intellectual property rights, and will continue to pursue a vigorous policy with respect to the adequate and effective protection of intellectual property rights in negotiations on bilateral and multilateral trade agreements. In this regard, the report of the Department of State provides a detailed statement of the Administration's position on those provisions of the Convention that relate to intellectual property rights.

Biological diversity conservation in the United States is addressed through a tightly woven partnership of Federal, State, and private sector programs in management of our lands and waters and their resident and migratory species. There are hundreds of State and Federal laws and programs and an extensive system of Federal and State wildlife refuges, marine sanctuaries, wildlife management areas, recreation areas, parks, and forests. These existing programs and authorities are considered sufficient to enable any activities necessary to effectively implement our responsibilities under the Convention. The Administration does not intend to disrupt the existing balance of Federal and State authorities through this Convention. Indeed, the Administration is committed to expanding and strengthening these relationships. We look forward

to continued cooperation in conserving biological diversity and in promoting the sustainable use of its components.

The Convention will enter into force on December 29, 1993. Prompt ratification will demonstrate the United States commitment to the conservation and sustainable use of biological diversity and will encourage other countries to do likewise. Furthermore, in light of the rapid entry into force of the Convention, early ratification will best allow the United States to fully represent its national interest at the first Conference of the Parties.

I recommend that the Senate give early and favorable consideration to this Convention and give its advice and consent to ratification, subject to the understandings described in the accompanying report of the Secretary of State.

LETTER OF SUBMITTAL

* * * *

ARTICLE 3 (PRINCIPLE)

The Convention states verbatim Principle 21 of the Stockholm Declaration from the 1972 United Nations Conference on the Human Environment. This principle recognizes the sovereign right of States to exploit their own resources pursuant to their own environmental policies and the concomitant responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Although the article lacks language which places it in specific context within the Convention, the United States understands that it references a principle that the Parties will bear in mind in their actions under the Convention. The Department of State recommends that the following understanding be included in the United States instrument of ratification:

> The Government of the United States of America understands that Article 3 references a principle to be taken into account in the implementation of the Convention.

* * * *

ARTICLE 16 (ACCESS TO AND TRANSFER OF TECHNOLOGY)

Paragraph 1 creates a general obligation with respect to access to and transfer of technology. . . . Paragraph 2 specifies the terms of such access and transfer. . . .

* * * *

Technology transfer by the U.S. private sector to other countries, including developing countries, requires an economic infrastructure in the recipient country that encourages the voluntary transfer of technology and provides sufficient safeguards for investment. An essential component of this infrastructure is a legal regime that provides adequate and effective levels of intellectual property protection. To be considered adequate and effective, a country's intellectual property system must make protection available for all fields of technology and provide effective procedures for enforcing rights. When a recipient country has an inhospitable climate for investment, it becomes less likely that the U.S. private sector will enter that country's market. The absence of such protection has the effect of blocking access to new products based on foreign-originated proprietary technology and inhibiting joint development activities and application of proprietary technology to address indigenous problems or needs of the recipient country.

The Convention is consistent with these fundamental tenets. The United States understands that with respect to technology subject to patents and other intellectual property rights, Parties must ensure that access to and transfer of technology recognize and are consistent with adequate and effective protection of intellectual property rights. In particular, the Convention does not provide a basis for the use of compulsory licensing laws to compel private companies to transfer technology.

The Department of State therefore recommends that the following understanding be included in the United States instrument of ratification:

It is the understanding of the Government of the United States of America with respect to provisions addressing access to and transfer of technology that:

a. "fair and most favorable terms" in Article 16(2) means terms that are voluntarily agreed to by all parties to the transaction;
b. with respect to technology subject to patents and other intellectual property rights, Parties must ensure that any access to or transfer of technology that occurs recognizes and is consistent with the adequate and effective protection of intellectual property rights, and that Article 16(5) does not alter this obligation.

* * * *

ARTICLE 19 (HANDLING OF BIOTECHNOLOGY AND DISTRIBUTION OF ITS BENEFITS)

Paragraph 1 provides for the effective participation in biotechnology research activities by those Parties that provided the genetic resources for such research, where feasible in the territory of such Parties. The United States understands that with respect to research conducted by public or private entities in the United States, the entity conducting the research shall determine the circumstances under which it is appropriate to provide for the participation of developing countries and whether it is feasible for such research to be performed in the territory of the developing country. The United States considers that in implementing Article 19(1) the Parties should take measures that promote the negotiation of agreements regarding research on genetic resources that are voluntarily accepted by both the provider of the genetic resource and the entity conducting the research activities.

The subject matter of Article 19(1) is virtually identical to the subject matter of Article 15(6). The United States understands Article 15(6) to apply only to scientific research conducted by a Party, while Article 19(1) addresses measures taken by Parties regarding scientific research conducted by either public or private entities. To confirm the United States' understanding of the

relationship between Articles 15(6) and 19(1) and the scope of the obligations under Article 19(1), the Department of State recommends that the following understanding be included in the United States instrument of ratification:

> It is the understanding of the Government of the United States of America with respect to provisions addressing the conduct and location of research based on genetic resources that:
>
> a. Article 15(6) applies only to scientific research conducted by a Party, while Article 19(1) addresses measures taken by Parties regarding scientific research conducted by either public or private entities.
> b. Article 19(1) cannot serve as a basis for any Party to unilaterally change the terms of existing agreements involving public or private U.S. entities.

* * * *

ARTICLE 20 (FINANCIAL RESOURCES)

Pursuant to this article the Parties undertake to provide financial resources in support of the Convention. . . .

* * * *

Agreement on the costs of implementing measures cannot be evaluated except in the context of agreement on a particular measure. Thus, the United States understands that to qualify for funding pursuant to this paragraph, both the costs *and* the measures must be agreed between a developing country Party and the institutional structure. The Department of State therefore recommends that the following understanding be included in the United States instrument of ratification:

> It is the understanding of the Government of the United States of America that, with respect to Article 20(2), the financial resources provided by developed country Parties are to enable developing country Parties to meet the agreed

> full incremental costs to them of implementing measures that fulfill the obligations of the Convention and to benefit from its provisions and that are agreed between a developing country Party and the institutional structure referred to in Article 21.

* * * *

ARTICLE 21 (FINANCIAL MECHANISM)

This article establishes a mechanism for the provision of financial resources to assist developing countries in implementing the Convention. . . .

Paragraph 1 provides that the mechanism shall function under the authority and guidance of, and be accountable to, the COP and that the operation of the mechanism shall be carried out by such institutional structure as may be decided upon by the COP at its first meeting. In addition, it states that the COP shall determine the policy, strategy, program priorities and eligibility criteria relating to the access to and utilization of the financial resources. In this context, the United States understands that the "authority" of the COP relates to determining policy, strategy, program priorities, and eligibility criteria and not that the COP will have absolute control over the institutional structure. The Department of State therefore recommends that the following understanding be included in the United States instrument of ratification:

> It is the understanding of the Government of the United States of America that, with respect to Article 21(1), the "authority" of the Conference of the Parties with respect to the financial mechanism relates to determining, for the purposes of the Convention, the policy, strategy, program priorities and eligibility criteria relating to the access to and utilization of such resources.

Paragraph 1 further provides that the contributions shall be such as to take into account the need for predictability, adequacy and timely flow of funds referred to in Article 20 in accordance with the amount of resources needed to be decided periodically by

the COP. At the time of the adoption of the agreed text of the Convention, nineteen countries (including the United States) declared their understanding that the decision to be taken by the COP under Paragraph 1 refers to the "amount of resources needed" by the financial mechanism, not to the extent or nature and form of the contributions of the Parties. The Department of State therefore recommends that the following understanding be included in the United States instrument of ratification:

> The Government of the United States of America understands that the decision to be taken by the Conference of the Parties under Article 21, Paragraph 1, concerns "the amount of resources needed" by the financial mechanism, and that nothing in Article 20 or 21 authorizes the Conference of the Parties to take decisions concerning the amount, nature, frequency or size of the contributions of the Parties to the institutional structure.

* * * *

ARTICLE 22 (RELATIONSHIP WITH OTHER INTERNATIONAL CONVENTIONS)

* * * *

Paragraph 2 obligates the Parties to implement the Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea. During the negotiations, the United States proposed, in addition to Article 22(2) the inclusion of a sovereign immunity clause, i.e., that the Convention does not apply to military vessels or aircraft, but that each Party has an obligation to ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with the Convention.

In view of the reference in Paragraph 22(2) to the law of the sea and the recognition by many delegations during the negotiations that the United States proposal was a principle of customary international law and therefore superfluous, the United States

withdrew its proposal. The Department of State therefore recommends that the following understanding be included in the United States instrument of ratification:

> The Government of the United States of America understands that although the provisions of this Convention do not apply to any warship, naval auxiliary, or other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

* * * *

(2) Specially protected areas and wildlife

On April 20, 1993, President William J. Clinton transmitted the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, with accompanying papers. The Senate gave advice and consent to ratification subject to certain reservations and an understanding, on September 5, 2002, 148 CONG. REC. S8,326 (Sept. 5, 2002); *see Digest 2002* at 792–94. It entered into force for the United States on August 16, 2003. Excerpts below from the transmittal letter and the report of the Department of State submitting the treaty to the President describe the protocol and U.S. concerns. S. Treaty Doc. No. 103–5 (1993); *see* S. Exec. Rep. No. 107–8 (2002).

LETTER OF TRANSMITTAL

I transmit herewith, for the advice and consent of the Senate to ratification, the Protocol Concerning Specially Protected Areas and

Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Kingston on January 18, 1990. Included for the information of the Senate is a Proces-verbal of Rectification correcting technical errors in the English and Spanish language texts. I also transmit, for the information of the Senate, the Annexes to the Protocol which were adopted at Kingston June 11, 1991, and the report of the Department of State with respect to the Protocol.

The Protocol elaborates and builds on the general obligation in the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, which calls for parties to establish specially protected areas in order to protect and preserve rare or fragile ecosystems, as well as the habitats of threatened or endangered species of fauna and flora. Species of plants and animals that the parties believe require international cooperation to provide adequate protection are listed in three Annexes developed in implementation of the Protocol. The initial version of the Annexes was adopted in 1991. Annexes I and II list species of special concern, including endangered and threatened species, subspecies, and their populations of plants (Annex I) and animals (Annex II). Species included in these Annexes are to receive protection within the geographic area of the Protocol comparable to that for species listed as endangered or threatened under the Endangered Species Act, or protected under the Marine Mammal Protection Act. Annex III lists plants and animals requiring some management, but not necessarily full protection.

* * * *

LETTER OF SUBMITTAL

* * * *

Article 11 of the Protocol contains co-operative measures that the parties are obligated to adopt to ensure the protection and recovery of endangered and threatened species of flora and fauna listed in the three Protocol Annexes. Annexes I and II comprise plant and animal species, respectively, requiring the most protection. They include endangered and threatened species, subspecies, and their populations. Parties are required to prohibit all forms of destruction

and disturbance of Annex I species. Parties are obligated to prohibit the taking, possession, killing or commercial trade of Annex II species and, to the extent possible, to prevent their disturbance particularly during periods of biological stress. Parties are obligated to adopt and implement plans for the management and use of Annex III species.

The provisions of Article 11 prohibiting the taking of the species of fauna listed in Annex II are inconsistent with the Marine Mammal Protection Act (P.L. 92–522), which permits limited takings of marine mammals for the purpose of display, in connection with the disposal of offshore drilling rigs, and as incidental catch related to fishing operations. I, therefore, recommend that [a reservation] be included in the United States instrument of ratification . . .

* * * *

The United States intends to notify the depositary at the time it accepts the Annexes that the Protocol will not 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 least tern (*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.

Several terrestrial species, e.g. bats (*Tadarida brasiliensis* and *Brachyphylla cavernarum*) and falcons (*Falco peregrinus*), are listed in the Annexes. The listing of these species, however, is not intended to describe the relevant terrestrial scope of the Protocol. As the United States has not designated any terrestrial area, the Protocol obligations will not apply with respect to such species.

* * * *

The Protocol requires each Contracting party to perform environmental assessments on "industrial and other projects and

activities that would have a negative environmental impact." It is ambiguous on its face as to the extent to which Article 13 would apply to non-federal activities and to activities which have an extraterritorial impact. The United States has actively promoted environmental impact assessment internationally and has broad-based laws and policies that implement environmental impact assessments domestically. However, U.S. law and policy does not require environmental impact assessments for non-federal actions and in certain other circumstances. The United States, therefore, intends to reserve to Article 13 of the Protocol to the extent that the obligations contained therein differ from the obligations contained in Article 12 of the Cartagena Convention. . . .

* * * *

The Protocol will be implemented in the United States through existing statutory authority and no additional legislation is required. Existing legislation relating to protected areas includes, among others, the Marine Protection, Research, and Sanctuaries Act (16 U.S.C. sec. 1431 et seq.), the Coastal Zone Management Act (16 U.S.C. sec. 1451 et seq.), and the Wilderness Act (16 U.S.C. sec. 1131 et seq.). The provisions of the Protocol relating to species conservation will be implemented through the Endangered Species Act (16 U.S.C. sec. 1531 et seq.), the Marine Mammal Protection Act (16 U.S.C. sec. 1361 et seq.), the Coastal Zone Management Act (*id.*) and the Migratory Bird Treaty Act (33 U.S.C. sec. 1251 et seq.), for example.

At the Diplomatic Conference that adopted the Annexes to the Protocol, the parties agreed that the Protocol would 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. Thus, in the United States, certain exotic species, e.g., the muscovy duck and the common iguana, are not covered by the Protocol obligations. I, therefore, recommend that [an understanding] be included in the United States instruments of ratification. . . .

* * * *

b. Desertification

On August 2, 1996, President William J. Clinton transmitted the United Nations Convention to Combat Desertification in Countries Experiencing Drought, Particularly in Africa, with Annexes, to the Senate for advice and consent to ratification. S. Treaty Doc. No. 104–29. As explained in the Department of State report accompanying the transmittal, "[t]he purpose of the Convention is to combat desertification (i.e., land degradation) and mitigate the effects of drought on arid, semiarid and dry sub-humid lands through effective action at all levels, . . . particularly in Africa." Further excerpts from the report of the Department of State to the President accompanying the transmittal are set forth in *Digest 2000* at 728–31. *See also* 91 Am. J. Int'l L. 93, 118 (1997).

The Senate gave advice and consent to ratification of the convention on October 18, 2000, *see Digest 2000* at 731–32, and it entered into force for the United States February 15, 2001.

c. Migratory birds

On October 23, 1997, the U.S. Senate gave advice and consent to ratification to two protocols relating to migratory birds, discussed below: (1) the Protocol Between the United States and Canada Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the United States, with a related exchange of notes, signed at Washington on December 14, 1995, and (2) the Protocol Between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for the Protection of Migratory Birds and Game Mammals, signed at Mexico City on May 5, 1997. 143 CONG. REC. at S11,167 and S11,168. In each case, ratification was conditioned on an understanding concerning the definition of "indigenous inhabitant," to be included in the instrument of ratification as follows:

> Indigenous inhabitants.—The United States understands that the term "indigenous inhabitants" as used in Article [I (Mexico); II(4)(b) (Canada)] means a permanent resident of a village within a subsistence harvest area, regardless of race. In its implementation of [the relevant article], the United States also understands that where it is appropriate to recognize a need to assist indigenous inhabitants in meeting nutritional and other essential needs, or for the teaching of cultural knowledge to or by their family members, there may be cases where, with the permission of the village council and the appropriate permits, immediate family members of indigenous inhabitants may be invited to participate in the customary spring and summer subsistence harvest.

See also 92 Am. J. Int'l L. 243, 267 (1998). The protocols entered into force on October 7, 1999 (Canada) and December 30, 1999 (Mexico).

(1) U.S.-Canada

On August 2, 1996, President William J. Clinton transmitted the Protocol between the United States and Canada amending the 1916 Convention for the Protection of Migratory Birds in Canada and the United States, with a related exchange of notes, signed at Washington December 14, 1995. The protocol was designed to bring the 1916 convention into conformity with the actual practices of the two parties and with Canadian law. Excerpts below from the report of the Department of State submitting the protocol to the President for transmittal provide the views of the United States on the importance of changes to be made by the protocol and the statutory requirement for consistency with other migratory bird conventions. S. Treaty Doc. No. 104–28 (1996); *see* S. Exec. Rep. No. 105–5. *See also* 90 Am. J. Int'l L. 647, 649 (1996).

---

* * * *

The 1916 Convention for the Protection of Migratory Birds in Canada and the United States ("the Convention") presently does not permit hunting of the migratory species covered under the Convention from March 10 to September 1 except in extremely limited circumstances. Despite this prohibition, aboriginal people of Canada and indigenous people in Alaska have continued their traditional hunt of these birds in the spring and summer for subsistence and other related purposes. In the United States, the prohibition against this traditional hunt has not been actively enforced. In Canada, as a result of recent constitutional guarantees and judicial decisions, the Canadian Federal Government has recognized a right in aboriginal people to this traditional hunt, and the prohibition has not been enforced for this reason.

The goals of the Protocol are to bring the Convention into conformity with actual practice and Canadian law, and to permit the effective regulation for conservation purposes of the traditional hunt. Timely ratification is of the essence to secure U.S.-Canada conservation efforts.

This Protocol would replace a protocol with a similar purpose, which was signed in 1979, transmitted to the Senate with a message from the President dated November 24, 1980, and which is now pending in the Committee on foreign Relations. (Executive W, 96th Cong., 2nd Sess. (1980).)

A detailed analysis of the Protocol follows.

THE PROTOCOL

The Preamble to the Protocol states as its goals allowing a traditional subsistence hunt and improving conservation of migratory birds by allowing for the effective regulation of this hunt. In addition, the Preamble notes that, by sanctioning a traditional subsistence hunt, the Parties do not intend to cause significant increases in the take of species of migratory birds relative to their continental population sizes, compared to the take that is occurring at present. Any such increase in take as a result of the types of hunting provided for in the Protocol would thus be inconsistent with the Convention.

* * * *

Article II of the Protocol substantially rewrites Article II of the Convention to include new subsistence hunt provisions. An introductory paragraph outlines the conservation principles that apply to all management of migratory birds under the Convention. In addition, this paragraph lists a variety of means to achieve these conservation principles.

The United States and Canada exchanged diplomatic notes at the time of the Protocol signing, in which both governments confirmed that the conservation principles set forth in Article II apply to all activities under Article II. The United States considered this exchange of notes desirable in light of the language of Article II (4)(a), which contains the phrase "subject to existing aboriginal and treaty rights of the Aboriginal peoples of Canada under section 35 of the Constitution Act, 1982, and the regulatory and conservation regimes defined in the relevant treaties, land claims agreements, self-government agreements, and co-management agreements with Aboriginal peoples of Canada. . . ." This phrase was sought by Canada in order to recognize Canadian court decisions that affirm certain rights of aboriginal people to exploit natural resources. However, as the exchange of notes makes clear, this phrase does not override the conservation principles set forth earlier in Article II.

Paragraphs 1, 2, and 3 of Article II of the Protocol continue the basic closed and open seasons for hunting contained in the original Convention, with a closed season between March 10 and September 1. The open season remains limited to three and one half months, which the Parties agreed would be interpreted to mean 107 days. The closed season for migratory insectivorous and nongame birds is maintained. Exceptions to these closed seasons may be made for scientific, educational or other specific purposes consistent with the conservation principles of the Convention. This language is found in similar conventions between the United States and Japan (TIAS 7990; 25 UST 3329) (hereinafter "the Japan Convention") and the successor States to the former U.S.S.R. (TIAS 9073; 29 UST 4647) (hereinafter the "U.S.S.R. Convention"), respectively.

The traditional subsistence hunt is provided for as an exception to the closed season and is dealt with in paragraph 4, with different

provisions for the hunt in Canada and the United States reflecting different domestic legal regimes and practices. Paragraph 4(a) recognizes that in Canada, aboriginal people have a right to harvest birds under the Canadian Constitution, treaties between aboriginal people and the Government, and other provisions of Canadian law, and permits Canada to allow such a harvest as a matter of international law. Paragraph 4(b) authorizes the United States to allow such a harvest only in Alaska.

* * * *

The Protocol does not create any private rights of action under U.S. law, and, in particular, does not create a right of persons to harvest migratory birds and their eggs. Similarly, Canada does not regard the agreement as creating a right in aboriginal people of Canada to harvest birds; this right is implemented by the Canadian Constitution and relevant agreements between the Government of Canada and its aboriginal groups.

* * * *

CONSISTENCY WITH OTHER MIGRATORY BIRD CONVENTIONS

As a matter of international law, in order for the United States to take advantage of certain provisions of the Protocol, a conforming amendment to the U.S.-Mexico Convention on the Protection of Migratory Birds and Mammals (TS 912; 50 Stat. 1311) will be required. The U.S.-Mexico Convention currently mandates a "close season for wild ducks from the tenth of March to the first of September," while the Protocol would allow a limited hunt of migratory birds, including ducks, in Alaska during part of this time period.

As a matter of domestic law, a conforming amendment to the U.S.-Mexico Convention would also be required. Specifically, the Department of Interior could not implement a provision of one convention that allows a hunt prohibited by the provision of another, since U.S. courts have held that the statute implementing the various migratory bird conventions should be interpreted to require application of the most restrictive one in the case of conflict.

See Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F. 2d 933, 941 (9th Cir. 1987), cert. den., 485 U.S. 988 (1988).

The United States has indicated to Canada that the provision allowing the hunting of wild ducks during the closed season cannot become effective in the United States until the conforming amendment to the U.S.-Mexico Convention enters into force.

It will not be necessary to amend the U.S.-U.S.S.R. Convention, since it allows a subsistence hunt of the type contained in the Protocol.

The U.S.-Japan Convention contains a more restrictive definition of subsistence hunt than is contemplated by the Protocol. . . . The U.S.-Japan Convention does, however, allow each Party to decide on open seasons for hunting, as long as these seasons are set "so as to avoid * * * principal nesting seasons and to maintain * * * optimum numbers." In addition, there is a specific prohibition on "any sale, purchase or exchange" of birds and their eggs, by-products or parts. A subsistence hunt under the U.S.-Canada Convention therefore will have to be implemented in a manner consistent with these provisions of the U.S.-Japan Convention. Thus, for example, avoidance of principal nesting seasons will allow for only limited taking of eggs.

DOMESTIC IMPLEMENTATION

An existing statute (16 U.S.C. § 712) authorizes the Department of the Interior to promulgate regulations to implement migratory bird treaties with a number of countries, including Canada. No additional statutory authority would be required to implement the Protocol.

Principal species customarily and traditionally taken for subsistence in the United States are shown in a list enclosed for your information.

The term "indigenous inhabitants" in Article II (4)(2)(b) of the Protocol refers primarily to Alaska Natives who are permanent residents of villages within designated areas of Alaska where subsistence hunting of migratory birds is customary and traditional. The term also includes non-Native permanent residents of these

villages who have legitimate subsistence hunting needs. Subsistence harvest areas encompass the customary and traditional hunting areas of villages with a customary and traditional pattern of migratory bird harvest. These areas are to be designated through a deliberative process, which would include the management bodies discussed below and employ the best available information on nutritional and cultural needs, customary and traditional use, and other pertinent factors.

* * * *

(2) U.S.-Mexico

As noted in (1), *supra*, the United States could not implement the terms of the new protocol with Mexico until it entered into a conforming amendment to a U.S.-Canada agreement on the same topic. On September 15, 1997, President William J. Clinton transmitted the Protocol Between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for the Protection of Migratory Birds and Game Mammals, signed at Mexico City on May 5, 1997 ("the Mexico Protocol") for this purpose. S. Treaty Doc. No. 105–26 (1997); *see* S. Exec. Rep. No. 105–5. Article I of the Mexico Protocol amended the original convention to permit the subsistence harvest of wild ducks and their eggs by indigenous inhabitants in Alaska during the period March 10 – September 1, to conform to the U.S.-Canada agreement. As explained in the President's letter of transmittal:

> The Mexico Protocol is particularly important because it will permit the full implementation of the Protocol Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the United States ("the Canada Protocol") that is pending before the Senate at this time. The Canada Protocol is an important agreement that addresses the management of a spring/summer subsistence hunt of waterfowl in communities in Alaska

and northern Canada. The Mexico Protocol conforms the Canadian and Mexican migratory bird conventions in a manner that will permit a legal and regulated spring/summer subsistence hunt in Canada and the United States.

d. Arctic

(1) Arctic Council

On September 19, 1996, the United States and seven other states with sovereignty over territory in the Arctic signed the Declaration on the Establishment of the Arctic Council in Ottawa, Canada, *reprinted in* 35 I.L.M. 1382 (1996). In September 1998 the Ministers of the Arctic Council, meeting in Iqaluit, which became the capital of Nunavut, Canada, approved certain rules, terms of reference and mandates. Brief excerpts below from an analysis of the Arctic Council prepared by Evan Bloom, attorney-adviser, Office of Oceans, Environment and International Scientific Affairs, Office of the Legal Adviser, U.S. Department of State, describe the development of the Arctic Council during the 1990s and its operation (footnotes omitted). *See also* U.S. Department of State press statement of September 18, 1998, announcing that the "Arctic Council today accepted an offer by the United States to serve as Chair for the period 1998–2000," available at *http://secretary.state.gov/www/briefings/statements/1998/ps980918.html*.

Mr. Bloom's analysis is available in full at 93 Am. J. Int'l L. 712 (1999).

A new "high level forum" for cooperation in the Arctic has been established by the eight states with sovereignty over territory in that region: Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the United States. This new entity, called the Arctic Council, ended its organizational phase and took up its new

responsibilities in September of 1998 at its first ministerial-level meeting held at Iqaluit, [now the capital of Nunavut], Canada. At that meeting, the chairmanship of the Council passed from Canada to the United States, which will hold that position for the next two years.

The Arctic Council is the only major intergovernmental initiative for the Arctic involving all eight Arctic states. . . .

I. HISTORY OF THE COUNCIL

The Arctic Council is an outgrowth of the Arctic Environmental Protection Strategy (AEPS), announced by the eight Arctic states in 1991 and based on a proposal by the Finnish Government to initiate a process to address Arctic-wide environmental issues. The AEPS, along with a Declaration on the Protection of the Arctic Environment, was approved by Arctic ministers at Rovaniemi, Finland, in June 1991 as a political—but not a legal—commitment to establish a more comprehensive structure for cooperation. The AEPS identified five key objectives . . .

Although "sustainable economic development" is mentioned in the AEPS, the primary emphasis was on environmental issues. The Arctic states, taking advantage of the opportunity for cooperation presented by the end of the Cold War, were particularly interested in giving an international scope to efforts to clean-up toxins in the Russian Arctic.

As part of the AEPS, the Arctic states established four working groups. States, observers and indigenous groups would send appropriate experts to assist in the work of those described below:

* The Arctic Monitoring and Assessment Program (AMAP) monitors levels and assesses the effects of anthropogenic pollutants in the Arctic. AMAP produces assessment reports on the status and trends in the condition of Arctic ecosystems, detects emerging problems, their possible causes and the potential risk to Arctic ecosystems, and recommends responses.
* The Conservation of Arctic Flora and Fauna (CAFF) working group facilitates the exchange of information and

coordination of research on species and habitats of flora and fauna in the Arctic. In particular, CAFF looks at the practices of Arctic states with respect to conservation and management of Arctic species and the relationship to and use of such species by indigenous groups.

* The Emergency Prevention, Preparedness and Response (EPPR) working group provides a framework for cooperation in responding to the threat of environmental emergencies. EPPR gathers experts to consider cooperation with regard to actions in response to significant accidental pollution from any source, coordination and harmonization of preventive policies, and establishment of a system of early notification in the event of significant accidental pollution or the threat of such pollution.

* The Protection of the Arctic Marine Environment (PAME) working group takes preventive and other measures directly or through competent international organizations regarding marine pollution in the Arctic irrespective of origin.

* * * *

Some states . . . felt that the AEPS comprised only part of what the states in the region should discuss with respect to the Arctic. . . . In 1995, Canada began to advocate the transformation of the AEPS into a new international organization which would not only subsume the existing AEPS programs but would also address the broader issue of sustainable development.

The United States, in particular, had difficulty with the notion of creating a new international organization. However, it ultimately agreed to the formation of a council without legal personality. The result was the Declaration on the Establishment of the Arctic Council, signed at Ottawa on September 19, 1996 (the "Ottawa Declaration").

II. THE MAIN THEMES OF THE NEW COUNCIL

The Ottawa Declaration marked a shift in focus for the Arctic states from environmental protection alone to the broader concept

of sustainable development. The Declaration provides that the Council is a high level forum designed to: "provide a means for promoting cooperation, coordination and interaction among the Arctic states, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic." The Council also oversees and coordinates programs established under the AEPS, namely those supervised by the four original working groups discussed above.

In the two-year period following adoption of the Ottawa Declaration, the Arctic states and Permanent Participants worked on rules of procedure and terms of reference for a sustainable development program, as well as new mandates for the Council's programs. Those rules, terms of reference and mandates were approved by the Arctic Ministers in their Declaration at Iqaluit (the "Iqaluit Declaration").

* * * *

(2) U.S.-Russia cooperation in the prevention of pollution

On December 16, 1994, Vice President Al Gore signed the Agreement Between the Government of the United States of America and the Government of the Russian Federation on Cooperation in the Prevention of Pollution of the Environment in the Arctic. TIAS No. 12589. The executive agreement was effective upon signature. Article 1 of the agreement indicated the types of issues on which the two governments intended to cooperate:

> The Parties shall cooperate in the prevention, reduction and control of pollution in the Arctic marine and terrestrial environment resulting from the accidental or intentional introduction of contaminants into that environment.
>
> To this end the Parties shall cooperate in research, monitoring, assessment and other activities, bilaterally and in the appropriate multilateral fora.

e. Antarctica: Protocol on Environmental Protection

(1) Transmittal of Protocol

On February 14, 1992, President George H.W. Bush transmitted the Protocol on Environmental Protection to the Antarctic Treaty of 1959, 12 UST 794, 402 U.N.T.S. 71 ("Protocol"), with annexes, done at Madrid October 4, 1991, and an additional annex done at Bonn, October 17, 1991, to the Senate for advice and consent to ratification. The Protocol was opened for signature on October 4 in Madrid and, thereafter, in Washington until October 3, 1992. Twenty-three of the Antarctic Treaty Consultative Parties, including the United States, signed the Protocol on October 4, along with eight of the Contracting Parties that were not Consultative Parties.

The Senate provided advice and consent on October 7, 1992, and the Protocol entered into force for the United States January 14, 1998. Excerpts below from the report of the Department of State submitting the Protocol to the President for transmittal describe the Protocol and its annexes. S. Treaty Doc. No. 102–22; *see* S. Exec. Rep. No. 102–54.

---

* * * *

The Protocol builds upon the Antarctic Treaty to extend and improve the Treaty's effectiveness as a mechanism for ensuring the protection of the Antarctic environment. It designates Antarctica as a natural reserve, devoted to peace and science, and sets forth legally binding environmental protection principles applicable to human activities in Antarctica, including obligations to accord priority to scientific research. The Protocol prohibits all activities relating to Antarctic mineral resources, except for scientific research, and provides that this prohibition cannot be amended by less than unanimous agreement for at least 50 years following entry into force of the Protocol.

The Protocol requires Parties to protect Antarctic fauna and flora and imposes strict limitations on disposal of wastes in

Antarctica and discharge of pollutants into Antarctic waters. It also requires application of environmental impact assessment procedures to activities undertaken in Antarctica, including non-governmental activities, for which advance notice is required under the Antarctic Treaty. Parties are further required to provide for response to environmental emergencies, including the development of joint contingency plans.

Detailed mandatory rules for environmental protection pursuant to these requirements are incorporated in a system of annexes, forming an integral part of the Protocol. Specific annexes on environmental impact assessment; conservation of Antarctic fauna and flora; waste disposal and waste management; and the prevention of marine pollution were adopted with the Protocol. A fifth annex on area protection and management was adopted October 17, 1991 by the Antarctic Treaty Consultative Parties at the Sixteenth Antarctic Treaty Consultative Meeting. Provision is also made for additional annexes to be incorporated following entry into force of the Protocol.

Dispute settlement procedures are included in the Protocol. These include compulsory and binding procedures for disputes over the interpretation or application of, and compliance with, the provisions of the Protocol relating to mineral resource activities, environmental impact assessment and response action, as well as most provisions included in the Annexes.

The Protocol establishes a Committee on Environmental Protection, as an expert advisory body to provide advice and formulate recommendations to the Antarctic Treaty Consultative Meetings in connection with the implementation of the Protocol.

Conclusion of the Protocol resulted from negotiations during the Eleventh Antarctic Treaty Special Consultative Meeting among the Antarctic Treaty Consultative Parties—Argentina, Australia, Belgium, Brazil, Chile, China, Ecuador, Finland, France, Germany, India, Italy, Japan, Republic of Korea, Netherlands, New Zealand, Norway, Peru, Poland, South Africa, Spain, Sweden, the Soviet Union, the United Kingdom, the United States and Uruguay.

The fourteen Contracting Parties which are not Consultative Parties—Austria, Bulgaria, Canada, Colombia, Czechoslovakia, Cuba, Denmark, Greece, Guatemala, Hungary, Democratic People's

Republic of Korea, Papua New Guinea, Romania and Switzerland, as well as representatives of a number of international organizations, attended as observers.

The Special Consultative Meeting, convened pursuant to a recommendation adopted in Paris in October, 1989, had as general terms of reference the "further elaboration, maintenance and effective implementation of a comprehensive system for the protection of the Antarctic environment." The first session of the Special Consultative Meeting took place in Vina del Mar, Chile, November 19–December 6, 1990; and the second in Madrid, April 22–30, June 17–22, and October 3–4, 1991.

* * * *

(2) Implementing legislation

Article 13 of the Protocol "obligates the Parties to take appropriate measures within their competence, including the adoption of laws and regulations, administrative actions and enforcement measures, to ensure compliance with the Protocol (including its annexes)." In October 1996 the United States amended current law applicable to Antarctica to fulfill its obligations preparatory to ratification. Antarctic Science, Tourism, and Conservation Act of 1996, Pub. L. 1014–227, 110 Stat. 3034, 16 U.S.C. 2401 note. Title I of the act amended the Antarctic Conservation Act of 1978 by, among other things, setting forth in new § 4 a list of prohibited acts, 16 U.S.C. § 2403. Section 4(a) enumerated acts generally unlawful, while 4(b) listed acts "prohibited unless authorized by permit." Section 4(c) provided that many of the acts in 4(a) and all in 4(b) were not unlawful "if the person committing the act reasonably believed that the act was committed under emergency circumstances involving the safety of human life or of ships, aircraft, or equipment or facilities of high value, or the protection of the environment."

As amended, prohibited acts under § 4(a) included, among other things, introduction of prohibited products,

disposal of waste in particular ways; transporting passengers by any seagoing vessel not required to comply with the Act to Prevent Pollution from Ships or Annex IV to the Protocol; damaging, removing, or destroying a historic site or monument; failing to cooperate with an authorized officer or employee of the United States to search or inspect in connection with enforcement of the act; and interfering with arrest or detention of another person known to have committed a prohibited act. Acts prohibited without permit under § 4(b) include certain types of waste disposal, introducing a nonnative species, operating within any Antarctic Specially Protected Area, and dealing with any native bird, mammal, or plant that the person knows or should have known was taken in violation of the act.

New § 4A, 16 U.S.C. § 2403a, established a requirement for an environmental impact assessment for proposals for federal agency activities in Antarctica affecting the quality of the human environment in Antarctica or dependent or associated ecosystems.

Section 202 of the 1996 act amended the Antarctic Protection Act of 1990 by prohibiting mineral resource activities in the Antarctic, 16 U.S.C. §§ 2463, 2465.

f. International Plant Protection Convention

On November 17, 1997, the United States signed the revised International Plant Protection Convention ("IPPC"), adopted at the 29th Conference of the Food and Agriculture Organization of the United Nations ("FAO") in Rome ("Conference"). At the request of the United States, the Conference adopted the following explanatory statement addressing the relationship between the revised IPPC and the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures in the Conference Report:

> With reference to Article III of this Convention, nothing in this Convention, and in particular in Articles VI or VII thereof, shall be interpreted as limiting the rights or the

> obligations of the contracting parties to this Convention under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

Food and Agriculture Organization of the United Nations, *Report of the World Food Summit, 7–18 November 1997* (Rome 1997) C 1997/REP, XIII.B., available at *www.fao.org/documents/show_cdr.asp?url_file=/docrep/W7475e/W7475e00.htm*.

To make clear the U.S. interpretation and intended implementation of the revised IPPC, as well as the U.S. understanding of other parties' interpretation, the U.S. delegation delivered a statement in a plenary session of the Conference, set forth below.

We thank the Secretariat and the membership of the FAO for their help and cooperation in clarifying the intent of the revised text of the IPPC. The United States has supported the work of the FAO Conference on the amended text of the International Plant Protection Convention.

Representatives of IPPC member countries have worked over many months to try to update the IPPC. The revised IPPC is designed to clarify how the IPPC parties will develop international phytosanitary standards, as called for in the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). At the same time, we also recognize the complementary role of other international organizations, in particular the Codex Alimentarius Commission, and the International Office of Epizootics, with respect to sanitary standards.

We agree with the clarifications of the Secretariat as well as the general understanding of the parties to the convention that, consistent with the current IPPC, nothing in the revised convention shall be interpreted as restricting the ability of contracting parties to take sanitary or phytosanitary measures against any pest to protect human, animal or plant life or health or the environment.

Accordingly, the United States will continue to regulate for these purposes, consistent with the requirements of U.S. law.

In addition, we are reassured that all Conference participants approved, in connection with the adoption of the revised IPPC, an explanatory statement that underscores that the amended IPPC is to be interpreted in a manner consistent with and does not alter the terms or effect of the SPS Agreement. Accordingly, in implementing the amended convention, the United States will be guided by the SPS Agreement, and in particular will interpret Articles VI and VII of the revised IPPC in a manner that is consistent with the SPS Agreement, including Article 5 thereof.

The United States believes that the international community is already witnessing the benefits of the more liberalized trade regime established with the completion of the Uruguay Round. The United States has a broad set of concerns, including human health and environment, that should be part of future international standard-setting activities. The standards we will establish in the IPPC process and other similar processes will help lay the foundation for unparalleled global prosperity. To ensure this, however, we must inform our work with scientific principles and develop consensus on enduring principles of plant protection that will not only protect species and human health and the environment, but also promote harmonized standards for exporters. We look forward to working with all parties to the IPPC in this vital endeavor.

Lastly, the United States notes that the Conference Report contains a conclusion, reflected in the Resolution concerning adoption of the amended IPPC, that the amended convention would not involve new obligations for contracting parties for purposes of Article XIII of the existing convention, which governs the amendment process. We can accept this conclusion on the basis of the foregoing understandings regarding how the convention is to be interpreted. Thank you.

President William J. Clinton transmitted the 1997 revisions to the Senate on March 23, 2000, for advice and consent to acceptance. S. Treaty Doc. No. 106–23 (2000); *see* S. Exec. Rep. No. 106–27 (2000). Excerpts below from the report of the Department of State submitting the convention to the

President include proposed understandings to be included in the instrument of acceptance.*

The IPPC, a multilateral convention which entered into force internationally in 1952 and for the United States in 1972, is aimed at promoting international cooperation to control and prevent the spread of harmful plant pests. The IPPC serves, together with regional plant protection organizations and national plant protection organizations, to develop international plant health standards, promote harmonization of plant quarantine activities with emerging standards, facilitate the dissemination of phytosanitary information, and support plant health assistance to developing countries. The United States has been a leading force in furthering the work of the IPPC. A 1979 revision of the original IPPC (the "existing IPPC") entered into force in 1991.

In 1995, after the adoption of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"), which identified the organizations operating within the framework of the IPPC as relevant international organizations in the field of sanitary and phytosanitary protection, a consensus developed among the IPPC parties to revise the IPPC text. An important impetus for

---

* Although "ratification" is the more familiar term for the action and instrument expressing U.S. consent to be bound by a treaty made by and with the advice and consent of the Senate, the term "acceptance" is synonymous and the procedure identical for the United States in this case. "Acceptance" was used in order to follow the language of the IPPC itself; the revisions were done as an amendment of the existing treaty and follow the amendment procedure provided in Article XXI, which calls for "acceptance" of amendments.

The United States also deposits an instrument of acceptance in the case of certain international agreements that require consent to be bound subsequent to signature, but that do not, under U.S. practice, require the advice and consent of the Senate. In some instances these instruments may be signed by the Secretary of State rather than by the President. *See, e.g,* Agreement on the International Dolphin Conservation Program, A.4.a.(10) *supra*.

the revision was to bring the existing IPPC into alignment with the SPS Agreement, which calls for the harmonization of sanitary and phytosanitary measures among countries on the basis of the development of international standards, including within the framework of the IPPC. The revised IPPC was adopted November 17, 1997, by the Conference of the Food and Agriculture Organization (FAO) of the United Nations.

The revised IPPC is intended to clarify existing procedures, update terms and definitions, and strengthen the ability of IPPC parties to develop phytosanitary standards. Standard setting has become a fundamental need for U.S. agriculture. It is necessary to create a stable international trade system that balances the need for protection against pest risks and the need for predictability and fairness in international trade practices. American farmers who are interested in exporting their products to foreign markets would benefit significantly from such a trade system. The revised IPPC is meant to be interpreted consistently with the SPS Agreement and not to limit the rights or obligations of the parties to that agreement.

* * * *

Article VI provides that a party may require phytosanitary measures for quarantine pests and regulated non-quarantine pests, provided that such measures are not more stringent than measures applied to the same pests within its own territory and limited to what is technically justified and necessary to protect plant health. This article restates in greater detail the parties' obligations, set forth in Article VI(2) of the existing IPPC, to have a technical basis for requiring phytosanitary measures and not to impose such requirements arbitrarily. The United States intends that nothing in this article will be interpreted or implemented to limit the rights of the United States under relevant international agreements, in particular the SPS Agreement, including the right to maintain control, inspection, and approval procedures consistent with its obligations under that Agreement. In order to make the U.S. view clear to the other parties, it is recommended that the following understanding be included in the U.S. instrument of acceptance:

> Nothing in the amended International Plant Protection Convention (IPPC) is to be interpreted in a manner inconsistent with, or alters the terms or effect of, the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) or other relevant international agreements. In implementing the amended IPPC, the United States will be guided by the SPS Agreement and other relevant international agreements, and in particular will interpret Articles VI and VII of the amended IPPC in a manner that is consistent with the SPS Agreement, including Article 5 thereof.

Article VI also prohibits the parties from requiring phytosanitary measures for non-regulated pests. This article would not, however, preclude the United States from restricting the importation of "invasive" pests in order to protect plant life or health or the environment. If an "invasive" pest is injurious to plant life or health or the environment, it could be regulated as a quarantine pest or a regulated non-quarantine pest. Nor would this article preclude the United States from restricting the importation of an "invasive" pest in order to protect human or animal life or health. The term "pest" is defined in Article II of the revised IPPC as "any species, strain or biotype of plant, animal or pathogenic agent *injurious to plants or plant products*" (emphasis added). The scope of both the existing and the revised IPPC is the protection of plant life and health and the environment. Therefore, neither the existing IPPC nor the revised IPPC prohibits the parties from taking any action with regard to pests that could harm human or animal life or health. (The protection of human and animal health falls within the domain of the Codex Alimentarius Commission and the International Office of Epizootics (OIE), not the IPPC.) In order to make the U.S. view clear to the other parties, it is recommended that the following understanding be included in the U.S. instrument of acceptance:

> Nothing in the amended IPPC limits the authority of the United States, consistent with the SPS Agreement, to take sanitary or phytosanitary measures against any pest to

protect human, animal or plant life or health or the environment.

* * * *

Existing legislation, *i.e.*, the Plant Quarantine Act, 7 U.S.C. 151 *et seq.*, the Federal Plant Pest Act, 7 U.S.C. 150aa *et seq.*, the Federal Noxious Weed Act, 7 U.S.C. 2801 *et seq.*, and the Federal Seed Act, 7 U.S.C. 1551 *et seq.*, provides sufficient authority to implement U.S. obligations under the revised IPPC. Therefore, no new legislation is necessary for the United States to accept the revised IPPC. Furthermore, implementation of the revised IPPC will not require any increase in appropriations.

* * * *

The Senate granted advice and consent on October 18, 2000, 146 CONG. REC. S10,658, but as of this writing the IPPC revisions had not entered into force. The resolution of acceptance included three understandings:

> (1) Relationship to other international agreements.—The United States understands that nothing in the amended Convention is to be interpreted in a manner inconsistent with, or alters the terms or effect of, the World Trade Organization Agreement on the application of Sanitary or Phytosanitary Measures (SPS Agreement) or other relevant international agreements.
>
> (2) Authority to take measures against pests.—The United States understands that nothing in the amended Convention limits the authority of the United States, consistent with the SPS Agreement, to take sanitary or phytosanitary measures against any pest to protect the environment or human, animal, or plant life or health.
>
> (3) Article XX ("Technical assistance").—The United States understands that the provisions of Article XX entail no binding obligation to appropriate funds for technical assistance.

B. OTHER TRANSNATIONAL SCIENTIFIC ISSUES

Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations

On November 17, 1998, Ambasador A. Peter Burleigh, Chargé d'affaires, a.i. of the United States Mission to the United Nations, signed the Tampere Convention on Provision of Emergency Telecommunications Resources for Disaster Mitigation and Relief Operations. A press statement by the United States mission to the United Nations described the convention as set forth below.

The text of the Tampere Convention and related documents, including "best practices," presented to the Working Group on Emergency Telecommunications for in December 1998, are available at *www.state.gov/www/issues/relief/tpere1.html*.

* * * *

The Convention was negotiated in June in Finland at the urging of the humanitarian relief community and has already been signed by 33 nations. One of the most important instruments of its kind in over a decade, Tampere will assist in moving telecommunications personnel and equipment, quickly, into disaster areas worldwide.

Tampere signatories agree to end excessive import duties and minimize administrative and political barriers that prevent or delay swift provision across national borders of emergency telecommunications. These are used to locate disaster victims or assist in movement of food, medicine and other vital supplies. Signatories agree for the first time to protect relief workers engaging in emergency telecommunications, and their equipment.

Signatories have also formed a working group to standardize cross-border and security procedures. This is managed by the United Nations Emergency Relief Coordinator, Sergio de Mello.

It is hoped that the Tampere Convention will lead to a second convention protecting all relief workers and victims they assist.

Cross-references

Claims for environmental cleanup from sunken vessel, **Chapter 12.A.5.e.**

Chapter 14

Educational and Cultural Issues

A. U.S. COMMISSION FOR THE PRESERVATION OF AMERICA'S HERITAGE ABROAD

The U.S. Commission for the Preservation of America's Heritage Abroad was established as an independent U.S. agency in 1985. § 1303 of Title XIII of Pub. L. No. 99–83 (1985), 16 U.S.C. § 469j. The main impetus behind § 1303 was the destruction and deterioration of cemeteries, monuments, and historic buildings in Eastern and Central Europe resulting from the genocide of the Jewish and other populations in these areas. The statute requires the commission to:

> (1) identify and publish a list of those cemeteries, monuments, and historic buildings located abroad which are associated with the foreign heritage of United States citizens from eastern and central Europe, particularly those cemeteries, monuments, and buildings which are in danger of deterioration or destruction; [and]
> (2) encourage the preservation and protection of such cemeteries, monuments, and historic buildings by obtaining, in cooperation with the Department of State, assurances from foreign governments that the cemeteries, monuments, and buildings will be preserved and protected . . .

In carrying out its duties, the commission has entered into agreements on the protection and preservation of relevant cultural properties with a number of countries. The

first such agreement was entered into with the Czech and Slovak Republic on March 17, 1992. (Subsequently, the commission entered into separate agreements with the Slovak Republic (March 9, 2001) and the Czech Republic (March 3, 2003)). Additional agreements entered into during the 1990s were with Romania (July 8, 1992), Ukraine (March 4, 1994) and Slovenia (May 8, 1996).

The agreements provided for: (1) taking appropriate steps to protect and preserve properties associated with the "cultural heritage" of all national, religious, or ethnic groups residing in the territory, including groups which were victims of genocide during World War II; (2) cooperation in identifying lists of such properties; (3) the possibility of contributions and assistance from the U.S. side; (4) the establishment of a Joint Cultural Heritage Commission to oversee the lists and perform other functions delegated to it; and (5) the designation of the Commission for the Preservation of America's Heritage Abroad and a counterpart foreign government body as Executive Agencies for implementing the agreement.

A current list of all countries with whom such agreements have been reached, with links to the text of each agreement and related information, is available at *www.heritageabroad.gov/agreements/agreement_list.html*.

B. INTERNATIONAL CULTURAL PROPERTY PROTECTION

1. Implementation

During the 1990s the United States took action to protect cultural property in El Salvador, Guatemala, Mali, Peru, and Nicaragua at the request of those countries. These actions were taken 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 UNTS 231 (1972), ratified by the United States in 1983 ("1970 UNESCO Convention"), and implemented by the Convention

on Cultural Property Implementation Act, Pub. L. No. 97–446 (1983), 19 U.S.C. § 2601 *et seq.*, which provides for imposition of 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. Information on all instruments and implementing regulations is available at *http://exchanges.state.gov/culprop/list.html*.

a. El Salvador

On March 8, 1995, the United States entered into its first bilateral instrument for the protection of international cultural property, signing a memorandum of understanding ("MOU") with El Salvador. The MOU placed import restrictions on all of El Salvador's pre-Hispanic archaeological materials and continued without interruption the protection of Cara Sucia archaeological material, which had been protected on an emergency basis since 1987. The MOU was extended for a five-year period and amended effective March 8, 2000.

In Article I of the MOU the United States agreed to restrict the importation into the United States of archaeological material listed in an appendix ("Designated List") unless El Salvador certifies that such exportation is not in violation of its laws. The United States also agreed to offer for return to El Salvador any material on the Designated List forfeited to the United States. Article II set forth measures to be taken by each government to further protect El Salvador's cultural patrimony. Under Article II.A. El Salvador also agreed to use its best efforts to permit the exchange of its archaeological materials under circumstances in which such exchange does not jeopardize its cultural patrimony. The import restrictions agreed to in the MOU were effective upon publication by the U.S. Customs Service in the Federal Register on March 10, 1995, 60 Fed. Reg. 13,351 (March 10, 1995), as corrected. Excerpts below from the Federal Register notice explain the action being taken.

Further information, including the text of the U.S.-El Savador MOU and the Federal Register notice, is available at *http://exchanges.state.gov/culprop/esfact.html.*

---

* * * *

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably makes them targets of theft, encourages clandestine looting of archaeological sites, and results in their illegal export and import.

The U.S. shares in the international concern for the need to protect endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been pillage has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of museum, archaeological, and scholarly communities, was recognized by the President and Congress. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in deliberations resulting in 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)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub. L. 97–446, 19 U.S.C. 2601 et seq.). The spirit of the Convention was enacted into law to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance not only to the nations whence they originate, but also to greater international understanding of mankind's common heritage. The U.S. is, to date, the only major art importing country to implement the 1970 Convention.

During the past several years, import restrictions have been imposed on a emergency basis on archaeological and cultural

artifacts of a number of signatory nations as a result of requests for protection received from those nations.

Now, for the first time, import restrictions are being imposed as the result of a bilateral agreement entered into between the United States and a signatory nation. This agreement has been entered into in March 1995, pursuant to the provisions of 19 U.S.C. 2602. Accordingly, the Customs Regulations are being amended to reflect the imposition of the restrictions. Section 12.104g(a) is being amended to indicate that restrictions have been imposed pursuant to the agreement between the United States and the Republic of El Salvador.

* * * *

b. Canada

On April 10, 1997, the Government of the United States of America and the Government of Canada signed an agreement to protect archaeological and ethnological material that represents the aboriginal cultural groups of Canada. The agreement also included protection for historic shipwrecks. In a reciprocal provision, Canada recognized the existence of U.S. laws that protect archaeological resources and Native American cultural items as well as historic shipwrecks. Canada agreed to cooperate with the U.S. Government in recovering such objects that had entered Canada illicitly. The Federal Register notice publishing the U.S. import restrictions, 62 Fed. Reg. 19,488 (April 22, 1997), explained that the application of import restrictions was based on a determination that the cultural patrimony of Canada was in jeopardy from the pillage of the following: archaeological and ethnological material from (1) the Inuit (since 2000 B.C.), (2) the Subarctic Indian (17th Century A.D.), (3) the Northwest Coast Indian (since 10,000 B.C.), and (4) the Woodland Indian (from 9000 B.C.); archaeological material (1) of the Plateau Indian (dating from 6,000 B.C.) and (2) found (at historic shipwrecks and other underwater historic sites) in the inland waters of Canada as well as in

the Canadian territorial waters of the Atlantic, Pacific, and Arctic Oceans, and the Great Lakes; and ethnological material (dating from approximately 1700 A.D.) of the Plains Indian. The restrictions expired on April 9, 2002.

For further information, including the full text of the agreement and the Federal Register notice, *see http://exchanges.state.gov/culprop/cafact.html.*

---

c. Peru

On June 9, 1997, the U.S. and Peru signed an MOU placing import restrictions on pre-Columbian archaeological artifacts and Colonial ethnological materials from all areas of Peru. Previously, on May 7, 1990, the United States had taken emergency action to impose import restrictions on Moche artifacts from the Sipan archaeological region of northern Peru. The MOU continued the import restrictions on Sipan archaeological material without interruption. The MOU was extended for a five-year period and amended effective June 9, 2002.

The import restrictions agreed to in the MOU were effective upon publication in the Federal Register on June 11, 1997, 62 Fed. Reg. 31,713 (June 11, 1997). Excerpts below from the Federal Register notice explain the basis for the action being taken.

For additional information, *see http://exchanges.state.gov/culprop/pefact.html.*

---

* * * *

In reaching the decision to recommend extension of protection, the Deputy Director, United States Information Agency, determined that, pursuant to the requirements of the Act, with respect to categories of pre-Columbian archaeological material proposed by the Government of Peru for U.S. import restrictions, ranging in

date from approximately 12,000 B.C. to A.D. 1532, and including, but not limited to, objects comprised of textiles, metals, ceramics, lithics, perishable remains, and human remains that represent cultures that include, but are not limited to, the Chavin, Paracas, Vincus, Moche (including objects derived from the archaeological zone of Sipan), Viru, Lima, Nazca, Recuay, Tiahuanaco, Huari, Chimu, Chancay, Cuzco, and Inca; that the cultural patrimony of Peru is in jeopardy from the pillage of these irreplaceable materials representing pre-Columbian heritage; and that with respect to certain categories of ethnological material of the Colonial period, ranging in date from A.D. 1532 to 1821, proposed by the Government of Peru for U.S. import restrictions but limited to (1) objects directly related to the pre-Columbian past, whose pre-Columbian design and function are maintained with some Colonial characteristics and may include textiles, metal objects, and ceremonial wood, ceramic and stone vessels; and (2) objects used for religious evangelism among indigenous peoples and including Colonial paintings and sculpture with distinct indigenous iconography; that the cultural patrimony of Peru is in jeopardy of pillage of these irreplaceable materials as documented by the request.

* * * *

d. Mali

On September 23, 1993, the U.S. took emergency action to impose import restrictions on archaeological material from the Niger River Valley region and the Tellem burial caves of Bandiagara. On September 19, 1997, the Government of the United States and the Government of the Republic of Mali signed an MOU that continued without interruption the import restrictions placed on archaeological material from Mali. The United States and Mali extended the MOU for five years on September 19, 2002.

As explained in the Federal Register Notice implementing the import restrictions in the MOU, 62 Fed. Reg. 49,594 (Sept. 23, 1997), the action protected "archaeological material

from sites in the region of the Niger River Valley and the Bandiagara Escarpment (Cliff), Mali, dating from approximately the Neolithic period to approximately the 18th century, identifiable by unique stylistic features, by medium, and where possible, by historic and cultural context." The decision to impose import restrictions was based on "a determination that the cultural patrimony of Mali continues to be in jeopardy from pillage of irreplaceable materials representing Mali heritage and that the pillage is endemic and substantially documented with respect to sites in the region of the Niger River Valley and the Bandiagara Escarpment (Cliff) of Mali." For further information *see http://exchanges.state.gov/culprop/mlfact.html*.

e. Nicaragua

On June 16, 1999, the Government of the United States of America and the Government of Nicaragua signed an agreement to place import restrictions on certain archaeological material ranging in date from approximately 8000 B.C. through approximately 1500 A.D. and representing prehispanic cultures of the Republic of Nicaragua. The import restrictions went into effect on October 26, 2000, following the conclusion of an exchange of diplomatic notes between the two governments on October 20, 2000. As explained in the Federal Register Notice implementing the import restrictions in the agreement, 65 Fed. Reg. 64,140 (Oct. 26, 2000), the decision to impose import restrictions was based on a determination that:

> the cultural patrimony of Nicaragua is in jeopardy from the pillage of archaeological materials which represent its prehispanic heritage. . . . Ranging in date from approximately 8000 B.C. to approximately 1500 A.D., categories of restricted artifacts include, but are not limited to: figurines of stone, ceramic, shell, and metal; ceramic polychrome vessels, drums, and other small ceramic objects; stone vessels, stone statues, small stone artifacts,

> and stone metates (carved three-legged grinding stones); and jade and metal (gold) artifacts. These materials of cultural significance are irreplaceable. The pillage of these materials from their context has prevented the fullest possible understanding of the prehispanic cultural history of Nicaragua by systematic destruction of the archaeological record. Furthermore, the cultural patrimony represented by these materials is a source of identity and esteem for the modern Nicaraguan nation.

For further information, *see http://exchanges.state.gov/culprop/nifact.html*.

2. Definition of "Pillage"

On August 20, 1990, the Office of Legal Counsel, U.S. Department of Justice, responded to a request from the United States Information Agency ("USIA") concerning, among other things, the interpretation of the statutory term "pillage" as used in the Convention on Cultural Property Implementation Act. Memorandum for Alberto J. Mora, General Counsel, USIA, Re: Application of the Convention on Cultural Property Implementation Act, August 20, 1990.

At the time, USIA was entertaining a request from the Government of Canada—the first request made to the United States under the 1970 UNESCO Convention. Under § 303(a)(1)(A) of the act, the President's authority to impose import restrictions in response to the Canadian request was contingent, *inter alia,* on a finding that Canada's "cultural patrimony . . . is in jeopardy from the pillage" of its archaeological or ethnological materials. The term "pillage" is not defined in the convention or in the act or its legislative history. Comments from the general public and elsewhere suggested a narrow reading of the statutory term that would limit it to "looting" in the traditional sense. OLC concluded, however, that USIA has discretion to interpret the term "pillage" as applied to ethnological materials to encompass the removal of such materials through thievery and fraud.

C. PROTECTION OF WORLD CULTURAL AND NATURAL HERITAGE

1. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage

As a party to the United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention Concerning the Protection of the World Cultural and Natural Heritage, done at Paris November 23, 1972, entered into force December 17, 1975, 27 UST 37; TIAS 8226, the United States has, among other things, entered into agreements with other countries in keeping with Article 6 of the convention. Article 6 provided:

> 1. Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.
>
> 2. The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.
>
> 3. Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.

During the 1990s the United States entered into a memorandum of understanding ("MOU") to create a framework for cooperation for conservation, preservation

and/or management based in whole or in part on the convention with Venezuela, TIAS 11807, July 1, 1991; Costa Rica, TIAS 11793, October 8, 1991; and Mexico, June 10, 1998. In each case the MOU was entered into for the United States by the National Park Service of the Department of the Interior.

2. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

The United States actively participated in the negotiation of the International Institute for the Unification of Private Law ("UNIDROIT") Convention on Stolen or Illegally Exported Cultural Objects, approved June 24, 1995, at a diplomatic conference co-hosted by UNIDROIT and the Government of Italy. The Convention entered into force on July 1, 1998, initially among China, Ecuador, Lithuania, Paraguay and Romania. The text of the convention and current status information are available at *www.unidroit.org/english/conventions/1995culturalproperty/main.htm*.

The United States abstained from the vote adopting the convention text and has not signed it. A memorandum prepared by Harold S. Burman, Office of the Legal Adviser for Private International Law, U.S. Department of State, discussed key provisions of the convention, its relationship to the UNESCO convention discussed in C.1., *supra*, and U.S. concerns, as excerpted below, and available in full at 34 I.L.M. 1322 (1995).

---

* * * *

The International Institute for the Unification of Private Law ("UNIDROIT") Convention on Stolen or Illegally Exported Cultural Objects was completed at a Diplomatic Conference held in Rome in June. The Conference was hosted by the Italian Government and UNIDROIT, and was attended by over 70 countries, as well as a number of observer states and international organizations. The Convention seeks to reduce illicit traffic in cultural objects by expanding the rights upon which return of such objects can

be sought, and by widening the scope of objects subject to its provisions, in comparison to earlier conventions and treaties. An earlier Convention produced by the United Nations Educational, Scientific and Cultural Organization ("UNESCO") in 1970 has been joined by over eighty states, but has had only limited impact since, of the so-called "market" states, only the United States, Canada and Australia have become parties. In the 1980's, UNESCO asked UNIDROIT, which specializes in private law unification, to undertake preparation of a second treaty that might bring the remaining market states, principally those in Western Europe and Japan, into the treaty regime. The final convention was approved by 37 States in favor, 5 against, and 17 abstentions (including the United States).

The negotiations, as reflected by the Preamble, avoided some issues that had been previously debated at the United Nations, such as the balance between protection of national cultural heritage and the international dissemination of culture. Language was also included in the Preamble and in operative provisions with regard to special concerns about archeological sites and protection of objects from native and indigenous communities, primarily at the request of the United States, Canada and Australia.

The Convention only applies prospectively (Article 10). Its two major parts would establish (1) an obligation to return stolen objects, subject to the Convention's provisions, and (2) new grounds for return of illegally exported objects. The first major part, set out in Chapter II (Articles 3–4) covers return of stolen objects, and its provisions apply to both public and private claims.

While all States recognize some concept of "theft," and U.S. courts have applied foreign law in a variety of cases, the extent to which foreign legal concepts of theft would be applied under the Convention in U.S. courts will need to be considered. Leading cases in the United States today[1] would require a particularized

[1] See Government of Peru v. Johnson, 720 F.Supp. 810 (C.D. Cal. 1989); McClain v. U.S., 545 F.2d 988 (5th Cir. 1977) and 593 F.2d 658 (5th Cir. 1979).

analysis of foreign law to determine whether the legal concept of "stolen" is clearly set out in foreign statutes and applicable to a given case; U.S. courts generally have rejected claims for return based on foreign law absent such proof. While the United States was unsuccessful in its effort to remove a provision (Article 3(2)) which equates "illegally excavated" objects with "stolen," final drafting changes brought that provision closer to the American cases referred to above.

A significant departure from U.S. practice is that, under the Convention, stolen object claims may be subject to prescription (a period beyond which claims under the Convention cannot be maintained) and compensation for bona fide possessors who can establish due diligence. The final text did not retain diligence requirements for claimants, a point on which U.S. state laws vary. The impact of Chapter II is likely to be limited in U.S. cases, since the Convention allows States to continue to apply provisions of their domestic laws that are more favorable for claimants (similar to the operation of a remedial statute). Most U.S. states follow the old English nemo dat rule, in contrast to most civil law States; thus proof of theft in U.S. cases leaves few defenses for return, and compensation in most cases is not required. Since U.S. state law in most cases will remain more beneficial to claimants, Chapter II would have its principal impact on claims brought in other countries.

One issue regarding the meaning of "public collections" (the Convention grants special treatment to such objects) illustrated the difficulty of accommodating some American practices. The United States, unlike almost all other countries, has developed a system whereby over ninety percent of identified collections are created and held by private "non-profits" (primarily museums and research institutions), rather than by government controlled or financed institutions. Only after protracted negotiation was agreement achieved in Article 3(7) allowing coverage of American-type "non-profits."

The second major part of the Convention (Chapter III, Articles 5–7) is more of a departure from traditional U.S. practice, and more problematic in terms of eventual U.S. ratification, in that it provides for indirect enforcement of foreign export laws. The

United States unsuccessfully sought an option, at least for those States already party to the 1970 UNESCO Convention, to exclude Chapter III altogether, that is, not to enforce that part of the Convention applying foreign export law.

Only States can pursue claims under this part, and it more closely resembles public rather than private law. If a claimant State can prove violation of its laws "regulating the export of cultural objects for the purpose of protecting its cultural heritage" (defined in Article 1(b)), it must then move to the second level of proof (Article 5(3)), that removal of the object significantly impairs the State or community interests listed in the Convention, or is otherwise of significant cultural importance for that State. Rules under this part on compensation, due diligence, prescription, etc., while not the same, are generally similar to those affecting recovery of stolen objects.

Some source States had initially sought an internationally-recognized system of export certification, and alternatively a treaty-based presumption of illegality that would apply in the absence of an export certificate. The final language eliminated any such presumption. Also eliminated, at the urging of the United States and a number of other States, was a provision that would have allowed a forum State to refuse to return an object on the basis that it had as close a relationship with the object as did the requesting State. Language that would have indirectly limited the use of ordre publique as a grounds for States to refuse to comply was also dropped.

Under its general priorities provision (Article 13), the Convention would not apply to cases otherwise covered by treaties or other legally binding international instruments to which a contracting State is a party. This formulation would include, e.g., conventions that regulate the acquisition or protection of objects in wartime. Unaddressed in the Convention are other issues that may arise concerning objects taken during periods of hostilities or occupation, whether artistic, archival, or otherwise. The United States had sought clarification, but few States were willing to take a public position on the matter.

At this stage, most U.S. commentators have stated that unless a sufficient number of market States—other than those already a

party to the 1970 UNESCO Convention (i.e., other than Canada or Australia)—ratify the UNIDROIT Convention, it is premature to consider in detail the possible benefits or drawbacks of the Convention for the United States. At such time as there may be interest in exploring possible U.S. ratification, draft federal implementing legislation would be necessary. As was the case with the UNESCO Convention, it is assumed that such legislation would further refine recovery rights and procedures in the United States, including possible additional conditions for enforcement.

D. EDUCATIONAL EXCHANGE

The Fulbright Program, sponsored by the U.S. Information Agency ("USIA"), now the Bureau of Educational and Cultural Affairs of the U.S. State Department, provides for international educational exchanges "to enable the government of the United States to increase mutual understanding between the people of the United States and the people of other countries . . . and thus to assist in the development of friendly, sympathetic, and peaceful relations, between the United States and other countries of the world." The program was first established by legislation in 1946 and operates currently under the Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87–256, 22 U.S.C. § 2451.

Events of the 1990s led to executive agreements between the United States and foreign countries to establish new or expanded programs in a number of countries. In the 1991–1999 period, these included: South Africa (Feburary 17, 1997), Bulgaria (September 1992), Romania (July 30, 1992), and Czechoslovakia (January 14, 1991) (Following the creation of the separate Czech and Slovak Republics on January 1, 1993, that agreement continued to apply to the Czech Republic and a separate agreement was signed with the Slovak Republic on September 22, 1994.)

A news release issued at the time the United States and South Africa signed their agreement establishing the binational J. William Fulbright Commission for Education

Exchange between the Republic of South Africa and the United States of America is excerpted below. The full text is available at *www.state.gov/s/l/c8183.htm*.

Vice President Al Gore and South African Deputy President Thabo Mbeki signed an agreement in Capetown, South Africa, Feb. 17, establishing a binational Fulbright Commission to expand academic and professional exchanges between their two countries. The Commission will be governed by a Board consisting of an equal number of citizens of the United States and citizens of South Africa. The Commission office will be in South Africa.

The agreement aims to continue the large number and variety of educational and professional exchanges already carried on between the countries and to develop a specific program with the principal objective to encourage greater mutual understanding between the peoples of the Republic of South Africa and of the United States. The agreement calls for financial contributions to the program from both governments and for the new Commission to engage in private sector fund raising.

The Fulbright Program . . . functioned on a limited scale between the two countries from 1952 to 1994. Administered by USIA staff in the U.S. embassy in Pretoria, the Fulbright Program primarily has involved South Africans coming to the United States to study and engage in research. Since South Africa's historic 1994 elections, academic exchanges among Americans and South Africans have increased greatly.

* * * *

Cross-references

Hague Convention on Cultural Property in War and Hague Protocol, **Chapter 18.A.1.d.(3) & A.8** *(transmittal)*.

Chapter 15

Private International Law

A. COMMERCIAL LAW

1. United Nations Commission on International Trade Law ("UNCITRAL")

a. Electronic commerce

On December 16, 1996, the UN General Assembly approved the UNCITRAL-prepared Model Law on Electronic Commerce. UN General Assembly Resolution 51/162, U.N. Doc. A/RES/51/162. An additional article 5 *bis* was adopted in 1998. U.N. Doc. A/CN.9/450 (1998). The full text of the model law, with Guide to Enactment, is available at *www.uncitral.org/en-index.htm*.

The UNCITRAL Working Group on Electronic Commerce, at its thirty-fourth session, Vienna, February 8–19, 1999, issued a note by the Secretariat on uniform rules for electronic signatures. *See* A/CN.9/WG/IV/WP.80, dated December 15, 1998. This product grew out of the UNCITRAL thirtieth session in May 1997, when the working group was asked to prepare uniform rules on the legal issues of digital signatures and certification authorities. A Report on Private International Law Activities prepared by Harold S. Burman and Peter H. Pfund for the 92nd Annual Meeting of the American Society of International Law, April 2, 1998, noted that

> [t]he 1996 UNCITRAL model law on electronic commerce, which contains basic functional rules equating

> computer-based commercial activities with older paper world standards, adds computer era special requirements, such as attribution, allocation of risk, and default rules on when and where contractual events may be deemed to have taken place. The model law was increasingly used as a source for new law proposals both within states of the US and foreign countries, and now appear in a number of provisions in [National Conference of Commissioners on Uniform State Laws'] NCCUSL's fast moving efforts toward developing new computer law, both in the draft UCC Article 2B and the new draft Uniform Electronic Transactions Act.

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

A memorandum prepared by Mr. Burman dated April 30, 1999, commented further on implications of legal developments in electronic commerce. The memorandum, excerpted below, is available at *www.state.gov/s/l/c8183.htm*. *See also Digest 2001* at 784–85, 791 concerning negotiation of a model law adopted by UNCITRAL on July 5, 2001.

---

* * * *

International developments on the electronic commerce (Ecom) front are at a crossroads, and raise problems which may blur the line between public and private law. The economics of and globalization of commerce and telecommunications, and the opening up of ECom trade and services between countries and distant parties previously limited in their ability to engage in direct commerce, are pushing the need for new legal standards and new concepts of jurisdiction. The concept of physical "territory" as the basis either for regulation or application of law is itself proving to be difficult to apply in some cases. Existing "direct effects" theories for extraterritorial application of national laws may also no longer work.

In recent years, public law initiatives in this field have rested on expansion of trade, including liberalization of trade in services;

deregulation of telecommunications; U.S. proposed restraints on taxation of cross-border internet commerce, as well as avoidance of over-regulation, to allow market forces to determine future commercial and technological patterns; and benign acceptance up to this point of cross-border company operations, such as credit card systems, without agreement as to underlying territorial legal differences. Gaps, at least for now, have however grown between the EU and the US, on the intersection of electronic commerce and data rights, consumer protection, security standards, message authentication, cryptology export, and national security and law enforcement. These gaps are generating standoff s in international bodies such as the OECD, making consensus on common standards difficult. In turn, if these gaps remain, substantial progress on Ecom at organizations such as the WTO and UNCITRAL may prove difficult.

Multilateral negotiations on private law unification, for example, produced significant progress at UNCITRAL on international electronic funds transfers in 1992 and the now widely used UN Model Law on Electronic Commerce in 1996. As the unresolved problems in the public law arena however now begin to merge with private law issues, progress on the private law front has bogged down, as has been seen at the OECD and UNCITRAL with regard to work on electronic and digital signature systems.

As with the OECD, the biggest divide at UNCITRAL is between the "free market" states, including the U.S., who seek laws that leave wide room for market forces to drive commerce in a computer age, versus some EU, Asian and other states, who seek to substantially regulate this new commercial arena. Efforts to promote regulation in turn are often premised on acceptance of a particular technology, a development that the U.S. also opposes.

All of the above test the limits of private law unification in newly developing electronic practices. Older paradigms, such as sales of goods involved in the 1980 UN "Vienna" Convention (CISG), the negotiation of the 1995 UN Convention on independent guarantees and standby letters of credit, and others sought to harmonize existing legal standards and established commercial practices. To facilitate the coming age of computer commerce, new standards and new default principals [sic] of commercial law may

at times be needed many years—maybe decades—before the older paradigm could produce them.

At the same time, the effort to anticipate the market and its legal needs has its own hazards, such as that experienced in efforts to find consensus on electronic signature and message authentication systems. Given the laws of unintended consequences, untimely development of rules can restrict market development and work against new technological applications. It also appears unlikely for most areas of Ecom that there will be the alternative of "instant customary law", in which new technology applications have produced consensus around standards without delay, such as has occurred for some aspects of international space law. The path forward therefore may require a new vision.

* * * *

b. UN Convention on Direct Guarantees and Standby Letters of Credit

The 1995 UNCITRAL-prepared UN Convention on Direct Guarantees and Standby Letters of Credit was adopted by the UN General Assembly in Resolution 50/48, December 11, 1995, U.N. Doc. A/RES/50/48 (1996). The Secretariat's Explanatory Note is available in U.N. Doc. A/CN.9/431 (1996). The United States signed the convention on December 11, 1997. A summary of the convention's provisions prepared by Harold Burman, is set forth below. A more extensive commentary, prepared by Mr. Burman and another member of the negotiating team, James E. Byrne, Professor, George Mason University School of Law and Director, Institute of International Banking Law and Practice, Inc., is available at 35 I.L.M. 735 (1996); the text of the convention is reprinted in 35 I.L.M. 740.

---

* * * *

The Convention provides uniform rules for bank guarantees and standby letters of credit that are used today in a large portion of

international trade, investment and financial undertakings. By bridging differences between American letter of credit practice and European-based guarantee practice, the Convention would streamline the use of these financial undertakings and lower the cost of international transactions.

The Convention, importantly, also adopts the U.S.-led effort to gain international agreement on rules which favor financial instruments with a high assurance of payment, by limiting grounds on which either parties, banks or courts may dishonor them. This in turn allows the use of such instruments as collateral, which significantly enhances commercial transactions and trade.

Of equal importance, the Convention's provisions promote sound international banking practices. The negotiation of the Convention was fully coordinated with concurrent revisions to the private sector rules followed by banks in 140 countries in processing letters of credit, published by the International Chamber of Commerce. In addition, the U.S. positions were also coordinated with 1995 revisions to thte Uniform Commercial Code.

* * * *

. . . [The Convention's] most significant provisions are as follows:

Chapters I and II define the financial instruments to be covered by the Convention, and set out standards to determine internationality and other criteria, and provide rules of interpretation. The convention's standards provide a bridge between American letter of credit law and European-based bank guarantee law.

Chapters III and IV set out the rights, obligations and defenses of the three key parties to such transactions, applicants, issuers and beneficiaries, provide standards by which payment obligations are to be met and set out the closely related standards under which courts of contracting states can order non-payment of such instruments. The Convention adopts cross-border uniform rules for independent undertakings with regard to their creation and formation (Articles 7 and 8), transfer of a drawing right (Article 9) termination (Articles 11 & 12) and rights and obligations (Articles 13–19) which are compatible with those contained in

recent revisions to Uniform commercial Code Article 5, the governing uniform law among the states of the United States.

Articles 19 (exception to payment obligations) and 20 (provisional court measures) are the key provisions of the Convention. Together with other articles, they provide very narrow grounds on which payment can be dishonored, which in turn allows such instruments to have a wide usage in international commerce as collateral. This approach is also a key feature of U.S. domestic law.

Chapter VI, together with subparagraph 3 of Article 1 provides a uniform international rule on applicable law for instruments covered by the Convention, even where the particular instrument may not otherwise be subject to the remaining rules in a given case. Chapter VII provides typical final provisions on signature, ratification, termination, etc.

c. Model Law on Cross-Border Insolvency

The Model Law on Cross-Border Insolvency was adopted in the 30th session of UNCITRAL, in Vienna, May 12–30, 1997, *reprinted in* 36 I.L.M. 1386 (1997). Report of the 30th session of UNCITRAL, ANNEX I (U.N. Doc. A/52/17). *See also* "Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency," U.N. Doc. A/CN.9/442 (1997).

On December 4, 1997, Harold S. Burman testified before the Subcommittee on Administrative Oversight and the Courts, Senate Committee on the Judiciary. His testimony, urging statutory implementation of the model law, is excerpted below. Legislation has been introduced but not yet enacted.

The full text of Mr. Burman's testimony is available at *www.state.gov/s/l/c 8183.htm.*

---

* * * *

The [National Bankruptcy Revision] Commission ["NBRC"], which was established by Congress to provide recommendations for revisions to the United States Bankruptcy Code, reviewed the

recently completed United Nations Model Law on Cross-Border Insolvency and unanimously recommended that its provisions be incorporated as amendments to the United States Code. . . .

We are pleased to support the NBRC recommendation, and believe that its adoption will further the interests of fair treatment for investors, lenders and commercial borrowers across all borders, and will thus facilitate investment and trade. The direction taken by this Model Law is fully consistent with the needs of a globalized economy as well as business and corporate interests that now link many countries together. The provisions of the Model Law *were* adopted in a process that itself illustrates a new path for co-operation between the private sector, public authorities and international organizations. The process was begun several years ago by two years of meetings organized by private sector associations which involved judges, the private bar, government officials, commercial finance interests and others from over 30 countries. Those meetings developed a working consensus on achievable and practical goals that would facilitate cross-border cooperation and commerce by modernizing national insolvency law regimes.

That consensus was brought before UNCITRAL, a UN General Assembly body in whose work the United States has actively participated since its establishment in 1966. The Commission began work and in a record two year period completed the Model Law with the support of over 50 countries. The General Assembly endorsed the Model Law last month in New York, and recommended that states review their legislative regimes and incorporate these provisions as necessary, which can establish a global receptivity to cross-border commerce.

The United Nations Model Law in many respects parallels the openness to fair treatment for foreign and domestic interests alike adopted in the 1978 amendments to the U.S. Bankruptcy Code. If the United States takes the step now to incorporate these provisions, to the extent not already reflected in our Code, it will be a strong signal to other countries to actively consider taking the same step. Conversely, if we fail to do so it will send an equally negative signal, which is not in the U.S. interest.

Our support emphasizes four overall factors. First, wide adoption of the Model Law is good economics in an era of global

business relationships. Business concerns increasingly develop close linkage with a variety of production, labor, distribution, financing and market access entities across many borders. That has facilitated trade to the benefit of many countries. At the same time, it has given rise to an increasing vulnerability, where any one or more of these linked business entities comes under severe financial pressure. Left to existing national legal systems, this can now more often lead to collapse, loss of jobs, and loss of value in many of the related business entities. This occurs because under many existing legal systems, without waiting for cooperative efforts spanning the several countries involved, local assets are distributed preferentially to local creditors and the economic value, and jobs, of the enterprise are quickly dissipated. The Model Law's provisions would provide a platform on which to avoid those consequences.

Secondly, the type of insolvency law regime of a country seeking commercial finance for its various enterprises has become a "front-line" factor in risk assessment, and therefore the cost of credit that could be extended to that country. This is not only because of the need to calculate the extent of risk, but also now as a gauge of how much a country in fact has sought to align its local system with the needs of global economic relationships. Adoption of the Model Law's provisions would signal such an intent.

Thirdly, the Model Law regime hinges on active cooperation between the courts and administrators of each country involved. While American Courts have become increasingly open to such cooperation, legislative authority is necessary for that to happen in many countries. Encouraging cross-border cooperation between judicial and other authorities should have beneficial spin-off effects in other areas of mutual interest as well.

The fourth and last factor is our view that the United States should support this type of process in which private sector-led economic objectives, and private sector associations both played a large part in the international process. We believe there is a developing role for such market-based projects, especially in the area of commercial and trade law development, while under the umbrella of an international organization.

The Department has consulted throughout this process with major associations and the judiciary in the United States involved

in this area of law and practice, to ensure that both private sector and state concerns are addressed. . . .

d. Convention on the Limitation Period in the International Sale of Goods, With Protocol

On August 6, 1993, President William J. Clinton transmitted the United Nations Convention on the Limitation Period in the International Sale of Goods and 1980 protocol amending that convention, to the Senate for advice and consent to accession. *See* Department of State Public Notice 2133, "Entry into Force for the United States of the Convention on the Limitation Period in the International Sale of Goods, With Protocol," 60 Fed. Reg. 3484 (Jan. 17, 1995), which reproduced the consolidated text of the 1974 convention, as modified by the 1980 protocol. The convention entered into force for the United States on December 1, 1994. Excerpted below is the June 17, 1993, report of the Department of State to the President describing the terms and function of the treaty, which was included with the letter of transmittal. S. Treaty Doc. No. 103–10 (Aug. 6, 1993); the convention text is reprinted in 13 I.L.M. 949 (1974) and the protocol in 19 I.L.M. 698 (1980).

---

* * * *

THE PRESIDENT: I have the honor to submit to you, with the recommendation that they be transmitted to the Senate for its advice and consent to accession, the multilateral United Nations Convention on the Limitation Period in the International Sale of Goods, done at New York on June 14, 1974, together with the 1980 Protocol amending that Convention, done at Vienna on April 11, 1980.

Both the 1974 Convention and its amending Protocol were prepared by the United Nations Commission on International Trade Law (UNCITRAL), in whose work the United States actively participates. The 1974 Convention, as amended by the 1980 Protocol, (together referred to as "the Convention"), provides an

international statute of limitations for disputes concerning international sales of goods transactions covered by the Convention. The Convention would reduce the present uncertainty as to finality in international sales that arises because of differing national legal rules, and thereby reduce impediments to international trade. The Convention preserves the right of parties to a transaction not to be bound by the Convention's provisions.

This Convention is intended to be implemented together with the 1980 United Nations Convention on Contracts for the International Sale of Goods (UN Sales Convention), which entered into force for the United States on January 1, 1988. The UN Sales Convention has over 30 states parties.

To obtain conformity between the two conventions, the 1980 Protocol amending the 1974 Limitation Convention was negotiated at the same Diplomatic Conference at which the UN Sales Convention was adopted.

Commerce generally, and international commerce especially, depends on reasonable certainty of commercial practice and finality of transactions. The latter is achieved partly through statutes of limitation on disputes which unsettle past transactions. This has been accomplished to a considerable extent between the states of the United States by widespread adoption of the Uniform Commercial Code. On the international level, it is hoped that greater certainty can also be achieved through countries becoming party to the Convention.

In the absence of the Convention's uniform rules, sellers and buyers in international transactions face an array of limitation periods and related rules. Limitation periods range from 6 months in some countries for certain transactions to 30 years in others. As with domestic statutes of limitations, the Convention balances the need to permit claims to be heard with the need to protect commerce by providing a point of finality to transactions.

Both the 1974 Convention and the 1980 amending Protocol came in force on August 1, 1988. More states are expected to become party to the Convention following the success of the UN Sales Convention. Accession by the United States to the Convention should accelerate this process and contribute to greater harmonization of trade laws.

The House of Delegates of the American Bar Association adopted a resolution in August 1989 endorsing accession by the United States to the Limitations Convention. In May 1989, the Secretary of State's Advisory Committee on Private International Law, on which 11 major national legal organizations are represented, also endorsed U.S. accession to the Convention.

Both the American Bar Association and the Advisory Committee recommended, and I agree, that the United States upon accession should make a declaration, as provided for in Article XII of the 1980 Protocol, excluding a provision that draws upon national rules on conflicts of laws to determine the Convention's applicability in certain cases. By making the applicability of the Convention depend on the non-uniform laws of various countries, this provision of the amended Convention would partially defeat the uniformity which we seek to achieve.

I recommend therefore that the U.S. accession be subject to the following declaration: Pursuant to Article XII, the United States will not be bound by Article I of the Protocol.

In accordance with the 1980 Protocol, the United Nations Secretary-General has prepared a consolidated text of the 1974 Limitation Convention as amended by the 1980 Protocol. A copy of that consolidated text is enclosed for the information of the Senate.

The Convention will be self-executing and thus requires no federal implementing legislation. The Convention has no budgetary implications and does not require administrative support. The Convention's effect is limited to foreign commerce of the United States.

* * * *

In testimony before the Senate Foreign Relations Committee, October 26, 1993, Harold S. Burman observed:

> One feature that we think should be noted is that the Convention preserves freedom of choice for individual parties to a contract, both in their ability to vary most provisions of the Convention by agreement, and in their ability to exclude the Convention altogether from applying

to their sales transactions. At the same time, the Convention creates a base line on the law on limitations for international transactions that is generally consistent with modern commercial law—which is a forward step and one fully supportive of our commercial and trade interests.

The full text of Mr. Burman's testimony is available at *www.state.gov/s/lc8183.htm*.

e. Procurement of Goods, Construction, and Services

The United States participated in the negotiation of the UNCITRAL Model Law on Procurement of Goods and Construction adopted by UNCITRAL in 1993 ("1993 model law"). U.N. Doc. A/Res/49/54 (1995). The following year, the UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment ("1994 model law") added provisions covering international procurement of services. Texts of the two model laws are available at *www.uncitral.org/english/texts/procurem/procurementindex.htm*.

Excerpts below from commentary prepared by Don Wallace, Jr., chief U.S. delegate to the Working Group on Insolvency Law (formerly the Working Group on the New International Economic Order ("NIEO")), in 1992, describe key issues in the 1993 model law. 1 Public Procurement Law Review 406 (1992); *see also* 3 Public Procurement Law Review CS2 (1994).

---

* * * *

The NIEO Working Group of UNCITRAL . . . began work on a draft model law on public procurement in 1988 and finished its work on July 2, 1992. The draft law along with a commentary (or guide to legislators) will be submitted to the full Commission for its approval at its plenary session in Vienna in May 1993. It is hoped that the draft will serve as a model for those governments wishing to adopt or modernize their public procurement law.

The model law deals with public procurement of goods and civil works (consultant services are not currently included but may be added [*see* 1994 model law]) and is so drafted that it may be adapted to any sector of the economy including military procurement. The law addresses procurement by any government agency and may apply to local governments and parastatals. It applies to both domestic and international procurement. It specifies six methods of procurement, and makes provision for bid protests (called the "right to review").

It is appropriate first to say a word or two about some of the more distinctive features of the model law. Article 8 *ter* of the draft provides that "suppliers and contractors" (defined to include potential suppliers and contractors) are eligible to bid or otherwise participate in all methods of procurement "without regard to nationality" unless the procuring entity decides otherwise. I believe this is a considerable innovation for a model national law. Thus, the law has no definition of a "foreign" individual or entity; rather the procuring entity will have to define, for example, "domestic" bidders if it wishes to limit bids to them. A procuring entity may be bound to limit procurement to a certain group of nations, for example under a regional treaty, and it is, of course, allowed to do so by the model law. It may be noted that this "international" preference applies to all methods, even to single-source procurement.

In some ways, the most difficult article for the working group has been Article 7 and its new companion Article 7 *bis*. These articles specify the six methods of procurement covered by the law: tendering proceedings (formal competitive bidding), two-stage tendering, requests for proposals, competitive negotiation, request for quotations ("shopping") and single-source procurement. Tendering proceedings are the preferred method, and a record must be made by a procuring entity before any other method may be used. (The decision to do so may also be subject to approval by a higher level of government authority). Article 7 *bis* specifies the conditions under which each of the remaining methods may be used. In the case of two-stage tendering, requests for proposals, and competitive negotiation (and it may be that not all governments will adopt all three methods in their law), the conditions are identical, the principal one being inability to "formulate detailed

specifications." The "urgent need" and "catastrophic event" (one thinks of Hurricane Andrew) are shared with the three methods just noted. Significant again is the requirement in Article 7(5) calling for a record "of the grounds and circumstances on which [the procuring entity] relied to justify the use of [a] . . . particular method of procurement."

With respect to competitive bids, it may be of interest that the working group dropped any provision for alternate bids. Article 12 makes clear that bidding should be open to all, and only in special circumstances may bids be sought from restricted lists, referred to as "particular suppliers or contractors selected" by the procuring entity. In the latter case the number selected must be sufficient to ensure "effective competition."

The final chapter of the law deals succinctly and cleanly with "right to review," available with respect to any "breach of a duty" imposed by the law. Excluded from the scope of review are certain discretionary decisions, such as the selection of the method of procurement, a decision to reject all tenders and some others. Administrative review is spelled out in some detail and provision is made in Article 41 for "suspension of procurement proceedings" for seven calendar days, although the suspension may in turn be waived in the case of "urgent public interest." Article 40 provides for judicial review in all cases where a country's law calls for it, and suggests that it be provided in those countries where it is not.

f. Receivables financing

On March 3, 1995, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") wrote to the Department of State "recommend[ing] that UNCITRAL proceed with a project to draft a model receivables financing law for adoption by nations." This unanimous request from NCCUSL was a primary factor in U.S. support for the UNCITRAL Convention on the Assignment of Receivables in International Trade (*see Digest 2003* at 854–55) and the UNIDROIT Convention on International Interest in Mobile Equipment (*Id. at* 848–54).

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

---

* * * *

The situation regarding receivables financing that was faced some forty years ago at the interstate level is similar to the situation regarding receivables financing arising now at the international level. The solution proposed by the Conference in cooperation with the American Law Institute for this country was to prepare a body of law that could be enacted, and that was enacted, by each of the states. It was unnecessary to prepare or propose any overarching federal legislation. In the international setting regarding receivables financing, we recommend a similar approach.

UNCITRAL's primary objective should be the preparation of a model law for enactment by nations as part of their corpus of law. It is in their interest to have a body of law that provides a sound basis for receivables financing. To the extent that any nation has such a body of law, suppliers of goods or services on unsecured credit will have access to a secondary credit market in which they may obtain funds by offering pools of receivables as collateral to secure loans. This form of receivables financing stimulates economic activity by facilitating the primary sale of goods and services.

UNCITRAL could provide a distinct and valuable service to the international community by formulating and promulgating a sound model receivables financing law for national adoption, so that the economic value of receivables financing can be realized even in credit markets within a nation. With that legal base, international credit markets will also be well served through increased primary sales and secondary level secured credit. Conversely, the absence of a sound legal base in the laws of the several nations will hinder the development of a satisfactory body of international economic law.

Three fundamental legal risks threaten the integrity of receivables financing, whether within a nation or internationally: (1) the risk that assignments will not be deemed valid and binding on debtors, (2) the risk of bankruptcy or insolvency of the assignor and the ensuing claim that the receivables are property of the

bankrupt's estate to be distributed to general creditors of the bankruptcy, and (3) the risk of conflicting claims to the same pool of receivables. The most important of these risks is the bankruptcy risk, but comprehensive solution to the bankruptcy risk is likely to include substantial resolution of the validity and priority risks as well.

If an assignor becomes bankrupt, the nation in which the assignor is located will probably prescribe the law governing the marketing and distribution of the assets of the assignor's estate. In cases in which the receivables have been absolutely assigned, it is vitally important that the assigned receivables not be captured for the benefit of unsecured creditors in the administration of the assignor's estate. As you may know, that issue arose in the United States recently, even after all these years, and to date has not been fully resolved. To achieve the desired result, the bankruptcy law governing the assignor's estate and the law governing receivables must recognize that absolute assignments are valid and the assignments divest the assignor of ownership of the receivables. In the event that more than one nation asserts bankruptcy power, rules of private international law will determine which nation has that jurisdiction.

The bankruptcy risk and risk of competing claims to receivables raise essentially "property"-type legal issues . . . International commercial law has wisely tended to address "contract"-type issues while avoiding a "property"-type analysis.

This is reflected clearly in the Convention on Contracts for the International Sale of Goods. Article 4(b) declares explicitly that the Convention is not concerned with the effect that a contract of sale may have on the property in the goods sold. The Factoring Convention stopped short of addressing property.

The 20 January 1995 draft refers to the Sales Convention and to the Factoring Convention, which were framed by a "contract"-type analysis. However, any law establishing a minimally satisfactory framework for receivables financing cannot be viewed in such a narrow context. Fundamental rules of property must be prescribed. Experience teaches that in that context, a model law for domestic enactment is preferable to an international convention.

* * * *

2. International Institute for the Unification of Private Law ("UNIDROIT")

a. Principles of International Commercial Contracts

The United States participated in the working group charged with developing the Principles of International Commercial Contracts approved by the UNIDROIT Governing Council in 1994. In 1997 the United States became a member in the working group to consider an enlarged second edition. A Report on Private International Law Activities prepared by Harold S. Burman and Peter H. Pfund for the 92nd Annual Meeting of the American Society of International Law, April 2, 1998, noted that, as part of the UNIDROIT work program for 1999–2001, "[t]he now widely used 1994 UNIDROIT 'Principles of International Commercial Contracts,' which merge common law and civil law contract law principles, will be updated in a four-five year process by considering new provisions in the following areas: agency law, assignments, third party rights, limitation periods, and possibly electronic contracting." The second edition was approved by the Governing Council in April 2004. Both the 1994 and a 2004 edition are available at *www.unidroit.org/english/principles/contracts/main.htm*.

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

b. Franchising

In 1998 the Governing Council of UNIDROIT authorized publication of its Guide to International Master Franchise Arrangements. The Guide was the first publication of its kind issued by UNIDROIT. As stated in the introduction, the Guide "confirms the intention of the organization to expand its activities to cover also alternative approaches to the unification of law in addition to the more traditional approach of preparing and adopting prescriptive legal norms in the

form of international conventions." *See* Guide at xxx. The Governing Council had established in 1993 a Study Group on Franchising, of which the United States was a member, to examine different aspects of franchising and indicate to the Institute what further actions would be suitable. The Study Group concluded that this subject did not lend itself to an international convention or uniform law, because such an approach would lack flexibility and might hamper the development of the franchising industry. The Study Group consequently recommended to the Council that work on a guide be undertaken, and the Council endorsed this recommendation. The Guide offers a comprehensive examination of the whole life of a master franchise arrangement, from negotiation and drafting to the end of the relationship and its effects. It deals with the relations between and among the franchisor, sub-franchisor and franchisee. A description of the Guide, including the table of contents, and information on ordering copies, are available at *www.unidroit.org*.

3. Jurisdiction and Judgments

a. Negotiation of Hague Conference on Private International law convention

In May 1992 the United States proposed that the Hague Conference place on its agenda consideration of a convention on jurisdiction and the recognition/enforcement of foreign judgments in civil and commercial matters in a letter from Edwin Williamson, Legal Adviser of the U.S. Department of State, to Georges Droz, Secretary General of The Hague Conference on Private International Law, May 5, 1992.

The full text of Mr. Williamson's letter, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

For some time the Department of State has been concerned by the anomaly resulting from the large number of countries party, as is

the United States, to the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the few successful conventions dealing with the recognition and enforcement of judgments. The United States is a party to no convention or treaty dealing with the recognition and enforcement of judgments.

. . . The United States would like to propose that The Hague Conference resume work in the field of recognition and enforcement of judgments with a view to preparing a single convention to which Hague Conference Member States and other countries might become parties and that would enter into force only between ratifying or acceding States that agree that it should enter into force as between them.

* * * *

. . . As the Hague Conference includes among its Member States the Member States of the European Community and those of the European Free Trade Area, the organization seems especially suited to be the forum for the preparation and negotiation of a convention that would involve the participation of these States and the organization's other Member States—from many regions of the world including Eastern Europe, North America, Central and South America and the Far East. Much of the research and cooperation that went into preparation and negotiation of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and its Supplementary Protocol will be generally useful in further work by the Hague Conference in this field. That Hague Convention was in effect superseded by subsequent events—the Brussels Convention that is obligatory among Member States of the European Community and more recently the Lugano Convention between Member States of the European Community and the European Free Trade Area. While taking account of the 1971 Hague Convention, we would propose that The Hague Conference build on the Brussels and Lugano conventions in seeking to achieve a convention that is capable of meeting the needs of and being broadly accepted by the larger community represented by the Member states of The Hague Conference. For example, it appears that it might be possible to

accept certain of the bases of jurisdiction and bases for recognition and enforcement of judgments set out in the Brussels and Lugano Conventions and thereby make provision for a generally accepted system for use in Europe and beyond. However, other aspects of these Conventions may not be so broadly acceptable and would need change to accommodate the needs and preferences of countries from other regions of the world than Western Europe. It seems to us that we need not necessarily choose between a *traité simple*, dealing essentially only with those judgments that are entitled to recognition and enforcement in party States, and a *traité double* also dealing with permissible bases of jurisdiction for litigation involving persons or entities habitually resident in party States. We believe that there should be consideration of the possibility for party States to utilize jurisdictional bases for litigation that are not designated as permissible or exorbitant by the convention. So long as such jurisdictional bases are not excluded as exorbitant, judgments based on them would not be entitled to recognition and enforcement under the convention, but party States would remain free to recognise and enforce them under their general law.

* * * *

The first session of a Hague Conference special commission on this topic took place in June 1997. The second negotiating session ended March 18, 1998. On that date, David R. Andrews, Legal Adviser of the U.S. Department of State, addressed the current state of negotiations in remarks to the Joint Conference of the London Court of International Arbitration and the American Arbitration Association, in Miami, Florida.

The full text of Mr. Andrews' remarks, excerpted below, is available in the LCIA International Arbitration Newsletter, August 1998. *See also* Jeffrey D. Kovar, "*A Convention on Jurisdiction and the Enforcement of Foreign Civil Judgments?*" International Law News, Summer 1999, at 14.

---

* * * *

With the continuing expansion of international trade and commerce, and the phenomenal growth in international telecommunications, we are riding the crest of a social and economic revolution as profound as the industrial revolution of the 19th Century. Our domestic economies are rapidly evolving into global economies.

* * * *

With this growth in international commerce and human contacts inevitably comes a growth in civil disputes, but the world's means of dispute resolution are not evolving at the pace of international trade law and institutions or the Internet. While arbitration has proved very effective at resolving an increasing number of international commercial disputes, it is not appropriate for all legal disputes or for all parties. If we are to avoid limiting or distorting the globalization of the economy, we must make sure that the world's judicial systems cooperate in providing remedies to international businesses.

European Common Market countries recognized very early how essential an integrated system for the recognition and enforcement of judgments was to their economic integration. They made accession to the Brussels Convention a requirement for entry into the EC and later the EU. Today European businesses enjoy the security of knowing that a judgment rendered by a court in one country of the European Union will be enforced with minimal procedural requirements in the courts of the 15 other EU states and the remaining EFTA states.

For reasons related to the federalist structure of the United States, the United States Supreme Court has also recognized the importance of enforcing foreign judgments in the 1895 case of *Hilton v. Guyot* [159 U.S. 113 (1895)]. In *Hilton*, the Supreme Court found that foreign judgments are entitled to recognition and enforcement in the courts of the United States on the basis of the principle of comity, provided they meet general requirements of due process.

Unfortunately, piecemeal solutions are not effective on a global basis, and raise their own inequities. The Brussels Convention, for example, generally only addresses jurisdiction and enforcement of

judgments between EU *domiciliaries*, but it also discriminates against persons and companies not domiciled in the EU.

* * * *

As for U.S. practice, although U.S. courts provide a hospitable forum for foreign judgment holders—at least those from countries with well-established and independent judicial systems that assure basic due process—there is little reciprocity in other countries for persons holding a valid judgment from a U.S. court. In fact, the courts of many countries cannot enforce the judgments of a foreign court unless there is a treaty obligation to do so. And, as I said earlier, the United States is not a party to any such treaties.

The lack of reciprocity and perception of unfairness cannot continue indefinitely. . . .

* * * *

The legal and policy issues confronting the negotiation of a global judgments convention are daunting. As a threshold matter, the Hague Conference member states have decided to attempt to prepare a convention that will address not only the recognition and enforcement of judgments, but will also set out required and prohibited grounds of jurisdiction over foreign defendants.

Clearly, a convention that simply set up rules for recognizing and enforcing judgments would most closely parallel the existing U.S. system of comity. (In the language of the negotiations, such a convention would be called a "simple" or a "single" convention.) However, we and other countries will seek to exclude grounds of jurisdiction that appear unreasonable, and forms and measures of damage viewed as excessive or otherwise unacceptable will be examined.

An international judgments convention that addressed only the recognition and enforcement of judgments, without addressing jurisdiction, would be perceived as opening the door to unfairness. While the New York Convention is not so limited, agreements to arbitrate represent the choice of both parties. Because the jurisdiction of national courts depends upon the choice of the plaintiff and local law, a convention simply providing for the recognition

and enforcement of all foreign judgments can afford only limited protection to defendants.

* * * *

The Brussels Convention creates a very rigid framework of required grounds of jurisdiction, and effectively prohibits courts from assuming jurisdiction against EU *domiciliaries* that are not among the required grounds. (It is called a "double" convention.)

The Brussels Convention has a list of required grounds of jurisdiction that is both broad and narrow. In certain applications it would violate constitutional due process limitations in the United States that protect the defendant (for example, the Brussels Convention permits jurisdiction over a tortfeasor in whatever country the effect of the tort is felt). The Convention also omits (and therefore prohibits) jurisdictional grounds that are well known in this country (for example, "doing business" jurisdiction).

It is natural for European countries to prefer their approach, which works well for them. However, it would not be reasonable to expect that such a system could be applied on a world-wide basis. While the approach may work within the confines of the EU—where countries are increasingly integrating and share an historic legal culture—a global agreement must be able to take into account the significant differences in the legal systems that exist outside the EU.

* * * *

It is no secret that U.S. "long-arm" and "tag" jurisdiction are not favored abroad. Nor do foreign governments appreciate our courts' awards for punitive and treble damages. It may even prove difficult to obtain acceptance of the common law principle of judicial restraint known as *forum non conveniens* by civil code countries unfamiliar with this type of judicial discretion.

* * * *

So, how can we structure a successful convention?

One proposal is to take the approach of the Brussels Convention, and negotiate a convention with an exhaustive list of required grounds of jurisdiction, all other grounds of jurisdiction

being prohibited. This does not appear realistic to us. The Brussels Convention was originally operative only among civil law countries with quite similar civil codes. This would not be the case for a global convention.

In our view, a more workable alternative would be for the convention to present a list of required and a list of prohibited grounds of jurisdiction, that do not purport to be exhaustive. The convention would therefore permit, but not benefit, any grounds of jurisdiction not listed. (Such a convention is currently referred to as a "mixed" convention.) U.S. courts would have to hear cases against persons and entities domiciled in a party state based on the required grounds, and judgments from U.S. courts based on the required grounds would be enforceable in other states party as a matter of treaty obligation. U.S. courts would refuse to hear cases invoking jurisdiction based on prohibited grounds of jurisdiction.

Litigation based on grounds of jurisdiction not listed in a mixed convention would not be barred, but recognition and enforcement under the convention would not be possible. Recognition and enforcement would only be available under the general law and comity of the requested country.

Whether or not the Hague convention will be a double or mixed convention has not yet been decided. We hope to see consensus on a mixed convention by the end of the special commission negotiating session next fall.

There are also questions of fundamental fairness that inevitably arise when considering the recognition of foreign judgments from a widely disparate group of countries. Some effort will have to be made, for example, to ensure that the convention takes into account the diversity of judicial systems represented by the various parties, and provides a mechanism that allows the recognition and enforcement of only those judgments that were the result of fair proceedings. For example, a state or state-owned entity should not be able to enforce a judgment against a debtor where the legal proceeding was subject to undue influence by the state.

In the United States, we will also have to grapple with constitutional due process requirements, as well as federalism concerns. Because due process limitations cannot be overcome by treaty or statute, they will constrain our negotiating latitude.

None of these difficult considerations should deter us from pursing the negotiation of a multilateral convention. . . .

* * * *

b. Enforcement of judgments in U.S. courts

(1) Due process

Two cases in 1999 addressed the requirement in U.S. law that judgments obtained in foreign courts can only be enforced in the United States if the judgment was obtained consistent with due process of law.

In *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1999), the court of appeals affirmed a lower court decision that judgments obtained by Bank Melli Iran and Bank Mellat ("the Bank") against Shams Pahlavi, the sister of the former Shah of Iran, in the tribunals of Iran could not be enforced. The court agreed that Pahlavi could not have obtained due process of law in the courts of Iran and rejected arguments of the Bank that provisions of the Algiers Accords exempted claims related to the Shah's assets from the requirement for due process in U.S. Courts. Footnotes have been omitted from the excerpts that follow.

---

* * * *

Pahlavi's major bulwark against the Banks' attack is her assertion that the judgments cannot be enforced because she could not have had due process in Iran during the period that those judgments were obtained against her. That simple but crucial fact, she says, precludes enforcement of the Banks' judgments on any theory. We agree with her premise, and, on the record of this case, we agree with the district court's conclusion as well.

It has long been the law of the United States that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the basics of due process. *See Hilton*, 159 U.S. at 205–06, 16 S. Ct. at 159. As the Restatement of the Foreign

Relations Law of the United States succinctly puts it: "A court in the United States may not recognize a judgment of a court of a foreign state if: (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law. . . ." § 482(1)(a) (1987).

We are aware of no deviation from that principle. In fact, as we have already shown, it was expressly incorporated into the Foreign Money-Judgments Act. Cal. Civ. Proc. Code § 1713.4. . . . It can hardly be gainsaid that enforcement will not be permitted under California law if due process was lacking when the foreign judgment was obtained. Faced with that ineluctable proposition, the Banks argue that the Algerian Accords have somehow elided the due process requirement from the law of the United States as far as Pahlavi is concerned. With that we cannot agree.

The Algerian Accords do provide that Iran can bring actions to recover any of its assets from the family of the former Shah. *See Declaration of the Government of the Democratic and Popular Republic*, Point IV, para. 12, *reprinted in* Dep't St. Bull., Jan. 19, 1981, at 3 ("General Declaration"). They also provide that in litigation against the Shah's family "the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law." *Id.* at Par. 14. It is upon this language that the Banks rest their claim that the United States courts cannot consider whether the judgments were obtained in accordance with due process. That is a foundation that crumbles under the weight the Banks seek to place upon it.

It is true that "the clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji Amer., Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S. Ct. 2374, 2377, 72 L. Ed. 2d 765 (1982) (citation omitted). Where the Banks' argument goes awry is in the suggestion that the language in question removes due process considerations from the purview of the United States Courts. In the first place, it is notable that the Accords eliminate

certain defenses—sovereign immunity and the act of state doctrine —but otherwise provide that enforcement of judgments shall be "in accordance with United States law." That law, of course, includes the due process requirement which we have already delineated.

Secondly, when Warren Christopher, then the former Deputy Secretary of State and one of the chief architects of the Algerian Accords, addressed the concerned members of the Committee on Foreign Affairs of the House of Representatives in 1981, he assured them that "Iran's claims to the property of the Shah and his family will have to be adjudicated in U.S. courts in full accordance with due process of law." *Iran's Seizure of the United States Embassy: Hearings before the House of Representatives Committee on Foreign Affairs*, 97th Cong., 1st Sess. 149 (1981). It would be most surprising if what he really meant was that due process would be applicable if the initial action were brought in the courts of the United States, a rather obvious point, but that those same courts would be expected to enforce any judgment obtained in Iran, regardless of due process considerations. Absent strong evidence to the contrary—evidence not present in this record—the only reasonable inference is that the United States intended that enforcement "in accordance with United States law" include the due process requirements that are usually demanded by our courts when they review foreign judgments.

Finally, a construction of the Algerian Accords that permitted the taking of assets from a resident of this country by means of a judgment obtained without due process of law would raise grave questions about the enforceability of that part of the Accords. That question would be lurking in the case were we to accept the position that the Banks argue for. *See Boeing Co.*, 771 F.2d at 1284 (regarding lurking constitutional issues in the Accords); *cf. Dames & Moore v. Regan*, 453 U.S. 654, 688–89, 101 S. Ct. 2972, 2991, 69 L. Ed. 2d 918 (1981) (court upholds Algerian Accords but notes that enforcement may leave residual constitutional issues, at least as against the United States Government.) We see no reason to stretch the language of the Accords and thereby create those questions because we have no reason to think that the Accords were intended to change the law of this country

in that backhanded a fashion. Thus, we hold that attempts to enforce judgments under the Algerian Accords are not exempt from due process defenses.

Having so held, we are left with the question of whether the district court properly granted Pahlavi summary judgment on the due process issue. That is, did she show that she could not get due process in Iran? On this record, the answer is yes. . . .

* * * *

The evidence in this case indicated that Pahlavi could not expect fair treatment from the courts of Iran, could not personally appear before those courts, could not obtain proper legal representation in Iran, and could not even obtain local witnesses on her behalf. Those are not mere niceties of American jurisprudence. . . . They are ingredients of basic due process.

* * * *

In *S. C. Chimexim S.A. v. Velco Enterprises Ltd*, 36 F. Supp. 2d 206 (S.D.N.Y. 1999), Chimexim sought to enforce in the Southern District of New York a judgment rendered in its favor by a tribunal in Bucharest, Romania. Following a description of Romania's government, and a summary of the underlying facts in the case and the proceedings in Romania, the court concluded that "the Romanian judicial system comports with the requirements of due process." The court's analysis is excerpted below (footnotes omitted).

---

* * * *

. . . The seminal case in the area of enforcing foreign judgments, *Hilton v. Guyot*, explained the doctrine of comity as follows:

> No law has any effect . . . beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory . . . by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call

> the "comity of nations". . . . [Comity] is the recognition which one nation allows within its territory to the . . . judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of persons who are under the protection of its laws.

159 U.S. at 163–64. The Supreme Court in *Hilton* held that if the foreign forum provides a full and fair trial before a court of competent jurisdiction, "under a system of jurisprudence likely to secure an impartial administration of justice . . . and there is nothing to show either prejudice . . . or fraud in procuring the judgment," the judgment should be enforced and not "tried afresh." *Id*. at 202–03.

* * * *

The materials submitted to the Court as well as the Court's own research demonstrate that the Romanian judicial system comports with the requirements of due process. Velco's sweeping allegation that the Bucharest Judgment is unenforceable because the "Romanian judicial system is incompatible with due process" (Velco Mem. at 10) is rejected, as a matter of law. . . .

The record establishes the following:

First, the Romanian government and its judicial system have undergone extensive reform since the fall of the Communist regime in 1989 and the adoption of the Romanian Constitution in 1991. . . .

Second, the Romanian judicial system now has the earmarks of an independent system that is capable of duly administering justice. There is a Constitution that sets forth certain due process guarantees, including procedural due process. There is a Judiciary Law that establishes the judiciary as an independent branch of government. There is judicial tenure for at least some judges. There are three levels of appellate review, and in the instant case Velco has taken advantage of that right to appellate review.

Third, as expert testimony submitted by Chimexim demonstrates, due process in fact is provided under Romanian law. . . . Velco failed to submit any expert opinion suggesting that

Romanian tribunals are not impartial or that Romanian civil courts do not provide litigants with due process.

Finally, the United States entered into a trade relations treaty with Romania in 1992, which provided that:

> nationals and companies of either [the United States or Romania] shall be accorded national treatment with respect to access to all courts and administrative bodies in the territory of the other [country], as plaintiffs, defendants or otherwise. They shall not claim or enjoy immunity from suit or execution of judgment, proceedings for the recognition and enforcement of arbitral awards, or other liability in the territory [of either country] with respect to commercial transactions.

The language of the trade agreement demonstrates that the United States was willing to recognize Romania's judicial system.

On the basis of this record, which includes the unrebutted affidavits of Chimexim's expert witnesses, I can only conclude that Chimexim has met its burden of demonstrating that the Romanian judicial system comports with the requirements of due process.

As noted, the record does demonstrate that the Romanian judicial system is far from perfect. As Velco points out, "corruption remains a concern" in Romania and there "is some evidence that [due process] guarantees are not always accorded." No judicial system operates flawlessly, however, and unfortunately injustices occur from time to time even in our own system. Velco's general (and conclusory) assertions are not sufficient to create a genuine issue of fact that Romania's judicial system as a whole is devoid of impartiality or due process.

* * * *

(2) Public policy

In *Southwest Livestock and Trucking Company, Inc. v. Ramon*, 169 F.3d 317 (5th Cir. 1999), the court of appeals vacated a district court decision refusing to recognize a judgment obtained in Mexico. Southwest Livestock argued that the

Mexican judgment in favor of Ramon, which required it to satisfy its debt and pay interest at 48%, violated Texas usury laws. The federal court noted that in this case it "must apply Texas law regarding the recognition of foreign country money-judgments." Excerpts below from the decision explain the court's conclusion that the judgment should be recognized.

---

* * * *

Under the Texas Recognition Act, a court must recognize a foreign country judgment assessing money damages unless the judgment debtor establishes one of ten specific grounds for nonrecognition. . . . Southwest Livestock contends that it established a ground for nonrecognition. It notes that the Texas Constitution places a six percent interest rate limit on contracts that do not contain a stated interest rate. . . . It also points to a Texas statute that states that usury is against Texas public policy. . . . Thus, according to Southwest Livestock, the Mexican judgment violates Texas public policy, and the district court properly withheld recognition of the judgment. . . .

* * * *

To decide whether the district court erred in refusing to recognize the Mexican judgment on public policy grounds, we consider the plain language of the Texas Recognition Act. . . . Section 36.005(b)(3) of the Texas Recognition Act permits the district court not to recognize a foreign country judgment if "*the cause of action* on which the judgment is based is repugnant to the public policy" of Texas. . . . This subsection of the Texas Recognition Act does not refer to the judgment itself, but specifically to the "cause of action on which the judgment is based." Thus, the fact that a judgment offends Texas public policy does not, in and of itself, permit the district court to refuse recognition of that judgment. . . .

In this case, the Mexican judgment was based on an action for collection of a promissory note. This cause of action is not repugnant to Texas public policy. . . . Under the Texas Recognition Act, it is irrelevant that the Mexican judgment itself contravened

Texas's public policy against usury. Thus, the plain language of the Texas Recognition Act suggests that the district court erred in refusing to recognize the Mexican judgment.

* * * *

[Furthermore,] [d]ifferent considerations apply when a party seeks recognition of a foreign judgment for defensive purposes [rather than using the foreign law offensively]. As Justice Brandeis once stated:

> The company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another state. The right which it claims should be given effect is set up by way of defense to an asserted liability; and to a defense different considerations apply. A state may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another state, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.

Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 160, 52 S. Ct. 571, 576, 76 L. Ed. 1026, (1932); *cf. Resource Sav. Assoc. v. Neary*, 782 S.W.2d 897, 900 (Tex. App.—Dallas 1989, writ denied) (noting that because a party sought recognition of a foreign judgment for defensive purposes different considerations applied, but refusing to recognize the foreign judgment nonetheless). . . .

* * * *

We are especially reluctant to conclude that recognizing the Mexican judgment offends Texas public policy under the circumstances of this case. The purpose behind Texas usury laws is to protect unsophisticated borrowers from unscrupulous lenders. *See Woods-Tucker*, 642 F.2d at 753 n.13 ("It is the underlying policy of each state's usury laws to protect necessitous borrowers

within its borders"); *see also Quinn-Moore v. Lambert*, 272 Ark. 324, 614 S.W.2d 230 (1981) ("As far as we know, usury laws exist in all states. Such laws are based upon a universally recognized public policy that protects necessitous borrowers from the exaction of exorbitant interest from unscrupulous lenders."). This case, however, does not involve the victimizing of a naive consumer. Southwest Livestock is managed by sophisticated and knowledgeable people with experience in business. Additionally, the evidence in the record does not suggest that Ramon misled or deceived Southwest Livestock. Southwest Livestock and Ramon negotiated the loan in good faith and at arms length. In short, both parties fully appreciated the nature of the loan transaction and their respective contractual obligations.

Accordingly, in light of the plain language of the Texas Recognition Act, and after consideration of our decision in *Woods-Tucker* [642 F.2d 744 (5th Cir. 1981)] and the purpose behind Texas public policy against usury, we hold that Texas's public policy does not justify withholding recognition of the Mexican judgment. The district court erred in deciding otherwise.

4. Organization of American States

The Organization of American States held its Fifth Inter-American Specialized Conference on Private International Law ("CIDIP-V") in Mexico City from March 14–18, 1994. Excerpts below from a memorandum prepared by Harold S. Burman and Peter H. Pfund for the 46th meeting of the Secretary of State's Advisory Committee on Private International Law, May 16, 1994, summarize aspects of the meeting, and, in particular, the Inter-American Convention on the Law Applicable to International Contracts. The text of the Convention is reprinted in uncorrected form in 33 I.L.M. 733 (1994). A corrected version of several of the translations, including English, has not yet been issued and the United States has not become party.

The full text of Mr. Burman's memorandum is available at *www.state.gov/s/l/c 8183.htm*. For more extensive

commentary, *see* Harold S. Burman, *International Conflict of Laws, the 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990s*, 28 Vand. J. Transnat'l L. 367 (May 1995).

---

* * * *

Nineteen OAS Member States—more than at any other previous CIDIP—participated at CIDIP-V. . . . A resolution adopted by the conference, co-sponsored by six States on the basis of a U.S. draft, calls for an examination of resources made available for secretariat legal services in support of the CIDIP process. The study could include recommendations for funding and other support for preparatory meetings as well. The purpose of the resolution is to encourage a reexamination of the OAS process by the new Secretary General and the new head of the Legal Secretariat, who will take office in mid-1994. This could include an increase in PIL support functions between the CIDIP conferences, along the lines of work now done by the secretariats of the other international organizations specialized in this field.

Inter-American Convention on the Law Applicable to International Contracts

Although preparatory work was limited to one meeting prior to CIDIP-V, a potentially effective final convention on applicable law embodying several modern commercial and conflicts of laws concepts was completed at CIDIP-V (ACPIL Doc. AC 46/OAS-1). The earlier draft convention text (distributed at the last ACPIL meeting), prepared by Mexico and approved by the Inter-American Juridical Committee, introduced a significant change by combining elements of Latin legal traditions with recent conventions completed by the Hague Conference and the European Community, as well as conflicts of law case developments in the U.S. Delegates at the preparatory meeting in Tucson, Arizona, co-hosted by the OAS and the National Law Center for Inter-American Free Trade (CIFT), introduced provisions significantly raising the role of business practice and custom, together with

those which would enhance validity and enforceability of commercial agreements.

The Convention text favors validation of agreements and commercial transactions, rather than applying conflicts rules in a neutral fashion without regard to their potential impact. States parties are assured the right to exclude categories of contracts from the convention's coverage, which the U.S. will need to invoke. Its innovations in an Inter-American context include coverage of governmental contracts, unless excluded; reference to extension of the Convention to new methods of contracting (primarily meant to encompass contracts utilizing electronic data interchange); recognition and enforcement of party choice of law; inclusion as a source of applicable law of general principles of international commercial law formulated by international organizations (primary examples discussed were the UNIDROIT General Principles and the ICC'S rules on letters of credit); inclusion of commercial usages as a source of law; a rule linking commercial practices to determinations as to whether a principal is bound by acts of an agent; and rules favoring existence and validity of contracts.

The drafting of the Convention leaves something to be desired, in large part due to time limitations at the diplomatic conference and the absence of additional preparatory meetings; clarifications can be made by the U.S. in the form of reservations and understandings that would accompany the U.S. instrument of ratification.

The Convention reflects an apparent change in approach by a number of countries in the Americas, who are now seeking to enhance economic integration by unifying transborder law. It offers us an opportunity to facilitate trade and support the process of Inter-American law modernization. . . .

5. Carriage of Goods by Sea Act: *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*

On March 20, 1995, the U.S. Supreme Court affirmed a First Circuit decision upholding a foreign arbitration clause in a bill of lading. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). The case involved a shipment of

fruit from Morocco to Massachusetts on the ship MV Sky Reefer. When the fruit arrived damaged, the insurance company paid the distributor's claim and brought suit, with the distributor, against the ship owner and the ship in the U.S. District Court for the District of Massachusetts. The respondents moved to stay the action in U.S. courts and to compel arbitration in Tokyo under the bill of lading's foreign arbitration clause and § 3 of the Federal Arbitration Act ("FAA"). Petitioners opposed the motion, arguing that the arbitration clause was unenforceable under the FAA, among other reasons, because it violated § 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300–1315. The district court granted the motion to stay and compelled arbitration while retaining jurisdiction pending arbitration. The First Circuit affirmed. 29 F.3d 727 (1st Cir. 1994).

The Supreme Court granted certiorari to resolve a split between the circuits on the enforceability of foreign arbitration clauses in maritime bills of lading. *See State Establishment for Agricultural Product Trading v. MV Wesermunde*, 838 F.2d 1576 (11th Cir. 1988). Excerpts below from the Court's opinion explain its decision in upholding the foreign arbitration clause.

---

* * * *

The leading case for invalidation of a foreign forum selection clause is the opinion of the Court of Appeals for the Second Circuit in *Indussa Corp.* v. *S. S. Ranborg*, 377 F.2d 200 (1967) (en banc). The court there found that COGSA invalidated a clause designating a foreign judicial forum because it "puts 'a high hurdle' in the way of enforcing liability, and thus is an effective means for carriers to secure settlements lower than if cargo [owners] could sue in a convenient forum." *Id.*, at 203 (citation omitted). The court observed "there could be no assurance that [the foreign court] would apply [COGSA] in the same way as would an American tribunal subject to the uniform control of the Supreme Court." *Id.*, at 203–204. Following *Indussa*, the Courts of Appeals without exception have invalidated foreign forum selection clauses under

§ 3(8). [internal citations omitted.] The logic of that extension would be quite defensible, but we cannot endorse the reasoning or the conclusion of the *Indussa* rule itself.

The determinative provision in COGSA, examined with care, does not support the arguments advanced first in *Indussa* and now by petitioner. Section 3(8) of COGSA provides as follows:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

The liability that may not be lessened is "liability for loss or damage . . . arising from negligence, fault, or failure in the duties and obligations provided in this section." The statute thus addresses the lessening of the specific liability imposed by the Act, without addressing the separate question of the means and costs of enforcing that liability. The difference is that between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated.

The liability imposed on carriers under COGSA § 3 is defined by explicit standards of conduct, and it is designed to correct specific abuses by carriers. In the 19th century it was a prevalent practice for common carriers to insert clauses in bills of lading exempting themselves from liability for damage or loss, limiting the period in which plaintiffs had to present their notice of claim or bring suit, and capping any damages awards per package. See 2A M. Sturley, Benedict on Admiralty § 11, pp. 2–2 to 2–3 (1995); 2 T. Schoenbaum, Admiralty and Maritime Law § 10–13 (2d ed. 1994); Yancey, The Carriage of Goods: Hague, COGSA, Visby, and Hamburg. Thus, § 3, entitled "Responsibilities and liabilities of carrier and ship," requires that the carrier "exercise due diligence to . . . make the ship seaworthy" and "properly man, equip, and supply the ship" before and at the beginning of the voyage, § 3(1),

"properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried," § 3(2), and issue a bill of lading with specified contents, § 3(3). Section 3(6) allows the cargo owner to provide notice of loss or damage within three days and to bring suit within one year. These are the substantive obligations and particular procedures that § 3(8) prohibits a carrier from altering to its advantage in a bill of lading. Nothing in this section, however, suggests that the statute prevents the parties from agreeing to enforce these obligations in a particular forum. By its terms, it establishes certain duties and obligations, separate and apart from the mechanisms for their enforcement.

* * * *

Our reading of "lessening such liability" to exclude increases in the transaction costs of litigation also finds support in the goals of the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading, 51 Stat. 233 (1924) (Hague Rules), on which COGSA is modeled. Sixty-six countries, including the United States and Japan, are now parties to the Convention, see Department of State, Office of the Legal Adviser, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1994, p. 367 (June 1994), and it appears that none has interpreted its enactment of § 3(8) of the Hague Rules to prohibit foreign forum selection clauses, see Sturley, International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation, 27 Va. J. Int'l L. 729, 776–796 (1987). The English courts long ago rejected the reasoning later adopted by the *Indussa* court. See *Maharani Woollen Mills Co.* v. *Anchor Line*, [1927] 29 Lloyd's List L. Rep. 169 (C. A.) (Scrutton, L. J.) ("The liability of the carrier appears to me to remain exactly the same under the clause. The only difference is a question of procedure—where shall the law be enforced?—and I do not read any clause as to procedure as lessening liability"). And other countries that do not recognize foreign forum selection clauses rely on specific provisions to that effect in their domestic versions of the Hague Rules, see, *e.g.*, Sea-Carriage of Goods Act 1924, § 9(2) (Australia); Carriage of Goods by Sea Act, No. 1 of 1986, § 3 (South Africa). In light of the fact

that COGSA is the culmination of a multilateral effort "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade," *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 301, 3 L. Ed. 2d 820, 79 S. Ct. 766 (1959), we decline to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed this issue. See Sturley, *supra*, at 736 (conflicts in the interpretation of the Hague Rules not only destroy aesthetic symmetry in the international legal order but impose real costs on the commercial system the Rules govern).

It would also be out of keeping with the objects of the Convention for the courts of this country to interpret COGSA to disparage the authority or competence of international forums for dispute resolution. Petitioner's skepticism over the ability of foreign arbitrators to apply COGSA or the Hague Rules, and its reliance on this aspect of *Indussa Corp.* v. *S. S. Ranborg*, 377 F.2d 200 (CA2 1967), must give way to contemporary principles of international comity and commercial practice. As the Court observed in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972), when it enforced a foreign forum selection clause, the historical judicial resistance to foreign forum selection clauses "has little place in an era when . . . businesses once essentially local now operate in world markets." *Id.*, at 12. "The expansion of American business and industry will hardly be encouraged," we explained, "if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *Id.*, at 9. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985) (if international arbitral institutions "are to take a central place in the international legal order, national courts will need to 'shake off the old judicial hostility to arbitration,' and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal") (citation omitted); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. at 516 ("A parochial refusal by the courts of one country to enforce an international arbitration agreement" would frustrate "the orderliness and predictability essential to any international business

transaction"); see also Allison, Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market, 18 N. Y. U. J. Int'l Law & Pol. 361, 439 (1986).

That the forum here is arbitration only heightens the irony of petitioner's argument, for the FAA is also based in part on an international convention, 9 U.S.C. § 201 *et seq*. (codifying the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, [1970] 21 U.S. T. 2517, TIAS No. 6997), intended "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries," *Scherk, supra*, at 520, n. 15. The FAA requires enforcement of arbitration agreements in contracts that involve interstate commerce, see *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995), and in maritime transactions, including bills of lading, see 9 U.S.C. §§ 1, 2, 201, 202, where there is no independent basis in law or equity for revocation, cf. *Carnival Cruise Lines*, 499 U.S. at 595 ("Forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness"). If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements. That concern counsels against construing COGSA to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law.

* * * *

6. NAFTA Arbitration

Article 2022 of the North American Free Trade Agreement ("NAFTA"), entitled "Alternative Dispute Resolution of

Commercial Disputes," addresses private investment disputes. Paragraph one provides that:

> Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.

Paragraph 4 requires the Free Trade Commission ("FTC") to "establish an Advisory Committee on Private Commercial Disputes ['Advisory Committee'] comprising persons with expertise or experience in the resolution of private international commercial disputes."

The FTC, established by NAFTA Article 2001 and made up of the United States Trade Representative, the Canadian Minister of International Trade, and the Mexican Secretary of Economy, established the advisory committee in October 1994. The Advisory Committee is composed of private sector members from the United States, Mexico, and Canada, and two representatives of each country who jointly chair the committee. The founding co-chairs for the United States were Ginger Lew, General Counsel of the U.S. Department of Commerce, and Conrad Harper, Legal Adviser of the U.S. Department of State. Under Article 1 of its Terms of Reference, available at *www.mac.doc.gov/nafta/terms.htm*, the Advisory Committee is required "to report and make recommendations to the [Free Trade] Commission on general issues referred to it by the Commission on the availability, use and effectiveness of arbitration, mediation, and other procedures for the resolution of private international commercial disputes in the free trade area." Article 1.2 specifies six matters referred to the Committee and Article 1.3 provides that the FTC may refer other matters from time to time.

In November 1996 the Advisory Committee issued the Report of the NAFTA Advisory Committee on Private Commercial Disputes to the NAFTA Free Trade Commission, available at *www.mac.doc.gov/nafta/report96.htm*. The report

described the establishment and activities of subcommittees to examine priority issues, set forth conclusions and future work plans, and recommended that the FTC adopt a statement reflecting its conclusions. Excerpts from the Advisory Committee's conclusions and its suggested recommendation to the FTC follow (italics in the original).

---

* * * *

III. COMMITTEE CONCLUSIONS

The Committee has reached several conclusions based on its work to date. Each NAFTA country has laws and procedures in place to support the use of arbitration, including the recognition and enforcement of arbitral awards, at both the federal and state/provincial levels. No new legislation is recommended at the present time. Although the three countries have supported the enforcement of arbitration agreements and arbitral awards, the Committee has identified some difficulties related to the recognition and enforcement of arbitral agreements and arbitral awards.

There is a wide range of arbitral institutions available in the three countries, including the American Arbitration Association, the British Columbia International Commercial Arbitration Center, The Quebec National and International Commercial Arbitration Center, the Mexico City National Chamber of Commerce and the International Chamber of Commerce. Moreover, a new transnational organization, the Commercial Arbitration and Mediation Center for the Americas (CAMCA), was launched in December 1995 by the first four institutions listed above. Users of arbitration services have a similarly wide selection of procedural rules available for arbitration, including the 1976 UNCITRAL Rules. Given the number and high caliber of available arbitral organizations, the Committee sees no need for the NAFTA Parties to promote or fund the creation of any additional organizations at this time.

The business and legal communities in the NAFTA countries regard arbitration as an acceptable method of dispute resolution. According to the Committee's survey, a number of current or potential users of ADR expressed some reservations with international arbitration (although not necessarily limited to the

NAFTA countries), stemming from perceived problems such as the difficulty in enforcing awards and the lack of pre-award remedies. There is a need for greater promotion of the use of ADR, in particular arbitration, targeted at end-users (business executives and in-house/corporate legal counsel) and the small business community. Such promotion should address the perceptions in the business community regarding arbitration. The distribution of a brochure and the presentation of seminars targeted at the end-users would represent a significant step forward in promoting the use of arbitration in the NAFTA region.

* * * *

V. RECOMMENDATIONS

The Committee recommends that the Commission:

Adopt a statement substantively in the following form: "The Free Trade Commission—confirming the commitment of the NAFTA Parties to encourage and facilitate, to the maximum extent possible, the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area; and acknowledging the obligation of the Parties to recognize and enforce arbitral awards under applicable international conventions and national laws—states its support for the use of arbitration and other forms of alternative dispute resolution in the NAFTA area, and wishes to draw to the attention of the Judiciary the significant benefits inherent in the use of arbitration and other forms of alternative dispute resolution. In this connection, the Commission calls for the assistance of each Party to: (1) take appropriate steps to ensure that domestic laws do not provide for the judicial review of arbitral awards in a manner inconsistent with their international obligations, including the NAFTA and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention); (2) take appropriate steps to include issues related to arbitration and other forms of alternative dispute resolution in judicial training programs; (3) encourage courts to direct matters to arbitration or other forms of alternative dispute resolution, and enforce arbitral awards and

arbitration agreements, where appropriate; and (4) promote dispute prevention."

* * * *

In 1997 the NAFTA advisory committee issued a brochure entitled "Alternative Dispute Resolution in International Contracts" outlining possible methods of alternative dispute resolution available to persons operating within the NAFTA region. The brochure also set out model clauses for use in contracts and described principal arbitration institutions available in the NAFTA. The brochure is available at *www.mac.doc.gov/nafta/contract.htm*.

7. Other Issues

a. Infrastructure project developments

A Report on Private International Law Activities prepared by Harold S. Burman and Peter H. Pfund for the 92nd Annual Meeting of the American Society of International Law, April 2, 1998, included the excerpt below on "Infrastructure project development in foreign countries: the new era of private sector partnership?"

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

---

* * * *

International organization work has begun on legislative guidance for new methods of project finance. UNCITRAL is actively engaged in preparing such legislative guidance, the first phase of which may be completed by mid-1999. The Organization of American States (OAS) may also soon begin work on a related topic for its next Specialized Conference on Private International Law (CIDIP-VI), international loan agreements with an emphasis on secured interest financing.

The last decade has seen a shift away from the post-1950s focus on multilateral and bilateral governmental funding and oversight of foreign projects, toward privatization which in turn has prompted a move toward private sector funding, construction and management. While governmental funding and recipient state regulation of public services, and in some cases government guarantees remain, nevertheless the balance has shifted toward building on private sector initiatives as a means of realizing the efficiencies of the market place. This also has the effect of moving major infrastructure work off-budget, leaving recipient governments more free to direct their available capital toward other purposes. This movement at the same time raises new issues of competition policy and other aspects of privatization of public services.

To accomplish these ends, the focus has now shifted at some bodies to private law regimes on management, financing and corporate law issues. These include recognition of foreign investment and management rights, profit repatriation, securitization, authorization for special corporate entities necessary for long-term private loan placement, new regulatory and dispute resolution methods which can recognize private interests in the provision of public services, standards for long-term development contracts and management, and new rules on applicable law.

* * * *

b. International secured interests

Remarks prepared by Mr. Burman for a symposium at the University of Pittsburgh, October 17, 1997, "Ten Years of the United Nations Sales Convention: Building on the CISG: International Commercial Law Developments and Trends for the 2000's" addressed, among other things, developments in international secured interests, as excerpted below. 17 J.L. & Com. 355 (1998).

---

* * * *

[International secured interests] crosses over areas of established law, such as those encountered in the formulation of the CISG, as well as electronic commerce and new economic functions of the law in today's market. It is the largest "front" in the PIL field today, cutting across many basic economic assumptions and beliefs as to what the commercial law can and cannot be permitted to do. Security interests for commercial finance in moveable, i.e., "non-possessory," property has been the real economic engine of the American experiment with the modern Uniform Commercial Code. Nevertheless, its economic underpinnings and the legal concepts it carries are a difficult sell internationally.

Two draft conventions are concurrently underway at UNIDROIT and UNCITRAL which can significantly boost availability of commercial credit for investments and transactions. Adoption of either for many countries could signal a concrete step toward seeking the benefits of a global economic village, which in turn may also call for a change in some domestic law traditions. On this topic, the U.S. view has been that traditional methods of harmonization are of little real value to the developing and emerging states. While merging existing concepts of assignment law may have some effect on evening out the legal field, it is unlikely to produce new credit.

According to the commercial finance community, if countries adopt laws comparable to Article 9 of the U.C.C., based on publicly-accessible notice filing systems which determine priority for claimants, new credit derived from bulk receivables, such as credit card receivables, can flow to the markets of underdeveloped countries. This means, in the U.S. view, that economic objectives, i.e., new credit for needy markets, should be agreed upon and serve as the basis for the formulation of laws. This would, however, also result in significant changes in many national laws, and the outcome of this approach is far from clear.

The first of the two projects, a proposed UNIDROIT convention, is more narrowly focussed on high-end moveable equipment such as aircraft, containers, satellites, agricultural and construction equipment, and possibly vessels. This convention builds on the 1988 UNIDROIT Convention on International Financial Leasing. Determining when equipment has entered the

international zone and is covered, or whether to cover equipment ab initio that crosses borders regularly in the normal course of business is a key issue. Both treaty projects rely on open disclosure systems, whereby potential assignees, upon whom credit systems rely, would have prior notice of the existence of other and possibly competing interests. Notice would be effected through internationally-based electronic registries, or nationally-linked registries under an international supervisory system.

The second related project, the proposed UNCITRAL convention, covers accounts receivable financing, which is often employed for general inventory and project financing, and would have a much wider reach than the UNIDROIT text. The convention, as currently drafted, would cover both international receivables and international assignment of domestic receivables. The latter would go beyond many similar conventions in terms of direct affect on domestically created rights, however, a consensus for such a step has not been reached. The draft also calls for acceptance of the concepts of future interests in property not yet in existence, "bulk" assignments, which are key factors in inventory and agricultural production financing, as well as accessing new pools of credit supported by bank card, toll road and other high volume transactions.

Both projects will soon face a significant conceptual and practical hurdle—the need for acceptance of the concept of perfection of security interests through computer-based registries, possibly operated internationally. The efficiency of computer systems covering distant countries' markets is what would achieve a sufficiently low cost of credit to make it useful for the undeveloped world, if its products are to enter the stream of trade. This is a vision shared by the international lending agencies, such as the World Bank, the IADB, the U.S., Canada and some other states, and the finance lending community, but not yet by a number of other states, including many West European states. Even if agreement on concepts can be reached, practical hurdles exist internationally since such registries do not yet exist. Conversely, in the U.S., where the legal concepts are in place, the registries across our many counties and states are almost all paper-based, and migration to linked computer systems, which would need some degree of uniformity, may be years away.

One might be tempted, on the basis of the discussion above, to cast the era of the CISG nostalgically as the "good old days."

* * * *

c. U.S. positions on certain private international law projects

In a memorandum prepared in April 1999, Harold Burman reviewed the basis for U.S. decisions not to support certain types of projects in the area of private international law during the 1990s.

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

---

* * * *

. . . [During the 1990s] projects rejected by the U.S. were in all but one case not approved by the [international organizations] involved. These tended to fall into two groups, either representing topics on which there had been (a) no showing that solutions in the private, as opposed to public, international, law were likely to be viable, or (b) no showing that any solution was needed in the particular legal sector involved.

The first category involved proposals for work on cross-border environmental damage, class action or mass tort case rules, or cross-border migratory movements and labor access. The first group, i.e. cross-border environmental law, arose from time to time in three of the four primary [International Organizations] that focus on PIL matters. Studies raising the possibility of work in that area were produced at the Hague Conference, Unidroit and by several states involved in the OAS Specialized Conferences on Private International Law. In each case, the U.S. position approved by this office after interagency consultation and review by private bar associations in the U.S. was that, while recognizing the importance of the topics as such, there was no showing that intergovernmental solutions could be achieved within the limits of the private law. The U.S. reiterated in those cases that we supported consideration of related issues in appropriate public law fora.

In the second group, class action or mass tort issues, we did not support the topics per se, that is, we rejected the notion that there were international problems of a nature warranting a PIL project to resolve them on a multilateral basis. Issues surrounding several cases such as the Bhopal chemical plant damage cases, in which jurisdiction was unsuccessfully sought in the U.S. for injuries occurring in India or alternately Indian courts were unsuccessfully urged to adopt U.S. standards for assessing tort liability were seen as the genesis of these proposals. Aside from our rejection of the notion that PIL could be a basis for restating important tort standards, the possibility of a political cast over such projects was apparent, and PIL projects have never been successfully pursued when underlaid with significant political agendas.

The third group, primarily arising from time to time in proposals for work at the OAS PIL Conferences, did not gain sufficient support so that no studies were produced and, other than declining to indicate support at an early stage, no further action was needed.

The second category, no showing of sufficient need, arose in two proposals. First, UNIDROIT proposed work on unifying the hotel keeper's contract with consumers, i.e. international travelers, and/or agents and others marketing such arrangements. Following a review by the U.S. travel and tourism industry and the Department of Commerce, the U.S., while agreeing that a wide disparity between various national and local laws and regulations was evident, took the position that no showing has been made that absent harmonization there was either dislocation of the market or serious impediments to trade. The U.S. was joined in that case by several other governments, and the project was dropped.

A second case arose concerning international electronic commerce. UNCITRAL, following completion of the successful 1996 Model Law on Electronic Commerce which the U.S. supported, undertook a second project to elaborate rules on electronic signatures. The U.S. sought unsuccessfully to defer that project, arguing that elaboration of such rules would constrain market development of contract law in the early stages of e-commerce, and that the proposed project favored certain

technologies over others. The U.S. position was difficult to maintain since both the legal concepts as well as the technology supporting such rules, which favored digital signatures and "public-key infrastructure", originated in the U.S. and had in fact been adopted at that time by several U.S. states. Ultimately, a second UNCITRAL Model law was on track to be produced on e-signatures which would eliminate many but not all of the U.S. concerns.

B. FAMILY LAW

1. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption was adopted at The Hague May 29, 1993, at the conclusion of the Seventeenth Session of the Hague Conference on Private International Law. It was signed by the United States at the Royal Netherlands Ministry of Foreign Affairs on March 31, 1994. President William J. Clinton transmitted the convention to the Senate for advice and consent to ratification on June 11, 1998. The Senate gave its advice and consent on September 20, 2000. 146 CONG. REC. S8866 (Sept. 20, 2000). Implementing legislation was adopted in The Intercountry Adoption Act of 2000, Pub. L. No. 106–279, 114 Stat. 825 (2000), codified at 42 U.S.C. §§ 14901–14954, and proposed implementing regulations were published on September 15, 2003. 68 Fed. Reg. 54,063 and 54,119 (Sept. 15, 2003). *See* discussion of transmittal documents and further steps for implementation in *Digest 2000* at 141–50; discussion of regulations in *Digest 2003* at 108–18; s*ee also* 92 Am. J. Int'l L. 734 (1993).

The President's transmittal letter of June 11, 1998, is excerpted below. *See* S. Treaty Doc. No. 105–51, 1870 U.N.T.S. 167, 32 I.L.M. 1134 (1993).

---

* * * *

The Convention sets out norms and procedures to safeguard children involved in intercountry adoptions and to protect the interests of their birth and adoptive parents. These safeguards are designed to discourage trafficking in children and to ensure that intercountry adoptions are made in the best interests of the children involved. Cooperation between Contracting States will be facilitated by the establishment in each Contracting State of a central authority with programmatic and case-specific functions. The Convention also provides for the recognition of adoptions that fall within its scope in all other Contracting States.

* * * *

It is estimated that U.S. citizens annually adopt as many children from abroad as all other countries combined (13,621 children in Fiscal Year 1997). The Convention is intended to ensure that intercountry adoptions take place in the best interests of the children and parents involved, and to establish a system of cooperation among Contracting States to prevent abduction of, and trafficking in children. We have worked closely with U.S. adoption interests and the legal community in negotiating the provisions of the Convention and in preparing the necessary implementing legislation.

* * * *

2. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

The United States participated in the negotiation of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("Child Protection Convention"), adopted by unanimous vote, October 18, 1996, at the Eighteenth Session of the Hague Conference, *reprinted in* 35 I.L.M. 1391 (1996). The new convention revised the 1961 Hague Convention on the Powers of Authorities and the Law Applicable in Respect of the

Protection of Children. Excerpts below from a description of the convention prepared by Gloria DeHart, Attorney-adviser, Office of Private International Law, Office of the Legal Adviser, Department of State, as an introductory note to publication in International Legal Materials, follow. The United States had not signed the convention as of the time of this writing.

---

* * * *

As adopted, the Convention has seven chapters—Scope, Jurisdiction, Applicable Law, Enforcement, Co-operation, General Clauses and Final Clauses. The 1961 Convention did not define what measures were included in it, resulting in some confusion as to its scope. In fact, the primary use of the 1961 Convention was related to issues of custody, the coverage of which is not clear from either its title or text. The descriptive title, the Preamble and Chapter I (Scope) make the coverage and purpose of the 1996 Convention clear.

In Chapter I (Articles 1–4), the Convention is made applicable to children from birth to age 18 (Article 2) and specifies, by example and not exclusively, what is included in the Convention—generally measures for the protection of the person or property of children, including custody determinations ("parental responsibility"—defined in Article 1). The inclusion of *kafala* (the Islamic institution used instead of adoption) together with the provisions of Chapter V on co-operation (especially Article 33) fills a gap in the coverage of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 32 I.L.M. 1134 (1993), whose procedures were not made applicable to *kafala* or analogous institutions. There are 10 specifically excluded subjects (including adoption) listed in Article 4.

Chapter II on jurisdiction (Articles 5–14) is the basic core of the Convention and establishes "habitual residence" as the primary jurisdictional standard. When the child's habitual residence changes, jurisdiction follows. Where a child has no habitual residence or it cannot be determined (as in the case of refugee children), the State where the child is present has jurisdiction. In Article 7, the Convention establishes the important principle that

jurisdiction cannot be based on a change in habitual residence occurring as a result of a wrongful removal except in two very limited circumstances. Related to this provision is Article 50 which provides that the Convention does not affect the application of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501 (1980), and that nothing precludes the Protection Convention from being invoked to obtain the return of a wrongfully abducted child or of organizing access rights. Giving some flexibility to the Convention are two articles which make it possible for the habitual residence State to transfer jurisdiction to other named States when it would be in the best interests of the child to do so. Authorities are authorized to communicate with each other in the application of these articles. (Articles 8, 9) A special divorce jurisdiction is established in Article 10, permitting a court with jurisdiction over the divorce to take measures for protection (most likely a custody determination) in limited circumstances even though the State is not the habitual residence of the child concerned. When the child is merely present in a State, that State may take measures in urgent situations or may take measures of a provisional character with a limited territorial effect. (Articles 11, 12) Jurisdiction is determined at the time measures have been requested and changes to a second State only if the first State has declined jurisdiction. Measures properly taken remain in effect until changed (Article 14).

* * * *

3. Convention on the International Protection of Adults

The United States participated actively in the preparation and negotiation of the Convention on the International Protection of Adults ("Adults' Convention" or "Convention"), adopted by unanimous vote of the Hague Conference at The Hague on October 2, 1999, *reprinted in* 39 I.L.M. 7 (2000). Laws in the United States and many other countries increasingly recognize the need to respect the rights of the incapacitated adult involved and provide for measures that

may be taken by adults themselves, such as durable powers of attorney intended to regulate the handling of their affairs in the event of incapacity. At the same time, the ease of international travel and the growing number of persons who divide their living arrangements between two or more countries give rise to questions concerning which country has jurisdiction and which country's laws apply if a traveler becomes incapacitated.

The stated purpose of the Adults' Convention is to protect adults (defined as persons 18 years or older) in international situations when "by reason of an impairment or insufficiency of their personal faculties, [they] are not in a position to protect their interests." It provides a means for determining which country's authorities have jurisdiction to take protective measures and which laws are applicable as well as providing for recognition and enforcement of protective measures in all Contracting States. The Convention establishes that jurisdiction generally lies with the country that is the adult's habitual residence or, in cases of refugees or others where habitual residence cannot be established, the country in which the adult is present. Authorities in the relevant jurisdiction are in most cases required to apply local law. An important exception to this rule is made when an adult takes action, such as executing a durable power of attorney, that grants powers of representation to be exercised in the future if the adult becomes unable to protect his or her own interests. In that case, the law of the habitual residence may be replaced by a law specified by the adult, so long as the law chosen is of a country with sufficient connections to the adult.

At the time of this writing, the United States had not signed the Convention.

4. International Reciprocal Family Support Enforcement

a. Overview

In 1995 the United States submitted to the Hague Conference on Private International Law's Special Commission on

Maintenance a review of U.S. efforts in international child support enforcement, excerpted below.

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

The United States has not as yet ratified any of the international treaties and conventions related to the recognition of support orders and the enforcement of support obligations. Family law has always been a matter of state law in the United States, and at the time the support conventions were developed by the United Nations and the Hague Conference on Private International Law, the United States federal government had not become involved in family law issues. Since that time, the United States federal government has become more involved in domestic family law matters, and particularly in developing a program for the enforcement of family support both within and among the states. In international family law matters, the United States has been involved, until recently, only with child abduction and adoption issues, not family support.

Lacking federal involvement, the states of the United States have developed their own system of international enforcement. However, legislation has now been proposed to place on a federal government-to-foreign government level the kind of bilateral system developed by the states. The legislation would provide for services at the federal level through a Central Authority to ensure an efficient, workable and uniformly implemented system in cooperation with the states and with the foreign countries which are willing to take part. In addition, the federal government is considering the possibility of the United States becoming a party to one or more of the existing conventions.

The purpose of this paper is to provide a brief explanation of the United States enforcement system generally, the state-developed international system, and the proposed federal level system. . . . Moreover, the United States would like, in the near future and for the medium term at least, to place the present U.S. state-level arrangements with some 18 countries and future arrangements on a federal government-to-foreign government basis.

The Federal Child Support Enforcement System

In 1974, the United States Congress established a mandatory program for the states for the enforcement of family support by the enactment of Title IV-D of the Social Security Act ("the IV-D program"). Congress has amended the program since that time, most notably in 1984 and 1988, to expand both the coverage of the program (to all families, not just those receiving welfare assistance) and the procedures the states are required to use. Legislation now pending in Congress would make additional changes. The federal program and accompanying regulations established a federal-level agency to administer the program—the Office of Child Support Enforcement (OCSE) in the Department of Health and Human Services. They also required each of the states to establish an agency at the state level to enforce existing orders, to obtain support orders where necessary, to establish paternity, and to cooperate with the child support enforcement offices in other states in interstate cases. The states must utilize interstate procedures when necessary to obtain support. The program countrywide is providing enforcement services in a total of almost 19 million cases. There is, at present, no federal requirement for U.S. states to provide support enforcement services in international cases. The absence of a mandate to the federal government prompted the states to use the system developed for dealing with interstate cases within the United States to extend their enforcement efforts to cases from other countries.

State Action: URESA and International Enforcement

The URESA System

The Uniform Reciprocal Enforcement of Support Act (URESA) was first developed in 1950 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), and was revised significantly in 1968 (RURESA). In August, 1992, an almost wholly new Act was completed to replace URESA/RURESA and was renamed the Uniform Interstate Family Support Act (UIFSA). In the United States, NCCUSL is composed of appointed representatives from the various states and has the purpose to develop laws in areas where uniformity of state law or procedure would be beneficial to the states. Enactment of these proposed laws is

entirely within the competence of state legislatures. The interstate support laws have been enacted in all of the states, and a majority of the states have now or shortly will enact the new UIFSA. Because the application of the new UIFSA to international cases is unchanged, the arrangements made and discussed below under URESA are equally applicable to UIFSA.

* * * *

URESA Applied to International Support Enforcement

Because the problems of interstate and international enforcement are similar, the URESA procedures proved flexible enough for use when one of the separated parents lives in a foreign jurisdiction. The 1968 RURESA expanded the definition of "state" to include "any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect." A similar definition is contained in UIFSA: "a foreign jurisdiction that has established procedures for the issuance and enforcement of support orders which are substantially similar to the procedures under this act." By this simple addition to the definition, the reach of the enforcement process of the states was greatly expanded.

Although the United States Constitution prohibits any state from entering "into any treaty, alliance, or confederation" and requires the consent of Congress for a state to "enter into any agreement or compact with another state, or with a foreign power," the consent of Congress is not required for interstate agreements that fall outside the scope of the Compact Clause. The arrangements between the states and foreign countries for the enforcement of support obligations are based on the principle of comity, that is, the voluntary recognition and respect given to the acts of another nation's government, and, as a matter of policy, also on the principle of reciprocity. They do not violate the Constitutional prohibition. In this area, the states and the federal government both have power to act, but if the federal government were to act, the federal power would control.

The Development and Function of the Support Agreements

Standards for Establishing Reciprocity

The states generally determine whether reciprocity is possible based on the following standards: 1) the country will enforce the

child support obligation, collect the money and send it to the requesting state, whether or not there is an existing order; 2) the order will be enforced if recognizable under the laws and procedures of the country, and if it is not recognized or no order exists, an order or its equivalent will be obtained; 3) the system will deal with both in and out of wedlock children, and a determination of paternity will be made if possible in the circumstances; 4) each country will use its own laws and procedures; and 5) there will be no means test for legal services, and no charge for legal assistance or the services of government offices or personnel.

Case Procedures

To satisfy the requirement of URESA that a copy of the "state's" reciprocal act accompany the petition, a summary of the law applicable to the enforcement of support was developed, where necessary, by the country involved. . . . [E]ach of these countries has designated an agency to act as a "Central Authority" to supervise the arrangement and ensure that petitions are processed and to provide location services as far as possible.

In the United States, the cases are handled through the public offices of the states for domestic child support cases—almost always the state IV-D offices—for both incoming and outgoing cases.

* * * *

The Reciprocating Countries

The states of the United States (varying with the state and country involved) first established reciprocity in support enforcement with the Canadian provinces which have a similar system for inter-province enforcement which they have extended individually to the states on a province-to-state basis. With the success of the Canadian arrangements, the system was used to extend enforcement to other countries: to Australia, Bermuda, Fiji, Jamaica, New Zealand, South Africa, and the United Kingdom with similar reciprocal systems; to Austria and Germany which developed and enacted reciprocal laws, and, based on existing laws and procedures, to the Czech Republic, France, Hungary, Mexico, Norway, Poland, the Slovak Republic, and Sweden. France

and Germany (the Deutsches Institut für Vormundschaftswesen before the German legislation was enacted) were the pioneers who helped in the development of forms and procedures. The possibility of such reciprocal arrangements has been discussed with a number of other countries throughout the world. Most of the state arrangements have been negotiated by a small "team" of state officials representing their individual states and the National Child Support Enforcement Association (NCSEA), and the Family Law Section of the American Bar Association (ABA).

* * * *

Proposed Action by the United States Federal Government
Proposed Legislation

* * * *

The proposed legislation for international support enforcement responds to the many concerns that have been voiced—by NCSEA, the ABA, and many foreign countries—about the ad hoc state-by-state method of attempting to enforce child support obligations across national borders. And it responds to calls for the federal government to create a unitary, national system that would help ensure that parents cannot evade their support obligations by leaving the United States or by coming to the United States. The legislation does the following:

- Authorizes the federal government to negotiate international support enforcement arrangements with foreign countries that would be applicable in all fifty states. These arrangements may be by simple declaration or by executive agreement (in effect a treaty) in whole or in part.
- Provides cost-free support enforcement services in the United States to persons resident abroad who wish to enforce support obligations against individuals living in the United States.
- Establishes standards to ensure that foreign countries will be declared to be reciprocating countries and receive support enforcement assistance from the United States only if they correspondingly provide U.S. residents needing such

assistance with substantially similar services, including cost-free administrative and legal assistance as necessary.
- Provides that requests for U.S. enforcement assistance from foreign countries that agree to provide reciprocal services qualify for federal funding under the IV-D program.
- Leaves individual states free to continue existing state-negotiated reciprocity arrangements with foreign jurisdictions in those cases where the United States federal government has not established reciprocity with a particular jurisdiction.
- Establishes the Department of Health and Human Services as the Central Authority for the United States.
- Provides an option for the states to enforce spousal support orders.

Developing this system does not preclude, and may facilitate, eventual United States ratification of the 1956 United Nations Convention on the Recovery Abroad of Maintenance and the several Hague Conventions dealing with family support. By adopting an existing and workable system of bilateral arrangements for initial United States government involvement in international enforcement, the legislation provides a framework for United States participation in the existing conventions and a means for the United States to develop enforcement systems with countries which are not parties to the existing conventions.

Plan for Implementation

Designation of Reciprocating Foreign Countries

The State Department and the Department of Health and Human Services will review the existing state arrangements and, with the agreement of the foreign country involved, make the appropriate federal declaration and place the agreement on a federal government to foreign government basis. In addition, these Departments will contact, and respond to contacts from, other countries, particularly those with whom discussions on possible reciprocal arrangements have already been held. These discussions may also involve the possibility of placing such arrangements, or any part of them including the provision of legal services, on the

level of a treaty by executive agreement rather than reciprocal declarations if this proves to be necessary or desirable.

Procedures and Central Authority Functions

The Department of Health and Human Services (HHS) in its Office of Child Support Enforcement (OCSE) has already established the position of International Liaison Officer. . . .

. . . We are interested in getting comments and suggestions from present and potential reciprocating countries on what needs to be done.

* * * *

b. U.S. legislation

As discussed above, the Uniform Interstate Family Support Act ("UIFSA") was drafted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and approved and recommended by it for enactment in all states in July 1996. UIFSA was intended to revise and replace the Uniform Reciprocal Enforcement of Support Act ("URESA") and the Revised Uniform Reciprocal Enforcement Support Act ("RURESA"). All 50 states and the District of Columbia had enacted UIFSA as state law by the end of 1999.

Although UIFSA is primarily concerned with enforcement of child support orders between states of the United States, the act defines the term "state" more broadly:

> "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes: (i) an Indian tribe; and (ii) *a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this [Act], the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act*.

Section 101(19) (emphasis added.) The full text of UIFSA, with prefatory note and comments, is available at *www.law.upenn.edu/bll/ulc/fnact99/1990s/uifsa96.htm*.

Shortly after the adoption of UIFSA in 1996, federal welfare reform legislation was enacted that, among other things, required states to enact UIFSA in order to remain eligible for federal funding of child support enforcement. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWA"), Pub. L. No. 104–193, § 321, 110 Stat. 2105, 42 U.S.C. § 666(f).

Section 459A of the PRWA, 42 U.S.C. § 659a(a), authorized the Secretary of State, with the concurrence of the Secretary of Health and Human Services, to declare foreign countries or their political subdivisions to be "reciprocating countries" for the purpose of enforcement of family support obligations if the country "has established, or undertakes to establish, procedures for the establishment and enforcement of duties of support owed to obligees who are residents of the United States. . . ." The procedures must be in substantial conformity with the standards set forth in subsection (b) of the provision. The mandatory elements set forth in that subsection are as follows:

> (A) The foreign country (or political subdivision thereof) has in effect procedures, available to residents of the United States—
> (i) for establishment of paternity, and for establishment of orders of support for children and custodial parents; and
> (ii) for enforcement of orders to provide support to children and custodial parents, including procedures for collection and appropriate distribution of support payments under such orders.
> (B) The procedures described in subparagraph (A), including legal and administrative assistance, are provided to residents of the United States at no cost.
> (C) An agency of the foreign country is designated as a Central Authority responsible for—

(i) facilitating support enforcement in cases involving residents of the foreign country and residents of the United States; and

(ii) ensuring compliance with the standards established pursuant to this subsection.

A declaration under this provision "may be made in the form of an international agreement, in connection with an international agreement or corresponding foreign declaration, or on a unilateral basis." Finally, § 659a(d) provides that a "State [of the United States] may enter into reciprocal arrangements for the establishment and enforcement of support obligations with foreign countries that are not the subject of a declaration pursuant to subsection (a), to the extent consistent with Federal law."

At the end of 1999, Ireland, Poland, the Slovak Republic and two Canadian Provinces—British Columbia and Nova Scotia—had been declared to be reciprocating countries under the act. 65 Fed. Reg. 31,953 (May 19, 2000).

c. Proposal for new Hague Conference convention on maintenance obligations

On April 13, 1999, the United States presented to the Hague Conference on Private International Law Special Commission on Maintenance Obligations a discussion paper entitled "Toward an Accommodation of Divergent Jurisdictional Standards for the Determination of Maintenance Obligations in Private International Law," prepared by Professor Robert G. Spector.

Professor Spector's comments, excerpted below (footnotes omitted), are available at *www.state.gov/s/l/c8183.htm*.

In April, 1999, the Hague Conference on Private International Law's Special Commission on Maintenance Obligations voted to begin work on a new convention on maintenance obligations. Professor William Duncan, First Secretary of the Conference, provided the delegates with an excellent background paper. He

noted that the present jurisdictional situation is "extraordinarily complex with a mixture of multilateral, regional and bilateral arrangements. . . ." Part of the complexity is due to the fact that legal systems have different rules of jurisdiction to determine the existence of a maintenance obligation. Divergent jurisdictional rules between civil law countries, as illustrated in the 1958 and 1973 Hague Conventions on the Recognition of Maintenance Obligations, and many common law countries, such as the United States, create obstacles to the receipt of maintenance by deserving families and obfuscate multilateral and bilateral negotiations.

It is the thesis of this essay that a new approach to the recognition of judgments, rather than direct or indirect jurisdictional rules, is the best way to harmonize divergent state practice. States should agree to recognize a maintenance judgment where the original determination was made under factual circumstances meeting the jurisdictional standards of the requested state. The issue therefore is whether on the facts of the case, the requested state could recognize the judgment based on a ground of jurisdiction acceptable under its law.

Adoption of this approach will result in the recognition of the vast majority of maintenance judgments, and eliminate a prolonged discussion of jurisdictional standards that may be unlikely to produce substantive agreement. There will be, however, a few judgments which will not be able to be recognized in the requested state. To address those situations, any new convention should establish procedures whereby the state of the maintenance creditor could request the state where the maintenance debtor is located to obtain a new maintenance order against the debtor. Thus, in every case, either a prior maintenance judgment can be recognized, or a new order obtained, thereby assuring that deserving families will not be deprived of necessary support.

A. The Current Divergent Jurisdictional Standards

1. The United States

In the United States family law cases are subject to three different jurisdictional standards. First, jurisdiction to enter a judgment of divorce or dissolution depends on the relationship between one

of the parties and the forum. The United States does not recognize divorce jurisdiction based on nationality. Second, jurisdiction to take a measure with regard to the protection of minors, such as custody or access, depends on the length of time the minor has been habitually resident in the state. If the minor has been a resident of the state for six months, jurisdiction to determine the minor's custody and access is normally present. Third, jurisdiction to determine a maintenance obligation is governed by the same standards as jurisdiction to determine any other monetary award. The United States Supreme Court has not distinguished between jurisdiction to award a monetary judgment in a commercial case, a tort case, and a family maintenance obligation. The same standards are applicable to all cases involving monetary judgments.

In cases involving monetary awards, such as maintenance cases, the jurisdictional standards dictated by the Constitution are based on the relationship between the defendant-debtor and the forum. Jurisdiction over a defendant who is a resident of the state is always permitted. The relationship required for a state to exercise jurisdiction over a nonresident defendant in family maintenance cases has been codified in the Uniform Interstate Family Support Act, which has been enacted in all fifty states of the United States. That Act provides that a state may exercise jurisdiction of a nonresident defendant in the following circumstances:

(A) the individual is personally served with a legal citation within the state;

(B) the individual submits to the jurisdiction of the state by consent, by entering a general appearance, or by filing a responsive document that has the effect of waiving the objection to the state's jurisdiction;

(C) the individual resided with the child in the state;

(D) the individual resided in the state and provided prenatal expenses or support for the child;

(E) the child resided in the state as a result of the acts or directives of the individual;

(F) the individual engaged in sexual intercourse in the state and the child may have been conceived by that act of intercourse;

(G) the individual asserted parentage in the state's putative father registry.

All of these enumerated circumstances have been found to be in conformity with the Due Process Clause of the United States Constitution. Conspicuously absent from the list of enumerated circumstances is an exercise of jurisdiction based solely on the residence of the maintenance creditor. Under the Constitution, courts in the United States may not exercise jurisdiction over a nonresident defendant if the defendant has no relationship to the forum. Therefore, the enumerated circumstances mentioned in the Uniform Interstate Family Support Act represent the furthest extent of the ability of any United States court to exercise jurisdiction over a nonresident defendant for the purpose of entering a maintenance order.

2. The Hague Conventions

Civil Law standards for the recognition and enforcement of maintenance are contained in Article 3 of the 1958 and Articles 7 and 8 of the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. These two conventions contain rules of indirect jurisdiction in that they require recognition of maintenance obligations if:

(A) the maintenance creditor or debtor had his habitual residence in the State where the decision was rendered at the time when the proceedings were instituted;

(B) the maintenance debtor and the maintenance creditor were nationals of the state at the time the proceedings were instituted;

(C) the defendant submitted to the jurisdiction either expressly or by presenting his case on the merits;

(D) the decision was part of a divorce, legal separation, or annulment by an authority of a State recognized as having jurisdiction in such matters.

B. The Incompatibility of the Jurisdictional Standards

Some of these jurisdictional rules are compatible. For example, both systems agree that jurisdiction is appropriate when the state is the residence of the maintenance debtor or when the debtor consents.

However, some of the formulated jurisdictional rules are, on their face, incompatible with each other. The indirect jurisdictional rules of Articles 7 and 8 of the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations would be unconstitutional in the United States. The United States requires that, if the maintenance debtor is not a resident of the state, there must be an adequate relationship between the debtor and the forum to justify the forum in assuming jurisdiction. The habitual residence of the maintenance creditor is not such an adequate relationship.

In addition, the common nationality of the maintenance creditor and debtor is not, by itself, a constitutionally sufficient relationship since nationality does not require that there be substantial contacts between the debtor and the forum. Jurisdiction based solely on nationality, as opposed to residence or domicile, is not recognized in the United States, regardless of whether the issue is one of divorce, custody and access or maintenance. Therefore, Article 8 of the 1973 Hague Convention would also be unconstitutional in the United States if the divorce, annulment or legal separation was performed by the state of the parties' nationality without the maintenance debtor being domiciled in the state or having some other adequate relationship to the state.

There have been a number advocates for the establishment in the United States of a child-centered standard of jurisdiction in maintenance cases which would allow the state where the child was a resident to determine the amount and duration of child support. Professor Duncan expressed the hope that the constitutional difficulties that such a rule would present for the United States would not be an insuperable obstacle to agreement.

Unfortunately, the United States has recently reconsidered the issue of child-centered jurisdiction during the process of studying the interstate child support system. After a long and serious debate, the United States Commission on Interstate Child Support and the drafters of the Uniform Interstate Family Support Act determined that any attempt to base jurisdiction on the residence of the maintenance creditor or the child would be unconstitutional under the United States Supreme Court's interpretation of the Due Process Clause as applied to the exercise of jurisdiction by state courts in

maintenance cases. Thus, the Uniform Act expands those actions of a maintenance debtor that would subject him to jurisdiction to the limits allowed by the Supreme Court but does not attempt to base jurisdiction on the habitual residence of the maintenance creditor or of the child.

Some of the jurisdictional bases of the Uniform Interstate Family Support Act would probably be unacceptable to the states that are parties to the 1973 Hague Convention. The Uniform Act authorizes a state to exercise jurisdiction when the defendant is served with a citation in the jurisdiction. This is a form of "tag" jurisdiction, which although common and accepted in the United States, is not generally accepted in civil law countries. The same may be true of jurisdiction based on the fact that sexual relations took place in the state which may have resulted in the conception of the child. This could result in taking jurisdiction when neither the maintenance creditor or debtor were habitually resident in the state.

C. Toward an Accommodation

When states have jurisdictional rules that are this divergent, it is very difficult to draft a mutually acceptable convention on jurisdiction. The current experience with the attempt to agree on rules of jurisdiction with respect to the proposed convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters is illustrative of the difficulties. The success of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children is due to the fact that the jurisdictional rules of both the common law and the civil law countries for measures dealing with the protection of minors are based on the relationship between the child and the state which is taking the measure. Therefore, agreement on the use of the habitual residence of the child as the primary jurisdictional standard was easy to obtain. However, because the rules on jurisdiction in maintenance cases are so diverse, it is very unlikely that rules of jurisdiction could be drafted which would be acceptable on a global basis.

A more productive approach would be to focus the discussion on standards for the recognition of judgments. It is possible to

agree on which judgments should be recognized without agreeing on rules of jurisdiction. This can be accomplished by granting recognition to all maintenance judgments which were rendered on a factual basis which would satisfy the jurisdictional rules of the state that is requested to recognize the judgment. Under this principle, it would not matter what jurisdictional basis the requesting state's court articulated when it rendered the judgment. The crucial question is whether, regardless of the reasons stated by the court of the requesting state, the facts of the case would support jurisdiction under the rules of the requested state. If so, the judgment should be recognized.

Under this proposal, a maintenance judgment from another country would be recognized by a party to the 1973 Hague Convention so long as the facts of the case indicated that it was rendered by a state that was the habitual residence of the maintenance creditor or debtor, was by the court of a state recognized as having jurisdiction over the divorce, legal separation or annulment of the parties, was the place of common nationality of the parties, or was the jurisdiction to which the maintenance debtor submitted. The United States would recognize a maintenance judgment of another state so long as the facts of the case indicated that jurisdiction could have been predicated on any of the grounds specified in the Uniform Interstate Family Support Act.

This proposal will result in the recognition of most maintenance judgments. There will be a few cases where recognition will not be possible. In those cases there should be an agreement that the non-recognizing country will obtain a new order against the maintenance debtor. Any proposed convention should include procedures for a state to request the establishment of a maintenance order in another state, particularly where the requested state cannot recognize the first state's maintenance judgment.

* * * *

D. Conclusion

It would greatly simplify the task of revising the maintenance conventions if there were no attempt to draft direct or indirect rules of jurisdiction. Instead, as indicated above, the revision should focus on accommodating all divergent jurisdictional views by a

standard that requires recognition when the factual basis underlying the maintenance judgment satisfies the jurisdictional rules of the requested state.

5. International Wills Convention

On August 2, 1991, the Senate gave its advice and consent to ratification of the Convention Providing a Uniform Law on the Form of an International Will, adopted at a diplomatic conference held in Washington, D.C. on October 26, 1973, entered into force on February 9, 1978 ("Wills Convention"), *reprinted in* 12 I.L.M. 1298 (1973). Advice and consent was provided subject to the understanding in the President's Letter of Transmittal that the U.S. instrument of ratification would not be deposited until after necessary federal legislation was enacted. *See* S. Treaty Doc. No. 99–29 (1986). In the United States the authority to execute an international will remains a matter of state law. A number of U.S. states have enacted the Uniform International Wills Act, prepared by the Uniform Law Commissioners for this purpose. The federal legislation would address, among other things, the validity of certain international wills in the United States and designation of U.S. diplomatic and consular agents to act with regard to U.S. nationals abroad and military officers licensed to practice law to act with regard to members of U.S. Armed Forces and other eligible legal assistance clients. Legislation had not been enacted at the time this volume went to press and the Wills Convention had not yet entered into force for the United States.

Cross-references

International Child Abduction and Intercountry Adoption Convention, **Chapter 2.B.1. and 2.**
Judicial Assistance, **Chapter 2.D.**

Chapter 16

Sanctions

A. IMPOSITION OF SANCTIONS

1. Burma

Section 570 of the Foreign Operations, Export Financing, and Related Programs Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009 (1996), required imposition of certain sanctions on Burma and authorized the President to prohibit investment in that country upon a determination that the Government of Burma had committed large-scale repression or violence against the democratic opposition. In addition, § 570(d) required a report to Congress every six months on conditions in Burma and U.S. policy. Excerpts below from the semiannual report submitted December 2, 1997, describe implementation of § 570 and summarize progress in implementing U.S. policy. The semiannual reports also addressed issues identified in § 570(d), measuring progress: (1) toward democratization; (2) on improving the quality of life; and (3) development of a multilateral strategy.

The full text of the December 1997 report is available at *www.state.gov/www/regions/eap/971202_us-burma_report.html*. The semiannual report submitted April 25, 2000, the last covering the 1991–1999 period, is available at *www.state.gov/www/regions/eap/000425_us-burma_report.html*.

---

* * * *

U.S. policy toward Burma seeks progress in three key areas: democracy, human rights, and counternarcotics. We have taken strong measures to pressure the SLORC to end its repression and move towards democratic government. Since 1989, the United States has been unable to certify that Burma has cooperated in efforts against narcotics. The U.S. has suspended economic aid, withdrawn GSP and OPIC, implemented an arms embargo, blocked assistance from international financial institutions, downgraded our representation from Ambassador to Charge, and imposed visa restrictions on senior leaders and their families.

In addition, the President signed Executive Order 13047 invoking the authority of section 570(d) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 and of section 203 of the International Emergency Economic Powers Act to impose a ban on new investment by U.S. persons in Burma effective May 21, 1997. The order prohibits U.S. persons from engaging in any of the following activities if they are undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Burma or a nongovernmental entity in Burma on or after May 21, 1997:

— entering a new contract that includes the economic development of resources located in Burma;
— entering a new contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma;
— the purchase of a share of ownership, including an equity interest, in the economic development of resources located in Burma; or
— entering into a contract providing for the participation in royalties, earnings, or profits in the economic development of resources located in Burma, without regard to the form of the participation.

Additionally, the executive order prohibits:

— persons from facilitating transactions of foreign persons that would violate any of the foregoing prohibitions if engaged in by a U.S. person; and
— any transaction by a U.S. person or within the United States that evades or avoids, or attempts to violate, any of the prohibitions in the order.

We are engaged in vigorous multilateral diplomacy to encourage ASEAN, Japan, the EU, and other nations to take similar steps and/or other actions to encourage progress by the SLORC in these areas of key concern. The EU imposed visa restrictions similar to ours and, earlier this year, withdrew certain trade preferences. Canada also withdrew GSP completely in August, imposed a requirement that all Canadian exports be issued an export permit prior to shipment to Burma, and issued a government statement discouraging further investment in Burma by Canadian firms. Japan's suspension of much of its bilateral aid program remains in force.

The net effect of these U.S. and international measures has been a further decline of investor confidence in Burma and deeper stagnation of the Burmese economy. While Burma's economic crisis is largely a result of the SLORC's own heavy-handed mismanagement, the SLORC is unlikely to find a way out of the crisis unless political developments permit an easing of international pressure.

* * * *

E.O. 13047, referred to in the report to Congress above, was published at 62 Fed. Reg. 28,301 (May 22, 1997). President Clinton's statement in transmitting the order to Congress, excerpted below, specified the Burmese authorities' actions and policies which led to the investment restrictions. 33 WEEKLY COMP. PRES. DOC. 751 (May 26, 1997). *See also* 91 Am. J. Int'l L. 697, 714–17 (1997).

---

* * * *

I have taken these steps in response to a deepening pattern of severe repression by the State Law and Order Restoration Council (SLORC) in Burma. During the past 7 months, the SLORC has

arrested and detained large numbers of students and opposition supporters, sentenced dozens to long-term imprisonment, and prevented the expression of political views by the democratic opposition, including Aung San Suu Kyi and the National League for Democracy (NLD). It is my judgment that recent actions by the regime in Rangoon constitute large-scale repression of the democratic opposition committed by the Government of Burma within the meaning of section 570(b) of the Act.

The Burmese authorities also have committed serious abuses in their recent military campaign against Burma's Karen minority, forcibly conscripting civilians and compelling thousands to flee into Thailand. Moreover, Burma remains the world's leading producer of opium and heroin, with official tolerance of drug trafficking and traffickers in defiance of the views of the international community.

I believe that the actions and policies of the SLORC regime constitute an extraordinary and unusual threat to the security and stability of the region, and therefore to the national security and foreign policy of the United States.

It is in the national security and foreign policy interests of the United States to seek an end to abuses of human rights in Burma and to support efforts to achieve democratic reform. Progress on these issues would promote regional peace and stability and would be in the political, security, and economic interests of the United States.

* * * *

2. Haiti

On October 4, 1991, President George H.W. Bush issued E.O. 12775, declaring a national emergency with respect to Haiti and imposing sanctions, as part of an effort to restore democracy in Haiti following the overthrow of Jean-Bertrand Aristide in September 1991. 56 Fed. Reg. 50,641 (Oct. 7, 1991). *See also* 2 Dep't St. Dispatch No. 44 at 814–817 (Nov. 4, 1991). The Office of Foreign Assets Control ("OFAC" or "FAC"), Department of the Treasury, issued the Haitian

Transaction Regulations implementing this executive order effective March 31, 1992. 57 Fed. Reg. 10,820 (Mar. 31, 1992). During the next three years the United States imposed sanctions—unilaterally, together with the Organization of American States, and in implementation of UN Security Council resolutions. Sanctions were fully lifted only when Jean-Bertrand Aristide was restored to power on October 15, 1994. Throughout this period the President transmitted messages to Congress pursuant to 50 U.S.C. §§ 1641(c) and 1703(c), which require semiannual reports whenever the President exercises his authority to declare a national emergency under the International Emergency Economic Powers Act ("IEEPA").

On October 13, 1994, just days before the return of Aristide to Haiti, President William J. Clinton transmitted the penultimate report pursuant to those provisions. The report provided the following background and summary of U.S. actions during the three years of diplomacy, sanctions, and threat of use of force. 30 WEEKLY COMP. PRES. DOC. 2012 (Oct. 13, 1994). *See also* Chapter 1.C.2. j. and m. and 3.a. concerning sanctions connected with immigration and visas, and Chapters 17.B.5. and 18.A.5.b.(1) discussing U.S. involvement in peacekeeping efforts in Haiti.

---

1. In December 1990, the Haitian people elected Jean-Bertrand Aristide as their President by an overwhelming margin in a free and fair election. The United States praised Haiti's success in peacefully implementing its democratic constitutional system and provided significant political and economic support to the new government. The Haitian military abruptly interrupted the consolidation of Haiti's new democracy when, in September 1991, it illegally and violently ousted President Aristide from office and drove him into exile.

2. The United States, on its own and together with the Organization of American States (OAS), immediately imposed sanctions against the illegal regime. The United States also actively supported the efforts of the OAS and the United Nations to restore

democracy to Haiti and to bring about President Aristide's return by facilitating negotiations between the Haitian parties. The United States and the international community also offered material assistance within the context of an eventual negotiated settlement of the Haitian crisis to support the return to democracy, build constitutional structures, and foster economic well-being.

As a result of continuing military intransigence in the face of these efforts and of worsening human rights abuses in Haiti, the conclusion was reached that no political settlement of the Haitian crisis was possible as long as the three principal military leaders remained in power. Therefore, beginning in early May 1994, a series of steps were taken to intensify the pressure of sanctions on the military leaders and their associates in order to bring the three leaders to step down. With U.S. leadership, the U.N. Security Council on May 6, 1994, enacted Resolution 917, imposing comprehensive trade sanctions and other measures on Haiti. This was followed by a succession of unilateral United States sanctions —banning scheduled air service and financial transactions to or from Haiti or between Haiti and third countries through the United States and blocking the assets in the United States or under United States control of Haitians resident in Haiti. Additionally, under authorities not related to the IEEPA, all visas that had been issued to Haitians at Port-au-Prince or Curacao before May 11, 1994, were revoked. Several other countries took similar actions.

The continued resistance of the illegal regime to the efforts of the international community also prompted the United States to augment embargo enforcement. The United States and other countries entered into a cooperative endeavor with the Dominican Republic to monitor that country's enforcement of sanctions along its land border with Haiti and in its coastal waters.

As the reporting period progressed, it became apparent that the Haitian military leaders, even under the pressure of intense worldwide sanctions, were determined to cling to power and to block the restoration of democracy and return of President Aristide. Internal repression continued to worsen, exemplified by the expulsion in July of the UN/OAS-sponsored International Civilian Mission (ICM) human rights observers. As a result of this deterioration and the threat it posed to peace and security in the region,

the U.N. Security Council enacted Resolution 940 on July 31, 1994, authorizing the use of all necessary means to bring about the departure of the military leadership and the return of the legitimate authorities including President Aristide. In the succeeding weeks, the international community under U.S. leadership assembled a multinational coalition force to carry out this mandate.

On September 18, 1994, I directed the deployment of U.S. Armed Forces to Haiti to remove the military leaders and restore democracy. However, I remained deeply committed to achieving our goals peacefully if possible. Therefore, on the previous day I had sent former President Jimmy Carter, Senator Sam Nunn and retired General Colin Powell to Haiti on a final diplomatic mission. The combination of an imminent military operation and determined diplomacy led to an agreement on September 18, that portends the early achievement of our and the international community's goals in Haiti. The military leaders have relinquished power and the legitimate authorities will be restored by October 15 at the latest. As a result of the agreement reached in Port-au-Prince on September 18, U.S. forces in the vanguard of the multinational coalition force drawn from 26 countries began a peaceful deployment to Haiti on September 19.

In a spirit of reconciliation and reconstruction, President Aristide called on September 25 for the immediate ceasing of sanctions to further the mission of the coalition forces and begin without delay the work of rebuilding. In response to this request, on September 26, in an address before the United Nations General Assembly, I announced my intention to suspend all unilateral sanctions against Haiti except those that affect the military leaders and their immediate supporters and families. I also directed that steps be taken in accordance with Resolutions 917 and 940 to permit supplies and services to flow to Haiti to restore health care, water and electrical services, provide construction materials for humanitarian programs, and allow the shipment of communications, agricultural, and educational materials.

Regulations to accomplish those objectives were published in the Federal Register on October 5. In addition, the U.N. Security Council on September 29 enacted Resolution 944 directing that all U.N. sanctions be terminated the day after President Aristide

returns to Haiti. Finally, the national emergency with respect to Haiti was extended on September 30, 1994, to allow the continued enforcement of those sanctions that are to remain in force until the restoration of democracy to Haiti is completed as will be signified by President Aristide's return to his country.

* * * *

Excerpts below from reports of April 25, 1994, 30 WEEKLY COMP. PRES. DOC. 91 (May 2, 1994) and further excerpts from the report of October 13, 1994, *supra*, provide more detailed descriptions of U.S. actions.

Message to Congress, April 25, 1994

* * * *

4. Economic sanctions against the de facto regime in Haiti were first imposed in October 1991. On October 4, 1991, in Executive Order No. 12775, President Bush declared a national emergency to deal with the threat to the national security, foreign policy, and economy of the United States caused by events that had occurred in Haiti to disrupt the legitimate exercise of power by the democratically elected government of that country (56 Fed. Reg. 50,641). In that order, the President ordered the immediate blocking of all property and interests in property of the Government of Haiti (including the Banque de la Republique d'Haiti) then or thereafter located in the United States or within the possession or control of a U.S. person, including its overseas branches. The Executive order also prohibited any direct or indirect payments or transfers to the de facto regime in Haiti of funds or other financial or investment assets or credits by any U.S. person, including its overseas branches, or by any entity organized under the laws of Haiti and owned or controlled by a U.S. person.

Subsequently, on October 28, 1991, President Bush issued Executive Order No. 12779, adding trade sanctions against Haiti to the sanctions imposed on October 4 (56 Fed. Reg. 55,975). This order prohibited exportation from the United States of goods, technology, services, and importation into the United States of

Haitian-origin goods and services, after November 5, 1991, with certain limited exceptions. The order exempted trade in publications and other informational materials from the import, export, and payment prohibitions and permitted the exportation to Haiti of donations to relieve human suffering as well as commercial sales of five food commodities: rice, beans, sugar, wheat flour, and cooking oil. In order to permit the return to the United States of goods being prepared for U.S. customers by Haiti's substantial "assembly sector," the order also permitted, through December 5, 1991, the importation into the United States of goods assembled or processed in Haiti that contained parts or materials previously exported to Haiti from the United States. On February 5, 1992, it was announced that specific licenses could be applied for on a case-by-case basis by U.S. persons wishing to resume a pre-embargo import/export relationship with the assembly sector in Haiti.

5. On June 30, 1993, I issued Executive Order No. 12853 that expanded the blocking of assets of the de facto regime to include assets of Haitian nationals identified by the Secretary of the Treasury as providing substantial financial or material contributions to the regime, or doing substantial business with the regime. That Executive Order also implemented United Nations Security Council Resolution ("UNSC Resolution") 841 of June 16, 1993, by prohibiting the sale or supply by U.S. persons or from the United States, or using U.S.-registered vessels or aircraft, of petroleum or petroleum products or arms and related materiel of all types to any person or entity in Haiti, or for the purpose of any business carried on in or operated from Haiti, or promoting or calculated to promote such sale or supply. Carriage of such goods to Haiti on U.S.-registered vessels is prohibited, as is any transaction for the evasion or avoidance of, or attempt to evade or avoid, any prohibition in the order.

6. As noted in my previous report, apparent steady progress toward achieving the firm goal of restoring democracy in Haiti permitted the United States and the world community to suspend economic sanctions against Haiti in August 1993. With strong support from the United States, the United Nations Security Council adopted Resolution 861 on August 27, 1993, suspending the petroleum, arms, and financial sanctions imposed under UNSC

Resolution 841. On the same day, the Secretary General of the OAS announced that the OAS was urging member states to suspend their trade embargoes. In concert with these U.N. and OAS actions, U.S. trade and financial restrictions against Haiti were suspended, effective at 9:35 a.m. e.d.t., on August 31, 1993.

These steps demonstrated my determination and that of the international community to see that Haiti and the Haitian people resume their rightful place in our hemispheric community of democracies. Our work to reach a solution to the Haitian crisis through the Governors Island Agreement was however seriously threatened by accelerating violence in Haiti sponsored or tolerated by the de facto regime. The violence culminated on October 11, 1993, with the obstruction by armed "attachés," supported by the Haitian military and police, of the deployment of U.S. military trainers and engineers sent to Haiti as part of the United Nations Mission in Haiti. The Haitian military's decision to dishonor its commitments made in the Governors Island Agreement was apparent. On October 13, 1993, the United Nations Security Council issued Resolution 873, which terminated the suspension of sanctions effective at 11:59 p.m. e.d.t., October 18, 1993.

As a result, effective at 11:59 p.m. e.d.t., October 18, 1993, the Department of the Treasury revoked the suspension of those trade and financial sanctions that had been suspended, so that the full scope of prior prohibitions was reinstated (58 Fed. Reg. 54,024, October 19, 1993). In addition to the actions I took in Executive Order No. 12853, the reinstated sanctions in the Haitian Transactions Regulations, 31 C.F.R. Part 580 (the "HTR"), prohibit most unlicensed trade with Haiti, and block the assets of the de facto regime in Haiti and the Government of Haiti. Restrictions on the entry into U.S. ports of vessels whose Haitian calls would violate U.S. or OAS sanctions had they been made by U.S. persons were also reinstated.

Also effective at 11:59 p.m. e.d.t., October 18, 1993, I issued Executive Order No. 12872 (58 Fed. Reg. 54,029), authorizing the Department of the Treasury to block assets of persons who have: (1) contributed to the obstruction of UNSC resolutions 841 and 873, the Governors Island Agreement, or the activities of the U.N. Mission in Haiti; (2) perpetuated or contributed to the violence

in Haiti; or (3) materially or financially supported either the obstruction or the violence referred to above. This authority is in addition to the blocking authority provided for in the original sanctions and in Executive Order No. 12853 of June 30, 1993, and ensures adequate authority to reach assets subject to U.S. jurisdiction of military and police officials, civilian "attaches" and their financial patrons meeting these criteria. A list of 41 such individuals was published on November 1, 1993, by the Office of Foreign Assets Control (FAC) of the Department of the Treasury (58 Fed. Reg. 58,480).

On October 18, I ordered the deployment of six U.S. Navy vessels off Haiti's shores. To improve compliance with the ban on petroleum and munitions shipments to Haiti contained in UNSC resolutions 841 and 873, my Administration succeeded in securing the passage of UNSC Resolution No. 875. UNSC Resolution 875 calls upon the United Nations Member States acting either nationally or through regional agencies or arrangements to halt inward maritime shipping for Haiti in order to inspect and verify that the Haiti-bound cargo does not contain UNSC-prohibited petroleum or arms. A multinational Maritime Interdiction Force that includes elements of the U.S. Navy and the U.S. Coast Guard has been established and now patrols the waters off Haiti.

7. The declaration of the national emergency on October 4, 1991, was made pursuant to the authority vested in the President by the Constitution and laws of the United States, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3 of the United States Code. The emergency declaration was reported to the Congress on October 4, 1991, pursuant to section 204(b) of IEEPA (50 U.S.C. 1703(b)). The additional sanctions set forth in Executive Orders Nos. 12779, 12853, and 12872, were imposed pursuant to the authority vested in the President by the Constitution and laws of the United States, including the statutes cited above, as well as the United Nations Participation Act of 1945 (22 U.S.C. 287c), and represent the response by the United States to the United Nations Security Council and OAS directives and recommendations discussed above.

* * * *

9. In implementing the Haitian sanctions program, FAC has made extensive use of its authority to specifically license transactions with respect to Haiti in an effort to mitigate the effects of the sanctions on the legitimate Government of Haiti and on the livelihood of Haitian workers employed by Haiti's assembly sector, and to ensure the availability of necessary medicines and medical supplies and the undisrupted flow of humanitarian donations to Haiti's poor. . . .

10. During this reporting period, U.S.-led OAS initiatives resulted in even greater intensification and coordination of enforcement activities. Continued close coordination with the U.S. Customs Service in Miami sharply reduced the number of attempted exports of unmanifested, unauthorized merchandise. New FAC initiatives are expected to result in more effective coordination of Customs Service and Department of Justice activities in prosecution of embargo violations. During the reporting period, the multinational Maritime Interdiction Force that contains elements of the U.S. Navy and U.S. Coast Guard, continued to patrol offshore Haiti and to conduct ship boardings, inspections of cargoes bound for Haiti, identification of suspected violators, and referrals for investigation. . . .

* * * *

Message to Congress, October 13, 1994

---

* * * *

8. Since my report of April 25, 1994, in order to implement UNSC Resolution 917 of May 6, and to take additional steps with respect to the actions and policies of the de facto regime in Haiti, I issued Executive Order No. 12914, dated May 7, 1994. Effective at 11:59 p.m. e.d.t., on May 8, 1994, the order blocks all funds and financial resources of three categories of individuals that are or hereafter come within the possession or control of U.S. persons, including their overseas branches. These groups include (a) all officers of the Haitian military, including the police, and their immediate families; (b) the major participants in the coup d'etat in Haiti of 1991 and in the illegal governments since the coup d'etat and their immediate

families; and (c) those employed by or acting on behalf of the Haitian military, and their immediate families. The Executive Order also bans arriving and departing flights, and overflights stopping or originating in Haiti, except regularly scheduled commercial passenger flights. . . . E.O. No. 12914 (59 Fed. Reg. 24,339, May 10, 1994) . . .

9. Subsequently, on May 21, 1994, in implementation of UNSC Resolution 917 of May 6, and in order to further strengthen sanctions in response to the actions and policies of the de facto regime in Haiti, I issued Executive Order No. 12917. Effective at 11:59 p.m. e.d.t., on May 21, 1994, the order prohibits (1) the importation into the United States of any goods originating in Haiti or services performed in Haiti, that are exported from Haiti after May 21, 1994, or any activity by any U.S. persons or in the United States that promotes, or is intended to promote, such importation; (2) any activity by U.S. persons or in the United States that promotes the exportation or transshipment of any goods originating in Haiti that are exported from Haiti after May 21, 1994; (3) any dealing by U.S. persons or in the United States, or using U.S.-registered vessels or aircraft, of any goods originating in Haiti that are exported from Haiti after May 21, 1994; and (4) the sale, supply, or exportation by U.S. persons or from the United States, or using U.S.-registered vessels or aircraft, of any goods, regardless of origin, to Haiti, or for the purpose of any business carried on in or operated from Haiti, or any activity by U.S. persons or in the United States that promotes such sale, supply, or exportation.

Exemptions from the foregoing prohibitions include: (1) informational materials, such as books and other publications, needed for the free flow of information; (2) the sale, supply, or exportation of medicines and medical supplies, as authorized by the Secretary of the Treasury, and rice, beans, sugar, wheat flour, cooking oil, corn, corn flour, milk and edible tallow, provided that neither the de facto regime in Haiti nor any person designated by the Secretary of the Treasury as a blocked individual or entity of Haiti is a direct or indirect party to the transaction; and (3) transactions specifically licensed or otherwise authorized by FAC. . . . E.O. No. 12917 (59 Fed. Reg. 26,925, May 24, 1994). . . .

10. Again, on June 10, 1994, in order to take additional steps with respect to the actions and policies of the de facto regime in Haiti, I issued Executive Order No. 12920. Effective at 11:59 p.m. e.d.t., on June 10, 1994, the order prohibits, first, any payment or transfer of funds or other financial or investment assets or credits to Haiti from or through the United States, or to or through the United States from Haiti, with the following exceptions: (1) payments and transfers for the conduct of activities in Haiti of the United States Government, the United Nations, the OAS, or foreign diplomatic missions; (2) payments and transfers between the United States and Haiti for the conduct of activities in Haiti of nongovernmental organizations (NGOs) engaged in the provision in Haiti of essential humanitarian assistance as authorized by the Secretary of the Treasury; (3) payments and transfers from a U.S. person to any close relative of the remitter or of the remitter's spouse who is resident in Haiti, provided that such payments do not exceed $50.00 per month to any one household, and that neither the de facto regime in Haiti nor any person designated by the Secretary of the Treasury as a blocked individual or entity of Haiti is a beneficiary of the remittance; (4) reasonable amounts of funds carried by travelers to or from Haiti to cover their travel-related expenses; and (5) payments and transfers incidental to shipments to Haiti of food, medicine, medical supplies, and informational materials exempt from the export prohibitions of this order. The order also prohibits the sale, supply, or exportation by U.S. persons or from the United States, or using U.S.-registered vessels or aircraft, of any goods, technology, or services, regardless of origin, to Haiti, or for the purpose of any business carried on in or operated from Haiti, or any activity by U.S. persons in the United States that promotes such sale, supply, or exportation. Exportations of the following types are exempt from the foregoing provision: (1) informational materials, such as books and other publications needed for the free flow of information; (2) medicines and medical supplies, as authorized by the Secretary of the Treasury, and rice, beans, sugar, wheat flour, cooking oil, corn, corn flour, milk, and edible tallow, provided that neither the de facto regime in Haiti nor any person designated by the Secretary of the Treasury as a blocked individual or entity of Haiti is a

direct or indirect party to the transaction; and (3) donations of food, medicine, and medical supplies intended to relieve human suffering. . . . E.O. No. 12920 (59 Fed. Reg. 30,501, June 14, 1994). . . .

11. Once again, on June 21, 1994, in order to take additional steps with respect to the actions and policies of the de facto regime in Haiti, I issued Executive Order No. 12922. Effective at 10:09 p.m. e.d.t., on June 21, 1994, the order blocks all property and interests in property that are or come within the United States or within the possession or control of U.S. persons, including their overseas branches, of (1) any Haitian national resident in Haiti; or (2) any other person subject to the blocking provisions of Executive Order Nos. 12775, 12779, 12853, 12872, or 12914 and Haitian citizens who are members of the immediate family of any such person, as identified by the Secretary of the Treasury. This provision does not apply to property of nongovernmental organizations engaged in the provision of essential humanitarian assistance in Haiti or in the conduct of refugee and migration operations in Haiti, as identified by the Secretary of the Treasury. Payments and transfers previously authorized by Executive Order No. 12920, of June 10, 1994, may continue to be made in a manner directed by the Secretary of the Treasury. . . . Executive Order No. 12922 (59 Fed. Reg. 32,645, June 23, 1994) . . .

12. A policy statement, effective January 31, 1994 (59 Fed. Reg. 8134, February 18, 1994), was published to extend until March 31, 1994, the expiration date for all current assembly sector licenses issued by FAC pursuant to the HTR, and a second policy notice, effective March 29, 1994, was published on April 1, 1994 (59 Fed. Reg. 15,342), extending these licenses through May 31, 1994. These licenses provided an exception to the comprehensive U.S. trade embargo on Haiti under which the "assembly sector" continued to receive parts and supplies from, and supply finished products to, persons in the United States.

Assembly sector trade with the United States accounted for a significant portion of Haiti's imports, and a substantial majority of its exports, prior to the institution of the OAS-requested embargo in November 1991. . . .

As noted above and as mandated by UNSC Resolution 917, Executive Order No. 12917 further restricted imports from and exports to Haiti after May 21, 1994. Consequently, all FAC licenses for importation into the United States from the Haitian assembly sector were withdrawn effective May 22, 1994. The FAC is continuing, in close coordination with the Department of State, to evaluate license applications from U.S. companies seeking to repatriate capital equipment, parts, and components previously exported for use in assembly sector activities.

Following the successful deployment to Haiti of U.S. forces serving as the vanguard of the multinational coalition force, and as promised in my September 26 address before the United Nations General Assembly, amendments to the HTR were published on October 5, 1994, suspending, effective 10:28 a.m. on October 5, 1994, the sanctions that the United States had imposed on Haiti unilaterally, with the exceptions noted below. Section 580.211 of the HTR, which was added to the HTR in June 1992 to deny entry into U.S. ports to vessels engaged in certain trade transactions with Haiti, was removed. A new section, 580.518, was added to license generally the export from the United States to Haiti of all food and food products.

Section 580.519 was added to the HTR to remove the prohibition (which I had imposed in Executive Order No. 12920 on June 14) on payments or transfers of funds or other financial or investment assets to Haiti from or through the United States, or to or through the United States from Haiti. Section 580.520 was added to unblock the property and interests in the United States of Haitian nationals resident in Haiti, which I had blocked in Executive Order No. 12922 on June 23; however, section 580.520 provides that the property and interests in property of certain persons, listed in the revised "Appendix A" to the HTR, will remain blocked until further notice. The HTR were also amended by the addition of section 580.521 to permit the specific licensing of exports to Haiti of fuel and equipment for electric power generation, telecommunications materials, media and educational supplies, agricultural supplies, and construction and transportation supplies for humanitarian purposes. Section 580.522 was added to authorize the case-by-case licensing of charter flights between

the United States and Haiti for use by humanitarian relief agencies to transport needed personnel and supplies, or for journalists covering events in Haiti. . . .

On September 29, I directed the Secretary of Transportation to issue the necessary directives to terminate the ban on regularly-scheduled air passenger service between the United States and Haiti that had been imposed on June 24.

The HTR will be further amended upon the return of President Aristide to Haiti to provide that, in accordance with U.N. Resolution 944 of September 29, 1994, on the day following his return, the U.S. sanctions imposed pursuant to U.N. Resolutions 841, 873, and 917 will be terminated. At that time, I will also direct the Secretary of Transportation to rescind the ban on all other air transportation (all cargo and charter) between the United States and Haiti that I imposed on May 7, 1994.

13. Humanitarian Shipments. Executive Order No. 12917 revoked an earlier exception to the export ban permitting the exportation to Haiti of "donated articles to relieve human suffering." . . . However, the Executive Order provides an exemption from its trade prohibitions for the sale, supply, or exportation of certain basic commodities essential to humanitarian assistance programs serving Haiti's urban and rural poor, i.e., medicines and medical supplies and certain nutritional staples of the Haitian diet, as well as for informational materials. The FAC developed procedures to facilitate U.N. Sanctions Committee approval for humanitarian shipments to Haiti that do not fall within the narrowly-defined U.N. exemption categories. Specific authorizations have also been issued on a case-by-case basis for commercial deliveries to certain "blocked individuals of Haiti," in order to allow the continued supply in Haiti of essential foodstuffs, while retaining the ability to closely monitor such transactions. . . .

Humanitarian Services. Executive Order No. 12920 exempts from its financial prohibitions payments and transfers between the United States and Haiti in support of the conduct of activities in Haiti of NGOs engaged in the provision in Haiti of essential humanitarian assistance. The FAC immediately issued a specific license to the U.S. Agency for International Development (AID),

permitting it to continue uninterrupted its essential services in Haiti. Subsequently, based on recommendations by AID and the State Department, FAC developed a system of registration for NGOs engaged in relief efforts such as the delivery of food, medicine and medical supplies, as well as refugee and migration operations, to assure that approved payment orders are neither rejected nor blocked by U.S. banks in implementing the financial prohibitions of recent Executive orders. . . .

Air Transportation Services. Executive Order No. 12914, effective 11:59 p.m. e.d.t., May 8, 1994, banned arriving and departing flights and overflights stopping or originating in Haiti, except regularly scheduled commercial passenger flights. On June 10, an order was issued by the President to the Secretary of Transportation that terminated, effective June 24, 1994, regularly scheduled air service between the United States and Haiti by U.S. and Haitian carriers.

Specific licenses have been issued to authorize air ambulance services for medical evacuation flights to and from Haiti [and] certain cargo flights for the delivery of humanitarian shipments, including food and medicine, by registered NGOs. . . .

Blocked Haitian-Owned Vessels. Several dozen Haitian-owned vessels in the United States were blocked by Executive Order No. 12922 on June 21, 1994. . . .

Specific licenses have been issued to U.S. agents for the blocked vessels to authorize the provisioning, maintenance and repairs necessary to ensure seaworthiness to facilitate the lawful return of crew members to their home countries. No debits of U.S.-blocked funds were authorized by such licenses. . . .

14. Following the issuance of the blocking order in Executive Order No. 12922 on June 21, more than 1200 Haitian accounts were blocked totaling in excess of $79.1 million as of August 30, 1994. . . .

15. . . . During the reporting period, the multi-national Maritime Interdiction Force (MIF), which contains elements of the U.S. Navy and U.S. Coast Guard, continued to patrol offshore Haiti and to conduct ship boardings, inspections of cargoes bound for Haiti, identification of suspected violators and referrals for investigation. . . . With assumption of control of Haitian ports by

the Multinational Force following its September 19 deployment to Haiti, enforcement of the maritime sanctions in the ports became possible. The MIF operations therefore were terminated on September 28, 1994.

16. Since my report of April 25, 1994, in consultation with the Department of State and other Federal agencies, FAC has issued General Notices No. 5, No. 6, No. 7, No. 8, No. 9, and No. 10, "Notification of Blocked Individuals and Blocked Entities of Haiti." The Notices (issued June 2, June 17, June 22 (two Notices, August 2, and September 14, 1994, respectively) identify a total of 372 additional individuals and 94 companies and banks determined by the Department of the Treasury to be Blocked Individuals and Blocked Entities of Haiti. These are persons (1) who seized power illegally from the democratically-elected government of President Jean-Bertrand Aristide on September 30, 1991, or who have since the effective date of Executive Order No. 12775, acted or purported to act directly or indirectly on behalf of, or under the asserted authority of, such persons or of any agencies, instrumentalities or entities of the de facto regime in Haiti or any extra-constitutional successor thereto; (2) are the immediate family members of an individual who is (a) an officer of the Haitian military, including the police, (b) a major participant in the coup d'etat in Haiti of 1991 or in the illegal governments since the coup d'etat, (c) employed by or acting on behalf of the Haitian military, or (d) a Haitian national resident in Haiti; or persons subject to the blocking provisions of Executive Orders No. 12775, No. 12779, No. 12853, No. 12872, or No. 12914, or a Haitian citizen who is member of the immediate family of such person. United States persons are prohibited from engaging in transactions with these entities and individuals and with all officers of the Haitian military unless the transactions are licensed by FAC. All assets owned or controlled by these parties that are or come within the United States or that are or come within the possession or control of U.S. persons, including their overseas branches, are blocked. United States persons are not prohibited, however, from paying funds owed to these entities or individuals into blocked Government of Haiti Account No. 021083909 at the Federal Reserve Bank of New York, or, pursuant to specific licenses issued

by FAC, into blocked accounts held in the names of the blocked parties in domestic U.S. financial institutions.

* * * *

Following the return of Jean-Bertrand Aristide to Haiti on October 15, 1994, the United States terminated the remaining sanctions as contemplated. Excerpts below from President Clinton's final report to Congress dated February 3, 1995, describe the actions taken. 31 WEEKLY COMP. PRES. DOC. 185 (Feb. 6, 1995).

---

* * * *

On October 15, President Aristide returned to Haiti to assume his official responsibilities. Effective October 16, 1994, by Executive Order No. 12932 (59 Fed. Reg. 52403, October 14, 1994), I terminated the national emergency declared on October 4, 1991, in Executive Order No. 12775, along with all sanctions with respect to Haiti imposed in that Executive Order, subsequent Executive Orders, and the Department of the Treasury regulations to deal with that emergency. This termination does not affect compliance and enforcement actions involving prior transactions or violations of the sanctions.

* * * *

4. The Department of the Treasury's Office of Foreign Assets Control (FAC) amended the Haitian Transactions Regulations, 31 C.F.R. Part 580 (the "HTR") on December 27, 1994 (59 Fed. Reg. 66,476, December 27, 1994), to add section 580.524, indicating the termination of sanctions pursuant to Executive Order No. 12932, effective October 16, 1994. The effect of this amendment is to authorize all transactions previously prohibited by subpart B of the HTR or by the previously stated Executive Orders. Reports due under general or specific license must still be filed with FAC covering activities up until the effective date of this termination. Enforcement actions with respect to past violations of the sanctions are not affected by the termination of sanctions. . . .

* * * *

3. Cuba

a. The Cuban Democracy Act of 1992

In an effort to bring about a transition to democracy in Cuba, Congress passed the Cuban Democracy Act of 1992, Pub. L. No. 102–484, tit. XII, §§ 1201–10, 22 U.S.C. §§ 6001–6010 (1994) ("CDA"). Among other things, the CDA modified the existing Cuba embargo and imposed civil penalties. President Clinton implemented the CDA by issuing Executive Order ("E.O.") 12854 of July 4, 1993, delegating authority to the Departments of State, Treasury and Commerce.

The Department of the Treasury amended the Cuban Assets Control Regulations, 31 CFR pt. 515 (1993), to bring them into conformity with the CDA in a rule promulgated on June 29, 1993. The Federal Register described the action as excerpted below. 58 Fed. Reg. 34,709 (June 29, 1993).

---

* * * *

The enactment on October 23, 1992, of the Cuban Democracy Act of 1992, sections 1701–12, Public Law 102–484, 106 Stat. 2575 (the "CDA"), requires changes to the Cuban Assets Control Regulations, 31 CFR part 515 (the "Regulations"), to effect the modification of the Cuban embargo contained in the CDA. Section 515.207 is amended to add to the Regulations a prohibition on the entry of a vessel into the United States to load or unload any freight if the vessel has entered Cuba in the trade of goods or services. Such a vessel may not enter the United States to load or unload freight for 180 days from the day it has departed Cuba. Section 515.559 is amended to reflect the CDA's prohibitions on the issuance of most licenses for trade with Cuba under that section to entities that are owned or controlled by a U.S. person and located in third countries. Such licenses may be granted only for transactions based on contracts entered into before October 23, 1992, or for other transactions authorized by the CDA involving the exportation of medicine or medical equipment, or telecommunications equipment. Section 515.571 is added to authorize

vessels to enter the United States after calling in Cuba where the vessels' trade with Cuba was authorized by the U.S Treasury Department or by the U.S. Commerce Department consistent with the requirements of the CDA.

Because the CDA amends section 16 of the Trading With the Enemy Act, 50 U.S.C. App. 16, to permit the imposition of civil monetary penalties and civil forfeiture, Subpart G is extensively revised to establish the procedures governing the imposition of civil penalties. In addition, § 515.417 is added to the Regulations to provide an interpretation of the limitations contained in the CDA on the use of civil penalties.

Section 1705 of the CDA authorizes certain transactions for the support of the Cuban People. . . .

* * * *

By letter of July 22, 1993, the Department of State provided general policy guidelines to the Federal Communications Commission for implementation of the telecommunications provisions of the CDA. The FCC published a notice in the Federal Register dated July 27, 1993, attaching the letter and notifying applicants for circuits between the United States and Cuba that they must comply with criteria set forth in the letter. 58 Fed. Reg. 46,193 (Sept. 1, 1993). The letter, excerpted below, also indicated that OFAC would license travel and payments related to telecommunications arrangements, *see* 58 Fed. Reg. 45,060 (Aug. 26, 1993) and that the Department of Commerce's Bureau of Export Administration would permit the export of telecommunications commodities for approved projects.

---

* * * *

The purpose of this letter is to inform you of the Executive branch's general policy guidelines for implementation of the telecommunications provisions of the Cuban Democracy Act. These guidelines provide guidance to the Commission in considering proposals for telecommunications between the United States and

Cuba. Also set forth is an action plan for the Departments of State, Treasury and Commerce, and the FCC.

Section 1705(e)(1) of the Cuban Democracy Act (CDA), states that "telecommunication services between the United States and Cuba shall be permitted." It further provides that "* * * telecommunications facilities are authorized in such quantity and of such quality as may be necessary to provide efficient and adequate telecommunications services between the United States and Cuba." The CDA also allows for full or partial payment of amounts due to Cuba as a result of the provision of such service.

Other provisions of the CDA are intended to tighten the economic embargo on Castro, and in section 1710(a) the Secretary of the Treasury is charged with ensuring that activities permitted under the CDA, such as telecommunications, are carried out for the purposes of the CDA and not for "the accumulation by the Cuban government of excessive amounts of United States currency or the accumulation of excessive profits by any person or entity."

The Executive branch has developed a policy which provides for open competition among all telecommunications carriers which comply with Federal Communications Commission regulations and are licensed as appropriate by Treasury's Office of Foreign Assets Control and Commerce's Bureau of Export Administration. The policy implements the applicable provisions of the CDA by authorizing the provision of service to Cuba as [set forth in further detail in following paragraphs.]

* * * *

Section 525(b) of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103–236, 108 Stat. 474 (1994), amended section 5(b)(4) of the Trading with the Enemy Act, 50 U.S.C. App. 1–44 ("TWEA"), to expand the list of items considered to be information or informational materials. Under this section of TWEA, often referred to as the Berman Amendment, the President is prohibited from regulating or prohibiting the importation or exportation of such materials. In implementing the new provision, OFAC amended certain aspects of the Cuban Assets Control

Regulations but noted the relationship between the CDA and TWEA as follows:

> The provision of, and payments for, telecommunications services between Cuba and the United States are governed exclusively by section 1705 of the Cuban Democracy Act . . . That section authorizes such services, but permits the regulation of payments to Cuba for telecommunications. The CDA provision on telecommunications preempts the provisions of TWEA on information and informational materials to the extent that the provisions are inconsistent. 60 Fed. Reg. 39,255 (Aug. 2, 1995).

b. The LIBERTAD Act

On March 12, 1996, President Clinton signed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104–114, 110 Stat. 785 (1996) (also referred to as the Helms-Burton Act). Titles I and II of the act contained a list of restrictions and incentives aiming to bring about a transition to democracy in Cuba. Section 204 of the act authorized the President to take steps to suspend the embargo, but only after submitting a determination to Congress that a "transition government" is in power in Cuba. A 1998 U.S. State Department fact sheet, available at *www.state.gov/www/regions/wha/cuba/helms.html*, described the law as follows:

After the fall of Communist governments in the Soviet bloc in the early 1990s, members of Congress sought to increase pressure for peaceful democratic change in Cuba and to deter international involvement with property claimed by U.S. citizens that had been expropriated without compensation by the Cuban Government. This led to the development of the Cuban Liberty and Democratic Solidarity (Libertad) Act, known as the Helms-Burton Act after its principal sponsors. In February 1996, Cuban MiGs shot down two civilian aircraft in international air space, killing three U.S.

citizens and one U.S. resident. Congress then passed the act by overwhelming margins. The President signed it into law on March 12, 1996.

Provisions

Title I strengthened sanctions against the current Cuban Government. Among many other provisions, it codified the U.S. embargo on trade and financial transactions which had been in effect pursuant to a Presidential proclamation since the Kennedy Administration.

Title II describes U.S. policy toward and assistance to a free and independent Cuba. It required the President to produce a plan for providing economic assistance to a transition or democratic government in Cuba. (The President delivered the plan to Congress in January 1997.)

Title III creates a private cause of action and authorizes U.S. nationals with claims to confiscated property in Cuba to file suit in U.S. courts against persons that may be "trafficking" in that property. The Act grants the President the authority to suspend the lawsuit provisions for periods of 6 months if it is necessary to the national interest of the United States and will expedite a transition to democracy in Cuba. The President has exercised this authority five times, most recently in July 1998.

Title IV requires the denial of visas to and exclusion from the U.S. of persons who, after March 12, 1996, confiscate or "traffic" in confiscated property in Cuba claimed by U.S. nationals. The objective of this provision is to protect the status of confiscated U.S. property and to support existing sanctions against the current regime. The State Department reviews a broad range of economic activity in Cuba to determine the applicability of Title IV. The results of this effort appear not only in the actual determinations of "trafficking," but also in the deterrent to investment in confiscated U.S. property and in the exacerbation of the uncertainty of investing in Cuba.

* * * *

See Chapter 1.C.2.f. concerning implementation of Title IV and Chapter 8.B.2. concerning decision to suspend Title III. *See also* Chapter 11.A.6. and B.4.c.; and discussion of

international cooperation with U.S. efforts to exert pressure on Cuba to initiate democratic change in statements in July 1997 by Under Secretary of State for Economic, Business, and Agricultural Affairs, Stuart Eizenstat, available at *www.state.gov/www/regions/wha/970716a_eizenstat.html* and *www.state.gov/www/issues/economic/cuba970716.html*.

In his statement on signing the LIBERTAD Act, March 12, 1996, excerpted below, President Clinton described the attack on U.S. civilian aircraft to which the act responded and his views on implementation of sanctions consistent with the President's constitutional authority. 32 WEEKLY COMP. PRES. DOCS 478 (Mar. 18, 1996).

Today I have signed into law H.R. 927, the "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996." This Act is a justified response to the Cuban government's unjustified, unlawful attack on two unarmed U.S. civilian aircraft that left three U.S. citizens and one U.S. resident dead. The Act imposes additional sanctions on the Cuban regime, mandates the preparation of a plan for U.S. assistance to transitional and democratically elected Cuban governments, creates a cause of action enabling U.S. nationals to sue those who expropriate or "traffic" in expropriated properties in Cuba, and denies such traffickers entry into the United States. It is a clear statement of our determination to respond to attacks on U.S. nationals and of our continued commitment to stand by the Cuban people in their peaceful struggle for freedom.

Immediately after Cuba's brutal act, I urged that differences on the bill be set aside so that the United States could speak in a single, strong voice. By acting swiftly—just 17 days after the attack—we are sending a powerful message to the Cuban regime that we do not and will not tolerate such conduct.

The Act also reaffirms our common goal of promoting a peaceful transition to democracy in Cuba by tightening the existing embargo while reaching out to the Cuban people. Our current efforts are beginning to yield results: they are depriving the Cuban regime of the hard currency it needs to maintain its grip on power; more importantly, they are empowering the agents of peaceful

change on the island. This Act provides further support for the Administration's efforts to strengthen independent organizations in Cuba intent on building democracy and respect for human rights. And I welcome its call for a plan to provide assistance to Cuba under transitional and democratically elected governments.

Consistent with the Constitution, I interpret the Act as not derogating from the President's authority to conduct foreign policy. A number of provisions—sections 104(a), 109(b), 113, 201, 202(e), and 202(f)—could be read to state the foreign policy of the United States, or would direct that particular diplomatic initiatives or other courses of action be taken with respect to foreign countries or governments. While I support the underlying intent of these sections, the President's constitutional authority over foreign policy necessarily entails discretion over these matters. Accordingly, I will construe these provisions to be precatory.

The President must also be able to respond effectively to rapid changes in Cuba. This capability is necessary to ensure that we can advance our national interests in a manner that is conducive to a democratic transition in Cuba. Section 102(h), concerning the codification of the economic embargo, and the requirements for determining that a transitional or democratically elected government is in power, could be read to impose overly rigid constraints on the implementation of our foreign policy. I will continue to work with the Congress to obtain the flexibility needed if the United States is to be in a position to advance our shared interest in a rapid and peaceful transition to democracy in Cuba.

Finally, Title IV of the Act provides for the Secretary of State to deny visas to, and the Attorney General to exclude from the United States, certain persons who confiscate or traffic in expropriated property after the date of enactment of the Act. I understand that the provision was not intended to reach those coming to the United States or United Nations as diplomats. A categorical prohibition on the entry of all those who fall within the scope of section 401 could constrain the exercise of my exclusive authority under Article II of the Constitution to receive ambassadors and to conduct diplomacy. I am, therefore, directing the Secretary of State and the Attorney General to ensure that this

provision is implemented in a way that does not interfere with my constitutional prerogatives and responsibilities.

The Cuban regime's lawless downing of two unarmed planes served as a harsh reminder of why a democratic Cuba is vitally important both to the Cuban and to the American people. The LIBERTAD Act, which I have signed into law in memory of the four victims of this cruel attack, reasserts our resolve to help carry the tide of democracy to the shores of Cuba.

OFAC amended the Cuban Assets Control Regulations to bring them into conformity with the LIBERTAD Act in a final rule published July 18, 1996. 61 Fed. Reg. 37,385 (July 18, 1996). Background provided in the Federal Register explained the amendments as excerpted below.

---

* * * *

Section 515.208 is added to the Regulations to include a specific prohibition on knowingly making a loan, extending credit or other financing by a United States national, permanent resident alien, or a United States agency for the purpose of financing transactions involving confiscated property, the claim to which is owned by a United States national. (All transactions with respect to property or interests in property of the Cuban Government or Cuban nationals are prohibited pursuant to § 515.201 of the Regulations.) Sections 515.334, .335, .336, and .337 are added to the Regulations to incorporate definitions for "United States national," "confiscated," "property," and "permanent resident alien" as used in the Libertad Act's prohibition on financing, contained in § 515.208. Section 515.701 is amended to state that violations of the prohibition on financing are subject to the civil penalties described in that section.

Section 515.701 is further amended to describe the civil penalty authority contained in section 16 of the Trading with the Enemy Act, 50 U.S.C. App. 1–44, as amended by the Libertad Act. Certain restrictions on the use of civil penalty authority were eliminated by the Act and references to those restrictions are removed.

* * * *

c. Policy on humanitarian assistance and support for civil society

On October 6, 1995, President Clinton announced a number of policy changes to Cuba sanctions. In remarks delivered at the non-governmental organization Freedom House, the President stated:

> In our own hemisphere, only one country, Cuba, continues to resist the trend toward democracy. Today we are announcing new steps to encourage its peaceful transition to a free and open society. We will tighten the enforcement of our embargo to keep the pressure for reform on, but we will promote democracy and the free flow of ideas more actively. I have authorized our news media to open bureaus in Cuba. We will allow more people to travel to and from Cuba for educational, religious, and human rights purposes. We will now permit American non-governmental organizations to engage in a fuller range of activities in Cuba. And today, it gives me great pleasure to announce that our first grant to fund NGO work in Cuba will be awarded to Freedom House to promote peaceful change and protect human rights.

31 WEEKLY COMP. PRES. DOC. 1775 (Oct. 9, 1995). Pursuant to this announcement, OFAC amended the Cuban Assets Control Regulations to add three interpretive sections "concerning the authorization of travel transactions related to research, free-lance journalism, and educational activities in Cuba." 60 Fed. Reg. 54,194 (Oct. 20, 1995).

Additional amendments, as described in the Federal Register, included the following:

> A general license is added to permit travel to Cuba once a year in cases of extreme humanitarian need. Statements of licensing policy are added concerning the availability of specific licenses for public performances, educational exchanges, activities of human rights organizations, and the reciprocal establishment of news organization offices.

Payment of expenses for intellectual property protection in Cuba is also authorized. In addition, a number of clarifying technical amendments are included in this final rule.

On March 20, 1998, President Clinton announced steps to expand the flow of humanitarian assistance to Cuba and to support religious freedom and other elements of civil society there. 34 WEEKLY COMP. PRES. DOC. 475 (Mar. 23, 1998). *See also* 63 Fed. Reg. 27,348 (May 18, 1998), amending the Cuban Assets Control Regulations, among other things, "to authorize a person subject to U.S. jurisdiction to make remittances to a close relative in Cuba of up to $300 in any consecutive 3-month period."

Eight weeks ago, His Holiness John Paul II made an historic visit to Cuba. He spoke to and for the Catholic faithful who have for decades endured a system that denied their right to worship freely.

In anticipation and in support of that visit, my administration made a number of exceptions to our policy regarding travel and shipment of humanitarian supplies to Cuba. The response of the Cuban people to that visit has since convinced me that we should continue to look for ways to support Cuba's people without supporting its regime, by providing additional humanitarian relief, increasing human contacts, and helping the Cuban people prepare for a peaceful transition to a free, independent, and prosperous nation.

Prior to the Pope's visit, we authorized direct charter flights for pilgrims to attend Papal services. We also authorized direct humanitarian cargo flights to Cuba in order to reduce the cost of getting these needed supplies to the Cuban people. The deliveries were carefully monitored to ensure that they reached the people for whom they were intended.

These measures were fully consistent with the letter and spirit of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act, which, in addition to sustaining tough economic sanctions, also enable and encourage the administration to conduct a program of support for the Cuban people.

* * * *

To build further on the impact of the Pope's visit, to support the role of the Church and other elements of civil society in Cuba, and to thereby help prepare the Cuban people for a democratic transition, I have also decided to take the following steps:

— Resume licensing direct humanitarian charter flights to Cuba. Direct humanitarian flights under applicable agency regulations will make it easier for Cuban-Americans to visit loved ones on the island, and for humanitarian organizations to provide needed assistance more expeditiously and at lower cost.
— Establish new licensing arrangements to permit Cuban-Americans and Cuban families living here in the United States to send humanitarian remittances to their families in Cuba at the level of $300 per quarter, as was permitted until 1994. This will enable Cuban-Americans to provide direct support to relatives in Cuba, while moving the current flow of remittances back into legal, orderly channels.
— Streamline and expedite the issuance of licenses for the sale of medicines and medical supplies and equipment to Cuba. Based on experience of the past several years, including during the Papal visit, we believe that the end-use verification called for in the Cuban Democracy Act can be met through simplified arrangements.

* * * *

On January 5, 1999, President Clinton announced additional steps to expand the flow of humanitarian assistance to Cuba and strengthen independent civil society. 35 WEEKLY COMP. PRES. DOC. 7 (Jan. 11, 1999). The President's statement, excerpted below, stated that the steps were "designed to help the Cuban people without strengthening the Cuban Government," consistent with the policy of "keeping pressure on the regime for democratic change . . . while finding ways to reach out to the Cuban people," and consistent with the CDA and LIBERTAD Act. OFAC amended the Cuban Assets Control Regulations in

light of the President's announcement effective May 10, 1999. 64 Fed. Reg. 25,808 (May 13, 1999). The rule also implemented § 211 of Division A, Title II, of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, "excluding from the scope of the general license contained in § 515.527 any transaction or payment 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."

---

* * * *

Building on the success of the measures I announced last March, I am today authorizing additional steps to reach out to the Cuban people:

Expansion of remittances by allowing any U.S. resident (not only those with families in Cuba) to send limited funds to individual Cuban families as well as to organizations independent of the government.

Expansion of people-to-people contact through two-way exchanges among academics, athletes, scientists, and others, including streamlining the approval process for such visits.

Authorization of the sale of food and agricultural inputs to independent non-governmental entities, including religious groups and Cuba's emerging private sector, such as family restaurants and private farmers.

Authorization of charter passenger flights to cities in Cuba other than Havana and from some cities in the United States other than Miami in order to facilitate family reunification for persons living outside those cities.

An effort to establish direct mail service to Cuba, as provided for in the Cuban Democracy Act of 1992.

At the same time, we are taking steps to increase the flow of information to the Cuban people and others around the world, by strengthening Radio and TV Marti and launching new public diplomacy programs in Latin America and Europe to keep international attention focused on the need for change in Cuba. The United States will continue to urge the international community to do more to promote respect for human rights and democratic transition in Cuba.

* * * *

4. Iran and Libya

a. Iran and Libya Sanctions Act of 1996

The Iran and Libya Sanctions Act of 1996 ("ILSA"), Pub. L. No. 104–172, 110 Stat. 1541, was signed into law on August 5, 1996. In remarks at The George Washington University on the same day, "American Security in a Changing World," President Clinton noted that he had signed the act into law and explained that:

> [i]t builds on what we've already done to isolate those regimes by imposing tough penalties on foreign companies that go forward with new investments in key sectors. The act will help to deny them the money they need to finance international terrorism or to acquire weapons of mass destruction. It will increase the pressure on Libya to extradite the suspects in the bombing of Pan Am 103.

32 WEEKLY COMP. PRES. DOC. 1404 (Aug. 12, 1996).

Section 5 of the act required the President to impose at least two of six enumerated sanctions if he determined that a sanctionable activity had occurred. The sanctionable activities, as set forth in § 5, were: (1) investments of $40 million (amended by the ILSA Extension Act of 2001 with respect to Libya to reduce triggering investment to $20 million) or more that directly and significantly enhanced

the ability of Iran or Libya to develop its petroleum resources, and (2) provision of goods, services, technology, or other items to Libya in violation of UN Security Council Resolutions 748 (1992) or 883 (1993) that significantly and materially contributed to Libya's ability to acquire certain weapons or enhanced Libya's military or paramilitary capabilities; or contributed to Libya's ability to develop its petroleum resources or maintain its aviation capabilities. (See 4.c. below).

Section 6 of the act set forth the six sanctions as follows.

---

* * * *

(1) EXPORT-IMPORT BANK ASSISTANCE FOR EXPORTS TO SANCTIONED PERSONS.—The President may direct the Export-Import Bank of the United States not to give approval to the issuance of any guarantee, insurance, extension of credit, or participation in the extension of credit in connection with the export of any goods or services to any sanctioned person.
(2) EXPORT SANCTION.—The President may order the United States Government not to issue any specific license and not to grant any other specific permission or authority to export any goods or technology to a sanctioned person under—

(i) the Export Administration Act of 1979;
(ii) the Arms Export Control Act;
(iii) the Atomic Energy Act of 1954; or
(iv) any other statute that requires the prior review and approval of the United States Government as a condition for the export or reexport of goods or services.

(3) LOANS FROM UNITED STATES FINANCIAL INSTITUTIONS.—The United States Government may prohibit any United States financial institution from making loans or providing credits to any sanctioned person totaling more than $10,000,000 in any 12-month period unless such person is engaged in activities to relieve human suffering and the loans or credits are provided for such activities.

(4) PROHIBITIONS ON FINANCIAL INSTITUTIONS.—The following prohibitions may be imposed against a sanctioned person that is a financial institution:

> (A) PROHIBITION ON DESIGNATION AS PRIMARY DEALER.—Neither the Board of Governors of the Federal Reserve System nor the Federal Reserve Bank of New York may designate, or permit the continuation of any prior designation of, such financial institution as a primary dealer in United States Government debt instruments.
> (B) PROHIBITION ON SERVICE AS A REPOSITORY OF GOVERNMENT FUNDS.—Such financial institution may not serve as agent of the United States Government or serve as repository for United States Government funds.

The imposition of either sanction under subparagraph (A) or (B) shall be treated as 1 sanction for purposes of section 5, and the imposition of both such sanctions shall be treated as 2 sanctions for purposes of section 5.
(5) PROCUREMENT SANCTION.—The United States Government may not procure, or enter into any contract for the procurement of, any goods or services from a sanctioned person [with certain exceptions].
(6) ADDITIONAL SANCTIONS.—The President may impose sanctions, as appropriate, to restrict imports with respect to a sanctioned person, in accordance with the International Emergency Economic Powers Act (50 U.S.C. 1701 and following).

* * * *

The act also set forth certain other possible courses of action following a determination that sanctionable activity had occurred. Section 9(a) of the act authorized the President to delay imposition of sanctions resulting from sanctionable activity by a foreign person in order to initiate consultations with the government with primary jurisdiction over that person and then to either impose the sanctions or certify to Congress that the government has taken specific and effective actions to terminate the involvement of the foreign person

in the activities at issue. Section 9(c) authorized the President to waive imposition of sanctions if he determined and reported to Congress that such waiver was important to the national interest of the United States. In addition, § 4(c), applicable only to Iran, authorized the President to waive sanctions with respect to all nationals of a country if the country had agreed to undertake substantial measures, including economic sanctions, that would inhibit Iran's efforts to acquire weapons of mass destruction and promote acts of intentional terrorism.

Section 7 of the act provided that the Secretary of State may, upon the request of any person, issue an advisory opinion on whether a proposed activity would be sanctionable.

Section 8 provided for termination of sanctions. As to Iran, the requirement to impose sanctions "shall no longer have force or effect" if the President determined and certified to Congress that Iran (1) "has ceased its efforts to design, develop, manufacture, or acquire" certain weapons and related technology; and (2) has been removed from the list of state sponsors of terrorism determined under section 6(j) of the Export Administration Act of 1979. As to Libya, the act required the President to determine and certify "that Libya has fulfilled the requirements of [UN Security Council Resolutions 731 and 748]." See certification by George W. Bush, 69 Fed. Reg. 24,907 (May 5, 2004).

On December 16, 1996, the Department of State, acting by delegation from the President, published a Federal Register notice, "Additional Information for the Iran and Libya Sanctions Act," 61 Fed. Reg. 66,067 (Dec. 16, 1996). Among other things, the notice indicated that the act did not replace or supersede existing sanctions against Iran or Libya, stating that "the Iranian Assets Control Regulations (31 C.F.R. Part 535), the Iranian Transactions Regulations (31 C.F.R. Part 560), and the Libyan Sanctions Regulations (31 C.F.R. Part 550) remain in effect . . ." See also delegation of authority at 61 Fed. Reg. 64,249 (Dec. 4, 1996).

On May 18, 1998, Secretary of State Madeleine K. Albright issued a determination entitled "Iran and Libya Sanctions Act (ILSA): Decision in the South Pars Case," excerpted below and available at *www.useu.be/summit/albr518.html.*

I have determined that the investment by the firms Total (France), Gazprom (Russia), and Petronas (Malaysia) in the development of Iran's South Pars gas field constitutes activity covered by the Iran and Libya Sanctions Act of 1996. This determination follows an extensive review of the actions taken by the firms in this case as they relate to the provisions of the law.

At the same time, exercising the project waiver authority of Section 9(c) of the Act, I have decided that it is important to the national interest to waive the imposition of sanctions against the three firms involved. Among other factors, I considered the significant, enhanced cooperation we have achieved with the European Union and Russia in accomplishing ILSA's primary objective of inhibiting Iran's ability to develop weapons of mass destruction and support of terrorism.

Granting this waiver does not mean we support this investment; we do not. In fact, we made vigorous efforts to stop it, including representations at the highest levels of the governments involved. When it appeared that the project would nevertheless go forward, we closely studied the possible application of sanctions. We concluded that sanctions would not prevent this project from proceeding.

While unsuccessful in stopping the South Pars deal, our efforts to discourage the Indonesian firm Bakrie from proceeding with the development of the Balal oilfield contributed to Bakrie's apparent decision to withdraw although the impact of the Asian financial crisis was also important.

My decision to grant section 9(c) waivers in this case is based on the conclusion that, taking all factors into account, it is the option that best serves U.S. interests. I also decided that it would not be appropriate to grant country-wide waivers under Section 4(c) of ILSA.

* * * *

b. Other sanctions with respect to Iran

With the seizure of the U.S. embassy in Tehran and the taking of hostages, President Jimmy Carter issued E.O. 12170 of November 14, 1979, declaring a national emergency with respect to Iran. In E.O. 12957 of March 15, 1995, President Clinton declared a separate national emergency under IEEPA with respect to Iran and imposed sanctions prohibiting any United States citizen or company from entering into contracts relating to Iranian petroleum resources. 60 Fed. Reg. 14,615 (Mar. 17, 1995); 31 WEEKLY COMP. PRES. DOC. 381 (Mar. 13, 1995). In reporting this action to Congress, the President explained:

> Iran has reacted to the limitations on its financial resources by negotiating for Western firms to provide financing and know-how for management of the development of petroleum resources. Such development would provide new funds that the Iranian Government could use to continue its current policies. It continues to be the policy of the U.S. Government to seek to limit those resources and these prohibitions will prevent United States persons from acting in a manner that undermines that effort.

31 WEEKLY COMP. PRES. DOC. 425 (Mar. 20, 1995).

On May 6, 1995, President Clinton issued E.O. 12959, which substantially supplemented and amended the sanctions in place, and revoked sections 1 and 2 of E.O. 12957. 60 Fed. Reg. 24,757 (May 9, 1995). In E.O. 13059 of August 19, 1997, President Clinton consolidated previous sanctions against Iran, revoking prospectively E.O. 12613 (52 Fed. Reg. 41,940 (Oct. 30, 1987), which had been partially revoked in E.O. 12959) and major parts of E.O. 12959. 62 Fed. Reg. 44,531 (Aug. 21, 1997). The President has continued to renew annually the national emergency declared in E.O.12957. *See, e.g.*, 64 Fed. Reg. 12,239 (Mar. 12, 1999).

In a letter to Congress reporting the issuance of E.O. 13059, the President described the three orders to

date and indicated certain transactions that he had directed the Secretary of the Treasury to authorize through licensing, as excerpted below. 33 WEEKLY COMP. PRES. DOC. 1262 (Aug. 25, 1997).

On March 15, 1995, I reported to the Congress that, pursuant to section 203(a) of the International Emergency Economic Powers Act (50 U.S.C. 1702(a)) ("IEEPA") and section 201(a) of the National Emergencies Act (50 U.S.C. 1621(a)) ("NEA"), I had exercised my statutory authority to declare a national emergency to respond to the actions and policies of the Government of Iran and to issue Executive Order 12957, which prohibited United States persons from entering into contracts for the financing or the overall management or supervision of the development of petroleum resources located in Iran or over which Iran claims jurisdiction. On May 6, 1995, I exercised my authority under these statutes and under section 505(a) of the International Security and Development Cooperation Act of 1985 (22 U.S.C. 2349aa-9(a)) ("ISDCA") to issue Executive Order 12959, which imposed additional measures to respond to Iran's intensified efforts to acquire weapons of mass destruction and to its continuing support for international terrorism, including support for acts that undermine the Middle East peace process. Executive Order 12959 imposed a comprehensive trade and investment embargo on Iran.

Following the imposition of these restrictions, Iran has continued to engage in activities that represent a threat to the peace and security of all nations. I have found it necessary to take additional measures to confirm that the embargo on Iran prohibits all trade and investment activities by United States persons, wherever located, and to consolidate in one order the various prohibitions previously imposed to deal with the national emergency declared on March 15, 1995. I have issued a new Executive order and hereby report to the Congress pursuant to section 204(b) of IEEPA (50 U.S.C. 1703(b)), section 301 of the NEA (50 U.S.C. 1631), and section 505(c) of the ISDCA (22 U.S.C. 2349aa-9(c)).

* * * *

This new Executive order provides that the Secretary of the Treasury, in consultation with the Secretary of State, is authorized to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of the order. There are certain transactions subject to prohibition under this order that I have directed the Secretary of the Treasury to authorize through licensing, including transactions by United States persons related to the Iran-United States Claims Tribunal in The Hague, established pursuant to the Algiers Accords, and other international obligations and U.S. Government functions. In addition, under appropriate conditions, United States persons may be licensed to participate in market-based swaps of crude oil from the Caspian Sea area for Iranian crude oil in support of energy projects in Azerbaijan, Turkmenistan, and Kazakhstan.

* * * *

Excerpts from E.O. 13059 follow.

---

* * * *

Section 1. Except to the extent provided in section 3 of this order or in regulations, orders, directives, or licenses issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, the importation into the United States of any goods or services of Iranian origin or owned or controlled by the Government of Iran, other than information or informational materials within the meaning of section 203(b)(3) of IEEPA (50 U.S.C. 1702(b)(3)), is hereby prohibited.

Sec. 2. Except to the extent provided in section 3 of this order, in section 203(b) of IEEPA (50 U.S.C. 1702(b)), or in regulations, orders, directives, or licenses issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, the following are prohibited:

(a) the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person,

wherever located, of any goods, technology, or services to Iran or the Government of Iran, including the exportation, reexportation, sale, or supply of any goods, technology, or services to a person in a third country undertaken with knowledge or reason to know that:

> (i) such goods, technology, or services are intended specifically for supply, transshipment, or reexportation, directly or indirectly, to Iran or the Government of Iran; or
> (ii) such goods, technology, or services are intended specifically for use in the production of, for commingling with, or for incorporation into goods, technology, or services to be directly or indirectly supplied, transshipped, or reexported exclusively or predominantly to Iran or the Government of Iran;

(b) the reexportation from a third country, directly or indirectly, by a person other than a United States person of any goods, technology, or services that have been exported from the United States, if:

> (i) undertaken with knowledge or reason to know that the reexportation is intended specifically for Iran or the Government of Iran, and
> (ii) the exportation of such goods, technology, or services to Iran from the United States was subject to export license application requirements under any United States regulations in effect on May 6, 1995, or thereafter is made subject to such requirements imposed independently of the actions taken pursuant to the national emergency declared in Executive Order 12957; provided, however, that this prohibition shall not apply to those goods or that technology subject to export license application requirements if such goods or technology have been:
>
> (A) substantially transformed into a foreign-made product outside the United States; or

(B) incorporated into a foreign-made product outside the United States if the aggregate value of such controlled United States goods and technology constitutes less than 10 percent of the total value of the foreign-made product to be exported from a third country;

(c) any new investment by a United States person in Iran or in property, including entities, owned or controlled by the Government of Iran;
(d) any transaction or dealing by a United States person, wherever located, including purchasing, selling, transporting, swapping, brokering, approving, financing, facilitating, or guaranteeing, in or related to:

(i) goods or services of Iranian origin or owned or controlled by the Government of Iran; or
(ii) goods, technology, or services for exportation, reexportation, sale, or supply, directly or indirectly, to Iran or the Government of Iran;

(e) any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this order if performed by a United States person or within the United States; and
(f) any transaction by a United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order.

* * * *

Sec. 8. 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. 9. The measures taken pursuant to this order are in response to actions of the Government of Iran occurring after the

conclusion of the 1981 Algiers Accords, and are intended solely as a response to those later actions.

* * * *

E.O. 13059 left intact subsections 1(e) and (g) of E.O. 12959, which prohibited:

> (e) any new investment by a United States person in Iran or in property (including entities) owned or controlled by the Government of Iran;
> . . . and
> (g) any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order.

For implementation of these executive orders by OFAC and the Bureau of Export Administration, Department of Commerce, *see* 60 Fed. Reg. 40,881 (Aug. 10, 1995); 60 Fed. Reg. 47,061 (Sept. 11, 1995); 61 Fed. Reg. 8471 (Mar. 5, 1996); 61 Fed. Reg. 58,480 (Nov. 15, 1996); and 64 Fed. Reg. 20,168 (Apr. 26, 1999). *See also Digest 2000* at 743–44 concerning authorization of importation into the United States of carpets and certain food products from Iran.

c. Other sanctions with respect to Libya

As discussed in Chapter 3.B.1.a.(1), in 1992 the UN Security Council adopted Resolution 731, condemning the destruction of Pan Am flight 103 and UTA flight 772, deploring the fact that the Libyan Government had not responded effectively to requests to cooperate fully in establishing responsibility for those terrorist acts and urging the Libyan Government to provide "a full and effective response to those requests so as to contribute to the elimination of international terrorism." U.N. Doc. S/RES/731 (1992). On March 31, 1992, acting under Chapter VII, the Security Council adopted Resolution 748,

which, among other things, included a ban on all air traffic into and out of Libya; a ban on the operations of Libyan Arab Airlines offices worldwide; a ban on provision of aircraft and related services and parts to Libya; a ban on all arms supplies and related material of all types to Libya; withdrawal of military advisers, specialists, and technicians from Libya; a requirement that states significantly reduce staff at Libyan diplomatic missions and consular posts; and a requirement that states take steps to deny entry or expel Libyan nationals involved in terrorist activities. On November 11, 1993, the UN Security Council adopted Resolution 883, ordering a freeze of all Libyan assets in other countries. U.N. Doc. S/RES/883 (1993).

Both a trade embargo (with certain exceptions for humanitarian purposes) and an asset freeze in respect of Libya had already been imposed by the United States in January 1986 in response to terrorist attacks at the Vienna and Rome airports in which five Americans were killed and to convincing evidence of Libyan government involvement with the Abu Nidal terrorist organization responsible for the attacks. President Reagan issued E.O. 12543, "Prohibiting Trade and Certain Transactions Involving Libya," on January 7, 1986, 51 Fed. Reg. 875 (Jan. 9, 1986), declaring a national emergency under IEEPA with respect to Libya. On January 8, President Reagan issued E.O. 12544, "Blocking Libyan Government Property in the United States or Held by U.S. Persons," 51 Fed. Reg. 1235 (Jan. 10, 1986). *See Cumulative Digest 1981–1988, II* at 2736–37 and *III* at 3034–41.

In E.O. 12801 of April 15, 1992, President George H.W. Bush imposed a ban on air traffic to and from Libya in further implementation of Resolution 748. 57 Fed. Reg. 14,319 (Apr. 17, 1992). Section 1 provided:

> Except to the extent provided in regulations, orders, directives, authorizations, or licenses that may hereafter be issued pursuant to this order, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract

> entered into or any license or permit granted before the effective date of this order, the granting of permission to any aircraft to take off from, land in, or overfly the United States, if the aircraft, as part of the same flight or as a continuation of that flight, is destined to land in or has taken off from the territory of Libya, is hereby prohibited.

E.O. 12801 was implemented by the Federal Aviation Administration ("FAA") in Special Federal Aviation Regulation ("SFAR") No. 65, effective April 20, 1992. In publishing a final rule on September 20, 1995, the FAA explained: "Exceptions are made for particular flights approved by the United States Government in consultation with the UN Security Council committee established under Security Council Resolution 748 (1992) and for certain emergency operations."

60 Fed. Reg. 48,643 (Sept. 20, 1995).

Effective January 31, 1994, OFAC amended the Libyan Sanctions Regulations, 31 CFR pt. 550, consistent with Resolution 883, to eliminate "an exception that had existed to the comprehensive blocking of [Government of Libya] property required by E.O. 12544." 59 Fed. Reg. 5105 (Feb. 3, 1994). The amendment revoked § 550.516 of the regulations which had "unblocked, by general license, deposits in currencies other than U.S. dollars held by U.S. persons abroad, if otherwise blocked under the [Libyan Sanctions Regulations]."

In response to the turnover by Libya in 1999 of two persons charged with the bombing of Pan Am flight 103, the UN Security Council, acting under UNSCR 1192 (1998), suspended UN sanctions against Libya. *See also Digest 2003* at 161–65 discussing UN Security Council Resolution 1506, lifting UN sanctions in response to positive Libyan commitments and actions relative to weapons of mass destruction, and E.O. 13357 (69 Fed. Reg. 56,665 (Sept. 22, 2004))

terminating the national emergency declared in E.O. 12543, and revoking related economic sanctions. These actions did not affect Libya's continued designation as a state sponsor of terrorism. *See* Chapter 3.B.1.g.

5. Iraq

a. U.S. declaration of national emergency

On August 2, 1990, upon Iraq's invasion of Kuwait, President George H.W. Bush issued E.O. 12722 declaring a national emergency with respect to Iraq and imposing economic sanctions. 55 Fed. Reg. 31,803 (Aug. 3, 1990). A letter of February 11, 1991, from President Bush reporting to Congress on the national emergency with respect to Iraq described the actions taken in this and subsequent executive orders as well as implementing regulations, as excerpted below. 27 WEEKLY COMP. PRES. DOC. 158 (Feb. 11, 1991).

---

* * * *

1. On August 2, 1990, in Executive Order No. 12722, I declared a national emergency to deal with the threat to the national security and foreign policy of the United States caused by Iraq's invasion of Kuwait. (55 FR 31803.) In that order, I ordered the immediate blocking of all property and interests in property of the Government of Iraq (including the Central Bank of Iraq) then or thereafter located in the United States or within the possession or control of a U.S. person. I also prohibited the importation of goods or services of Iraqi origin into the United States and the exportation of goods, technology, and services to Iraq from the United States. In addition, I prohibited travel-related transactions and transportation transactions from or to Iraq and the performance of any contract in support of any industrial, commercial, or governmental project in Iraq. U.S. persons were also prohibited from granting or extending credit or loans to the Government of Iraq.

At the same time, at the request of the Government of Kuwait, I issued Executive Order No. 12723 (55 FR 31805), blocking all property of the Government of Kuwait then or thereafter in the United States or in the possession or control of a U.S. person.

Subsequently, on August 9, 1990, I issued Executive Orders Nos. 12724 and 12725 (55 FR 33089), to ensure that the sanctions imposed by the United States were consistent with United Nations Security Council Resolution 661 of August 6, 1990. Under these orders, additional steps were taken with regard to Iraq, and sanctions were applied to Kuwait as well to insure that no benefit to Iraq resulted from the military occupation of Kuwait.

2. The declaration of the national emergency on August 2, 1990, was made pursuant to the authority vested in me as President by the Constitution and laws of the United States, 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.), and section 301 of title 3 of the United States Code. I reported the declaration to the Congress on August 3, 1990, pursuant to section 204(b) of the International Emergency Economic Powers Act (50 U.S.C. 1703(b)). The additional sanctions of August 9, 1990, were imposed pursuant to the authority vested in me by the Constitution and laws of the United States, including the statutes cited above the United Nations Participation Act (22 U.S.C. 287(c)). The present report is submitted pursuant to 50 U.S.C. 1641(c) and 1703(c). This report discusses only Administration actions and expenses directly related to the national emergency with respect to Iraq declared in Executive Order No. 12722, as implemented pursuant to that order and Executive Order Nos. 12723, 12724, and 12725.

3. The Office of Foreign Assets Control of the Department of the Treasury ("FAC"), after consultation with other Federal agencies, issued the Kuwaiti Assets Control Regulations, 31 C.F.R. Part 570 (55 FR 49857, November 30, 1990), and the Iraqi Sanctions Regulations, 31 C.F.R. Part 575 (56 FR 2112, January 18, 1991), to implement the prohibitions contained in Executive Orders Nos. 12722–12725.

Prior to the issuance of the final regulations, FAC issued a number of general licenses to address emergency situations affecting U.S. persons and the legitimate Government of Kuwait. Those

general licenses have been incorporated, as appropriate, into the Kuwaiti Assets Control Regulations and the Iraqi Sanctions Regulations as general licenses, which permit transactions that would otherwise be prohibited by the Executive orders and regulations. U.S. persons, including U.S. financial institutions, are authorized to complete certain securities, foreign exchange, and similar transactions on behalf of the Government of Kuwait that were entered into prior to August 2, 1990. Similarly, certain import and export transactions commenced prior to August 2, 1990, were allowed to be completed, provided that any payments owed to Iraq or Kuwait were paid into a blocked account in a U.S. financial institution. The regulations also allow for the investment and reinvestment of blocked Kuwaiti and Iraqi assets. Consistent with United Nations Security Council Resolutions 661 and 666, the regulations also outline licensing procedures permitting the donation to Iraq or Kuwait of food in humanitarian circumstances, and of medical supplies, where it is demonstrated to FAC that the proposed export transaction meets the requirements for exemption under United Nations Security Council Resolution 661. . . .

4. Worldwide outrage over the invasion of Kuwait by Saddam Hussein has resulted in the imposition of sanctions by nearly every country of the world. To an extent unprecedented in the history of peacetime economic sanctions, the community of nations has worked together to make the sanctions effective in isolating Saddam Hussein and in cutting him off from the support he needs in order to continue his illegal occupation of Kuwait. This cooperation has occurred through the United Nations Sanctions Committee, established by United Nations Security Council Resolution 661, diplomatic channels, and day-to-day working contact among the national authorities responsible for implementing and administering the sanctions.

5. As of January 24, 1991, FAC had issued 158 specific licenses to Kuwaiti governmental entities operating assets or direct investments in the United States, enabling continued operation and the preservation of Kuwaiti government assets in the United States, as well as addressing certain expenditures by or on behalf of the Government of Kuwait in exile. In addition, 68 specific licenses were issued regulating transactions involving the

Government of Iraq or its assets. Authorizations were granted enabling the Iraqi Embassy to conduct diplomatic representation in the United States. Specific licenses were also issued to non-Iraqi entities determining or authorizing the disposition of pre-embargo imports and exports on the high seas, authorizing the payment under confirmed letters of credit for pre-embargo exports, and permitting the conduct of procedural transactions such as the filing of lawsuits and payment for legal representation. In all cases involving Iraqi property, steps were taken to ensure that no financial benefit accrued to Iraq as a result of a licensing decision. In order to ensure compliance with the terms and conditions of licenses, reporting requirements have been imposed that are closely monitored. Licensed accounts are regularly audited by FAC compliance personnel and by deputized auditors from other regulatory agencies. Compliance analyses are prepared monthly for major licensed Kuwaiti governmental entities.

* * * *

The enforcement efforts of the United States Government complement the efforts worldwide to enforce sanctions against Iraq. The United States has utilized a wide variety of diplomatic, administrative, and enforcement tools to deter circumvention of the global trade and financial embargoes established under United Nations Security Council resolutions. The enforcement efforts of the United States have been augmented through ongoing contacts with the United Nations, the Organization of Economic Cooperation and Development, the European Community and member states' central banks through the Bank for International Settlements, as well as with representatives of individual governments.

* * * *

On April 3, 1991, the Iraq Sanctions Regulations were amended to add an appendix to provide public notice of a list of persons, known as "specially designated nationals" of the Government of Iraq, falling within the definition of "Government of Iraq" in the regulations. 56 Fed. Reg. 13,584 (Apr. 3, 1991). In his report on the national emergency to Congress of August 3, 1992, President Bush explained, among

other things, the status and operation of the list at that time. 28 WEEKLY COMP. PRES. DOC. 1377 (Aug. 3, 1992).

---

* * * *

3. Investigation also continues into the roles played by various individuals and firms outside of Iraq in Saddam Hussein's procurement network. These investigations may lead to additions to the FAC listing of individuals and organizations determined to be Specially Designated Nationals ("SDN's") of the Government of Iraq. In practice, an Iraqi SDN is a representative, agent, intermediary, or front (whether open or covert) of the Iraqi government that is located outside of Iraq. Iraqi SDN's are Saddam Hussein's principal instruments for doing business in third countries, and doing business with them is the same as doing business directly with the Government of Iraq.

The impact of being named an Iraqi SDN is considerable: all assets within U.S. jurisdiction of parties found to be Iraqi's SDN's are blocked; all economic transactions with SDN's by U.S. persons are prohibited; and the SDN individual or organization is exposed as an agent of the Iraqi regime.

* * * *

The list was amended periodically on the basis of new information; *see*, *e.g.*, 60 Fed. Reg. 6376 (Feb. 1, 1995).

b. UN Oil-for-Food Program

(1) Preliminary actions

On April 15, 1991, the Security Council adopted Resolution 706, authorizing the import by UN member states of oil products originating from Iraq for a six-month period, up to a value of $1.6 billion under certain conditions, for humanitarian activities, funding of the United Nations Compensation Fund, and payment of UN costs in facilitating the return of all Kuwaiti property seized by Iraq, and half the costs of the Boundary Commission. U.N. Doc. S/RES/706

(1991). Iraq did not make use of the mechanism provided by this resolution.

Subsequently, on October 2, 1992, the Security Council adopted Resolution 778 requiring states temporarily to transfer Iraqi funds representing the proceeds of sale of Iraqi petroleum or petroleum products paid for after August 6, 1990, to the escrow account provided for in Resolution 706 for humanitarian and other specified activities in Iraq. In keeping with this resolution, President Bush issued E.O. 12817. 57 Fed. Reg. 48,433 (Oct. 23, 1992). In a February 22, 1993, report to Congress on the national emergency, President William J. Clinton described these developments as excerpted below. 29 WEEKLY COMP. PRES. DOC. 212 (Feb. 22, 1993).

---

* * * *

1. On October 21, 1992, President Bush issued Executive Order No. 12817, implementing in the United States measures adopted in United Nations Security Council Resolution ("UNSCR") No. 778 of October 2, 1992. UNSCR No. 778 requires U.N. member states temporarily to transfer to a U.N. escrow account up to $200 million apiece in Iraqi oil proceeds paid by the purchaser after the imposition of U.N. sanctions on Iraq. These funds finance Iraq's obligations for U.N. activities with respect to Iraq, including expenses to verify Iraqi weapons destruction and to provide humanitarian assistance in Iraq on a nonpartisan basis. A portion of the escrowed funds will also fund the activities of the U.N. Compensation Commission in Geneva, which will handle claims from victims of the Iraqi invasion of Kuwait. The funds placed in the escrow account are to be returned, with interest, to the member states that transferred them to the U.N., as funds are received from future sales of Iraqi oil authorized by the United Nations Security Council. No member state is required to fund more than half of the total contributions to the escrow account.

Executive Order No. 12817 authorized the Secretary of the Treasury (the "Secretary") to identify the proceeds of the sale of Iraqi petroleum or petroleum products paid for by or on behalf of the purchaser on or after August 6, 1990, and directed United States

financial institutions holding such funds to transfer them to the Federal Reserve Bank of New York ("FRBNY") in the manner required by the Secretary. Executive Order No. 12817 further directs the FRBNY to receive, hold, and transfer funds in which the Government of Iraq has an interest at the direction of the Secretary to fulfill U.S. rights and obligations pursuant to UNSCR No. 778.

* * * *

5. Pursuant to Executive Order No. 12817 implementing UNSCR No. 778, on October 26, 1992, FAC directed the FRBNY to establish a blocked account for receipt of certain post-August 6, 1990, Iraqi oil sales proceeds, and to hold, invest, and transfer these funds as required by the order. On the same date, FAC directed the eight United States financial institutions holding the affected oil proceeds, on an allocated, pro rata basis, to transfer a total of $200 million of these blocked Iraqi assets to the FRBNY account. On December 15, 1992, following the payment of $20 million by the Government of Kuwait and $30 million by the Government of Saudi Arabia to a special United Nations-controlled account, entitled UNSCR No. 778 Escrow Account, the FRBNY was directed to transfer a corresponding amount of $50 million from the blocked account it holds to the United Nations-controlled account. Future transfers from the blocked FRBNY account will be made on a matching basis up to the $200 million for which the United States is potentially obligated pursuant to UNSCR No. 778.

* * * *

9. The United States imposed economic sanctions on Iraq in response to Iraq's invasion and illegal occupation of Kuwait, a clear act of brutal aggression. The United States, together with the international community, is maintaining economic sanctions against Iraq because the Iraqi regime has failed to comply fully with United Nations Security Council resolutions, including those calling for the elimination of Iraqi weapons of mass destruction, the inviolability of the Iraq-Kuwait boundary, the release of Kuwaiti and other third country nations, compensation for victims of Iraqi aggression, long-term monitoring of weapons of mass destruction (WMD) capabilities, and the return of Kuwaiti assets stolen during

its illegal occupation of Kuwait. The U.N. sanctions remain in place; the United States will continue to enforce those sanctions.

The Saddam Hussein regime continued to violate basic human rights by repressing the Iraqi civilian population and depriving it of humanitarian assistance. The United Nations Security Council passed resolutions that permit Iraq to sell $1.6 billion of oil under U.N. auspices to fund the provision of food, medicine, and other humanitarian supplies to the people of Iraq. Under the U.N. resolutions, the equitable distribution within Iraq of this assistance would be supervised and monitored by the United Nations. The Iraqi regime continued to refuse to accept these resolutions and has thereby chosen to perpetuate the suffering of its civilian population.

* * * *

In his letter to Congress on February 9, 1996, President Clinton reported that "[c]umulative transfers from the blocked Federal Reserve Bank of New York account since issuance of E.O. 12817 now have amounted to $200 million, fully satisfying the U.S. commitment to match the payments of other Member States from blocked Iraqi oil payments, and its obligation pursuant to United Nations Security Council Resolution 778." 32 WEEKLY COMP. PRES. DOC. 230 (Feb. 12, 1996).

See also Digest 2003 at 909–12, concerning vesting of remaining blocked Iraqi accounts being held in U.S. banks to be used "to assist the Iraqi people and to assist in the reconstruction of Iraq."

(2) UN Security Council Resolution 986 and subsequent actions

On April 14, 1995, the Security Council adopted Resolution 986 authorizing states, under certain conditions, to import Iraqi petroleum and petroleum products up to one billion dollars every 90 days primarily for humanitarian purposes. *See also* Resolutions 1111 (1997), 1129 (1997), 1143 (1997), 1153 (1998), 1158 (1998), and 1175 (1998) amending and extending the program established in Resolution 986. Effective December 10, 1996, the Iraqi Sanctions Regulations

were amended to implement this "oil-for-food" procedure in the United States. 61 Fed. Reg. 65,312 (Dec. 11, 1996). Excerpts below describe the action taken.

---

* * * *

On April 14, 1995, the United Nations Security Council (the "UNSC") adopted Resolution 986, which creates a framework, subject to agreement of the Government of Iraq, that would permit the Government of Iraq to sell $2 billion worth of petroleum and petroleum products over a 6-month period, with all proceeds placed in a United Nations ("UN") escrow account for designated uses. On May 20, 1996, a Memorandum of Understanding Between the Secretariat of the United Nations and the Government of Iraq on the Implementation of Security Council Resolution 986 (1995) (the "Memorandum of Understanding") was signed by representatives of the Government of Iraq and the UN. The Memorandum of Understanding contains agreements preparatory to implementation of Resolution 986. On August 12, 1996, Procedures to be Employed by the Security Council Committee Established by Resolution 661 (1990) Concerning the Situation Between Iraq and Kuwait in the Discharge of its Responsibility as Required by Paragraph 12 of Security Council Resolution 986 (1995) (the "Guidelines") further elaborated the procedures necessary to implement Resolution 986. A portion of the proceeds in the escrow account will be available for Iraq's purchase of medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs, to be specified in a list prepared by Iraq and submitted to and approved by the UN Secretary-General. At the UN level, this program will be administered by the UNSC Committee established pursuant to UNSC Resolution 661 (the "661 Committee"), which has established guidelines concerning procedures for permitted Iraqi purchases and sales. Within the United States, the Treasury Department's Office of Foreign Assets Control ("OFAC"), in consultation with the Department of State, will implement UNSC Resolution 986. No direct financial transactions with the Government of Iraq are permitted.

* * * *

New [31 C.F.R.] § 575.523 provides a statement of licensing policy for U.S. persons seeking to purchase petroleum and petroleum products from the Government of Iraq or Iraq's State Oil Marketing Organization ("SOMO") pursuant to UNSC Resolution 986, other relevant Security Council resolutions, the Memorandum of Understanding, and other guidance issued by the 661 Committee. Issuance of a specific license authorizes the licensee to deal directly with the 661 Committee or its designee (the "overseers") appointed by the UN Secretary-General pursuant to UNSC Resolution 986, other relevant Security Council resolutions, the Memorandum of Understanding, and other guidance issued by the 661 Committee. The list of "national oil purchasers" will be supplied to the 661 Committee. Licensees whose contracts are approved by the overseers are authorized to perform those contracts in accordance with their terms.

New §§ 575.524 and 575.525 provide statements of licensing policy for the exportation to Iraq of pipeline parts and equipment necessary for the safe operation of the Iraqi portion of the Kirkuk-Yumurtalik pipeline system, and the sale of humanitarian aid to Iraq.

New § 575.526 adds a general license for dealing in, and importation into the United States of, Iraqi-origin petroleum and petroleum products, the purchase and exportation of which have been authorized in accordance with UNSC Resolution 986, other relevant Security Council resolutions, the Memorandum of Understanding, and other guidance issued by the 661 Committee.

In testimony before the Senate Foreign Relations Committee on May 21, 1998, Thomas Pickering, Under Secretary of State for Political Affairs, discussed the role of the oil-for-food program in U.S. policy toward Iraq.

Mr. Pickering's testimony, excerpted below, is available at *www.state.gov/www/policy_remarks/1998/980521_pickering_iraq.html*.

---

* * * *

[The Security Council resolutions that ended the Gulf war] mandate that Iraq is to be disarmed of its weapons of mass destruction capabilities and of missile systems with a range of more than 150 kilometers. They also mandate the maintenance of sanctions on Iraq until it has complied with its obligations under the range of Security Council resolutions.

I will be very frank. Based on Saddam's record, we have no reason to think he will comply with the obligations the Security Council has levied on Iraq. That means, as far as the U.S. is concerned, that sanctions will be a fact of life for the foreseeable future. But since our quarrel is with Saddam, not with the Iraqi people, we have never sought to impose unnecessary hardship on innocent Iraqi civilians who have no voice in the decisions the regime makes. The sanctions themselves never barred the shipment of humanitarian goods to Iraq. Since 1991, we have worked hard to come up with mechanisms to ensure that the humanitarian needs of Iraqi civilians can be met within the framework of the sanctions regime.

To that end, we have proposed several "oil-for-food" programs, with various degrees of success:

- The U.S. proposed the first "oil-for-food" program in 1991 with UNSCR 706/712. Iraq rejected this program.
- In 1995, we drafted UNSCR 986, which provided a slightly revised "oil-for-food" program. Iraq resisted implementing this program for more than a year, then dragged out negotiations with the SYG (UN Secretary General) for months. It finally went into effect in December 1996.
- Most recently, we supported the expansion of the "oil-for-food" program under UNSCR 1153, based on the SYG's recommendations that the expanded program was needed to meet the legitimate humanitarian concerns of the Iraqi people.

The so-called "oil-for-food" framework is a unique effort. For the first time, the international community is using the revenues of a state subject to strict sanctions to meet the humanitarian needs of that state's citizens. Let me be perfectly clear—this is not a humanitarian assistance program, but the controlled and monitored

utilization of Iraq's own resources to provide for the humanitarian needs of its people.

Since 1990, Iraq has been subject to the toughest and most comprehensive international sanctions regime in history. It still is. The "oil-for-food" program keeps these sanctions in place but makes them endurable for the average Iraqi and acceptable to the larger international community which, unlike Saddam, is concerned about the suffering of his people. The Iraqi Government has no control over any of the revenue generated by UN-monitored oil sales; all revenue goes directly into a UN-controlled escrow account. The Iraqi Government may not legally purchase anything other than the humanitarian items it was always permitted to buy under the existing sanctions regime—but chose not to—and the UN Sanctions Committee must approve all such purchases. In the parts of Iraq controlled by the Iraqi Government, distribution of these humanitarian purchases is observed by the UN; in the northern areas of Iraq, the distribution is undertaken by the UN directly.

Without an "oil-for-food" program in place, our options are stark. Let me be perfectly clear what those options are:

- watching the Iraqi people starve while Saddam Hussein deliberately refuses to spend Iraq's resources on their welfare; or
- lifting sanctions prematurely.

There is no doubt that, without an "oil-for-food" program in place, the Iraqi Government would continue to exploit the suffering of its people to force the international community to lift sanctions. This has been Iraq's policy for years. Frankly, after eight years of sanctions, most states in the world either do not understand or do not care that the Iraqi Government is fully responsible for the Iraqi people's suffering—they just want that suffering to end.

The "oil-for-food" program allows us to meet the humanitarian needs of the Iraqi people without compromising our firm stand on sanctions. In a very real sense, the "oil-for-food" program is the key to sustaining the sanctions regime until Iraq complies with its obligations. The Iraqi Government clearly understands this basic dynamic. That is why it rejected earlier efforts to implement an

"oil-for-food" program, and why it has gone to such lengths to obstruct the current program.

We are now working with the Secretariat and other members of the Security Council to ensure the effective implementation of the expanded "oil-for-food" program the Council approved last February. Predictably, Iraq has been dragging its heels in producing a distribution plan that would allow UNSCR 1153 to go into effect. Even more disturbing, Iraq explicitly rejected some of the SYG's key recommendations which are essential for implementing UNSCR 1153 as intended. Given the importance of the "oil-for-food" program in humanitarian terms—and to the sustainability of the sanctions regime—we will persist in our efforts nonetheless.

I should also mention our continuing concern at the illegal traffic in oil and petroleum products conducted by Iraq. The $5.2 billion ceiling under UNSCR 1153 was specifically intended to allow Iraq to sell legally as much oil as is needed to meet the humanitarian needs of the Iraqi people. The fact that Iraq continues to export sizeable amounts of petroleum products illegally—and that the Iraqi Government refuses to permit the UN to oversee or monitor these sales—strongly suggests that the proceeds from these sales are intended for nonhumanitarian purposes. We are currently seeking ways to make the Iraqi Government accountable for this illegal traffic—or to end it through tougher enforcement measures.

* * * *

See also testimony of Mr. Pickering before the Senate Foreign Relations Committee, May 21, 1998, available at *www.state.gov/www/policy_remarks/1998/980521_pickering_iraq.html*; and *Digest 2001* at 815–17 and *Digest 2002* at 894–97 concerning the goods review list to implement the oil-for-food program, and *Digest 2003* at 912–23 for lifting of sanctions against Iraq.

6. Sudan

On January 31, 1996, the United Nations Security Council adopted Resolution 1044, which called upon the Government

of Sudan to comply with the requests of the Organization of African Unity to extradite three suspects in an assassination attempt on the President of Egypt in Addis Ababa, Ethiopia the previous year and to desist from actions providing support for international terrorism. U.N. Doc. S/RES/1044 (1996). As a result of Sudan's continued non-compliance, the Security Council passed Resolution 1054 on April 26, 1996. Resolution 1054 demanded that the Government of Sudan comply with the conditions set forth in Resolution 1044 and decided that all states must reduce significantly the staff at Sudanese diplomatic missions and restrict their movement, and take steps to restrict the entry into or travel through their territory for members of the Sudanese government and armed forces. U.N. Doc. S/RES/1054 (1996). For implementation of these restrictions by the United States, *see* Chapter 1.C.3.f.

On August 16, 1996, the Security Council adopted Resolution 1070, deciding that all states must deny permission to take off from, land in, or overfly their territories for any commercial or government aircraft from Sudan, but its sanctions were not imposed. U.N. Doc. S/RES/1070 (1996). UN Security Council Resolution 1372, adopted September 28, 2001, lifted the UN's sanctions against Sudan.

By E.O. 13067 of November 3, 1997, President William J. Clinton declared a national emergency and imposed unilateral sanctions against Sudan, finding that

> the policies and actions of the Government of Sudan, including continued support for international terrorism; ongoing efforts to destabilize neighboring governments; and the prevalence of human rights violations, including slavery and the denial of religious freedom, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States . . .

62 Fed. Reg. 59,989 (Nov. 5, 1997). The order, excerpted below, blocked all property of the Government of Sudan within the United States or in the possession or control of a U.S. person (including overseas branches), and prohibited

trade and related transactions with Sudan by U.S. persons or from the United States, except for humanitarian aid.

---

* * * *

Section 1. Except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) and in regulations, orders, directives, or licenses that may be issued pursuant to this order, all property and interests in property of the Government of Sudan that are in the United States, that hereafter come within the United States, or that hereafter come within the possession or control of United States persons, including their overseas branches, are blocked.

Sec. 2. The following are prohibited, except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) and in regulations, orders, directives, or licenses that may be issued pursuant to this order:

(a) the importation into the United States of any goods or services of Sudanese origin, other than information or informational materials;

(b) the exportation or reexportation, directly or indirectly, to Sudan of any goods, technology (including technical data, software, or other information), or services from the United States or by a United States person, wherever located, or requiring the issuance of a license by a Federal agency, except for donations of articles intended to relieve human suffering, such as food, clothing, and medicine;

(c) the facilitation by a United States person, including but not limited to brokering activities, of the exportation or reexportation of goods, technology, or services from Sudan to any destination, or to Sudan from any location;

(d) the performance by any United States person of any contract, including a financing contract, in support of an industrial, commercial, public utility, or governmental project in Sudan;

(e) the grant or extension of credits or loans by any United States person to the Government of Sudan;

(f) any transaction by a United States person relating to transportation of cargo to or from Sudan; the provision of transportation of cargo to or from the United States by any Sudanese person or any vessel or aircraft of Sudanese registration; or the sale in the United States by any person holding authority under subtitle 7 of title 49, United States Code, of any transportation of cargo by air that includes any stop in Sudan; and
(g) any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order.

* * * *

See 63 Fed. Reg. 29,608 (June 1, 1998) adding the names of 62 Sudanese entities to the list of specially designated nationals maintained by OFAC, 31 C.F.R. ch. V, which has been updated as needed. By final rule of July 1, 1998, OFAC promulgated the Sudanese Sanctions Regulations further implementing the executive order. 63 Fed. Reg. 35,809 (July 1, 1998).

7. UNITA (Angola)

a. Arms embargo under UN Security Council Resolution 864

On May 19, 1993, after a 16-year civil war between the National Union for Total Independence of Angola ("UNITA") and the Popular Movement for the Liberation of Angola ("MPLA"), the United States officially recognized the Government of Angola under President Jose Eduardo dos Santos, leader of the MPLA. *See* Chapter 9.A.1.

UNITA returned to armed conflict after failing to win a majority in multi-party democratic elections. The United Nations Security Council, acting under its Chapter VII authority, adopted Resolution 864 on September 15, 1993, U.N. Doc. S/RES/864 (1993), in which it determined that UNITA's military actions constituted a threat to international

peace and security. Among other things, Resolution 864 imposed an arms embargo.

On September 26, 1993, President William J. Clinton issued E.O. 12865, excerpted below, declaring a national emergency under IEEPA, and implementing the arms embargo as to UNITA. 58 Fed. Reg. 51,005 (Sept. 29, 1993). OFAC implemented the UNITA (Angola) Sanctions Regulations in December, 31 C.F.R. pt. 590, 58 Fed. Reg. 64,904 (Dec. 10, 1993).

---

* * * *

I, WILLIAM J. CLINTON, President of the United States of America, take note of the United Nations Security Council's determination that, as a result of UNITA's military actions, the situation in Angola constitutes a threat to international peace and security, and find that the actions and policies of UNITA, in continuing military actions, repeated attempts to seize additional territory and failure to withdraw its troops from locations that it has occupied since the resumption of hostilities, in repeatedly attacking United Nations personnel working to provide humanitarian assistance, in holding foreign nationals against their will, in refusing to accept the results of the democratic elections held in Angola in 1992, and in failing to abide by the "Acordos de Paz," constitute an unusual and extraordinary threat to the foreign policy of the United States, and hereby declare a national emergency to deal with that threat.
I hereby order:

Section 1. The following are prohibited, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or contract entered into or any license or permit granted before the effective date of this order, except to the extent provided in regulations, orders, directives, or licenses which may hereafter be issued pursuant to this order:

(a) The sale or supply by United States persons or from the United States, or using U.S.-registered vessels or aircraft, of arms and

related materiel of all types, including weapons and ammunition, military vehicles and equipment and spare parts for the aforementioned, as well as petroleum and petroleum products, regardless of origin:

(1) to UNITA;
(2) to the territory of Angola, other than through points of entry to be designated by the Secretary of the Treasury, or any activity by United States persons or in the United States which promotes or is calculated to promote such sale or supply.

(b) Any transaction by any United States person that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order.

* * * *

b. Further sanctions under UN Security Council Resolution 1127

In Resolution 1127 of August 28, 1997, the UN Security Council decided, among other things, that all member nations must restrict the travel of senior officials of UNITA and adult members of their families through their territories; close all UNITA offices in their territories; deny permission for aircraft to land in, take off from, or overfly their territories if such aircraft were used by UNITA, or originating from or destined for certain locations within Angola; and prohibit the supply of specified aircraft-related goods and services. U.N. Doc. S/RES/1127 (1997).

On December 12 President Clinton issued E.O. 13069, excerpted below, closing UNITA offices, implementing the flight restrictions called for under Resolution 1127, and restricting the sale of aircraft-related goods and services to UNITA. 62 Fed. Reg. 65,989 (Dec. 16, 1997). *See also* Chapter 1.C.3.g., suspending entry of "senior officials of [UNITA] and adult members of their immediate families."

---

* * * *

Section 1. Except to the extent provided in regulations, orders, directives, or licenses issued pursuant to this order, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to the effective date of this order, all UNITA offices located in the United States shall be immediately and completely closed.

Sec. 2. Except to the extent provided in regulations, orders, directives, or licenses issued pursuant to this order, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to the effective date of this order, the following are prohibited:

(a) the sale, supply, or making available in any form, by United States persons or from the United States or using U.S.-registered vessels or aircraft, of any aircraft or aircraft components, regardless of origin:

(i) to UNITA; or
(ii) to the territory of Angola other than through a point of entry specified pursuant to section 4 of this order;

(b) the insurance, engineering, or servicing by United States persons or from the United States of any aircraft owned or controlled by UNITA;
(c) the granting of permission to any aircraft to take off from, land in, or overfly the United States if the aircraft, as part of the same flight or as a continuation of that flight, is destined to land in or has taken off from a place in the territory of Angola other than one specified pursuant to section 4 of this order;
(d) the provision or making available by United States persons or from the United States of engineering and maintenance servicing, the certification of airworthiness, the payment of new claims against existing insurance contracts, or the provision, renewal, or making available of direct insurance with respect to:

(i) any aircraft registered in Angola other than those specified pursuant to section 4 of this order; or

(ii) any aircraft that entered the territory of Angola other than through a point of entry specified pursuant to section 4 of this order;

(e) any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order.

* * * *

c. Asset freeze and diamond import ban under UN Security Council Resolution 1173

Again finding that UNITA had failed to fulfill its obligations to demilitarize under the Angolan Peace Accords and previous resolutions, the UN Security Council adopted Resolution 1173 on June 12, 1998. In this resolution, the Security Council called upon all nations, among other things, to freeze assets owned by UNITA, to prohibit importation of diamonds from Angola that were not certified by the Government of Angola, and to prohibit the sale to certain persons and entities in Angola of mining equipment, motorized vehicles, or watercraft. U.N. Doc. S/RES/1173 (1998). *See also* U.N. Doc. S/RES/1176 (1998) (postponing the effective date of measures specified by Resolution 1173 until July 1, 1998).

In E.O. 13098 of August 18, 1998, excerpted below, President William J. Clinton implemented these sanctions. 63 Fed. Reg. 44,771 (Aug. 20, 1998).

---

* * * *

Section 1. Except to the extent provided in regulations, orders, directives, or licenses issued pursuant to this order, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property

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, of UNITA, or of those senior officials of UNITA, or adult members of their immediate families, who are designated pursuant to section 5 of this order, are hereby blocked.

Sec. 2. Except to the extent provided in regulations, orders, directives, or licenses issued pursuant to this order, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to the effective date of this order, the following are prohibited:

(a) the direct or indirect importation into the United States of all diamonds exported from Angola on or after the effective date of this order that are not controlled through the Certificate of Origin regime of the Angolan Government of Unity and National Reconciliation;
(b) the sale or supply by United States persons or from the United States or using U.S.-registered vessels or aircraft, of equipment used in mining, regardless of origin, to the territory of Angola other than through a point of entry designated pursuant to section 5 of this order;
(c) the sale or supply by United States persons or from the United States or using U.S.-registered vessels or aircraft, of motorized vehicles, watercraft, or spare parts for the foregoing, regardless of origin, to the territory of Angola other than through a point of entry designated pursuant to section 5 of this order; and
(d) the sale or supply by United States persons or from the United States or using U.S.-registered vessels or aircraft, of mining services or ground or waterborne transportation services, regardless of origin, to persons in areas of Angola to which State administration has not been extended, as designated pursuant to section 5 of this order.

* * * *

By final rule effective August 12, 1999, OFAC amended the UNITA (Angola) Sanctions Regulations to implement E.O.s 13069 and 13098. 64 Fed. Reg. 43,924 (Aug. 12, 1999). *See also* 64 Fed. Reg. 34,991 (June 30, 1999), amending appendix A to 31 CFR ch. V.

In 2003, following adoption of UN Security Council Resolution 1448, President George W. Bush issued E.O. 13298 terminating the emergency in the United States with respect to UNITA. 68 Fed. Reg. 24,857 (May 8, 2003). *See Digest 2003* at 934–35.

8. Former Yugoslavia

a. Preliminary steps

As discussed in Chapter 17.A.1 and 18.A.4., widespread armed conflict existed in the former Yugoslavia throughout the 1990s. The United States imposed sanctions beginning in July 1991, announcing "the policy of the U.S. Government to deny all applications for licenses and other approvals to export or otherwise transfer defense articles to Yugoslavia" and suspending all licenses authorizing export or transfers of defense articles or services. Department of State Public Notice 1427, 56 Fed. Reg. 33,322 (July 19, 1991). On December 5, 1991, President George H.W. Bush issued Proclamation 6389, amending the Generalized System of Preferences ("GSP") to remove Yugoslavia from the list of countries whose products were eligible for benefits of the GSP. 56 Fed. Reg. 64,467 (Dec. 9, 1991). A statement released by the White House Office of the Press Secretary, April 7, 1992, announcing U.S. recognition of Bosnia-Hercegovina, Croatia, and Slovenia "as sovereign and independent states" also announced the lifting of economic sanctions against those three countries. I Pub. Papers 553 (April 7, 1992), *see also* Chapter 9.A.2.c. Lifting of sanctions against Serbia and Montenegro would be "contingent on Belgrade's lifting the economic blockades directed against Bosnia-Herzegovina and Macedonia." The arms embargo remained in effect.

b. Implementation of sanctions under UN Security Council resolutions

On May 30, 1992, the UN Security Council adopted Resolution 757 that, among other things, decided that all states must adopt specified measures as to the Former Republic of Yugoslavia (Serbia and Montenegro) ("FRY(S/M)") "until the Council decides that the authorities in the [FRY(S/M)], including the Yugoslav People's Army, have taken effective measures to fulfill the requirements of Resolution 752 (1992)." The measures included, with certain exceptions, a trade embargo, asset freeze, denial of permission for aircraft landing or overflight, and reduction of the level of staff at diplomatic and consular posts of the FRY(S/M). U.N. Doc. S/RES/757 (1992).

On the same day, President Bush issued E.O. 12808, excerpted below, declaring a national emergency under IEEPA and blocking all property and interests in property of the Governments of Serbia and Montenegro, or held in the name of the former Government of the Socialist Federal Republic of Yugoslavia or the Government of the Federal Republic of Yugoslavia located in the United States or within the possession or control of U.S. persons, including their overseas branches. 57 Fed. Reg. 23,299 (June 2, 1992).

---

* * * *

I, GEORGE BUSH, President of the United States of America, find that the actions and policies of the Governments of Serbia and Montenegro, acting under the name of the Socialist Federal Republic of Yugoslavia or the Federal Republic of Yugoslavia, in their involvement in and support for groups attempting to seize territory in Croatia and Bosnia-Hercegovina by force and violence utilizing, in part, the forces of the so-called Yugoslav National Army, constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat. I hereby order:

Section 1. Except to the extent provided in regulations, orders, directives, or licenses which may hereafter be issued pursuant to this order, all property and interests in property of the Government of Serbia and the Government of Montenegro that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are hereby blocked.

Sec. 2. Except to the extent provided in regulations, orders, directives, or licenses which may hereafter be issued pursuant to this order, all property and interests in property in the name of the Government of the Socialist Federal Republic of Yugoslavia or the Government of the Federal Republic of Yugoslavia that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are hereby blocked.

Sec. 3. Any transaction by any United States person that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order is prohibited.

* * * *

President Bush took additional measures to prohibit trade and other transactions by issuing E.O. 12810, (57 Fed. Reg. 24,347 (June 9, 1992)). In response to UN Security Council Resolution 787, E.O. 12831, (58 Fed. Reg. 5253 (Jan. 21, 1993)), expanded the sanctions further. In keeping with UN Security Council Resolution 820 of April 17, 1993, (U.N. Doc. S/RES/820 (1994)), on April 25, 1993, President William J. Clinton issued E.O. 12846, again expanding sanctions on the FRY (S/M) and Serbian-controlled areas of Croatia and Bosnia-Herzegovina. 58 Fed. Reg. 25,771 (Apr. 27, 1993).

In his report of May 25, 1993, to Congress on the national emergency with respect to the former Yugoslavia, President William J. Clinton described the relevant Security Council resolutions and U.S. sanctions then in place, including implementing regulations, as excerpted below. 29 WEEKLY COMP. PRES. DOC. 950 (May 31, 1993).

---

* * * *

. . . The present report . . . discusses Administration actions and expenses directly related to the exercise of powers and authorities conferred by the declaration of a national emergency in Executive Order No. 12808 and to expanded sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) (the "FRY (S/M)") contained in Executive Order No. 12810 of June 5, 1992 (57 FR 24347, June 9, 1992), Executive Order No. 12831 of January 15, 1993 (58 FR 5253, January 21, 1993), and Executive Order No. 12846 of April 28 [sic], 1993 (58 FR 25771, April 27, 1993).

1. Executive Order No. 12808 blocked all property and interests in property of the Governments of Serbia and Montenegro, or held in the name of the former Government of the Socialist Federal Republic of Yugoslavia or the Government of the Federal Republic of Yugoslavia, then or thereafter located in the United States or within the possession or control of U.S. persons, including their overseas branches. Subsequently, Executive Order No. 12810 expanded U.S. actions to implement in the United States the U.N. sanctions against the FRY (S/M) adopted in United Nations Security Council Resolution No. 757 of May 30, 1992. In addition to reaffirming the blocking of FRY (S/M) Government property, this order prohibits transactions with respect to the FRY (S/M) involving imports, exports, dealing in FRY-origin property, air and sea transportation, contract performance, funds transfers, activity promoting importation or exportation or dealings in property, and official sports, scientific, technical, or cultural representation of the FRY (S/M) in the United States. Executive Order No. 12810 exempted from trade restrictions (1) transshipments through the FRY (S/M), and (2) activities related to the United Nations Protection Force ("UNPROFOR"), the Conference on Yugoslavia, or the European Community Monitor Mission.

On January 15, 1993, President Bush issued Executive Order No. 12831 to implement new sanctions contained in United Nations Security Council Resolution No. 787 of November 16, 1992. The order revokes the exemption for transshipments through the FRY (S/M) contained in Executive Order No. 12810; prohibits transactions within the United States or by a U.S. person relating

to FRY (S/M) vessels and vessels in which a majority or controlling interest is held by a person or entity in, or operating from, the FRY (S/M), and states that all such vessels shall be considered as vessels of the FRY (S/M), regardless of the flag under which they sail. Executive Order No. 12831 also delegates discretionary authority to the Secretary of the Treasury, in consultation with the Secretary of State, to prohibit trade and financial transactions involving any areas of the former Socialist Federal Republic of Yugoslavia as to which there is inadequate assurance that such transactions will not be diverted to the benefit of the FRY (S/M).

On April 26, 1993, I issued Executive Order No. 12846 to implement in the United States the sanctions adopted in United Nations Security Council Resolution No. 820 of April 17, 1993. That resolution called on the Bosnian Serbs to accept the Vance-Owen peace plan for Bosnia-Hercegovina and, if they failed to do so by April 26, called on member states to take additional measures to tighten the embargo against the FRY (S/M) and Serbian-controlled areas of Croatia and Bosnia-Hercegovina. Effective 12.01 a.m. e.d.t., April 28, 1993, Executive Order 12846: (1) blocks all property and interests in property of businesses organized or located in the FRY (S/M), including the property of their U.S. and other foreign subsidiaries, that are in or later come within the United States or the possession or control of U.S. persons, including their overseas branches; (2) confirms the charging to the owners or operators of property blocked under this order or Executive Orders No. 12808, No. 12810, or No. 12831 all expenses incident to the blocking and maintenance of such property, requires that such expenses be satisfied from sources other than blocked funds, and permits such property to be sold and the proceeds (after payment of expenses) placed in a blocked account; (3) orders (a) the detention pending investigation of all nonblocked vessels, aircraft, freight vehicles, rolling stock, and cargo within the United States suspected of violating United Nations Security Council Resolutions No. 713, No. 757, No. 787, or No. 820, and (b) the blocking of such conveyances or cargo if a violation is determined to have been committed, and permits the liquidation of such blocked conveyances or cargo and the placing of the proceeds into

a blocked account; (4) prohibits any vessel registered in the United States, or owned or controlled by U.S. persons, other than U.S. naval vessels, from entering the territorial waters of the FRY (S/M); and (5) prohibits U.S. persons from engaging in any transactions relating to the shipment of goods to, from, or through United Nations Protected Areas in the Republic of Croatia and areas in the Republic of Bosnia-Hercegovina under the control of Bosnia Serb forces. Executive Order No. 12846 authorizes the Secretary of the Treasury in consultation with the Secretary of State to take such actions, and to employ all powers granted to me by the authorities cited above, as may be necessary to carry out the purposes of that order. The sanctions imposed in the offer do not invalidate existing licenses or authorizations issued pursuant to Executive Orders No. 12808, No. 12810, or No. 12831 except as those licenses and authorizations may thereafter be terminated, suspended, or modified by the issuing Federal agencies, but otherwise the sanctions apply notwithstanding any preexisting contracts, international agreements, licenses, or authorizations.

2. The declaration of the national emergency on May 30, 1992, was made pursuant to the authority vested in the President by the Constitution and laws of the United States, 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.), and section 301 of title 3 of the United States Code. The emergency declaration was reported to the Congress on May 30, 1992, pursuant to section 204(b) of the International Emergency Economic Powers Act (50 U.S.C. 1703(b)). The additional sanctions set forth in Executive Orders No. 12810, No. 12831, and No. 12846 were imposed pursuant to the authority vested in the President by the Constitution and laws of the United States, including the statutes cited above, section 1114 of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. 1514), and section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c).

3. Since the last report, the Office of Foreign Assets Control of the Department of the Treasury ("FAC"), in consultation with the Department of State and other Federal agencies, issued the Federal

Republic of Yugoslavia (Serbia and Montenegro) Sanctions Regulations, 31 C.F.R. Part 585 (58 FR 13199, March 10, 1903—the "Regulations"), to implement the prohibitions contained in Executive Orders No. 12808, No. 12810, and No. 12831. . . .

On January 15, 1993, FAC issued General Notice No. 2, entitled "Notification of Status of Yugoslav Entities." . . . The list is composed of government, financial, and commercial entities organized in Serbia or Montenegro and a number of foreign subsidiaries of such entities. The list is illustrative of entities covered by FAC's presumption, stated in the notice, that all entities organized or located in Serbia or Montenegro, as well as their foreign branches and subsidiaries, are controlled by the Government of the FRY (S/M) and thus subject to the blocking provisions of the Executive orders. . . . As part of a U.S.-led allied effort to tighten economic sanctions against Yugoslavia, on March 11, 1993, FAC named 25 maritime firms and 55 ships controlled by these firms as "Specially Designated Nationals" ("SDNs") of Yugoslavia. . . . The FRY (S/M) has continued to operate its maritime fleet and trade in violation of the international economic sanctions mandated by United Nations Security Council Resolutions No. 757 and No. 787. Operations and activities by Yugoslav front companies, or SDNs, enable the Government of the FRY (S/M) to circumvent the international trade embargo. The effect of FAC's SDN designation is to identify agents and property of the Government of the FRY (S/M), and property of entities organized or located in the FRY (S/M), and thus to extend the applicability of the regulatory prohibitions governing transactions with the Government of the FRY (S/M) and its nationals by U.S. persons to these designated individuals and entities wherever located, irrespective of nationality or registration. U.S. persons are prohibited from engaging in any transaction involving property in which an SDN has an interest; which includes all financial and trade transactions. All SDN property within the jurisdiction of the United States (including financial assets in U.S. bank branches overseas) is blocked. . . .

4. Over the past 6 months, the Departments of State and the Treasury have worked closely with European Community (the "EC") member states and other U.N. member nations to coordinate

implementation of the sanctions against the FRY (S/M). This has included visits by assessment teams formed under the auspices of the United States, the EC, and the Conference for Security and Cooperation in Europe (the "CSCE") to states bordering on Serbia and Montenegro; deployment of CSCE sanctions assistance missions ("SAMs") to Albania, Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Hungary, Romania, and Ukraine to assist in monitoring land and Danube River traffic; bilateral contacts between the United States and other countries with the purpose of tightening financial and trade restrictions on the FRY (S/M); and establishment of a mechanism to coordinate enforcement efforts and to exchange technical information.

5. In accordance with licensing policy and the Regulations, FAC has exercised its authority to license certain specific transactions with respect to the FRY (S/M) that are consistent with the Security Council sanctions. . . . Specific licenses have been issued for (1) payment to U.S. or third-country secured creditors, under certain narrowly defined circumstances, for pre-embargo import and export transactions; (2) for legal representation or advice to the Government of the FRY (S/M) or FRY (S/M)-controlled clients; (3) for restricted and closely monitored operations by subsidiaries of FRY (S/M)-controlled firms located in the United States; (4) for limited FRY (S/M) diplomatic representation in Washington and New York; (5) for patent, trademark and copyright protection, and maintenance transactions in the FRY (S/M) not involving payment to the FRY (S/M) Government; (6) for certain communications, news media, and travel-related transactions; (7) for the payment of crews' wages and vessel maintenance of FRY (S/M)-controlled ships blocked in the United States; (8) for the removal from the FRY (S/M) of manufactured property owned and controlled by U.S. entities; and (9) to assist the United Nations in its relief operations and the activities of the U.N. Protection Force. Pursuant to United Nations Security Council Resolutions No. 757 and No. 760, specific licenses have also been issued to authorize exportation of food, medicine, and supplies intended for humanitarian purposes in the FRY (S/M).

* * * *

Following adoption of UN Security Resolution 942, September 23, 1994, (U.N. Doc. S/RES/942 (1994)), President Clinton issued E.O. 12934. 59 Fed. Reg. 54,119 (Oct. 27, 1994). E.O. 12934 expanded the scope of the national emergency "to address the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States posed by the actions and policies of the Bosnian Serb forces and the authorities in the territory that they control, including their refusal to accept the proposed territorial settlement of the conflict in the Republic of Bosnia and Herzegovina." It blocked all property and interests in property of the "Bosnian Serb forces and the authorities in the territory that they control within the Republic of Bosnia and Herzegovina, as well as the property of any entity organized or located in, or controlled by any person in, or resident in, those areas." 32 WEEKLY COMP. PRES. DOC. 2467 (Dec. 6, 1996).

c. Suspension of certain sanctions

As discussed in Chapter 17.A.1., the General Framework Agreement for Peace in Bosnia and Herzegovina was signed in Paris on December 14, 1995. In recognition of this action, President Clinton issued Presidential Determination No. 96–7, December 27, 1995, directing the Secretary of the Treasury to suspend the application of sanctions imposed on Serbia and Montenegro pursuant to E.O.s 12808, 12810, 12831, and 12846; and the Secretary of Transportation to suspend sanctions imposed pursuant to Department of Transportation Orders 92-5-28 and 92-6-27 of 1992 and Special Federal Aviation Regulation No. 66–2 of May 31, 1995. It also authorized the Secretary of State to take appropriate action to suspend the application of sanctions imposed pursuant to Department of State Public Notice 1427 (*see* 8.a. *supra*), "at the appropriate time in conformity with the provisions of United Nations Security Council Resolution 1021 of November 22, 1995." 61 Fed. Reg. 2887 (Jan. 29, 1996). *See* 61 Fed.

Reg. 1282 (Jan. 19, 1996) prospectively suspending sanctions imposed on the FRY(S/M) and 61 Fed. Reg. 24,696 (May 16, 1996), prospectively suspending sanctions imposed on the Bosnian Serb forces and authorities and on the territory that they control within the Republic of Bosnia and Herzegovina.

In issuing Determination No. 96–7, the President determined that

> the waiver or modification of the sanctions on Serbia and Montenegro . . . is necessary to achieve a negotiated settlement of the conflict in Bosnia-Herzegovina that is acceptable to the parties.

An accompanying Memorandum of Justification for Presidential Certification Regarding the Modification of the Application of U.S. Sanctions on Serbia and Montenegro, also available at 61 Fed. Reg. 2887, described the peace negotiations in detail.

On May 24, 1996, President William J. Clinton continued in place the national emergency with respect to the Government of the FRY(S/M) and the Bosnian Serb forces and those areas of the Republic of Bosnia and Herzegovina under the control of the Bosnian Serb forces. 61 Fed. Reg. 26,773 (May 29, 1996). As explained in a letter to Congress, the President found it "necessary to maintain in force the broad authorities necessary to reimpose economic pressure on the Government of the [FRY(S/M)] and the Bosnian Serb forces and the authorities in the territory that they control if either fail significantly to meet their obligations under the Peace Agreement." 32 WEEKLY COMP. PRES. DOC. 945 (May 24, 1996).

Excerpts below from the May 24 Federal Register Notice announcing the continuation of the emergency describe Presidential Determination 96–7 and the status of blocked property as of that date.

---

* * * *

On December 27, 1995, I issued Presidential Determination No. 96–7, directing the Secretary of the Treasury, inter alia, to

suspend the application of sanctions imposed on the Federal Republic of Yugoslavia (Serbia and Montenegro) pursuant to the above-referenced Executive Orders and to continue to block property previously blocked until provision is made to address claims or encumbrances, including the claims of the other successor states of the former Yugoslavia. This sanctions relief, in conformity with United Nations Security Council Resolution 1022 of November 22, 1995 (hereinafter the "Resolution"), was an essential factor motivating Serbia and Montenegro's acceptance of the General Framework Agreement for Peace in Bosnia and Herzegovina initialed by the parties in Dayton, Ohio, on November 21, 1995, and signed in Paris on December 14, 1995 (hereinafter the "Peace Agreement"). The sanctions imposed on the Federal Republic of Yugoslavia (Serbia and Montenegro) were accordingly suspended prospectively, effective January 16, 1996 [61 Fed. Reg. 1282 (Jan. 19, 1996)]. Sanctions imposed on the Bosnian Serb forces and authorities and on the territory that they control within the Republic of Bosnia and Herzegovina were subsequently suspended prospectively, effective May 10, 1996 [61 Fed. Reg. 24,696 (May 16, 1996)], also in conformity with the Peace Agreement and Resolution.

In the last year, substantial progress has been achieved to bring about a settlement on the conflict in the former Yugoslavia acceptable to the parties. Before agreeing to the sanctions suspension, the United States insisted on a credible reimposition mechanism to ensure the full implementation of the Peace Agreement. Thus, Resolution 1022 provides a mechanism to reimpose the sanctions if the Federal Republic of Yugoslavia or the Bosnian Serb authorities fail significantly to meet their obligations under the Peace Agreement. It also provides that sanctions will not be terminated until after the first free and fair elections occur in the Republic of Bosnia and Herzegovina, as provided for in the Peace Agreement, and provided that the Bosnian Serb forces have continued to respect the zones of separation as provided in the Peace Agreement. The Resolution also provides for the continued blocking of assets potentially subject to conflicting claims and encumbrances, including the claims of the other successor states of the former Yugoslavia, until provision is made to address them.

Because the resolution of the crisis and conflict in the former Yugoslavia that resulted from the actions and policies of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), and of the Bosnian Serb forces and the authorities in the territory that they control, will not be complete until such time as the Peace Agreement is implemented fully and the terms of Resolution 1022 have been met, the national emergency declared on May 30, 1992, as expanded in scope on October 25, 1994, and the measures adopted pursuant thereto to deal with that emergency must continue beyond May 30, 1996.

Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Bosnian Serb forces and those areas of the Republic of Bosnia and Herzegovina under the control of the Bosnian Serb forces.

* * * *

As authorized in Presidential Determination No. 96–7, effective July 12, 1996, the Department of State amended the International Traffic in Arms Regulations ("ITAR") to reflect that it was no longer the policy of the United States to deny licenses or other approvals for exports and imports of defense articles and defense services, destined for or originating in the states of the former Yugoslavia with the exception of the FRY(S/M). 61 Fed. Reg. 36,625 (July 12, 1996). Excerpts from the Federal Register Supplementary Information explaining the lifting of the policy of denial imposed in 1991 follow.

---

* * * *

. . . Upon the initialing of the Dayton accords, the UN Security Council (UNSC) on November 22, 1995, adopted Resolution 1021, providing for a phased lifting of the UNSC arms embargo on all the successor states of former Yugoslavia. With the signing of the peace agreement on December 14, 1995, by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), and the submission of a

report on the signing by the UN Secretary General ("signing report") on the same date, the timeline for the phased lifting began.

* * * *

Section 126.1(c) of the ITAR states that whenever the UN Security Council mandates an arms embargo, all transactions which are prohibited by the embargo and which involve U.S. persons anywhere, or any person in the United States, and defense articles and services of a type enumerated on the United States Munitions List, irrespective of origin, are prohibited under the ITAR for the duration of the embargo, unless the Department of State publishes a Federal Register notice specifying different measures. Notice of the policy of denial and suspension with regard to the states of former Yugoslavia was published in the Federal Register on July 19, 1991 (5[6] FR 33322).

The lifting at this time of the policy of denial with respect to states of former Yugoslavia other than the FRY (Serbia and Montenegro), and corresponding amendment to the relevant portion of § 126.1(a) of the ITAR, is consistent with developments in the region and is in furtherance of our national security and foreign policy objectives.

The Federal Register notice of July 19, 1991, may not, however, cease to be effective with respect to the FRY (Serbia and Montenegro) without a certification to Congress by the President pursuant to Section 540A of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. 104–107. No such certification has been made.

* * * *

In his December 6, 1996, report to Congress on the national emergency President Clinton noted:

> On October 1, 1996, the United Nations passed UNSCR 1074, terminating U.N. sanctions against the FRY (S/M) and the Bosnian Serbs in light of the elections that took place in Bosnia and Herzegovina on September 14, 1996. UNSCR 1074, however, reaffirms the provisions of UNSCR 1022 with respect to the release of blocked assets. . . .

* * * *

> The resolution of the crisis and conflict of the former Yugoslavia that has resulted from the actions and policies of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), and of the Bosnian Serb forces and the authorities in the territory that they control, will not be complete until such time as the Peace Agreement is implemented fully and the terms of UNSCR 1022 have been met. . . .

32 WEEKLY COMP. PRES. DOC. 2467 (Dec. 6, 1996); *see also Digest 2003* at 930–34 for termination of the national emergencies.

d. Kosovo

On March 31, 1998, the UN Security Council adopted Resolution 1160, U.N. Doc. S/RES/1160, calling upon the Federal Republic of Yugoslavia ("FRY") to take the "necessary steps to achieve a political solution to the issue of Kosovo," and deciding under Chapter VII to impose an arms embargo as to the FRY, including Kosovo. *See* Chapter 17.B.3. Effective July 14, 1998, the United States implemented the arms embargo through a final rule published by the Bureau of Export Administration, U.S. Department of Commerce. 63 Fed. Reg. 37,767 (July 14, 1998).

On June 9, 1998, President Clinton issued E.O. 13088, declaring a national emergency under IEEPA to deal with the new threat from developments in Kosovo, finding:

> that the actions and policies of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Republic of Serbia with respect to Kosovo, by promoting ethnic conflict and human suffering, threaten to destabilize countries of the region and to disrupt progress in Bosnia and Herzegovina in implementing the Dayton peace agreement, and therefore constitute an unusual and extraordinary threat to the national security and foreign policy of the United States. . . .

63 Fed. Reg. 32,109 (June 12, 1998). E.O. 13088 imposed economic sanctions as set forth below.

---

* * * *

Section 1. (a) Except to the extent provided in section 2 of this order, section 203(b) of IEEPA (50 U.S.C. 1702(b)), and in regulations, orders, directives, or licenses that may hereafter be issued pursuant to this order, all property and interests in property of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are hereby blocked.

(b) The blocking of property and property interests in paragraph (a) of this section includes the prohibition of financial transactions with, including trade financing for, the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro by United States persons.

Sec. 2. Nothing in section 1 of this order shall prohibit financial transactions, including trade financing, by United States persons within the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) if (a) conducted exclusively through the domestic banking system within the Federal Republic of Yugoslavia (Serbia and Montenegro) in local currency (dinars), or (b) conducted using bank notes or barter.

Sec. 3. Except as otherwise provided in regulations, orders, directives, or licenses that may hereafter be issued pursuant to this order, all new investment by United States persons in the territory of the Republic of Serbia, and the approval or other facilitation by United States persons of other persons' new investment in the territory of the Republic of Serbia, are prohibited.

* * * *

Sec. 7. The Secretary of the Treasury, in consultation with the Secretary of State, shall give special consideration to the

circumstances of the Government of the Republic of Montenegro and persons located in and organized under the laws of the Republic of Montenegro in the implementation of this order.

* * * *

President Clinton's January 5, 1999, report to Congress on the national emergency with respect to Kosovo included a summary of the regulations enacted to implement E.O. 13088, as excerpted below. 35 WEEKLY COMP. PRES. DOC. 8 (Jan. 5, 1999).

---

* * * *

2. The Office of Foreign Assets Control (OFAC), acting under authority delegated by the Secretary of the Treasury, implemented the sanctions imposed under the foregoing statutes and Executive Order 13088 and has issued the Federal Republic of Yugoslavia (Serbia and Montenegro) Kosovo Sanctions Regulations, 31 CFR part 586 (the "Regulations") (63 Fed. Reg. 54,575, October 13, 1998). . . .

* * * *

[In addition to blocking property and interests in property, t]he Regulations also prohibit all new investment in the territory of the Republic of Serbia by United States persons, and the approval or other facilitation by United States persons or other persons' new investment in the territory of the Republic of Serbia. The term "new investment," means (a) the acquisition of debt or equity interests in, (b) a commitment or contribution of funds or other assets to, or (c) a loan or other extension of credit to, a public or private undertaking, entity, or project, other than donations of funds to charitable organizations for purely humanitarian purposes. Any transaction by a United States person that evades or avoids, or that has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in Executive Order 13088 is prohibited. Finally, the Regulations provide a general license, authorizing all transactions by United States persons involving property or interests in property of the Government of the Republic

of Montenegro, except as provided pursuant to the Federal Republic of Yugoslavia (Serbia and Montenegro) and Bosnian Serb-Controlled Areas of the Republic of Bosnia and Herzegovina Sanctions Regulations, 31 CFR part 585.

* * * *

On April 30, 1999, President Clinton issued E.O. 13121 to take additional steps with respect to the continuing human rights and humanitarian crisis in Kosovo and the national emergency declared with respect to Kosovo, effective May 1, 1999. 64 Fed. Reg. 24,021 (May 5, 1999). That order, among other things, replaced § 2 of E.O. 13088 with language imposing sanctions on trade in goods or services and related activities with the FRY(S/M), its government, the government of the Republic of Serbia, and the government of the Republic of Montenegro. At the same time, it added new language to § 7, including the following new subsection c:

> The Secretary of the Treasury, in consultation with the Secretary of State, is hereby directed to authorize commercial sales of agricultural commodities and products, medicine, and medical equipment for civilian end use in the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) under appropriate safeguards to prevent diversion to military, paramilitary, or political use by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Government of the Republic of Serbia, or the Government of the Republic of Montenegro.

As explained in the President's message to Congress reporting the new order, this action was taken "in keeping with [the] Administration's new policy to exempt commercial sales of food and medicine from sanctions regimes." 35 WEEKLY COMP. PRES. DOC. 780 (Apr. 30, 1999).

On May 27, 1999, President Clinton announced the continuation of the emergency imposed by executive orders from 1992–1994 as to blocked funds and assets subject to claims and encumbrances "until the status of all remaining

blocked property is resolved, the Peace Agreement implemented, and the terms of the Resolution met." 64 Fed. Reg. 29,205 (May 28, 1999). The same order continued the emergency in response to the situation in Kosovo, stating:

> Since [E.O. 13088 was issued], the government of President Milosevic has rejected the international community's efforts to find a peaceful settlement for the crisis in Kosovo and has launched a massive campaign of ethnic cleansing that has displaced a large percentage of the population and been accompanied by an increasing number of atrocities. In light of President Milosevic's brutal assault against the people of Kosovo, his complete disregard for the requirements of the international community and the threat his actions pose to regional peace and stability, I have determined that it is necessary to maintain in force these emergency authorities beyond June 9, 1999.

See Digest 2001 at 803–08 discussing E.O. 13192, lifting and modifying certain sanctions, and E.O. 13219 declaring a national emergency relating to persons who threaten international stabilization efforts in the Western Balkans; and *Digest 2003* at 930–34 discussing E.O. 13304 terminating national emergencies and instituting certain new measures.

See also Chapter 3.C.1.(a)(4) concerning sanctions imposed on the former Yugoslavia for harboring individuals indicted by the International Criminal Tribunal for the Former Yugoslavia.

9. Niger

As a result of a military coup on January 27, 1996, that overthrew the democratically elected Government of Niger, on January 30, 1996, the United States suspended bilateral development and military assistance to Niger, totaling almost $25 million in fiscal year 1995. A statement by White House Press Secretary Michael McCurry on January 31, 1996,

announcing the suspension, is excerpted below. *See also* 90 Am. J. Int'l L. 454 (1996).

---

* * * *

The United States regrets that these programs, which directly benefited the people of Niger, are now suspended.

In addition, the United States will not support any new programs for Niger in the international financial institutions in which it holds membership so long as the military authorities ignore the calls of the international community to return to the barracks and restore the legitimately elected government.

The United States again calls upon the military leadership in Niger to restore immediately the duly elected, civilian, democratic government and stresses that we will not recognize any interim civilian administration appointed by the military coup leaders. The existing democratic institutions, however imperfect, represent the will of the Nigerian people and must be respected.

Finally, the United States urges the military coup leaders to engage in discussion with elected authorities of Niger on means to restore the legitimate civilian government promptly. The swift condemnation of this coup by the Secretaries General of the United Nations and the Organization of African Unity, along with the European Union and many individual countries, demonstrates the international community's firm rejection of military solutions to political problems. The United States will consult urgently with other countries in capitals and at the United Nations on possible additional steps we might take to restore the legitimate Government of Niger.

* * * *

The action was taken pursuant to section 508 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104–107, 110 Stat. 704, 723 (1996) which prohibited obligation or expenditure of funds made available under the act for assistance "to any country whose duly elected Head of Government is deposed by military coup or decree." Assistance may be resumed if

"subsequent to the termination of assistance a democratically elected government has taken office." For a discussion of similar provisions in previous appropriations acts, *see, e.g.*, *II Cumulative Digest 1981–1988*, at 2606–08.

10. Terrorism: Taliban support of international terrorism

On July 4, 1999, President William J. Clinton issued E.O. 13129, declaring a national emergency, prohibiting United States companies from selling goods and services to Afghanistan's ruling Taliban militia, and freezing all Taliban assets in the United States. 64 Fed. Reg. 36,759 (July 7, 1999). *See* 35 WEEKLY COMP. PRES. DOCS. 1283 (July 12, 1999).

---

* * * *

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) ("IEEPA"), the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3, United States Code,

I, WILLIAM J. CLINTON, President of the United States of America, find that the actions and policies of the Taliban in Afghanistan, 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 who have committed and threaten to continue to commit acts of violence against the United States and its nationals, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. Except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) and in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date:

(a) all property and interests in property of the Taliban; and
(b) all property and interests in property of persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General:

(i) to be owned or controlled by, or to act for or on behalf of, the Taliban; or
(ii) to provide financial, material, or technological support for, or services in support of, any of the foregoing,

that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, are blocked.

Sec. 2. Except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) and in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date:

(a) any transaction or dealing by United States persons or within the United States in property or interests in property blocked pursuant to this order is prohibited, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of the Taliban or persons designated pursuant to this order;
(b) the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, software, technology (including technical data), or services to the territory of Afghanistan controlled by the Taliban or to the Taliban or persons designated pursuant to this order is prohibited;
(c) the importation into the United States of any goods, software, technology, or services owned or controlled by the Taliban or persons designated pursuant to this order or from the territory of Afghanistan controlled by the Taliban is prohibited;
(d) any transaction by any United States person or within the United States that evades or avoids, or has the purpose

of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order is prohibited; and
(e) any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 3. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby directed to authorize commercial sales of agricultural commodities and products, medicine, and medical equipment for civilian end use in the territory of Afghanistan controlled by the Taliban under appropriate safeguards to prevent diversion to military, paramilitary, or terrorist end users or end use or to political end use.

* * * *

On October 15, 1999, the UN Security Council, acting under Chapter VII, unanimously adopted Resolution 1267. U.N. Doc. S/RES/1267 (1999). The Security Council decided that unless the Taliban complied fully with its demand that it "turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice," by November 14, all states must impose sanctions. Resolution 1267 also established a committee consisting of all members of the Security Council to undertake specified tasks related to implementation of the measures mandated in the resolution. Materials related to operation of the committee are maintained at *www.un.org/Docs/sc/committees/1267Template.htm*.

On November 15, 1999, President Clinton issued a statement concerning the UN sanctions against the Taliban, as excerpted below. 35 WEEKLY COMP. PRES. DOC. 2386 (Nov. 22, 1999).

Today the President of the United Nations Security Council certified that the economic sanctions against the Taliban laid out

in Resolution 1267 one month ago are now in effect. These sanctions are being implemented because the Taliban has spurned the unanimous demand of the Security Council and refused to deliver Usama bin Ladin to a country where he can face justice for his acts of terrorism, including the bombing of America's Embassies in Nairobi and Dar es Salaam.

The international community has again spoken with one voice, and its resolve to combat the threat of international terrorism is clear. The U.N. sanctions parallel the unilateral ones that the United States placed on the Taliban in July and will result in the restriction of landing rights of airlines owned, leased, or operated by or on behalf of the Taliban, the freezing of Taliban accounts around the world, and the prohibition of investment in any undertaking owned or controlled by the Taliban. I ask all the nations of the world to do their utmost so that these sanctions are implemented fully and swiftly.

* * * *

For the interim rule establishing the Taliban (Afghanistan) Sanctions Regulations, *see* 66 Fed. Reg. 2726 (Jan. 11, 2001). *See Digest 2002* at 882–84 concerning E.O. 13268 terminating the national emergency. For further discussion of implementation of sanctions against the Taliban and other terrorism-related entities, *see Digest 2001* at 801–03, 881–923; *Digest 2002* at 881–93; *Digest 2003* at 150–80.

Imposition of sanctions against terrorists who threaten the Middle East Peace Process and against foreign terrorist organizations are discussed in Chapter 3.B.1.b. and c.

B. LIFTING OF SANCTIONS

1. Cambodia

In January 1992 President George H.W. Bush lifted the trade embargo against Cambodia, normalizing economic relations between the United States and Cambodia. In remarks to the Singapore Lecture Group in Singapore, January 4, 1992, President Bush stated:

> When the Paris conference agreed on a peace settlement for Cambodia, my Government offered to remove our trade embargo as the United Nations advance mission began to implement the settlement. And today I am pleased to announce the lifting of that embargo. Working with others, we need to turn attention to the economic reconstruction of that deeply wounded land, and so its new political reconciliation has a home from which to grow.

28 WEEKLY COMP. PRES. DOC. 28 (Jan. 4, 1992).

OFAC implemented the lifting of the embargo by final rule effective January 3, 1992. 31 C.F.R. pt. 500, 57 Fed. Reg. 1872 (Jan. 16, 1992). The supplementary information provided in the Federal Register explained:

> . . . Newly authorized transactions include, but are not limited to, importations from and exportations to Cambodia (not otherwise restricted), new investment, travel-related transactions and brokering transactions. Property blocked as of January 2, 1992, because of an interest therein of Cambodia or its nationals, remains blocked.

OFAC amended its regulations effective March 16, 1992, to provide for the registration of claims by U.S. nationals against Cambodia. 57 Fed. Reg. 9052 (Mar. 16, 1992). Pursuant to a settlement reached October 6, 1994, discussed in Chapter 8.A.6., most previously blocked funds were unblocked. 59 Fed. Reg. 60,558 (Nov. 25, 1994).

2. Vietnam

In the early 1990s the United States took steps toward normalization of relations between the United States and Vietnam through amendments to the Foreign Assets Control Regulations. *See, e.g.*, 57 Fed. Reg. 17,855 (Apr. 28, 1992) (authorizing telecommunications transactions involving Vietnam "provided that payments owed to Vietnam or its nationals are deposited into blocked interest-bearing accounts in domestic U.S. banks pending full lifting of the trade

embargo"); 57 Fed. Reg. 20,765 (May 15, 1992) (authorizing non-governmental organizations to conduct humanitarian projects in Vietnam and allowing issuance of specific licenses for certain humanitarian transactions with related amendment of Bureau of Export Administration controls, 57 Fed. Reg. 31,658 (July 17, 1992)); 57 Fed. Reg. 62,230 (Dec. 30, 1992) (authorizing persons subject to U.S. jurisdiction to enter into contracts with Vietnam or Vietnamese nationals "contingent upon the lifting of the embargo on Vietnam"); 58 Fed. Reg. 63,083 (Nov. 30, 1993) (making available specific licenses authorizing training and orientation services by U.S. entities to Vietnamese nationals); 58 Fed. Reg. 68,529 (Dec. 28, 1993) (making available a general license permitting participation by persons subject to U.S. jurisdiction in certain development projects in Vietnam).

On February 3, 1994, President Clinton lifted the trade embargo against Vietnam. 30 WEEKLY COMP. PRES. DOC. 205 (Feb. 7, 1994). Excerpts from the President's statement announcing this decision are set forth below. *See also* Chapter 9.A.2.j.

---

* * * *

Today I am lifting the trade embargo against Vietnam because I am absolutely convinced it offers the best way to resolve the fate of those who remain missing and about whom we are not sure. We've worked hard over the last year to achieve progress. On Memorial Day, I pledged to declassify and make available virtually all Government documents related to our POW's and MIA. On Veterans Day, I announced that we had fulfilled that pledge. Last April, and again in July, I sent two Presidential delegations to Vietnam to expand our search for remains and documents. We intensified our diplomatic efforts. . . .

Last July, I said any improvement in our relations with Vietnam would depend on tangible progress in four specific areas: first, the recovery and return of remains of our POW's and MIA; second, the continued resolution of discrepancy cases, cases in which there is reason to believe individuals could have survived the incident

in which they were lost; third, further assistance from Vietnam and Laos on investigations along their common border, an area where many U.S. servicemen were lost and pilots downed; and fourth, accelerated efforts to provide all relevant POW/MIA-related documents.

Today, I can report that significant, tangible progress has been made in all these four areas. Let me describe it. First, on remains: Since the beginning of this administration, we have recovered the remains of 67 American servicemen. In the 7 months since July, we've recovered 39 sets of remains, more than during all of 1992. Second, on the discrepancy cases: Since the beginning of the administration, we've reduced the number of these cases from 135 to 73. Since last July, we've confirmed the deaths of 19 servicemen who were on the list. A special United States team in Vietnam continues to investigate the remaining cases. Third, on cooperation with Laos: As a direct result of the conditions set out in July, the Governments of Vietnam and Laos agreed to work with us to investigate their common border. The first such investigation took place in December and located new remains as well as crash sites that will soon be excavated. Fourth, on the documents: Since July, we have received important wartime documents from Vietnam's military archives that provide leads on unresolved POW/MIA cases. The progress achieved on unresolved questions is encouraging, but it must not end here. I remain personally committed to continuing the search for the answers and the peace of mind that families of the missing deserve.

* * * *

I want to be clear: These actions do not constitute a normalization of our relationships. Before that happens, we must have more progress, more cooperation, and more answers. Toward that end, this spring I will send another high-level U.S. delegation to Vietnam to continue the search for remains and for documents.

* * * *

Also on February 3, OFAC issued a final rule implementing prospectively the lifting of the embargo. 59 Fed. Reg. 5696 (Feb. 7, 1994). As explained in the Federal Register:

> The effect of this amendment is that transactions involving [property in which Vietnam or its nationals have an interest] coming within the jurisdiction of the United States or into the possession or control of persons subject to the jurisdiction of the United States after 5:05 p.m. E.S.T., February 3, 1994, or in which an interest of Vietnam or a national thereof arises after that time, are authorized by general license. Newly authorized transactions include, but are not limited to, importations from and exportations to Vietnam (not otherwise restricted), new investment, travel-related transactions and brokering transactions. Property blocked as of 5:04 p.m. E.S.T., February 3, 1994, remains blocked. . . .

See also 60 Fed. Reg. 12,885 (Mar. 9, 1995) unblocking the remaining Vietnamese property, based on a claims settlement agreement, discussed in Chapter 8.A.7.

C. SANCTIONS POLICY

1. Policy on Food and Medical Sanctions

On April 28, 1999, President William J. Clinton announced that the United States would exempt commercial sales of agricultural commodities and products, medicine, and medical equipment from future unilateral economic sanctions regimes, with certain exceptions. *See, e.g.*, E.O. 13121, 64 Fed. Reg. 24,021 (May 5, 1999), discussed in 8.d., *supra*.

Excerpts below from a fact sheet released by the Department of State, July 27, 1999, describe the implementation of the policy. The fact sheet is available at *www.state.gov/www/issues/economic/fs_990727_sanctions.html*.

On July 26, 1999, the Department of the Treasury issued changes to the Iran, Libya and Sudan sanctions regulations concerning the sale of certain agricultural commodities, medicine and medical equipment implements.

The changes were intended to implement President Clinton's announcement of April 28, 1999 that the United States would henceforth exempt commercial sales of agricultural commodities and products, medicine, and medical equipment from future unilateral economic sanctions regimes.

In addition, the President decided that the Administration would extend that policy to existing economic sanctions programs by modifying licensing policies for currently embargoed countries to permit a case-by-case review of specific proposals for commercial sales.

The new regulations, issued by Treasury's Office of Foreign Assets Control (OFAC), permit the sale of agricultural commodities and products intended for use as food, and medicines, and medical equipment provided they are not on the Commerce Control List in effect on the date of exportation.

As the President said, this change in policy has been implemented as part of the overall United States Government approach to sanctions reform. It is not directed at any specific country. Rather, it reflects a calculation of the impact on overall policy objectives of including food and medicine in unilateral sanctions. Sales of food, medicine and medical equipment do not generally enhance a nation's military capacity or ability to support terrorism. On the contrary, funds spent on agricultural commodities are not available for other, less desirable uses. The purpose in applying sanctions is to influence the behavior of regimes, not to deny people their basic humanitarian needs.

The new regulations do not provide for the automatic approval of food and medicine sales. Each contract will still have to pass through a policy filter. However, the regulations shift the presumption in favor of approving such sales. At the same time, there will be no U.S. Government funding or financing in support of such sales authorized by the change.

There are, of course, circumstances under which such commercial sales will not be permitted. These include:

- armed conflict involving the United States or its allies;
- the diversion by a regime of agricultural or medical imports to its armed forces or its political supporters;

- or situations where the regime or its officials would derive an unjustifiable economic benefit from these imports.

Sanctions are a legitimate tool of our foreign policy. But the United States has always sought to limit their impact on innocent and vulnerable populations. For 2 years, the Administration has been working to ensure that sanctions are carefully targeted, advance foreign policy goals, and avoid as much as possible damage to other U.S. interests. The U.S. Government has—and continues to have—extensive discussions of these issues with the Congress with the goal of comprehensive sanctions reform.

The announced changes reflect the basic objectives of overall sanctions reform effort:

- to ensure that unilateral economic sanctions are effective;
- that the costs to U.S. interests of imposing sanctions are minimized; and
- that the President retain the flexibility to impose sanctions —even on food and medicine—should circumstances warrant.

* * * *

2. Sanctions as a Foreign Policy Tool

Toward the end of the 1990s, several pieces of legislation were introduced that would have effected reforms on the use of economic sanctions. In testimony before the Senate Foreign Relations Committee on July 1, 1999, Under Secretary of State for Economic, Business, and Agricultural Affairs Stuart E. Eizenstat addressed the use of economic sanctions in U.S. foreign policy and the role of federal legislation.

The full text of Mr. Eizenstat's testimony is available at *www.state.gov/www/policy_remarks/1999/990701_eizen_sanctions.html.*

---

* * * *

A number of bills involving economic sanctions have . . . been introduced into both Houses of Congress. These include broad legislation such as the Sanctions Policy Reform Act, S.757, and its House counterpart, the Enhancement of Trade, Security, and Human Rights through Sanctions Reform Act, H.R. 1244, and the Sanctions Rationalization Act of 1999, S.927. Others are narrower in scope, addressing food and medicines, targeting specific countries or issues, such as the Export Administration Act.

The Administration has a clear position, Mr. Chairman, on the role of economic sanctions. Properly designed, implemented and applied as a part of a coherent strategy, sanctions—including economic sanctions—are a valuable tool for enforcing international norms and protecting our national interests. At the same time, sanctions are a blunt instrument. They are not a panacea nor are they cost free. Indeed, used inappropriately, they can actually impede the attainment of our objectives and come at a significant cost to other U.S. policy objectives.

* * * *

With respect to what constitutes a sanction, Mr. Chairman, there is no uniformly applicable legislative definition, but when I speak of a sanction, I have in mind the use of economic tools to address conduct by foreign governments or entities that is harmful to U.S. foreign policy interests. I do not include, for example, trade-related retaliation under our trade laws.

During today's testimony, I will speak to the full range of measures that are sometimes placed within the rubric of "economic sanctions." Some include, for example, the denial of a normally available benefit, such as access to the U.S. market on an NTR basis, or the right to purchase U.S. goods or services or to attract U.S. investment. The broad trade embargoes on Iran, Cuba, North Korea, Libya, Sudan and Yugoslavia are undisputed examples. Some might also include decisions about whether to offer U.S. support in International Financial Institutions or conditions on U.S. aid that are imposed to advance U.S. foreign policy objectives.

* * * *

We believe that our use of sanctions should be governed by a number of common sense principles and that any prospective legislation should be measured against these same standards.

First, effectiveness should be our watchword. In fact, used ineffectively, they can even make it more difficult to attain our goals and come at a significant cost to other U.S. policy objectives. At the same time, our emphasis on effectiveness should not lead us to expect instant results or deter us from acting alone when important U.S. interests are at stake. Indeed, this is why presidential flexibility is essential.

Second, unilateral economic sanctions should not be a first resort to conduct by a foreign government which negatively affects our interests. We should first aggressively pursue other available diplomatic options. These can range from symbolic measures like withdrawing an Ambassador, reducing embassy staff, to denying visas to target figures, entering into security arrangements with neighboring countries, to military intervention and everything in between. In general, we should turn to sanctions only after other options have failed or have been judged inadequate or inappropriate.

Third, sanctions are most effective when they have broad multilateral support. The history of our use of unilateral sanctions shows that by themselves in the majority of cases they fail to change the conduct of the targeted country or, at best, are a contributory but probably not a decisive factor in securing the changes of behavior or policy that we seek. Multilateral sanctions in contrast maximize international pressure on the offending state. They show unity of international purpose. Because they are multilateral, these sanctions regimes are more difficult to evade or undermine. They minimize the damage to U.S. competitiveness and distribute more equitably the cost of sanctions across countries. It was multilateral sanctions that helped end apartheid in South Africa, that have isolated Saddam Hussein in Iraq, that brought Serbia to the bargaining table in Dayton. When considering sanctions legislation, we believe that the Congress could include provisions urging the President to make maximum efforts to develop multilateral cooperation with other countries having similar interests in addressing the concern which the sanctions are intended to address.

Nonetheless, if we are unsuccessful in building a multilateral regime, and important national interests are at issue, we must be prepared to act unilaterally. To maintain its leadership role, the U.S. must sometimes act even though other nations are not compelled to do so.

Fourth, flexibility of application is absolutely essential if we are to use sanctions effectively. The fundamental principle underlying our approach is one of symmetry between the two branches—Congress, in short, should be no more prescriptive of the Executive Branch than it is of itself.

Our foreign policy is most effective when it reflects cooperation and consultation between the Administration and the Congress. The decision to apply economic sanctions—or to lift or waive potential measures or those already in place—should reflect a relationship of comity between the Executive and Legislative branches. We must respect the particular role that each branch plays in making foreign policy.

* * * *

In any sanctions reform legislation we support a single national interest waiver standard applicable to all future sanctions legislation.

Our experiences with the Libertad Act (Helms-Burton) and the Iran-Libya Sanctions Act (ILSA) underscore the importance of flexibility to achieving the purposes of those acts.

In the case of Helms-Burton, the exercise of Title III waiver authority led the EU, in December, 1996, to enact and restate each 6 months its Common Position on Cuba, tying concrete improvement of its relations with Cuba to fundamental changes in respect for human rights and fundamental freedoms in Cuba. The EU has spoken out more forcefully in support of democracy and human rights. It has established a special Human Rights Working Group among its Embassies to reach out to dissidents and has condemned the arrest of the dissident working group.

Similarly, the prospect of an amendment to Title IV that would authorize a waiver led the EU to agree to an Understanding to limit investment in illegally expropriated properties worldwide, including in Cuba. . . . The pathbreaking Understanding that we

reached with the EU on May 18, 1998, will, for the first time, establish multilateral disciplines among major capital exporting countries to inhibit and deter investment in properties that have been expropriated in violation of international law.

These new restrictions will discourage illegal expropriations and chill investment in Cuba, warning investors to keep "hands off." Castro has railed against the Understanding, precisely because he understands its potential impact on Cuba and because he sees that it embodies the principles underlying Helms-Burton.

* * * *

Similarly, the flexibility included in ILSA—the ability to decide whether to impose or waive sanctions—was central to our ability to advance the objectives of that law. In developing ILSA, Congress was motivated by its deep concern about the proliferation of weapons of mass destruction (WMD) and terrorism and expressed its deep concern about Iran. We used the Act's waiver authority to help consolidate the gains that we had made with the EU and Russia on strengthening international cooperation to oppose Iran's dangerous and objectionable behavior. For example, the EU strengthened its already good export controls on dealing with Iran. It helped us avoid a major dispute with allies that would not have served the Act's objectives and would have heavily strained our cooperation with our allies across the board.

With these general principles in mind, . . . [w]e have proposed appropriate and flexible guidelines that the Executive Branch would be willing to apply to future imposition of sanctions under IEEPA as well as discretionary sanctions under future sanctions laws passed by Congress.

First, we believe that flexibility accompanied by national interest waiver authority applicable to all future unilateral sanctions legislation is the single most essential element. . . .

Second, it is important to prevent excessive procedural constraints from hamstringing the Executive Branch, for example, advance public notice of sanctions which could allow a target country or entity to rearrange its assets in advance of U.S. action. . . .

Sunset clauses tied to a set time period rather than a measure of a sanction's performance are not appropriate. . . .

* * * *

In sum, if our policies are to be effective, we must work together—Administration, Congress, at the state and local level, as well as the business community, including NGOs—to see that our use of sanctions is appropriate, coherent, and designed to attract international support. . . .

Cross-references

Cuba, **Chapters 1.B.5 & C.2.f. and 8.B.2.**
Terrorism-related sanctions, **Chapter 3.B.1.b., c., & g., and Chapter 7.B.4.**
Counter-narcotics-related sanctions, **Chapter 3.B.3.**
Sanctions related to cooperation with the International Criminal Tribunal for the Former Yugoslavia, **Chapter 3.C.1.a.(4).**
Sanctions in human rights, **Chapter 6.A.5.**
Continuation of sanctions imposed on China following 1989 incident, **Chapter 11.B.4.g.(2).**
Iraq, **Chapter 18.A.1.a.**
Arms control and non-proliferation sanctions, **Chapter 18.A.7., B.1., C.4., C.5.d., D.1.d., D.3., E.4., & F.**

Chapter 17

International Conflict Resolution and Avoidance

A. PEACE PROCESS AND RELATED ISSUES

1. Bosnia: 1995 Dayton Peace Accords

The Socialist Federal Republic of Yugoslavia splintered during the 1990s. Slovenia, Croatia, The Former Yugoslav Republic of Macedonia, and Bosnia and Herzegovina ("Bosnia") were recognized as independent states in 1992. The remaining republics of Serbia and Montenegro declared a new Federal Republic of Yugoslavia ("FRY") in April 1992. *See* Chapter 9.B.1. A State Department historical publication described the subsequent conflict as "Europe's bloodiest conflict since World War II. Lasting nearly 4 years, the conflict caused by the breakup of Yugoslavia claimed some quarter of a million lives, displaced two million people from their homes, and posed one of the great tests to the international community since the end of the Cold War." History of the Department of State During the Clinton Presidency (1993–2001), Chapter 11, produced by the Department of State Historian's Office ("History"), available at *www.state.gov/r/pa/ho/pubs/8527.htm.*

In 1992 the International Conference on the Former Yugoslavia was convened in London and in Geneva in an effort to find a peaceful settlement to the resulting conflicts. The London Conference, co-chaired by UK Prime Minister John Major as the Head of State/Government of the Presidency of the European Community and by UN Secretary General Boutros-Ghali, was held August 26–27, 1992. *See*

intervention of Acting Secretary of State Lawrence Eagleburger at the London Conference, August 26, 1992, with conference documents and related materials in 3 Dep't St. Dispatch Supp. No. 7 (Sept. 15, 1992), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*. *See also* intervention of Secretary Eagleburger at the Geneva Conference, December 16, 1992, in Chapter 3.B.2.c.

As discussed in Chapter 16.A.8.b, sanctions imposed by the United Nations and the United States during this period were tied to specific efforts to achieve a peaceful resolution. In particular, UN Security Council Resolution 820 of April 17, 1993, called on the Bosnian Serbs to accept by April 26, 1993, a peace plan for Bosnia "in the form agreed to by two of the Bosnian parties and set out in the report of the Secretary-General of 26 March 1993 (S/25479)" (often referred to as the "Vance-Owen peace plan" after the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia). U.N. Doc. S/RES/820 (1993). When the Bosnian Serbs failed to accept the plan, President William J. Clinton issued Executive Order No. 12846 implementing sanctions mandated by Resolution 820. 58 Fed. Reg. 25,771 (Apr. 27, 1993).

Significant developments in 1994 are described as excerpted below in the 1996 CIA World Factbook, available at *www.theodora.com/wfb/bosnia_and_herzegovina_geography.html*:

> In March 1994, Bosnia's Muslims and Croats reduced the number of warring factions from three to two by signing an agreement in Washington, DC, creating the Federation of Bosnia and Herzegovina. A group of rebel Muslims, however, continues to battle government forces in the northwest enclave of Bihac. A Contact Group of countries, the US, UK, France, Germany, and Russia, continues to seek a resolution between the Federation and the Bosnian Serbs. In July of 1994 the Contact Group presented a plan to the warring parties that roughly equally divides the country between the two, while

> maintaining Bosnia in its current internationally recognized borders. The Federation agreed to the plan almost immediately, while the Bosnian Serbs rejected it.

Negotiating efforts continued through 1995 and, as discussed in Chapter 18.A.4.a., on August 26, 1995, the United States participated in a NATO two-week bombing campaign in response to a mortar attack by Bosnian Serbs on a Sarajevo market. Following this attack, on October 5, the parties agreed to end their fighting and meet in the United States for "'proximity talks,' a negotiating process in which a neutral party conducted individual talks with the combatants, who were housed in close quarters but separate from each other." History, *supra*.

The proximity talks were held at Wright-Patterson Air Force Base, Dayton, Ohio, from November 1 through November 21, 1995, and resulted in three agreements. The first two, concluded on November 10 and 12, 1995, were the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, with annexed Agreed Principles for the Interim Statute for the City of Mostar, *reprinted in* 35 I.L.M. 170 (1996); and the Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, *reprinted in* 35 I.L.M. 184 (1996).

On November 21, 1995, the Republic of Bosnia and Herzegovina, the FRY, and the Republic of Croatia initialed the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Peace Accords"), *reprinted in* 35 I.L.M. 75 (1996). In an "Agreement on Initialing," signed on the same day, the initialing parties made a commitment to sign the agreement, with annexes, in their initialed form, and expressed consent to be bound. The Dayton Peace Accords were signed by the parties at Paris on December 14, 1995, and entered into force upon signature. The United States and the other members of the Contact Group, as well as a representative of the European Union, signed as witnesses. Documents related to the Dayton Peace Accords are available at 7 Dep't St. Dispatch Supp. No. 1 (March 1996).

A summary of the Dayton Peace Accords released by the Department of State on November 30, 1995, described the terms of the agreement as follows:

- Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia agree to fully respect the sovereign equality of one another and to settle disputes by peaceful means.
- The FRY and Bosnia and Herzegovina recognize each other, and agree to discuss further aspects of their mutual recognition.
- The parties agree to fully respect and promote fulfillment of the commitments made in the various Annexes, and they obligate themselves to respect human rights and the rights of refugees and displaced persons.
- The parties agree to cooperate fully with all entities, including those authorized by the United Nations Security Council, in implementing the peace settlement and investigating and prosecuting war crimes and other violations of international humanitarian law.

The twelve annexes addressed detailed arrangements among the Republic of Bosnia and Herzegovina and its constituent entities for the transition from war to peace and for the establishment of a constitutional system of governance. The annexes also contemplated the designation of a High Representative, *inter alia*, to monitor the implementation of the peace settlement and coordinate the activities of the civilian organizations and agencies in Bosnia and Herzegovina to ensure the efficient implementation of the civilian aspects of the peace settlement. The complete text of the agreement and twelve annexes and related documents is available at *www.state.gov/www/regions/eur/bosnia/bosagree.html*.

Suspension of sanctions in response to these developments is discussed in Chapter 16.A.8.c. Participation by the United States in multilateral peacekeeping operations implementing the Dayton Accords is discussed in B.2. below.

2. Middle East

During the 1990s the United States and other countries continued efforts to resolve longstanding conflicts in the Middle East. Key documents from the period 1993–2001 and related materials are available at *www.state.gov/p/nea/rt/c9679.htm*.

a. Madrid Peace Conference

(1) Resumption of the peace process

On March 6, 1991, President George H.W. Bush addressed a joint session of Congress to mark the end of the Gulf War. 27 WEEKLY COMP. PRES. DOC. 257 (Mar. 6, 1991). In his remarks, the President also announced that he had instructed Secretary of State James Baker to travel to the region to resume the peace process, which would be grounded in United Nations Security Council Resolutions 242 and 338.

Resolution 242, adopted in 1967,

> [a]ffirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
>
> > Withdrawal of Israeli armed forces from territories occupied in the recent conflict;
> > Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force . . .
>
> U.N. Doc. S/RES/242 (1967).

Resolution 338, adopted in 1973,

> [c]alls upon all parties to present fighting to cease all firing and terminate all military activity immediately,

> no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;
>
> [c]alls upon all parties concerned to start immediately after the cease-fire the implementation of Security Council Resolution 242 (1967) in all of its parts;
>
> [d]ecides that, immediately and concurrently with the cease-fire, negotiations start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.

U.N. Doc. S/RES/338 (1973).

President Bush's March 6, 1991, speech is excerpted below.

---

* * * *

Our commitment to peace in the Middle East does not end with the liberation of Kuwait. So tonight let me outline four key challenges to be met.

First, we must work together to create shared security arrangements in the region. . . .

Second, we must act to control the proliferation of weapons of mass destruction and the missiles used to deliver them. . . .

And third, we must work to create new opportunities for peace and stability in the Middle East. On the night I announced Operation Desert Storm, I expressed my hope that out of the horrors of war might come new momentum for peace. We've learned in the modern age geography cannot guarantee security, and security does not come from military power alone.

All of us know the depth of bitterness that has made the dispute between Israel and its neighbors so painful and intractable. Yet, in the conflict just concluded, Israel and many of the Arab States have for the first time found themselves confronting the same aggressor. By now, it should be plain to all parties that peacemaking in the Middle East requires compromise. At the same time, peace brings real benefits to everyone. We must do all that we can to

close the gap between Israel and the Arab States—and between Israelis and Palestinians. The tactics of terror lead absolutely nowhere. There can be no substitute for diplomacy.

A comprehensive peace must be grounded in United Nations Security Council Resolutions 242 and 338 and the principle of territory for peace. This principle must be elaborated to provide for Israel's security and recognition and at the same time for legitimate Palestinian political rights. Anything else would fail the twin test of fairness and security. The time has come to put an end to Arab-Israeli conflict.

The war with Iraq is over. The quest for solutions to the problems in Lebanon, in the Arab-Israeli dispute, and in the Gulf must go forward with new vigor and determination. And I guarantee you: No one will work harder for a stable peace in the region than we will.

Fourth, we must foster economic development for the sake of peace and progress. . . .

By meeting these four challenges, we can build a framework for peace. I've asked Secretary of State Baker to go to the Middle East to begin the process. He will go to listen, to probe, to offer suggestions—to advance the search for peace and stability. I've also asked him to raise the plight of the hostages held in Lebanon. We have not forgotten them, and we will not forget them.

To all the challenges that confront this region of the world there is no single solution, no solely American answer. But we can make a difference. America will work tirelessly as a catalyst for positive change.

* * * *

(2) Invitation to participants

On October 18, 1991, Secretary of State Baker announced that the United States and the Soviet Union would co-sponsor a peace conference in Madrid, to commence October 30, 1991. The invitation from the United States and the Soviet Union, describing the structure and goals of the conference, is available at 4 Dep't St. Dispatch Supp. No. 4 (1993),

http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html, and is excerpted below.

. . . The United States and the Soviet Union are prepared to assist the parties to achieve a just, lasting and comprehensive peace settlement, through direct negotiations along two tracks, between Israel and the Arab states, and between Israel and the Palestinians, based on United Nations Security Council Resolutions 242 and 338. The objective of this process is real peace.

* * * *

Direct bilateral negotiations will begin four days after the opening of the conference. Those parties who wish to attend multilateral negotiations will convene two weeks after the opening of the conference to organize those negotiations. The co-sponsors believe that those negotiations should focus on region-wide issues of water, refugee issues, environment, economic development, and other subjects of mutual interest.

The co-sponsors will chair the conference which will be held at ministerial level. Governments to be invited include Israel, Syria, Lebanon and Jordan. Palestinians will be invited and attend as part of a joint Jordanian-Palestinian delegation. Egypt will be invited to the conference as a participant. The European Community will be a participant in the conference, alongside the United States and the Soviet Union and will be represented by its presidency. The Gulf Cooperation Council will be invited to send its secretary-general to the conference as an observer, and GCC member states will be invited to participate in organizing the negotiations on multilateral issues. The United Nations will be invited to send an observer, representing the secretary-general.

The conference will have no power to impose solutions on the parties or veto agreements reached by them. It will have no authority to make decisions for the parties and no ability to vote on issues or results. The conference can reconvene only with the consent of all the parties.

With respect to negotiations between Israel and Palestinians who are part of the joint Jordanian-Palestinian delegation,

negotiations will be conducted in phases, beginning with talks on interim self-government arrangements. These talks will be conducted with the objective of reaching agreement within one year. Once agreed, the interim self-government arrangements will last for a period of five years; beginning the third year of the period of interim self-government arrangements, negotiations will take place on permanent status. These permanent status negotiations, and the negotiations between Israel and the Arab states, will take place on the basis of Resolutions 242 and 338.

It is understood that the co-sponsors are committed to making this process succeed. It is their intention to convene the conference and negotiations with those parties who agree to attend.

* * * *

(3) The Madrid Peace Conference and the commencement of negotiations

The Madrid Peace Conference began on October 30, 1991, with opening remarks by President Bush reaffirming the basis and structure of the negotiations and outlining the role the United States would play in the process, including the provision of written assurances to Israel, Syria, Jordan and Lebanon and the Palestinians. Documents related to the Madrid Peace Conference, including President Bush's speech, excerpted below, and the closing remarks of Secretary of State Baker on November 1, 1991, are available at 2 Dep't St. Dispatch No. 44 at 803–10 (Nov. 4, 1991), *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html.*

---

* * * *

Our objective must be clear and straightforward. It is not simply to end the state of war in the Middle East and replace it with a state of non-belligerency. This is not enough; this would not last. Rather, we seek peace, real peace. And by real peace I mean

treaties. Security. Diplomatic relations. Economic relations. Trade. Investment. Cultural exchange. Even tourism.

What we envision is a process of direct negotiations proceeding along two tracks, one between Israel and the Arab states; the other between Israel and the Palestinians. Negotiations are to be conducted on the basis of U.N. Security Council Resolutions 242 and 338. . . .

* * * *

We know that peace must . . . be based on fairness. In the absence of fairness, there will be no legitimacy—no stability. This applies above all to the Palestinian people, many of whom have known turmoil and frustration above all else. Israel now has an opportunity to demonstrate that it is willing to enter into a new relationship with its Palestinian neighbors; one predicated upon mutual respect and cooperation. Throughout the Middle East, we seek a stable and enduring settlement. We've not defined what this means; indeed, I make these points with no map showing where the final borders are to be drawn. Nevertheless, we believe territorial compromise is essential for peace. Boundaries should reflect the quality of both security and political arrangements. The United States is prepared to accept whatever the parties themselves find acceptable. What we seek, as I said on March 6, is a solution that meets the twin tests of fairness and security.

. . . I want to say something about the role of the United States of America. We played an active role in making this conference possible; both the Secretary of State, Jim Baker, and I will play an active role in helping the process succeed. Toward this end, we've provided written assurances to Israel, to Syria, to Jordan, Lebanon, and the Palestinians. In the spirit of openness and honesty, we will brief all parties on the assurances that we have provided to the other. We're prepared to extend guarantees, provide technology and support, if that is what peace requires. And we will call upon our friends and allies in Europe and in Asia to join with us in providing resources so that peace and prosperity go hand in hand.

* * * *

b. The implementing agreements and Oslo Accords

(1) Post-Madrid negotiations

Secretary of State Warren Christopher made his first official trip to the Middle East in February 1993 in an attempt to remove obstacles to negotiations. On March 10, 1993, Secretary Christopher, speaking on behalf of President Clinton, invited the parties to negotiations in Washington starting April 20, 1993, stating:

> The resumption of bilateral and multilateral negotiations, which we are announcing today, is important but not an end in itself. Our objective and the objective of all parties must be to make real, tangible progress soon. Nearly everyone I spoke to on my trip in the Middle East agreed that there may be now a one-time opportunity to promote peace. History tells us that such opportunities may be fleeting, especially in the Middle East, and we believe it is now time to re-launch the negotiations.
>
> Toward this end, the United States and Russia, as co-sponsors of the Middle East peace negotiations, are today inviting the parties to resume bilateral negotiations here in Washington for the 2-week period commencing on Tuesday, April 20 [1993]. We're also announcing the reconvening of the multilateral working groups [on] a specified series of dates beginning with the water group on April 27 in Geneva.

The text of Secretary Christopher's statement is available at *http://dosfan.lib.uic.edu/ERC/briefing/dossec/1993/9303/930310dossec2.html*.

(2) The Declaration of Principles ("Oslo Accords")

In August 1993 the Palestinian Liberation Organization and the Israeli Government announced that, through secret talks held in Oslo since January 1993, they had agreed upon a Declaration of Principles that would create the framework

for a five-year transition to Palestinian self-rule in the West Bank and the Gaza Strip. Materials from the September 1993 developments discussed below are reprinted in 4 Dep't St. Dispatch Supp. No. 4 (Sept. 1993), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

In an exchange of letters dated September 9, 1993, Yasser Arafat, Chairman of the Executive Committee of the PLO, confirmed PLO commitments to, among other things, recognize the right of Israel to exist in peace and security, accept UN Security Council Resolutions 242 and 338, commit to the Middle East peace process, renounce the use of terrorism and other acts of violence, and undertake to submit necessary changes in regard to the Palestinian Covenant to the Palestinian National Council for formal approval. In response, Yitzhak Rabin, Prime Minister of Israel, recognized the PLO as the representative of the Palestinian people and agreed to negotiate with it within the Middle East peace process. In a separate letter of the same date addressed to Norwegian Foreign Minister Johan Jorgen Holst, Chairman Arafat confirmed that, upon the signing of the Declaration of Principles, he would include in public statements that the PLO "encourages and calls upon the Palestinian people in the West Bank and Gaza Strip to take part in steps leading to normalization of life, rejecting violence and terrorism, contributing to peace and stability and participating actively in shaping reconstruction, economic development and cooperation."

The Government of the State of Israel and the PLO signed the Declaration of Principles on Interim Self-Government Arrangements at Washington, D.C. on September 13, 1993, *reprinted in* 32 I.L.M. 1525 (1993). The United States and the Russian Federation signed as witnesses.

Article I of the Declaration of Principles described the aim of the negotiations as follows:

> The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government

> Authority, the elected Council (the "Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338.
>
> It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.

Article II provided that "the agreed framework for the interim period is set forth in this Declaration of Principles."

The remaining articles and attached annexes addressed elections in the West Bank and Gaza Strip for the Council, jurisdiction of the Council, a five-year transitional period, and provision for permanent status negotiations, preparatory transfer of powers and responsibilities, negotiation of an agreement on the interim period, public order and security for the West Bank and the Gaza Strip, enactment and review of laws and military orders, establishment of a joint Israeli-Palestinian Liaison Committee, cooperation in economic fields, liaison and cooperation with Jordan and Egypt, redeployment of Israeli forces, Israeli withdrawal from the Gaza Strip and Jericho area, resolution of disputes, and Israeli-Palestinian cooperation concerning regional programs.

At the signing ceremony, President William J. Clinton "pledge[d] the active support of the United States of America to the difficult work that lies ahead." 29 WEEKLY COMP. PRES. DOC. 1739 (Sept. 20, 1993). On the same day, Secretary of State Warren Christopher, at a luncheon with Israeli Foreign Minister Shimon Peres and PLO Executive Committee Member Mahmoud Abbas, reiterated the commitment of the United States to "remain a full partner in the pursuit of peace, as asked for by the parties. We will spare no effort in helping the parties reach new agreements and then to turn the agreements into reality." He continued:

> To accomplish that end, we will need the international community to become all of our partners in mustering the

substantial resources necessary to make these historic agreements succeed. The United States will try to play a coordinating role in marshaling these resources. Together with our international partners, we must ensure that the new Palestinian authority will have the resources to enable it to do its vital work. We must also promote economic development in the West Bank and the Gaza Strip.

We will also be responsive to the needs of Israel that result from this agreement. For the part of the United States, I want to reaffirm our unshakable commitment to Israel's security and well-being.

(3) Middle East Peace Facilitation Act

Following the signing of the Declaration of Principles, Congress passed the Middle East Peace Facilitation Act, Part E, Pub. L. No. 103–125, 107 Stat. 1309 (1993), amended by Pub. L. No. 103–166, 107 Stat. 1978 (1993) ("MEPFA"). MEPFA granted the President authority to suspend, under certain conditions and for periods of no more than 6 months, the following statutory provisions as they applied with respect to the PLO or entities associated with it: (1) § 307 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. § 2227) (making funds authorized to be appropriated for voluntary contributions to international organizations unavailable for U.S. proportionate share for programs for the PLO or projects whose purpose is to benefit the PLO or associated entities); (2) § 114 of the Department of State Authorization Act, Fiscal Years 1984 and 1985 (22 U.S.C. § 287e note) (reducing payment of assessed contributions to the United Nations by share of amounts budgeted for projects whose primary purpose is to benefit the PLO or associated entities); (3) § 1003 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. § 5202) (making it unlawful, with the purpose of furthering the interests of the PLO, to receive anything of value or to expend funds from the PLO or any of its constituent groups, or for the PLO to establish

a PLO office in the United States)*; and (4) § 37 of the Bretton Woods Agreement Act (22 U.S.C. § 286w) (stating the policy of the United States that the PLO should not be given membership or any other official status in the International Monetary Fund).

President Clinton certified to the Congress pursuant to § 583(b)(2) of the act that "(A) it is in the national interest of the United States to exercise such authority; and (B) the Palestine Liberation Organization continues to abide by all the commitments described in paragraph (4)." Paragraph (4) enumerated commitments made in letters of September 9, 1993, to the Prime Minister of Israel and to the Foreign Minister of Norway, and "in, and resulting from, the good faith implementation of, the Declaration of Principles on Interim Self-Government Arrangements. . . ." *See* 2.b.(2), *supra*.

The President's authority was continued in the Middle East Peace Facilitation Act of 1994, Part E of Title V, Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103–236, 108 Stat. 382 (1994); the Middle East Peace Facilitation Act of 1995, Title VI of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104–107, 110 Stat. 704. Thereafter, authority to waive certain prohibitions was continued in general provisions of the annual Foreign Operations, Export

---

* The U.S. District Court for the Southern District of New York had previously determined that this provision did not require the closure of the PLO Permanent Observer Mission to the United Nations nor impair the continued exercise of the PLO's functions as a Permanent Observer at the United Nations. *United States v. Palestine Liberation Organization*, 695 F.Supp. 1456 (S.D.N.Y. 1988). The court explained: "In sum, the language of the Headquarters Agreement, the long-standing practice under it, and the interpretation given it by the parties to it leave no doubt that it places an obligation upon the United States to refrain from impairing the function of the PLO Observer Mission to the United Nations. The ATA and its legislative history do not manifest Congress' intent to abrogate this obligation. We are therefore constrained to interpret the ATA as failing to supersede the Headquarters Agreement and inapplicable to the Mission." The United States did not appeal.

Financing, and Related Programs Appropriations Act. *See, e.g.*, §§ 539(d), 552 and 566 of Pub. L. No. 105–118, 111 Stat. 2386 (1997) §§ 553, 556, and 566 of Pub. L. No. 105–277, 112 Stat. 2681 (1998), and §§ 551, 554, 563 of Pub. L. No. 106–113, 113 Stat. 1501 (1999).

During the 1990s the President issued required certifications and suspended restrictions in accordance with these authorities beginning with Presidential Determination No. 94–13 of January 14, 1994, 59 Fed. Reg. 4777 (Feb. 1, 1994). *See also* 59 Fed. Reg. 35, 607 (July 13, 1994), 60 Fed. Reg. 2673 (Jan. 11, 1995); 60 Fed. Reg. 35,827 (July 11, 1995), 60 Fed. Reg. 44,725 (Aug. 28, 1995), 60 Fed. Reg. 53,093 (Oct. 11, 1995), 60 Fed. Reg. 57,821 (Nov. 22, 1995), 61 Fed. Reg. 2889 (Jan. 29, 1996), 61 Fed. Reg. 26,019 (May 23, 1996), 61 Fed. Reg. 32,629 (June 25, 1996), 61 Fed. Reg. 43,137 (Aug. 21, 1996), 62 Fed. Reg. 9903 (Mar. 4, 1997); 62 Fed. Reg. 66,255 (Dec. 18, 1997), 63 Fed. Reg. 32,711 (June 16, 1998), 63 Fed. Reg. 68,145 (Dec. 9, 1998), 64 Fed. Reg. 29,537 (June 2, 1999), and 64 Fed. Reg. 58,755 (Nov. 1, 1999).

(4) Implementing agreements

In 1994 and 1995, the Government of the State of Israel and the Palestinian Liberation Organization concluded a series of agreements intended to implement the Declaration of Principles. Prominent among these was the Agreement on the Gaza Strip and the Jericho Area signed at Cairo on May 4, 1994, *reprinted in* 33 I.L.M. 622 (1994). The agreement provided, among other things, for the scheduled withdrawal of Israeli forces, the establishment of the Palestinian Authority, and the assumption of specified authority and responsibilities by the Palestinian Authority in areas subject to the agreement. It was signed by the Government of the State of Israel and the Palestine Liberation Organization as parties and officially began the five-year period of interim Palestinian self-rule envisaged by the Declaration of

Principles. The United States, the Russian Federation, and the Arab Republic of Egypt signed as witnesses. The text of the Agreement on the Gaza Strip and the Jericho Area is available at *www.state.gov/p/nea/rt/c9962.htm*.

(5) Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip

On September 28, 1995, the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip was signed in Washington, D.C. ("Interim Agreement"), *reprinted in* 36 I.L.M. 551 (1997) as called for in the Declaration of Principles.

The Interim Agreement, among other things, provided for the establishment of an elected, self-governing Palestinian Authority comprised of a representative Council and a Ra'ees (leader) of its Executive Authority, and for transfer of civil and security responsibilities to the Palestinian Authority in additional parts of the West Bank. It also called for the establishment of U.S.-Israel-Palestinian and U.S.-Jordan-Israel trilateral commissions, both of which were established. *See, e.g.*, Remarks by Secretary of State Warren Christopher, PLO Chairman Yasser Arafat and Israeli Foreign Minister Shimon Peres following the first meeting of the U.S.-Israel-Palestinian trilateral commission, September 29, 1995, available at *http://dosfan.lib.uic.edu/ERC/briefing/dossec/1995/9509/950929dossec.html*.

The agreement was signed by the Government of the State of Israel and the Palestinian Liberation Organization and witnessed by the United States, Russia, Egypt, Jordan, Norway, and the European Union. The text of the agreement is available at *www.state.gov/p/nea/rls/22678.htm*.

(6) The Jordan/Israel peace process

In the course of the Madrid/Oslo process, Israel and Jordan negotiated three documents bringing an end to their hostilities and culminating in a Treaty of Peace. The first of

the documents was the Israel-Jordan Common Agenda for The Bilateral Peace Negotiations ("Common Agenda"), *reprinted in* 32 I.L.M. 1522 (1993), which was initialed on September 14, 1993, at Washington D.C. The stated goal of the Common Agenda was "the achievement of just, lasting and comprehensive peace between the Arab States, the Palestinians and Israel as per the Madrid invitation." To this end, the Common Agenda outlined eight elements on which Israel and Jordan would work to achieve satisfactory resolutions, and stated that the anticipated outcome of this endeavor would be the conclusion of a peace treaty. Secretary of State Christopher commented as follows at the initialing ceremony, which occurred one day after the signing of the Declaration of Principles:

> Yesterday, I expressed the hope that we could see progress toward a comprehensive peace settlement between Israel and all of her Arab neighbors. Today, we take a very important step toward that very comprehensive peace with the initialing of the Israeli-Jordanian substantive agenda.
>
> * * * *
>
> . . . You have created a substantive framework to negotiate, and we hope to resolve, vital issues between Israel and Jordan—issues such as security, territory, refugees and displaced persons, natural resources, and economic cooperation.

See 4 St. Dep't Dispatch Supp. No. 4 (Sept. 1993), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1993/html/Dispatchv4Sup4.html.*

The second of the documents, the Washington Declaration, was signed on July 25, 1994, at Washington, D.C., by Israel and Jordan and witnessed by the United States. The Declaration embraced and expanded upon the underlying principles of the Common Agenda and recorded that "the state of belligerency between Jordan and Israel has been terminated."

The culminating document, the Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, was initialed on October 17, 1994, and signed at the Israel/Jordan border on October 26, 1994, *reprinted in* 34 I.L.M. 43 (1995). The Treaty was signed by the State of Israel and the Hashemite Kingdom of Jordan and witnessed by the United States. The Treaty established a state of peace between the parties, fixed their common boundary without prejudice to the status of the West Bank, and provided for the resumption of normal economic relations.

The texts of the Common Agenda, the Washington Declaration, and the Treaty of Peace are available at *http://usembassy-israel.org.il/publish/peace/peaindex.htm#jordan*.

c. The Hebron redeployment

The next agreement to emerge from the Israeli-Palestinian peace process was the January 1997 Protocol Concerning the Redeployment in Hebron ("Hebron Protocol"), *reprinted in* 36 I.L.M. 650 (1997); *see also www.state.gov/p/nea/rt/c9960.htm*. The Hebron Protocol, which was signed by the Government of the State of Israel and the Palestinian Liberation Organization at Jerusalem on January 17, 1997, provided for the redeployment of Israeli military forces and the reconfiguration of Palestinian and Israeli security powers and responsibilities in Hebron.

A Note for the Record on more general issues, prepared by U.S. Special Middle East Coordinator Dennis Ross at the request of the parties and dated January 17, 1997, recorded points agreed upon in a meeting by leaders of the two sides on January 15, 1997. The text of the Note for the Record is available at *http://usembassy-israel.org.il/publish/peace/note_record.htm*. The texts of briefings, press releases, and speeches relating to the signature of the Protocol are available at *http://usembassy-israel.org.il/publish/peace/1997archive.html*.

On January 14, 1997, President William J. Clinton had welcomed news that agreement on Hebron had been reached,

as excerpted below. 33 WEEKLY COMP. PRES. DOC. 41 (Jan. 20, 1997).

A few minutes ago, Prime Minister Netanyahu and Chairman Arafat called me to tell me that they have reached agreement on the Israeli redeployment in Hebron. This achievement brings to a successful conclusion the talks that were launched in Washington last September, and it brings us another step closer to a lasting, secure Middle East peace.

* * * *

Israel will promptly redeploy its troops. The parties will establish practical security arrangements to strengthen stability and improve cooperation. There will also be an agreed roadmap for further redeployment by Israel. The Palestinians have reaffirmed their commitments, including their commitment to fight terrorism.

I thank Prime Minister Netanyahu and Chairman Arafat for their leadership. King Hussein also deserves special recognition and gratitude for his work for peace. I also want to express my appreciation to President Mubarak for his support. . . .

Today's agreement is not an end in itself. Bringing its words to life will require active and continuous cooperation between Israeli and Palestinian officials. It will demand every effort to stop those who would choose confrontation over cooperation. . . .

That's why it is so important that the Israelis and the Palestinians have agreed to continue to work on the remaining issues contained in their agreements. As they do, the United States will do all it can to help. . . .

d. The Wye River Memorandum

President William J. Clinton, Secretary of State Madeleine Albright, and Special Middle East Coordinator Dennis Ross began a series of meetings and visits with Israeli and Palestinian leaders in the first half of 1998, resulting in the Wye River Memorandum signed October 23, 1998, at

Washington, *reprinted in* 37 I.L.M. 1251 (1998). The signing parties were the Palestinian Liberation Organization and the Government of the State of Israel. The United States signed as a witness.

As set forth in the memorandum, certain steps were to be undertaken initially over a 12-week period

> to facilitate implementation of the Interim Agreement on the West Bank and Gaza Strip of September 28, 1995 (the "Interim Agreement") and other related agreements including the Note for the Record of January 17, 1997 (hereinafter referred to as "the prior agreements") so that the Israeli and Palestinian sides can more effectively carry out their reciprocal responsibilities, including those relating to further redeployments and security respectively. These steps are to be carried out in a parallel phased approach in accordance with this Memorandum and the attached time line. They are subject to the relevant terms and conditions of the prior agreements and do not supersede their other requirements.

The Wye River Memorandum specifically provided for a role for the United States in implementation, including on security, as excerpted below.

The text of the memorandum is also available at *www.state.gov/p/nea/rt/c9960.htm*. Press and other materials released by the United States relating to the memorandum are available at *http://usembassy-israel.org.il/publish/peace/october98/news.html*.

---

* * * *

II. SECURITY

* * * *

Pursuant to the prior agreements, the Palestinian side's implementation of its responsibilities for security, security cooperation, and other issues will be as detailed below during the time periods specified in the attached time line:

A. Security Actions

1. Outlawing and Combating Terrorist Organizations

(a) The Palestinian side will make known its policy of zero tolerance for terror and violence against both sides.
(b) A work plan developed by the Palestinian side will be shared with the U.S. and thereafter implementation will begin immediately to ensure the systematic and effective combat of terrorist organizations and their infrastructure.
(c) In addition to the bilateral Israeli-Palestinian security cooperation, a U.S.-Palestinian committee will meet biweekly to review the steps being taken to eliminate terrorists cells and the support structure that plans, finances, supplies and abets terror. In these meetings, the Palestinian side will inform the U.S. fully of the actions it has taken to outlaw all organizations (or wings of organizations, as appropriate) of a military, terrorist or violent character and their support structure and to prevent them from operating in areas under its jurisdiction.
(d) The Palestinian side will apprehend the specific individuals suspected of perpetrating acts of violence and terror for the purpose of further investigation, and prosecution and punishment of all persons involved in acts of violence and terror.
(e) A U.S.-Palestinian committee will meet to review and evaluate information pertinent to the decisions on prosecution, punishment or other legal measures which affect the status of individuals suspected of abetting or perpetrating acts of violence and terror.

2. Prohibiting Illegal Weapons

(a) The Palestinian side will ensure an effective legal framework is in place to criminalize, in conformity with the prior agreements, any importation, manufacturing or unlicensed sale, acquisition or possession of firearms, ammunition or weapons in areas under Palestinian jurisdiction.
(b) In addition, the Palestinian side will establish and vigorously and continuously implement a systematic program for the collection and appropriate handling of all such illegal items in accordance

with the prior agreements. The U.S. has agreed to assist in carrying out this program.
(c) A U.S.-Palestinian-Israeli committee will be established to assist and enhance cooperation in preventing the smuggling or other unauthorized introduction of weapons or explosive materials into areas under Palestinian jurisdiction.

3. Prevention of Incitement

(a) Drawing on relevant international practice and pursuant to Article XXII (1) of the Interim Agreement and the Note for the Record, the Palestinian side will issue a decree prohibiting all forms of incitement to violence or terror, and establishing mechanisms for acting systematically against all expressions or threats of violence or terror. This decree will be comparable to the existing Israeli legislation which deals with the same subject.
(b) A U.S.-Palestinian-Israeli committee will meet on a regular basis to monitor cases of possible incitement to violence or terror and to make recommendations and reports on how to prevent such incitement. The Israeli, Palestinian and U.S. sides will each appoint a media specialist, a law enforcement representative, an educational specialist and a current or former elected official to the committee.

* * * *

e. Continuation of Oslo Process after May 4, 1999

With the approach of May 4, 1999, the date for the end of the five-year transitional period and for the conclusion of permanent status negotiations, the White House announced several steps it was taking to promote the pursuit of Israeli-Palestinian peace. The April 26, 1999, statement by the White House Press Secretary, excerpted below, is available at *www.usembassy-israel.org.il/publish/peace/archives/1999/april/me0426a.html.*

---

* * * *

First, the United States calls upon both parties to continue to adhere to the terms of reference of the peace process as defined in Madrid and Oslo. The objective of the negotiating process is the implementation of United Nations Security Council Resolutions 242 and 338, including land for peace, and all other agreements under the Oslo process.

Second, the United States calls on the parties to continue to carry out all their interim period responsibilities, including full implementation without any further delay of the Interim Agreement and the Wye River Memorandum and continued cooperation between the Palestinian Authority and the Israeli Government.

Third, the United States believes that the Oslo process was never intended to be open-ended; accordingly, the United States calls on both parties to engage in accelerated permanent status negotiations and to rededicate themselves to the goal of reaching an agreement within one year. Toward that end, and in an effort to facilitate that process, the United States is ready to help launch those negotiations after the Israeli elections and once an Israeli government has been formed, and to review and monitor their progress. The United States also is prepared, with the consent of the parties, to bring them together within six months to review the status of their efforts and to facilitate reaching an agreement.

Finally, if Israelis and Palestinians are to reach an agreement, it is essential that they do their part to create a serious, fair and credible environment for negotiations. In this regard, it is critical to the interest both sides share in enhancing the security of their people that the Palestinians continue their efforts to fight terror and that Israelis and Palestinians maintain their security cooperation. Furthermore, Palestinians and Israelis must avoid unilateral acts and declarations that prejudge or predetermine issues reserved for permanent status negotiations. Indeed, negotiations and a credible peace process offer the only way to reach an enduring agreement on permanent status issues.

Acting in a spirit of partnership and moving away from a zero-sum mentality, Israelis and Palestinians can work together to achieve a just and lasting peace.

f. The Sharm el-Sheikh Memorandum

Following the election of Ehud Barak as Israeli Prime Minister in 1999, Israel and the PLO concluded the Sharm el-Sheikh Memorandum on the Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, *reprinted in* 38 I.L.M. 1465 (1999). The memorandum was signed at Sharm el-Sheikh, Egypt on September 4, 1999, by the Government of the State of Israel and the Palestinian Liberation Organization, and witnessed by Egypt, the United States, and Jordan.

In addition to addressing the fulfillment of certain commitments from prior agreements relating to the interim period, the Sharm el-Sheikh Memorandum provided a timeline for the resumption of negotiations concerning the permanent status of the Palestinians, "reaffirm[ing] their understanding that the negotiations on the Permanent Status will lead to the implementation of Security Council Resolutions 242 and 338." According to the timeline, those negotiations were to commence by September 13, 1999, with a framework agreement to be reached within five months, and a comprehensive agreement to be reached no later than September 13, 2000.

Remarks by Secretary of State Madeleine Albright at the time of signing, excerpted below, are available at *http://usembassy-israel.org.il/publish/press/visits/september99/transcripts.html*, as are additional related materials. The Sharm el-Sheikh Memorandum can also be found at *www.state.gov/p/nea/rt/c9960.htm*.

---

* * * *

The accord Israeli and Palestinian leaders have just signed provides a long awaited boost both to the substance and to the spirit of the search for Middle East peace. By agreeing on a plan for implementing the Wye River Memorandum and other outstanding commitments, the two sides have begun to rebuild their partnership;

a partnership that is central to the Oslo process, and vital to the region's future.

For the first time in several years, Israelis and Palestinians are working together and solving problems together. Relationships of trust and shared conviction are being built through this process. The result is beneficial to both sides. Under today's agreement further redeployments will be carried out. Security cooperation will deepen. The fight against terror will continue, and prisoners will be reunited with their families. In addition, construction of a port for Gaza will begin, and safe passage between Gaza and the West Bank will be opened.

These provisions are important in themselves, but there is an even larger significance to this agreement.

First, the fact that Israelis and Palestinians negotiated this pact directly is a rich source of hope for the future. As one can see here tonight, the peace process has many sponsors and many supporters. But that process cannot succeed unless the parties are engaged with each other gaining mutual confidence and building mutual trust.

When that happens, agreements are not only more likely to be signed, they are more likely to be implemented. And if you ask the average Palestinian or Israeli, he or she will tell you, implementation is what counts.

Second, through this agreement the parties have cleared the way for the beginning of serious permanent status negotiation. Here is where the bold vision encompassed by the Oslo Declaration of Principles will meet its sternest test.

* * * *

3. Peru and Ecuador

A longstanding border conflict between Ecuador and Peru broke into renewed fighting in January 1995. Prior hostilities had been settled by the 1942 Rio de Janeiro Protocol of Peace, Friendship and Boundaries between Ecuador and Peru ("Rio Protocol") that defined the border and provided for its demarcation. The Rio Protocol was signed January 29, 1942, by

Peru and Ecuador and also by representatives of four countries as guarantors: the Argentine Republic, Brazil, Chile and the United States. Among other things, Article VII of the protocol provided that "any doubt or disagreement which may arise in the execution of this protocol shall be settled by the parties concerned, with the assistance of the [guarantor states]." Article IX provided in relevant part that "rectifications [in the demarcation of the boundary] shall be made with the collaboration of the [guarantor states]."

A White House statement of October 9, 1998, described the background and ongoing participation of the United States in negotiations to resolve the unresolved border dispute, as excerpted below.

The full text of the statement is available at *http://clinton6.nara.gov/1998/10/1998-10-09-fact-sheet-on-ecuador-peru-border-dispute.html.*

---

* * * *

In 1995, in the most serious combat since 1941, Peru and Ecuador fought in a remote undemarcated area. As Guarantors of the Rio Protocol, the United States, Brazil, Argentina, and Chile, became actively engaged in the search for a diplomatic solution. With Guarantor help, Ecuador and Peru agreed to stop fighting and seek a definitive peace settlement [Declaration of Peace of Itamaraty, February 17, 1995].

Without exemplary peacekeeping support from many nations, including the U.S., this peace would not be moving forward. Guarantor military observers (MOMEP) organized the withdrawal of troops from the disputed Cenepa Valley and supervised demobilization of troops on both sides. The combat zone was demilitarized. MOMEP, with the privatization of military personnel over the former guarantor states, continues to monitor the demilitarized zone.

Since February 1998, with the assistance of the Guarantors, Ecuador and Peru have been engaged in direct negotiations to reach a comprehensive and lasting settlement. This final settlement package is to consist of four agreements, each of which must be

approved before any one is implemented. The package consists of: a commerce and navigation treaty guaranteeing Ecuador's free navigation on the Amazon; a mutual security agreement designed to prevent future conflicts; a border integration agreement which will stimulate much-needed development in both countries; and a completion of demarcation of the land border. Presidents Fujimori and Mahuad have met several times to resolve the remaining differences. The first three agreements have been completed, but no understanding has been reached on the fourth—the land border question. Both countries stand to benefit enormously from the successful conclusion of the peace process. And all nations of the Americas take pride in the elimination of one of the last sources of international armed conflict in the Hemisphere.

* * * *

Subsequently, the Presidents of Peru and Ecuador, with formal backing from their respective national legislatures through resolutions adopted October 16, requested the guarantors of the Rio Protocol to formulate a binding solution to their dispute. In a joint letter dated October 23, 1998, representatives of the four guarantor countries set forth their solution. Identical copies of the letter were sent to President Fujimori and President Mahuad.

The full text of the letter, excerpted below from an English translation of the official Spanish, is available at *www.state.gov/s/l/c8183.htm*.

Our governments have accepted, through Article VII of the Rio Protocol of Peace, Friendship and Boundaries of 1942, the obligation of guaranteeing the implementation of that treaty. That commits us to facilitating, when necessary, understandings among the parties. This responsibility includes presenting ideas to clarify points on which the parties may differ.

As guarantors, we recognize that the parties, acting on the basis of the Rio Protocol and its implementing documents, have attempted to achieve the high purposes of peace, friendship and understanding that would enable them to develop a mutually

beneficial and cooperative relationship in accord with the purposes set forth in Article I of the Protocol.

We thus record with satisfaction that this process has to date produced drafts for a "Treaty of Commerce and Navigation," for "Navigation in Sectors Cut by Geodesic Lines and the Napo River," for a "Broad Agreement of Border Integration," and for the creation of a "Binational Commission on Confidence-Building Measures and Security," as well as an "Agreement for the Establishment of Measures to Assure the Efficient Functioning of the Zarumilla Canal."

Your government, together with that of [Peru/Ecuador], has informed us of your concern that your efforts, in the course of this long process, have not obtained results that meet the expectations of both countries that would enable you to complete all the aspects described in the Declaration of Brasilia of November 26, 1997 and the Work Plan of Rio de Janeiro of January 19 of this year. As Your Excellency points out in the joint letter that you sent with the President of [Peru/Ecuador] to the President of Brazil on October 8, the difficulties concern the completion of the fixing on the ground of your common land boundary.

In that letter, the parties ask for our support to formulate a comprehensive and definitive proposal that will contribute to the attainment of the objectives of peace, friendship, understanding and good will that motivate them. Our governments, by means of the letter of the President of Brazil of October 10, informed Your Excellency that obtaining this proposal would require prior acceptance by both of your governments that our point of view would be mandatory, and the approval of this commitment by the Congresses of Ecuador and Peru.

These requirements having been met, we the Chiefs of State of the guarantor countries, in accordance with the provisions of the Santiago Accord and the Work Plan of Rio de Janeiro, propose the following points to conclude the fixing of the common land boundary and complete the comprehensive and definitive settlement: . . .

* * * *

2. In accordance with the attached map, the Government of Peru will grant as private property to the Government of Ecuador an

area of one square kilometer, at the center of which will be the point Ecuador identified to MOMEP as being Tiwinza, within the sector referred to in Ecuador as Tiwinza.

* * * *

11. In addition, the parties will put into final form the drafts of the Treaties and Agreements, whose texts form part of the comprehensive and definitive settlement that ends the differences between the two countries.

* * * *

In this manner, we, the guarantors, believe that the process that began with the Declaration of Itamaraty concludes in a manner that respects the interests and sentiments of both nations and ensuring the full and proper implementation of the Protocol of Rio de Janeiro. As a result, this will make possible the development of the aspirations of peace, friendship, and confidence in a common future desired by the peoples of Peru and Ecuador.

* * * *

On October 26, 1998, the Presidential Act of Brasilia was signed by the Republic of Ecuador and the Republic of Peru, with representatives of the four guarantor countries signing as witnesses. Thomas McClarty, President Clinton's Special Envoy for the Americas, signed on behalf of the United States. The Presidential Act provides, in translation from the official Spanish, as excerpted below.

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

On the occasion of this transcendental event, the Presidents of Peru and Ecuador came together to sign this:
Presidential Act of Brasilia

1. They expressed their conviction of the historic transcendence that the agreements reached between the two governments has for the development and well-being of the brotherly communities

of Ecuador and of Peru. With them culminates the process of substantive conversations provided for in the Declaration of Peace of Itamaraty the 17th of February 1995 and the discrepancies between the two Republics are concluded in global and definitive form in such a way that, on the basis of their common roots, both Nations direct themselves toward a promising future of cooperation and mutual benefit.

2. They declare that from the binding point of view expressed by the Heads of State of the Guarantor Countries, in their letter dated the 23rd of October, which forms an integral part of this document, the border differences between the two countries are definitively resolved. On this basis, they register their firm and unshakeable will of their respective Governments to conclude, inside of the briefest possible space of time, the fixing on the ground of the common land border.

3. Simultaneously, they manifest their commitment to submit the accords that are signed on this date, to the process of approval of domestic law, as is appropriate, with an eye toward assuring their fastest entrance into force. . . .

4. To set down firm expressions of the importance of the accords for the ideals of peace, stability and prosperity that animate the American Continent. In this spirit and in conformity with the First Article of the Protocol of Peace, Friendship and Boundaries of Rio de Janeiro, they solemnly reaffirm the renunciation of the threat and use of force in the relations between Peru and Ecuador, as well as all acts which might affect peace and friendship between the two nations.

5. Desirous of highlighting their recognition of the fundamental role played in the achievement of these understandings by the governments of the Republic of Argentina, the Federal Republic of Brazil, the Republic of Chile and the United States of America, Guarantor countries of the Protocol of Peace, Friendship and Boundaries signed in Rio de Janeiro the 29th of January 1942, the Presidents of Ecuador and Peru register their appreciation of these Nations for their dedication and effort displayed in compliance with the dispositions of the Protocol and they urge them to continue this function until the conclusion of the demarcation.

* * * *

On June 17, 1999, the U.S. Department of Defense announced the formal closure of MOMEP, stating that "all foreign military personnel who participated in MOMEP, including the U.S. contingent, will be entirely withdrawn from the area by June 30." The announcement explained that the October 26 agreements had "led to formal demarcation of border regions on May 13, 1999." *See www.defenselink.mil/releases/1999/b06171999_bt298–99.html.*

4. Mozambique

The United States acted as an observer during peace talks in Rome to end a civil war in Mozambique dating to shortly after its independence in 1975. The talks resulted in the conclusion of the General Peace Agreement for Mozambique, signed at Rome October 4, 1992. The Agreement was signed by Joaquim Alberto Chissano, President of the Republic of Mozambique, and Afonso Macacho Marceta Dhlakama, President of the armed rebel movement Resistëncia Nacional Moçambicana ("RENAMO"), in the presence of representatives of the United States of America, among others. The text of the agreement and certain related documents are available at *www.usip.org/library/pa/mozambique/pa_mozambique.html.*

5. Ethiopia and Eritrea

On May 25, 1999, Assistant Secretary of State for African Affairs Susan Rice testified before the Subcommittee on Africa of the House International Relations Committee on the border conflict between Ethiopia and Eritrea. S. Hrg. No. 106–60 (1999). Excerpts from her remarks set forth below address U.S. efforts to facilitate a peaceful resolution of the dispute. *See Digest 2000* at 311–12 for the signing of a peace agreement and *Digest 2002* at 925–26 concerning the delimitation of the border through the Eritrea/Ethiopia Boundary Commission in The Hague.

The full text of Ms. Rice's testimony is also available at *www.state.gov/www/policy_remarks/1999/990525_rice_eewar.html*.

---

* * * *

Immediately upon the outbreak of hostilities in May 1998, I led two interagency missions to Ethiopia and Eritrea to facilitate a peaceful resolution of the dispute. Working with the Government of Rwanda, we proposed a series of steps to end the conflict in accordance with both sides' shared principles and international law. These recommendations, endorsed by the OAU and the UNSC, later informed development by the OAU of its Framework Agreement. These initial missions also resulted in agreement by the two parties to the airstrike moratorium, which remained in effect until February 6, 1999. Beginning in October, President Clinton sent former National Security Advisor Anthony Lake and an interagency team from the State Department, the National Security Council, and the Department of Defense on four missions to Ethiopia and Eritrea, the most recent occurring in early 1999. We are grateful for Mr. Lake's tireless work on behalf of the President and the Secretary of State. His intensive efforts, which still continue, have been aimed at helping both sides find a mutually agreed basis for resolving the dispute without further loss of life. Working closely with the OAU and the UNSC, Mr. Lake and our team put forth numerous proposals to both sides consistent with the OAU Framework. In December, Ethiopia formally accepted the Framework Agreement. Eritrea did not, requesting clarification on numerous specific questions.

Fighting resumed on February 6 while UN envoy Ambassador Mohammed Sahnoun was in the region still seeking a peaceful resolution to the conflict. Following this first phase of fighting, Eritrean troops were compelled to withdraw from Badme—an important element of the draft OAU Framework Agreement. Subsequent Eritrean acceptance of the Framework was welcomed by the United States and the UNSC but was greeted with skepticism by Ethiopia. Ethiopia instead demanded Eritrea's unconditional, unilateral withdrawal from all contested areas that Ethiopia had administered prior to last May.

On April 14, Prime Minister Meles of Ethiopia offered a cease-fire in return for an explicit commitment by Eritrea to remove its forces unilaterally from contested areas. He later added that Eritrean withdrawal must occur within an undefined but "short" period.

Eritrea continues to demand a cease-fire prior to committing to withdraw from disputed territories. Ethiopia insists that a cease-fire and implementation of the OAU Framework Agreement can only follow an explicit Eritrean commitment to withdraw from all territories occupied since the conflict erupted on May 6, 1998.

* * * *

6. Democratic Republic of the Congo

In 1994 Zaire, as the Democratic Republic of the Congo was then known, became a haven for over a million Rwandan ethnic Hutus. Many of these Hutus had been involved in the 1994 genocide in Rwanda and were fleeing the Tutsi-dominated government that subsequently took power there. Rwanda invaded Zaire in 1996. President Mobutu was replaced by rebel leader Laurent Kabila in May 1997, who changed the country's name to the Democratic Republic of the Congo ("DRC"). Less than fifteen months after installing Kabila, Rwanda again invaded Congo to topple him. President Kabila, however, was able to survive by winning military support from Angola and Zimbabwe. The war continued, and the country descended into a conflict between a coalition that formed between President Kabila and Zimbabwe, Chad, Angola, and Namibia on the one hand, and one that included Rwanda, Uganda, and the Congolese rebels they supported on the other.

The United States became involved in efforts to reach a diplomatic resolution and, in part through the efforts of Presidential Envoy Howard Wolpe, helped to facilitate the Cease Fire Agreement signed at Lusaka on July 10, 1999. The text of the agreement is available at *www.usip.org/library/pa/drc/drc_07101999.html*.

On June 8, 1999, Assistant Secretary Susan Rice testified before the Senate Foreign Relations Committee on the United States' ongoing efforts in the Congo.

The full text of her testimony, excerpted below, is available at *www.state.gov/www/policy_remarks/1999/990608_rice_conflict.html*.

---

* * * *

From the start of the Congo crisis, the U.S. has pursued an active diplomatic strategy in support of our objectives. Beginning last August, we have provided full support for the regional initiative taken by [the Southern African Development Community ("SADC")] and the [Organization for African Unity "OAU")]. . . .

* * * *

Throughout, U.S. policy objectives in the Congo have been consistent and clear. We seek peace, prosperity, democracy, and respect for fundamental human rights. We have affirmed our support for the sovereignty and territorial integrity of the Congo. We have repeatedly condemned any violation of this fundamental principle of both the United Nations Charter and the Organization of African Unity.

We have worked to counter those who would perpetuate genocide in the region. We have encouraged the establishment of an inclusive political transition that would end the cycle of violence and impunity; build respect for the rule of law and human rights; and create the conditions for lasting development and reconstruction. As a consequence, we have been committed to a policy of engagement in support of the Congolese people who suffered so much under Mobutu Sese Seko's tyranny.

* * * *

We cannot lose sight of the continued need for a meaningful constructive role by the United Nations. In the medium to long term, it will be dangerous for Africa and for the world at large if the UN becomes marginalized from the management of crises. For this reason, we have been encouraged by the UN Secretary

General's appointment of Special Envoy Niasse, and have encouraged a very active engagement by the UN SYG.

In the longer term, our objectives are equally clear. We seek to strengthen the process of internal reconciliation and democratization within all of the states of the region, so as to reduce the tensions and conflicts that fuel insurgent movements. In short, we seek stable, economically self-reliant, and democratic nations with which we can work to address our mutual economic and security interests on the continent. A stable and democratic Congo can contribute powerfully to regional stability. Its economic promise is even greater, with enormous benefits for U.S. economic interests as well as for the African continent in general.

However, Congo's potential can only be realized in the context of a negotiated cease-fire and comprehensive political settlement that takes account both of the legitimate concerns of Congo's neighbors and the internal political conditions that helped precipitate the crisis. For a resolution to be durable, any solution must also address the issue of ex-FAR, Interahamwe, UNITA, and other nonstate actors.

* * * *

The Lusaka Cease Fire Agreement, signed in July 1999, called for a cease-fire, the deployment of a UN peacekeeping operation, the withdrawal of foreign troops, and the launching of an "Inter-Congolese Dialogue" to form a transitional government leading to elections. The accords additionally called for the parties to create a Joint Military Commission ("JMC") which, together with a UN/OAU observer group, would be responsible for executing peace-keeping operations until the deployment of a UN peace-keeping force.

In a statement in Pretoria, South Africa, on December 6, 1999, U.S. Permanent Representative to the United Nations Richard Holbrooke referred to the DRC as "perhaps the biggest challenge we may face in Africa in the coming year" and pledged U.S. support:

> The United States through the United Nations and through our special envoy [Howard Wolpe] here with us

today, has worked tirelessly to support the Lusaka process. This includes supporting the recently established Joint Military Commission (JMC), which needs significant international support.

The full text of Ambassador Holbrooke's statement is available at *www.un.int/usa/99_139.htm*.

7. Sierra Leone

U.S. Presidential Envoy Reverend Jesse Jackson assisted in the negotiation of a cessation of hostilities agreement in Sierra Leone in May 1999. Assistant Secretary Rice had testified on the prospects for peace in Sierra Leone before the House International Relations Committee on March 23, 1999. Excerpts from her remarks, set forth below, describe the background of the conflict as well as U.S. interest in Sierra Leone and involvement in the peace effort.

Ms. Rice's testimony is available in full at *www.state.gov/www/policy_remarks/1999/990323_rice_sierra.html*.

---

* * * *

The war in Sierra Leone has its origins in a long history of corrupt and predatory civilian and military governments that set the stage for a decade-long insurrection, destroyed state institutions, and left the country vulnerable to external manipulation. . . .

In early 1996, Sierra Leone's people demanded a return to democracy and celebrated their country's first free-and-fair elections in 3 decades. The democratically elected government of President Ahmad Tejan Kabbah took office in March and immediately began negotiations with the rebel movement [Revolutionary United Front ("RUF")], resulting in a peace agreement signed in Abidjan in November 1996. But peace and stability were short-lived. Elements of the Sierra Leone Army, styling themselves the Armed Forces Revolutionary Council (AFRC), overthrew the Kabbah government in May 1997, and invited the RUF to join their junta. The AFRC suspended the constitution, banned political activity, and killed, tortured, or arbitrarily detained anyone they perceived threatening

their hold on power. World opinion resounded against the coup. The Sierra Leonean people stood up to the junta as well, often at the risk of their lives. For 9 months civil servants refused to go to work, children refused to go to school, university students protested and plotted to regain freedom. After almost a year of brutal AFRC misrule, ECOMOG [Economic Community of Western African States Cease-fire Monitoring Group] restored President Kabbah and his government to power in February 1998, earning commendation from the international community.

* * * *

. . . RUF/AFRC rebels still control much of the Kailahun District on the Liberian border, the Kono diamond mining district, and Makeni. RUF forces continue to victimize innocent civilians throughout the country.

U.S. Interests

The United States has significant interests in Sierra Leone and a stake in the country's future. First, our response to the crisis is an important test of our commitment to democracy and human rights in Africa. . . . Second, we feel a compelling moral imperative to end the suffering of innocent civilians, many of whom have lived with the violent whims of armed thugs for most of this decade. Third, a lasting settlement in Sierra Leone will allow Nigerian, Ghanaian, and Malian troops to return honorably to their countries. An honorable exit for Nigerian-led ECOMOG could improve prospects for a successful transition to democratic and civilian rule for Nigeria.

Conversely, a continued rebel offensive would further threaten regional stability and progress in West Africa. The conflict in Sierra Leone could easily cross borders, spilling into Guinea, and potentially re-igniting civil war in Liberia. It could adversely affect our allies in the region, including Nigeria, Senegal, Cote d'Ivoire and Ghana, and other countries of the Economic Community of West African States (ECOWAS). Continued hostilities could thwart ECOWAS' ongoing efforts to integrate their economies more effectively.

* * * *

U.S. Role

The United States has been actively involved in Sierra Leone over the past 4 years to try to end rebel hostilities, consolidate democracy, and promote national reconciliation. First, the Administration provided logistical and communications support for the elections in 1996. After the May 1997 coup, we joined ECOWAS, the Organization of African Unity, the United Nations, and the rest or the international community, in condemning the overthrow of the elected government and to press for its restoration. The UN Security Council, led by the United States and the United Kingdom, adopted targeted sanctions in October 1997 against the junta and authorized ECOWAS to enforce them. After the restoration of the democratic government, we supported ECOMOG's Sierra Leone operation with critical nonlethal logistical assistance to help it respond effectively to the rebels' "Operation No Living Thing" campaign. We provided the peacekeeping force $3.9 million in communications, transportation equipment, and other logistical services—including helicopter lift in fiscal year 1998.

* * * *

The Lomé Peace Agreement, signed July 7, 1999, made Foday Sankoh Vice President and gave other RUF members positions in the government. The agreement called for an international peacekeeping force run initially by both ECOMOG and the United Nations. The UN Security Council established the United Nations Mission in Sierra Leone ("UNAMSIL") in 1999, with an initial force of 6,000.

In a joint statement issued by the United States and the United Kingdom at the time of the July 6, 1999, signing, the two governments "congratulate[d] the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone on the conclusion of the peace agreement signed today." The statement continued:

> We would also like to express our support for the agreement, which will bring to an end the tragic war in Sierra Leone. We encourage both parties to continue to demonstrate their commitment to long term peace.

> We will continue to encourage and support the implementation of this agreement as appropriate and beneficial to both parties, and will encourage other members of the international community to do the same.

See www.usip.org/library/pa/sl/adddoc/sl_signing_07061999.html. The agreement and related materials are available at *http://www.usip.org/library/pa/drc/drc_07101999.html.*

8. Liberia

The 1989–1996 Liberian civil war, which was one of Africa's bloodiest, claimed the lives of more than 200,000 Liberians and further displaced a million others into refugee camps in neighboring countries. The Economic Community of West African States ("ECOWAS") and its security arm, the Economic Community of West African States Monitoring Group ("ECOMOG"), intervened to counter an insurgency led in part by Charles Taylor. An important opportunity for advancing the peace process under ECOMOG's military leadership arose following the highly contested Battle for Monrovia in April 1996, in which both sides fought to a stalemate, and regional commitment to the peace process intensified. After consultations in Liberia in July 1996, the United States provided 30 million dollars in non-lethal assistance (e.g., transportation and communications assistance) to bolster ECOMOG. The United States also chaired the International Contact Group on Liberia ("ICGL"), which shared information and coordinated donor assistance to the peace process; the U.S. additionally acted as interlocutor between ECOMOG and the ICGL with respect to the peace process. As an ICGL member, the United States participated in four UN special conferences on Liberia beginning in September 1996, which brought together ECOWAS, ECOMOG, ICGL, Organization of African Unity ("OAU", now the African Union), and UN agency representatives and officials. As a result, disarmament and demobilization of warring factions were carried out and special elections were held on July 19, 1997, resulting in Charles Taylor's election.

B. PEACEKEEPING MISSIONS AND RELATED ISSUES

1. Presidential Directive on Multilateral Peace Operations

On May 3, 1994, President William J. Clinton issued Presidential Decision Directive 25, establishing U.S. policy on reforming multilateral peace operations. ("PDD 25"). A press release of May 5, 1994, described the directive as follows:

> . . . This directive is the product of a year-long interagency policy review and extensive consultations with dozens of Members of Congress from both parties.
>
> The policy represents the first, comprehensive framework for U.S. decision-making on issues of peacekeeping and peace enforcement suited to the realities of the post Cold War period.
>
> Peace operations are not and cannot be the centerpiece of U.S. foreign policy. However, as the policy states, properly conceived and well-executed peace operations can be a useful element in serving America's interests. The directive prescribes a number of specific steps to improve U.S. and UN management of UN peace operations in order to ensure that use of such operations is selective and more effective.

30 WEEKLY COMP. PRES. DOC. 998 (May 9, 1994).

An executive summary prepared by the Department of State February 22, 1996, provided a summary of key elements of PDD 25. Excerpts below address factors to be considered in deciding whether to vote for proposed new UN peace operations or to support regionally-sponsored peace operations, command and control of U.S. forces participating in peace operations, and protection of peace keepers and peace enforcers.

The full texts of the press release and executive summary are available at *http://www.fas.org/irp/offdocs/pdd25.htm.*

---

* * * *

I. Supporting the Right Peace Operations

i. Voting for Peace Operations

The U.S. will support well-defined peace operations, generally, as a tool to provide finite windows of opportunity to allow combatants to resolve their differences and failed societies to begin to reconstitute themselves. Peace operations should not be open-ended commitments but instead linked to concrete political solutions; otherwise, they normally should not be undertaken. To the greatest extent possible, each UN peace operation should have a specified timeframe tied to intermediate or final objectives, an integrated political/military strategy well-coordinated with humanitarian assistance efforts, specified troop levels, and a firm budget estimate. The U.S. will continue to urge the UN Secretariat and Security Council members to engage in rigorous, standard evaluations of all proposed new peace operations. The Administration will consider the factors below when deciding whether to vote for a proposed new UN peace operation (Chapter VI or Chapter VII) or to support a regionally-sponsored peace operation:

— UN involvement advances U.S. interests, and there is an international community of interest for dealing with the problem on a multilateral basis.
— There is a threat to or breach of international peace and security, often of a regional character, defined as one or a combination of the following:
— International aggression, or;—Urgent humanitarian disaster coupled with violence;—Sudden interruption of established democracy or gross violation of human rights coupled with violence, or threat of violence.
— There are clear objectives and an understanding of where the mission fits on the spectrum between traditional peacekeeping and peace enforcement.
— For traditional (Chapter VI) peacekeeping operations, a ceasefire should be in place and the consent of the parties obtained before the force is deployed.

— For peace enforcement (Chapter VII) operations, the threat to international peace and security is considered significant.
— The means to accomplish the mission are available, including the forces, financing and mandate appropriate to the mission.
— The political, economic and humanitarian consequences of inaction by the international community have been weighed and are considered unacceptable.
— The operation's anticipated duration is tied to clear objectives and realistic criteria for ending the operation.

These factors are an aid in decision-making; they do not by themselves constitute a prescriptive device. Decisions have been and will be based on the cumulative weight of the factors, with no single factor necessarily being an absolute determinant.

In addition, using the factors above, the U.S. will continue to scrutinize closely all existing peace operations when they come up for regular renewal by the Security Council to assess the value of continuing them. . . .

* * * *

II. The Role of Regional Organizations

In some cases, the appropriate way to perform peace operations will be to involve regional organizations. The U.S. will continue to emphasize the UN as the primary international body with the authority to conduct peacekeeping operations. At the same time, the U.S. will support efforts to improve regional organizations' peacekeeping capabilities. When regional organizations or groupings seek to conduct peacekeeping with UNSC endorsement, U.S. support will be conditioned on adherence to the principles of the UN Charter and meeting established UNSC criteria, including neutrality, consent of the conflicting parties, formal UNSC oversight and finite, renewable mandates.

With respect to the question of peacekeeping in the territory of the former Soviet Union, requests for "traditional" UN blue-helmeted operations will be considered on the same basis as other requests, using the factors previously outlined (e.g., a threat to international peace and security, clear objectives, etc.). U.S.

support for these operations will, as with other such requests, be conditioned on adherence to the principles of the UN Charter and established UNSC criteria.

* * * *

V. Command and Control of U.S. Forces

A. Our Policy: The President retains and will never relinquish command authority over U.S. forces. On a case by case basis, the President will consider placing appropriate U.S. forces under the operational control of a competent UN commander for specific UN operations authorized by the Security Council. The greater the U.S. military role, the less likely it will be that the U.S. will agree to have a UN commander exercise overall operational control over U.S. forces. Any large scale participation of U.S. forces in a major peace enforcement mission that is likely to involve combat should ordinarily be conducted under U.S. command and operational control or through competent regional organizations such as NATO or ad hoc coalitions.

There is nothing new about this Administration's policy regarding the command and control of U.S. forces. U.S. military personnel have participated in UN peace operations since 1948. American forces have served under the operational control of foreign commanders since the Revolutionary War, including in World War I, World War II, Operation Desert Storm and in NATO since its inception. We have done so and will continue to do so when the President determines it serves U.S. national interests.

Since the end of the Cold War, U.S. military personnel have begun serving in UN operations in greater numbers. President Bush sent a large U.S. field hospital unit to Croatia and observers to Cambodia, Kuwait and Western Sahara. President Clinton has deployed two U.S. infantry companies to Macedonia in a monitoring capacity and logisticians to the UN operation in Somalia.

B. Definition of Command: No President has ever relinquished command over U.S. forces. Command constitutes the authority to issue orders covering every aspect of military operations and administration. The sole source of legitimacy for U.S. commanders

originates from the U.S. Constitution, federal law and the Uniform Code of Military Justice and flows from the President to the lowest U.S. commander in the field. The chain of command from the President to the lowest U.S. commander in the field remains inviolate.

C. Definition of Operational Control: It is sometimes prudent or advantageous (for reasons such as maximizing military effectiveness and ensuring unity of command) to place U.S. forces under the operational control of a foreign commander to achieve specified military objectives. In making this determination, factors such as the mission, the size of the proposed U.S. force, the risks involved, anticipated duration, and rules of engagement will be carefully considered.

Operational control is a subset of command. It is given for a specific time frame or mission and includes the authority to assign tasks to U.S. forces already deployed by the President, and assign tasks to U.S. units led by U.S. officers. Within the limits of operational control, a foreign UN commander cannot: change the mission or deploy U.S. forces outside the area of responsibility agreed to by the President, separate units, divide their supplies, administer discipline, promote anyone, or change their internal organization.

D. Fundamental Elements of U.S. Command Always Apply: If it is to our advantage to place U.S. forces under the operational control of a UN commander, the fundamental elements of U.S. command still apply. U.S. commanders will maintain the capability to report separately to higher U.S. military authorities, as well as the UN commander. Commanders of U.S. military units participating in UN operations will refer to higher U.S. authorities orders that are illegal under U.S. or international law, or are outside the mandate of the mission to which the U.S. agreed with the UN, if they are unable to resolve the matter with the UN commander. The U.S. reserves the right to terminate participation at any time and to take whatever actions it deems necessary to protect U.S. forces if they are endangered.

There is no intention to use these conditions to subvert the operational chain of command. Unity of command remains a vital

concern. Questions of legality, mission mandate, and prudence will continue to be worked out "on the ground" before the orders are issued. The U.S. will continue to work with the UN and other member states to streamline command and control procedures and maximize effective coordination on the ground.

E. Protection of U.S. Peacekeepers: The U.S. remains concerned that in some cases, captured UN peacekeepers and UN peace enforcers may not have adequate protection under international law. The U.S. believes that individuals captured while performing UN peacekeeping or UN peace enforcement activities, whether as members of a UN force or a U.S. force executing a UN Security Council mandate, should, as a matter of policy, be immediately released to UN officials; until released, at a minimum they should be accorded protections identical to those afforded prisoners of war under the 1949 Geneva Convention III (GPW). The U.S. will generally seek to incorporate appropriate language into UN Security Council resolutions that establish or extend peace operations in order to provide adequate legal protection to captured UN peacekeepers. In appropriate cases, the U.S. would seek assurances that U.S. forces assisting the UN are treated as experts on mission for the United Nations, and thus are entitled to appropriate privileges and immunities and are subject to immediate release when captured. Moreover, the Administration is actively involved in negotiating a draft international convention at the United Nations to provide a special international convention at the United Nations to provide a special international status for individuals serving in peacekeeping and peace enforcement operations under a UN mandate. Finally, the Administration will take appropriate steps to ensure that any U.S. military personnel captured while serving as part of a multinational peacekeeping force or peace enforcement effort are immediately released to UN authorities.

* * * *

2. Macedonia and Bosnia

On December 11, 1992, the UN Security Council adopted Resolution 795 (U.N. Doc. S/RES/795 (1992), establishing

the UN Protection Force ("UNPROFOR") Macedonia mission under chapter VI of the UN Charter, and expanded its size in Security Council Resolution 842, adopted June 18, 1993 (U.N. Doc. S/RES/842 (1993)). In July 1993 a U.S. peacekeeping contingent was deployed as part of that mission. In a letter to Congress of July 9, 1993, President William J. Clinton described the action as follows:

> Over the past several days, we have begun implementing plans to augment UNPROFOR Macedonia with U.S. Armed Forces, consistent with Security Council Resolution 842 and as part of the U.S. commitment to support multilateral efforts to prevent the Balkan conflict from spreading and to contribute to stability in the regions. . . .
>
> The U.S. contingent will serve under the operational control of UNPROFOR Macedonia and will conduct missions as directed by the U.N. commander. . . .

29 WEEKLY COMP. PRES. DOC. 1297 (July 19, 1993).

In conjunction with the Dayton Peace Accords, discussed in A.1., *supra*, the United States addressed the question of its role in post-Dayton peacekeeping operations to be conducted under NATO auspices. In remarks delivered November 21, 1995, President Clinton stated:

> Now that the parties to the war have made a serious commitment to peace, we must help them to make it work. All the parties have asked for a strong international force to supervise the separation of forces and to give them confidence that each side will live up to their agreements. Only NATO can do that job. And the United States as NATO's leader must play an essential role in this mission. . . .
>
> * * * *
>
> The NATO military mission will be clear and limited. Our troops will take their orders only from the American general who commands NATO. They will have authority to meet any threat to their safety or any violation of the

peace agreement with immediate and decisive force. And there will be a reasonable timetable for their withdrawal.

31 WEEKLY COMP. PRES. DOC. 2049 (Nov. 27, 1995).

Secretary of State Warren Christopher subsequently testified before the U.S. House of Representatives, Committee on International Relations, in support of committing U.S. troops to the NATO peacekeeping force to be deployed to Bosnia. Excerpts below from Secretary Christopher's prepared testimony addressed the importance of helping to ensure the implementation of the Dayton Peace Accords.

The full text of Secretary Christopher's testimony is available at *www.state.gov/www/regions/eur/bosnia/bosctest.html*. For additional information on U.S. policy and actions in Bosnia, *see www.state.gov/www/regions/eur/bosnia/boshome.html*.

---

* * * *

We have a fundamental choice. As the President made clear, if the United States does not participate, there will be no NATO force. If there is no NATO force, there will be no peace in Bosnia, and the war will reignite.

* * * *

Our national interest in implementing the Dayton settlement is clear.

We have a strong interest in ending the worst atrocities in Europe since World War II—atrocities that are all the more pernicious because they have been directed at specific groups of people because of their faith. By helping peace take hold, we can make sure that the people of Bosnia see no more days of dodging bullets, no more winters of freshly dug graves, no more years of isolation from the outside world.

We have a strong interest in making sure that this conflict does not spread. Bosnia lies on a faultline in a volatile region of Europe. To the south are Kosovo, Albania, and the Former Yugoslav Republic of Macedonia, the likeliest flashpoints of a wider war, as well as Greece and Turkey, two NATO allies. To

the north and east lie Hungary, Romania and Bulgaria, fragile new democracies deeply threatened by the prospect of ethnic conflict in the Balkans. To the north also lies the Eastern Slavonia region of Croatia, which could yet spark a regional war if the Dayton accords are not implemented.

Peace in this part of Europe matters to the United States because Europe matters to the United States. Twice this century, we have sent millions of American soldiers to war across the Atlantic. The first of this century's great wars began with violence in Sarajevo. The second began with aggression in Central Europe and with horrors that the world ignored until it was too late. Ever since, our leaders, Republican and Democrat alike, have acted to protect our vital interest in European stability. If we do not take this opportunity for peace, we could be faced with the prospect of action far costlier and more dangerous than anything being contemplated now.

The United States also has a vital interest in maintaining our leadership in the world. Taking action in Bosnia now is an acid test of American leadership. After creating this opportunity for peace, we cannot afford to walk away. I can tell you from my personal experience as Secretary of State that if we are seen as a country that does not follow through on its initiatives, no nation will follow us—not in Europe, not in the Middle East, not in Asia, not anywhere.

* * * *

The Dayton accord does require the parties to take extremely difficult steps on the road to peace. I believe that each is prepared to carry out its commitments, but only if each is confident that the other parties will carry out theirs. Each party made it clear that they would reach settlement only if NATO agreed to lead a peace implementation force.

* * * *

. . . We must remember that we secured the agreement because peace is the key to what all the parties want: from reconstruction, to justice, to rejoining the international community. We constructed the agreement to ensure that it will be carried out. We have made

certain that sanctions against Serbia, our main source of leverage with that country, will be reimposed if the agreement is not implemented. Sanctions against the Bosnian Serbs will remain in place until their forces withdraw behind the agreed boundary of the Serb Republic. Moreover, our troops will have the strength and authority to enforce key military provisions of the agreement.

In addition, let me emphasize that it was not enough for me that President Milosevic was specifically authorized to negotiate the accord on behalf of the Bosnian Serbs. I insisted that the Bosnian Serbs initial it as well. In Dayton, President Milosevic promised to obtain their agreement within 10 days; as it turned out, he did so in just two days. This kind of response increases my confidence that this accord will be carried out.

Mr. Chairman, as we negotiated in Dayton, we constantly insisted on an agreement that our military could implement and enforce. Each part of the agreement was carefully constructed to take into account the needs of our armed forces and the advice of the military members of our team. As a result, the military annex to the agreement contains the kind of detailed provisions our military considered essential to their task.

Let me assure you that [the NATO Implementation Force] IFOR's mission is well-defined and limited. Our troops will enforce the military aspects of the agreement—enforcing the cease-fire, supervising the withdrawal of forces, and establishing a zone of separation between them. But it will not be asked to guarantee the success of democracy or reconstruction, or to act as a police force. One of the lessons we have learned in the last few years is that our military should not be a permanent guarantor of peace. It should create opportunities that others must then seize.

* * * *

Civilian agencies from around the world will carry out a separate program to help the people of Bosnia rebuild. Our European allies will pay for most of this vital civilian effort. International organizations will also play an important role. The OSCE will supervise elections. The UNHCR will coordinate the

return of refugees. The World Bank and IMF will help Bosnia's economy recover, with the EU also playing a leading role. The UN will help monitor and train local police.

In a letter to Congress of December 6, 1995, President Clinton reported:

> . . . [P]ursuant to the North Atlantic Council (NAC) decision of December 1, 1995, I have ordered the deployment of approximately 1,500 U.S. military personnel to Bosnia and Herzegovina and Croatia as part of a NATO "enabling force" to lay the groundwork for the prompt and safe deployment of the NATO-led Implementation Force (IFOR). United States personnel participating in the enabling force will be under NATO operational control and rules of engagement. To date, I have also authorized the deployment of approximately 3,000 additional U.S. military personnel to Hungary, Italy, and Croatia in order to establish forward U.S. support infrastructure for the enabling force and the IFOR.
>
> * * * *
>
> It is envisioned that the IFOR main body will begin to deploy following the signature of the peace agreement in Paris and the issuance of final NATO and U.S. orders. The enabling force will thereafter remain as part of the IFOR.

31 WEEKLY COMP. PRES. DOC. 2144 (Dec. 11, 1995).

On December 21, 1995, President Clinton reported to Congress that, following the signing of the Dayton Accords on December 14 and "consistent with United Nations Security Council Resolution 1031 (U.N. Doc. S/RES/1031 (1995)) and the North Atlantic Council (NAC) decision of December 16, 1995," he had ordered 20,000 U.S. military personnel to participate in IFOR "in the Republic of Bosnia and Herzegovina, principally in a sector surrounding Tuzla." 31 WEEKLY COMP. PRES. DOC. 2215 (Dec. 25, 1995). He explained further that

> [a]pproximately 5,000 U.S. military personnel will also deploy as part of the IFOR in other states of the former Yugoslavia, principally Croatia. The IFOR, including U.S. forces assigned to it, will be under NATO operational control and will operate under NATO rules of engagement. In addition, a total of approximately 7,000 U.S. support forces, under U.S. command and control and rules of engagement, will deploy in Hungary, Croatia, Italy, and other states in the region in support of IFOR. . . .

On December 20, 1996, President Clinton reported to Congress that IFOR had "successfully accomplished its mission to monitor and ensure compliance by all parties with the military aspects of the Peace Agreement . . . [and] assisted in the overall civilian implementation effort. . . ." 32 WEEKLY COMP. PRES. DOC. 2535 (Dec. 30, 1996). Excerpts below describe U.S. participation in a follow-on force known as the Stabilization Force ("SFOR"), established pursuant to UN Security Council Resolution 1088 (U.N. Doc. S/RES/1088 (1996)) The report also indicated that U.S. troops continued to be deployed in the Former Yugoslav Republic of Macedonia as part of the United Nations Preventive Deployment force ("UNPREDEP"), which succeeded UNPROFOR, and that a small contingent was serving in Croatia "in direct support of the UNTAES Transitional Administrator." The United Nations Transitional Authority In Eastern Slavonia, Baranja And Western Sirmium ("UNTAES") was established on January 15, 1996, by UN Security Council Resolution 1037 (U.N. Doc. S/RES/1037 (1996)).

---

* * * *

In order to contribute further to a secure environment necessary for the consolidation of peace throughout Bosnia and Herzegovina, NATO has approved, and I have authorized U.S. participation in [SFOR]. The United Nations Security Council authorized member states to establish the follow-on force in UNSCR 1088 of December 12, 1996. Transfer of authority from IFOR to SFOR occurred on

December 20, 1996. The parties to the Peace Agreement have all confirmed to NATO their support for the SFOR mission. . . .

SFOR's tasks are to deter or prevent a resumption of hostilities or new threats of peace, to consolidate IFOR's achievements, to promote a climate in which the civilian-led peace process can go forward. Subject to this primary mission, SFOR will provide selective support, within its capabilities to civilian organizations implementing the Dayton Peace Agreement.

3. Kosovo

In 1998 the Contact Group previously engaged in reaching the political solution in Bosnia, *see* A.1., *supra,* addressed new issues arising out of Serbia's violent suppression of ethnic Albanians in the province of Kosovo. On March 9 and 25, 1998, the foreign ministers of the now six-nation group (Italy having joined the United States, Britain, France, Germany, and Russia) met in London and in Brussels and transmitted statements to the Security Council issued on each of those occasions, U.N. Docs. S/1998/223 and S/1998/272, respectively. The March 9 statement, transmitted by the United Kingdom by letter of March 12, 1998, stated that "[i]n light of the deplorable violence in Kosovo, we feel compelled to take steps to demonstrate to the authorities in Belgrade that they cannot defy international standards without facing severe consequences" and enumerated "a broad range of actions to address the current situation on an urgent basis" the Contact Group had decided to take. The statement called on President Milosevic, among other things, to withdraw special police units and cease action by the security forces affecting civilians, and to commit himself publicly to meaningful dialogue without preconditions and take other steps toward peaceful resolution. The Contact Group also endorsed consideration by the Security Council of a comprehensive arms embargo against the FRY, including Kosovo, and refusal to supply equipment to the FRY "which might be used for internal repression, or for terrorism."

In its March 25 statement, transmitted by the United States by letter of March 27, 1998, the Contact Group found that insufficient progress had been made by Milosevic in taking the actions identified in the statement of March 9. The Contact Group called upon President Milosevic "to implement fully all the relevant steps in the London statement" and, among other things, "agreed to maintain and implement the measures announced on March 9, including seeking adoption by March 31 of the arms embargo resolution currently under consideration in the United Nations Security Council." The statement concluded:

> 13. The fundamental position of the Contact Group remains the same. We support neither independence nor the maintenance of the status quo as the end-result of negotiations between the Belgrade authorities and the Kosovo Albanian leadership on the status of Kosovo. Without prejudging what that result may be, we base the principles for a solution to the Kosovo problem on the territorial integrity of the Federal Republic of Yugoslavia and on OSCE standards, Helsinki principles, and the UN Charter. Such a solution must also take into account the rights of the Kosovar Albanians and all those who live in Kosovo. We support a substantially greater degree of autonomy for Kosovo, which must include meaningful self-administration.

On March 31, 1998, the Security Council adopted Resolution 1160 (U.N. Doc. S/RES/1160 (1998)), noting with appreciation the statements of the Contact Group. Acting under Chapter VII, among other things, the Security Council called upon the FRY to take "necessary steps to achieve a political solution to the issue of Kosovo through dialogue and to implement the actions indicated in the Contact Group statements of 9 and 25 March 1998"; called upon the Kosovar Albanian leadership to "condemn all terrorist action"; and called upon the authorities in Belgrade and the Kosovar Albanian leadership "to enter without preconditions into a meaningful dialogue on political status issues." It also decided to impose

the proposed arms embargo as to the FRY, including Kosovo, "for the purposes of fostering peace and stability in Kosovo." U.N. Doc. S/RES/1160 (1998). *See also* discussion of sanctions imposed by the United States in Chapter 16.A.8.d.

a. UN Security Council Resolution 1244

As discussed in Chapter 18.A.4.b., in 1999 the United States participated in a NATO military campaign to end the humanitarian crisis in Kosovo. On June 8, 1999, the United Nations Security Council, acting under Chapter VII, adopted Resolution 1244 as part of a settlement designed to bring about a cessation of the NATO military campaign. In the resolution the Security Council demanded that the FRY "put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo" and decided that "a political solution to the Kosovo crisis shall be based on the general principles in annex 1 [adopted by the G-8 Foreign Ministers May 6, 1999] and as further elaborated in the principles and other required elements in annex 2 [including points 1 to 9 of a paper presented in Belgrade on June 2, 1999, and accepted by the FRY]." U.N. Doc. S/RES/1244 (1999).

The Security Council also decided, among other things, to deploy both international civil and security presences. Operative Paragraph ("OP") 7 authorized the establishment of the international security presence, the Kosovo Security Force ("KFOR"), with a non-exclusive list of responsibilities set forth in OP 9. OP 10 authorized the establishment of the international civil presence, the UN Interim Administration for Kosovo ("UNMIK"), described as "an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal

life for all inhabitants of Kosovo." OP 11 enumerated UNMIK's main responsibilities.

On June 12, 1999, in light of the cessation of hostilities, President Clinton reported in a letter to Congress, excerpted below, that he was committing U.S. forces to KFOR. 35 WEEKLY COMP. PRES. DOC. 1107 (June 21, 1999).

---

* * * *

I can now confirm that the FRY has accepted NATO's conditions, and the process of implementing them has begun. On June 9, Lieutenant General Sir Michael Jackson, the NATO commander of KFOR, concluded a Military-Technical Agreement (MTA) with FRY authorities. The MTA specifies the detailed modalities and schedule for the full withdrawal of all FRY military, paramilitary and police forces from Kosovo. The MTA also details the role and authorities of KFOR, confirming that it can take the measures necessary to create a secure environment for the return of the Kosovars to their homes in safety and self-government. Among other authorities, KFOR is empowered to ensure that the withdrawal of FRY forces proceeds on schedule, to protect KFOR and the civil implementation presence, and assist other international entities involved in restoring peace to Kosovo.

Conclusion of the MTA and the subsequent start of Serb force withdrawals paved the way for NATO to suspend its air campaign on June 10, 1999, and for the United Nations Security Council on the same day to adopt Resolution 1244 authorizing the establishment of the international security force.

In view of these events, I have directed the deployment of approximately 7,000 U.S. military personnel as the U.S. contribution to the approximately 50,000 member, NATO-led security force (KFOR) now being deployed into Kosovo. The KFOR will operate under unified NATO command and control, and with rules of engagement set by the Alliance. As part of the central NATO role that we have insisted upon, and consistent with the recommendations of my senior civilian and military advisors, U.S. personnel participating in these efforts will be under the operational control solely of officers from the Untied States or other NATO

countries. In addition, a total of approximately 1,500 U.S. military personnel, under separate U.S. command and control, will deploy to other countries in the region, as our national support element, in support of KFOR.

* * * *

On December 15, 1999, President Clinton reported further to Congress on developments in Kosovo, including the then current roles of KFOR and UNMIK, as excerpted below. The full text is available at 35 WEEKLY COMP. PRES. DOC. 2623 (Dec. 15, 1999).

---

* * * *

. . . The mission of KFOR is to provide a continued military presence in order to deter renewed hostilities; verify and, if necessary, enforce the terms of the Military Technical Agreement (MTA) between NATO and the Federal Republic of Yugoslavia (FRY); enforce the terms of the agreement of the Kosovo Liberation Army (KLA) to demilitarize and reintegrate itself into civil society; provide operational direction to the newly established Kosovo Protection Corps; and contribute to a secure environment to facilitate the work of the U.N. Interim Administration Mission in Kosovo (UNMIK) by providing, until UNMIK assumes these functions, for public security and appropriate control of the borders.

* * * *

Since my report to the Congress of June 12, the FRY, in accordance with Resolution 1244 and the MTA, withdrew its military, paramilitary, and police forces from Kosovo. The KLA agreed on June 21, 1999, to a ceasefire, to withdraw from the zones of conflict in Kosovo, and to demilitarize itself. On September 20, 1999, KFOR Commander Lieutenant General Sir Mike Jackson accepted the KLA's certification that the KLA had completed its demilitarization in accordance with the June 21 agreement. The UNMIK thereafter established a civil emergency services entity known as the Kosovo Protection Corps that is intended to provide civic assistance in emergencies and other forms of humanitarian

assistance. The UNMIK is in the process of considering applications from former KLA personnel for service in this Corps.

b. Authorities of UNMIK

As a UN mission administering territory within a sovereign state, UNMIK presented a number of legal questions, including the basic issue of its legal authority, its ability to enter into international agreements, and establishment of representative offices.

(1) General

Within weeks of the adoption of Resolution 1244, representatives of the United States presented U.S. views of UNMIK's legal authority in a meeting with the United Nations legal office, as set forth in full below.

- UNSCR 1244 authorizes the SYG to establish an interim administration for Kosovo, initially under the sole governing authority of an International Civil Presence (ICP), controlled by a Special Representative of the SYG (SRSG).
- In UNSCR 1244, the Security Council conferred on the SRSG all legal authority necessary to implement the resolution and to achieve the Council's objectives.
- The ICP's responsibilities include providing civilian administration for as long as required, establishing and overseeing provisional Kosovar institutions of self-government, and maintaining civil law and order. In order to fulfill these responsibilities, the SRSG must exercise or control all governmental authority in Kosovo, including political and economic functions, until such time as Kosovar institutions of self-government can exercise such authority.
- The SRSG has the full authority to implement the ICP's mandate, including by modifying or suspending FRY/Serbian

law, or suspending the operation of existing FRY/Serbian institutions, as necessary.

- Because this is a Chapter VII resolution, the FRY is obligated to carry out its responsibilities under the resolution; it must cooperate fully with the ICP and may not erect or invoke domestic legal barriers to the fulfillment of the ICP's mandate.
- The FRY also may not erect practical barriers to the fulfillment of the ICP's mandate. Any lack of FRY cooperation may not stand in the way of implementation of UNSCR 1244.
- The resolution refers to promoting substantial autonomy and self-government "taking full account . . . of the Rambouillet accords." Rambouillet, however, is neither definitive nor binding, and may be utilized as a model at UNMIK's discretion.
- UNMIK's broad mandate is in no way inconsistent with the resolution's preambular reference to FRY "sovereignty and territorial integrity," or with the operative text's statement that the purpose of the interim administration is to allow the people of Kosovo to "enjoy substantial autonomy within the Federal Republic of Yugoslavia."
- The international borders of the FRY will remain intact during the interim period, and may only be adjusted in negotiations on future status.
- The resolution also explicitly provides for the "presence" of a limited number of Yugoslav personnel (to be determined by KFOR) at key border crossings. The resolution makes clear, however, that UNMIK, not the FRY, will determine who and what may transit at those and other border crossings.
- There can be no question that the Security Council both possesses, and has in this case exercised, the authority under Chapter VII to establish an interim administration for Kosovo that does carry out other functions that might otherwise be considered to be attributes of "sovereignty".

UNMIK issued Regulation 1 on July 25, 1999. UNMIK/REG/1999/1. Sections 1, 3 and 4, excerpted below, reflect the U.S. legal views. UNMIK regulations are available at *www.unmikonline.org/regulations/index_reg_1999.htm*.

* * * *

Section 1

AUTHORITY OF THE INTERIM ADMINISTRATION

1.1 All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.

1.2 The Special Representative of the Secretary-General may appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person. Such functions shall be exercised in accordance with the existing laws, as specified in section 3, and any regulations issued by UNMIK.

Section 2

OBSERVANCE OF INTERNATIONALLY RECOGNIZED STANDARDS

In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.

* * * *

Section 3

APPLICABLE LAW IN KOSOVO

The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in section 2, the fulfillment of the mandate given to UNMIK under United Nations Security

Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK.

Section 4
REGULATIONS ISSUED BY UNMIK
In the performance of the duties entrusted to the interim administration under United Nations Security Council resolution 1244 (1999), UNMIK will, as necessary, issue legislative acts in the form of regulations. Such regulations will remain in force until repealed by UNMIK or superseded by such rules as are subsequently issued by the institutions established under a political settlement, as provided for in United Nations Security Council resolution 1244 (1999).

* * * *

Because of questions raised concerning changes in Kosovar law after March 22, 1989, UNMIK later decided to modify Regulation 1 and adopted Regulation 24, entitled "On the Law Applicable in Kosovo," on December 12, 1999, set forth below. UNMIK/REG/1999/24. On the same day, Regulation 25 repealed section 3 of Regulation 1.

1.1 The law applicable in Kosovo shall be:
(a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and
(b) The law in force in Kosovo on 22 March 1989.
In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence.

1.2 If a court of competent jurisdiction or a body or person required to implement a provision of the law determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law.

1.3 In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in [specified human rights treaties].

1.4 No person undertaking public duties or holding public office in Kosovo shall discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, natural, ethnic or social origin, association with a national community, property, birth or other status. In criminal proceedings, the defendant shall have the benefit of the most favourable provision in the criminal laws which were in force in Kosovo between 22 March 1989 and the date of the present regulation.

1.5 Capital punishment is abolished.

See also Regulation 59, adopted October 27, 2000, UNMIK/REG/2000/54, amending Regulation 24 to provide that "for each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the penalty will be a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty (40) years."

(2) Authority to enter into international agreement

Subsequently, the U.S. Overseas Private Investment Corporation ("OPIC") entered into an international agreement with UNMIK to permit OPIC to support eligible projects in Kosovo in order to contribute to its economic development. *See* Chapter 11.c.3. The agreement entered into force May 30, 2002; *see www.opic.gov/PressReleases/2002/2-18.htm*. By law, OPIC operates its insurance, reinsurance, and guaranty programs only in a "less developed friendly country or area with the government of which the President of the United States has agreed to institute" such programs. Foreign Assistance Act of 1961, as amended, ("FAA") § 273(a), Pub. L. No. 87–195, 75 Stat. 424 (1961). Section 237(b) of the FAA also requires

OPIC to determine that "suitable arrangements" exist to protect its interests in the relevant country or area. Although OPIC traditionally meets these requirements through a bilateral agreement with the government of a foreign country, UNMIK was deemed to have the authority under UNSCR 1244 to enter into an agreement related to the establishment of OPIC programs in Kosovo and to be treated as the governing authority in Kosovo for purposes of § 237(a) of the FAA. UNMIK had also displayed the effective control necessary to guarantee that suitable arrangements were in place to protect OPIC's interests related to these programs as required under § 237(b).

Provisions governing the duration of the OPIC agreement reflected the uncertain duration of the interim administration for Kosovo. UNSCR 1244 envisioned that the period of interim administration would terminate following a political process designed to determine Kosovo's future status. Following the successful conclusion of that process, UNMIK would oversee the transfer of authority from Kosovo's provisional institutions to institutions established under the political settlement. Article 5 of the agreement therefore provided for expiration at the end of the period of interim administration:

> This Agreement shall continue in force until the earlier of (i) conclusion of UNMIK's mandate to provide interim administration in Kosovo, as provided in United Nations Security Council Resolution 1244, and (ii) six months from the date of a receipt of a note by which one party informs the other of an intent to terminate this Agreement. In such event, the provisions of this Agreement shall, with respect to Investment Support provided while this Agreement was in force, remain in force so long as such Investment Support remains outstanding, but in no case longer than the first to occur of (iii) twenty years after the termination of this Agreement and (iv) termination of the authority of UNMIK.

(3) Establishment of U.S. office in Pristina

On July 6, 1998 U.S. Chargé d'Affaires in Belgrade Richard Miles and his Russian counterpart launched the Kosovo Diplomatic Observer Mission ("KOM" or "KDOM"). As explained in a fact sheet released by the Department of State July 8, 1998, "[t]he KOM is an integrated entity under the political guidance of a coordination group consisting of the ambassadors of the Contact Group countries in Belgrade as well as the ambassadors of Austria (representing the EU Presidency) and Poland (representing the Chairman-in-Office of the OSCE). Each national component of the KOM is an extension of its respective embassy in Belgrade." *See www.state.gov/www/regions/eur/fs_980708_kom.html.*

By July 1999 the United States had begun the process of establishing the United States Office Pristina ("USOP"). Its functions were to serve as a liaison office to UNMIK and KFOR, engage with the Kosovars regarding U.S. concerns, and provide a platform for the activities of U.S. visitors and agencies. The office was initially established based on authority derived from U.S. participation in KDOM. Because an office of this nature is not contemplated under the Vienna Conventions on Diplomatic or Consular Relations and because diplomatic relations with the FRY had been severed, persons initially assigned to the office did not have privileges and immunities and the office was not inviolable. Once the office was fully operational, the United States intended to seek to formalize the office's status as a liaison mission to UNMIK. The United States viewed UNMIK's authority as including the ability to authorize the establishment of such an office and to provide protection and some derivative privileges and immunities.

On July 10, 2000, UNMIK issued Regulation 42, entitled "On the Establishment and Functioning of Liaison Offices in Kosovo," relying on the authority of Resolution 1244 and Regulation No. 1999/1. Section 2 of the regulation reflected the U.S. views, setting forth the privileges and immunities of liaison offices and their personnel, as well as the functions

they may perform. The regulation is available at *www.unmikonline.org/regulations/index_reg_2000.htm*.

4. Somalia

In response to widespread famine and clan violence in Somalia, on December 3, 1992, the UN Security Council, acting under Chapter VII, adopted Resolution 794 (U.N. Doc. S/RES/794 (1992)), which among other things authorized Member States to use "all necessary means" to establish a secure environment for humanitarian relief operations.

On December 10, 1992, the United States led a multinational force called the Unified Task Force ("UNITAF") into Somalia in Operation Restore Hope. On December 10, 1992, President George H.W. Bush reported to Congress setting forth the basis for U.S. participation in this mission. 28 WEEKLY COMP. PRES. DOC. 2338 (Dec. 10, 1992).

Beginning in January of this year with the adoption of U.N. Security Council Resolution 733, the United Nations has been actively addressing the humanitarian crisis in Somalia. The United States has been assisting the U.N. effort to deal with a human catastrophe. Over 300,000 Somalis have died of starvation. Five times that number remain at risk, beyond the reach of international relief efforts in large part because of the security situation. As a result, voluntary relief organizations from the United States and other countries have appealed for assistance from outside security forces.

On November 29, 1992, the Secretary General of the United Nations reported to the Security Council that the deteriorating security conditions in Somalia had severely disrupted international relief efforts and that an immediate military operation under U.N. authority was urgently required. On December 3, the Security Council adopted Resolution 794, which determined that the situation in Somalia constituted a threat to international peace and security, and, invoking Chapter VII of the U.N. Charter, authorized Member States to use all necessary means to establish

a secure environment for humanitarian relief operations in Somalia. In my judgment, the deployment of U.S. Armed Forces under U.S. command to Somalia as part of this multilateral response to the Resolution is necessary to address a major humanitarian calamity, avert related threats to international peace and security, and protect the safety of Americans and others engaged in relief operations.

In the evening, Eastern Standard Time, on December 8, 1992, U.S. Armed Forces entered Somalia to secure the airfield and port facility of Mogadishu. Other elements of the U.S. Armed Forces and the Armed Forces of other Members of the United Nations are being introduced into Somalia to achieve the objectives of U.N. Security Council Resolution 794. No organized resistance has been encountered to date.

U.S. Armed Forces will remain in Somalia only as long as necessary to establish a secure environment for humanitarian relief operations and will then turn over the responsibility of maintaining this environment to a U.N. peacekeeping force assigned to Somalia. Over 15 nations have already offered to deploy troops. While it is not possible to estimate precisely how long the transfer of responsibility may take, we believe that prolonged operations will not be necessary.

We do not intend that U.S. Armed Forces deployed to Somalia become involved in hostilities. Nonetheless, these forces are equipped and ready to take such measures as may be needed to accomplish their humanitarian mission and defend themselves, if necessary; they also will have the support of any additional U.S. Armed Forces necessary to ensure their safety and the accomplishment of their mission.

I have taken these actions pursuant to my constitutional authority to conduct our foreign relations and as Commander in Chief and Chief Executive, and in accordance with applicable treaties and laws. In doing so, I have taken into account the views expressed in H. Con. Res. 370, S. Con. Res. 132, and the Horn of Africa Recovery and Food Security Act, Public Law 102–274, on the urgent need for action in Somalia.

I am providing this report in accordance with my desire that Congress be fully informed and consistent with the War Powers Resolution. I look forward to cooperating with Congress in the

effort to relieve human suffering and to restore peace and stability to the region.

> On May 4, 1993, the United Nations Operation in Somalia ("UNOSOM II") assumed control of operations as "Operation Continued Hope." *See* U.N. Doc. S/RES/814 (1993), expanding the mandate of UNOSOM I (S/RES/751 (1992)). UNITAF was disbanded and the United States presence reduced from approximately 30,000 to approximately 1,200 personnel. After the Somali National Congress attacked and killed 25 UN peacekeepers on June 5, 1993, the United States increased its operations as authorized by UN Security Council Resolution 837 (U.N. Doc. S/RES/837 (1993)). On October 3 and 4, 1993, eighteen U.S. personnel died in a violent clash with the Somali National Congress. In March 1994 the United States withdrew its personnel from Somalia.

5. Haiti

As discussed in Chapter 16.A.2., the United States was engaged during the years 1991–1994 in efforts to restore democracy in Haiti following the military overthrow of President Jean-Bertrand Aristide in September 1991. On July 31, 1994, the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 940 (U.N. Doc. S/RES/940 (1994)). Among other things, the resolution authorized the Member States to form a multinational force "and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti," and to offer transitional assistance. Resolution 940 also revised and extended the mandate of the United Nations Mission in Haiti ("UNMIH"). UNMIH, composed of UN police monitors and a military construction unit, was originally established under Security Council Resolution 867 (U.N. Doc. S/RES/

867 (1993)) to help implement efforts during 1993 to reach a solution to the Haitian crisis recorded in "the Governors Island Agreement [S/26063] and the political accords contained in the New York Pact . . . (S/26297)."

At the same time, President Clinton sent a negotiating team led by former President Jimmy Carter to persuade the de facto authorities to step aside and allow for the return of constitutional rule. The leaders of the military regime agreed to a peaceful transfer of power and accepted the introduction of the multinational force before it reached Haitian soil. *See* letter of September 21, 1994, from President Clinton to Congress. 30 WEEKLY COMP. PRES. DOC. 1823 (Sept. 26, 1994). In a further report to Congress of March 21, 1995, President Clinton described the U.S. force and transition as follows:

> On September 21, 1994, I reported to the Congress that on September 19, 1994, U.S. forces under the command of the Commander in Chief, U.S. Atlantic Command, were introduced into Haitian territory following an agreement successfully concluded by former President Jimmy Carter, Senator Sam Nunn, and General Colin Powell and as part of the Multinational Force (MNF) provided for by United Nations Security Council Resolution (UNSCR) 940 of July 31, 1994. . . .
>
> At their peak last September and into October, U.S. forces assigned to the MNF in Haiti numbered just over 20,000. Approximately 2,000 non-U.S. personnel from 27 nations also participated in the initial stages of the MNF. Over the last 6 months, U.S. forces gradually have been reduced, consistent with the establishment of a secure and stable environment called for by UNSCR 940, such that they currently number just under 5,300. . . . When the transition to the United Nations Mission in Haiti (UNMIH) authorized by UNSCR 975 of January 30, 1995, is complete on March 31, 1995, approximately 2,500 U.S. forces will remain in Haiti as the U.S. contribution to UNMIH's force structure. . . .

31 WEEKLY COMP. PRES. DOC. 452 (Mar. 27, 1995).

In a March 21, 1996, letter to Congress, President Clinton stated that the United States supported

> the successful efforts of UNMIH to assist the Government of Haiti in sustaining a secure and stable environment, protecting international personnel and key installations, establishing the conditions for holding elections, and professionalizing its security force.
>
> . . . [P]ursuant to U.N. Security Council Resolution 975, UNMIH was authorized to assume responsibility for the U.S.-led Multinational Force for peacekeeping operations in Haiti. Through the presence of UNMIH and its support to the United Nations-Organization of American States International Civilian Mission, a tremendous improvement in the observance of basic human rights in Haiti has been achieved. . . . [and] Haiti's Presidential election on December 17, 1995, led to the first-ever transition from one democratically elected President to another on February 7, 1996.

32 WEEKLY COMP. PRES. DOC. 542 (Mar. 25, 1996). A letter dated September 27, 1994, from Walter A. Dellinger, Assistant Attorney General, Office of Legal Counsel, setting forth the basis under U.S. law for deploying U.S. armed forces into Haiti as part of the multinational force is discussed in Chapter 18.A.5.b.(1).

6. East Timor

The United States strongly supported the 1999 United Nations-sponsored referendum on independence in East Timor and worked to persuade Indonesia to accept an international peacekeeping force after the independence vote. The vote for independence from Indonesia was held on August 30, 1999, and was followed by a surge in violence. The UN Security Council subsequently adopted Resolution 1264 which, among other things, authorized the creation of a multinational force for the purpose of stabilizing the country and offering humanitarian assistance. U.N. Doc. S/RES/1264 (1999).

On October 8, 1999, President William J. Clinton reported to Congress describing U.S. participation in support of the UN operation in East Timor, excerpted below. 35 PRES. WEEKLY COMP. DOC. 1998 (October 18, 1999). East Timor gained independence on May 20, 2002.

On September 15, 1999, the United Nations Security Council, under Chapter VII of the Charter, authorized the establishment of a multinational force to restore peace and security in East Timor, to protect and support the United Nations Mission in East Timor (UNAMET), and, within force capabilities, to facilitate humanitarian assistance operations. In support of this multinational effort, I directed a limited number of U.S. military forces to deploy to East Timor to provide support to the multinational force (INTERFET) being assembled under Australian leadership to carry out the mission described in Security Council Resolution 1264. United States support to the multinational force has thus far been limited to communications, intelligence, logistics, planning assistance, and transportation.

Recently, I authorized the deployment of the amphibious ship, USS BELLEAU WOOD (LHA 3), and her embarked helicopters, to the East Timor region, including Indonesian waters, to provide helicopter airlift and search and rescue support to the multinational operation. Also embarked in BELLEAU WOOD is a portion of her assigned complement of personnel from the 31st Marine Expeditionary Unit (Special Operations Capable) (MEU (SOC)). At this time, I do not anticipate that the embarked Marines will be deployed ashore, with the exception of the temporary deployment of a communications element to support air operations.

At this point, it is not possible to predict how long this operation will continue. The duration of the deployment depends upon the course of events in East Timor and may include rotation of naval assets and embarked aircraft. United States support for this multinational effort will continue until transition to a U.N. peacekeeping force is complete. It is, however, our objective to redeploy U.S. forces as soon as circumstances permit.

* * * *

Cross-references

Suspension of entry, **Chapter 1.C.3.**
Denial of visas for foreign policy reasons, **Chapter 1.C.2.o.**
Sanctions against terrorists disrupting Mid East Peace Process, **Chapter 3.B.1.c.**
Prospects for free and fair elections in Cambodia, **Chapter 3.C.1.f.**
Lessons of the Holocaust, **Chapter 6.A.4.**
Rule of Law and Democracy, **Chapter 6.J.**
Israel and PLO issues at the United Nations, **Chapter 7.B.1.–3.**
NATO expansion and NATO-Russia Founding Act, **Chapter 7.C.**
Angola Peace Accords, **Chapter 9.A.2.b.**
Use of economic sanctions, **Chapter 16.**
Presidential authority to deploy forces for peacekeeping, **Chapter 18.A.5.b.**

Chapter 18

Use of Force and Arms Control

A. USE OF FORCE

1. The Gulf War

a. UN Security Council resolutions adopted in 1990 concerning Iraq's invasion of Kuwait

On August 2, 1990, Iraq invaded Kuwait. Between that time and November 29, 1990, the UN Security Council adopted twelve resolutions relating to the Iraqi invasion. The first, Resolution 660 (U.N. Doc. S/RES/660 (1990)), was adopted on August 2, 1990. In that resolution, the Security Council determined "that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait." The Security Council, among other things, demanded "that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990."

Subsequent resolutions included, among others, Resolution 661 (U.N. Doc. S/RES/661 (1990)), adopted on August 6. In that resolution, the Security Council, acting under Chapter VII of the UN Charter, decided that "no state shall import or promote the export of goods from Iraq or Kuwait, or make economic or financial resources available to Iraq or Kuwait, except for medical or humanitarian purposes." The Security Council also established a committee to oversee the implementation of the economic measures set forth in Resolution 661. Those measures were expanded upon in

Resolution 665 (U.N. Doc. S/RES/665 (1990)), adopted on August 25; and in Resolution 670 (U.N. Doc. S/RES/670 (1990)), adopted on September 25. In Resolution 666 (U.N. Doc. S/RES/666 (1990)), adopted on September 13, and Resolution 669 (U.N. Doc. S/RES/669 (1990)), adopted on September 24, the Security Council directed the committee that was established in Resolution 661 to consider the humanitarian situation in Iraq and any requests for assistance under Article 50 of the UN Charter.

In Resolution 662 (U.N. Doc. S/RES/662 (1990)), adopted on August 9, the Security Council decided that Iraq's annexation of Kuwait was null and void. In Resolution 677 (U.N. Doc. S/RES/677 (1990)), adopted on November 28, the Security Council acted under Chapter VII of the UN Charter to condemn Iraq's attempts to alter Kuwait's demographic population and to destroy Kuwait's civil records.

Finally, on November 29, 1990, the Security Council adopted Resolution 678 (U.N. Doc. S/RES/678 (1990)). In that resolution, the Security Council, acting under Chapter VII of the UN Charter, authorized states "to use all necessary means" to uphold the previous resolutions if Iraq failed to comply with those resolutions by January 15, 1991.

Resolution 678 is set forth in full below.

The Security Council,

Recalling, and reaffirming its resolutions 660 (1990) of 2 August 1990, 661 (1990) of 6 August 1990, 662 (1990) of 9 August 1990, 664 (1990) of 18 August 1990, 665 (1990) of 25 August 1990, 666 (1990) of 13 September 1990, 667 (1990) of 16 September 1990, 669 (1990) of 24 September 1990, 670 (1990) of 25 September 1990, 674 (1990) of 29 October 1990 and 677 (1990) of 28 November 1990,

Noting that, despite all efforts by the United Nations, Iraq refuses to comply with its obligation to implement resolution 660 (1990) and the above-mentioned subsequent relevant resolutions, in flagrant contempt of the Security Council,

Mindful of its duties and responsibilities under the Charter of the United Nations for the maintenance and preservation of international peace and security,

Determined to secure full compliance with its decisions,

Acting under Chapter VII of the Charter,

1. Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so;

2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area;

3. Requests all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of the present resolution;

4. Requests the States concerned to keep the Security Council regularly informed on the progress of actions undertaken pursuant to paragraphs 2 and 3 of the present resolution;

5. Decides to remain seized of the matter.

b. U.S. authorization for the use of force

On January 14, 1991, President George H.W. Bush signed into law a Joint Resolution to authorize the use of United States armed forces pursuant to UN Security Council Resolution 678. Key provisions of the law entitled "Authorization for Use of Military Force Against Iraq Resolution," H.R.J. Res. 77, 102d Cong., 1st Sess., Pub. L. No. 102–1, 105 Stat. 3 (1991), are provided below.

Whereas the Government of Iraq without provocation invaded and occupied the territory of Kuwait on August 2, 1990;

Whereas both the House of Representatives (in H.J. Res. 658 of the 101st Congress) and the Senate (in S. Con. Res. 147 of the

101st Congress) have condemned Iraq's invasion of Kuwait and declared their support for international action to reverse Iraq's aggression;

Whereas Iraq's conventional, chemical, biological, and nuclear weapons and ballistic missile programs and its demonstrated willingness to use weapons of mass destruction pose a grave threat to world peace;

Whereas the international community has demanded that Iraq withdraw unconditionally and immediately from Kuwait and that Kuwait's independence and legitimate government be restored;

Whereas the United Nations Security Council repeatedly affirmed the inherent right of individual or collective self-defense in response to the armed attack by Iraq against Kuwait in accordance with Article 51 of the United Nations Charter;

Whereas, in the absence of full compliance by Iraq of with its resolutions, the United Nations Security Council in Resolution 678 has authorized member states of the United Nations to use all necessary means, after January 15, 1991, to uphold and implement all relevant Security Council resolutions and to restore international peace and security in the area; and

Whereas Iraq has persisted in its illegal occupation of, and brutal aggression against Kuwait: Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled.

This joint resolution may be cited as the "Authorization for Use of Military Force Against Iraq Resolution".

* * * *

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES

(a) Authorization.—The President is authorized, subject to subsection (b), to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674 and 677.

(b) Requirement for Determination That Use of Military Force is Necessary.—Before exercising the authority granted in subsection (a), the President shall make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that—
  (1) the United States has used all appropriate diplomatic and other peaceful means to obtain compliance by Iraq with the United Nations Security Council resolutions cited in subsection (a) and
  (2) that those efforts have not been and would not be successful in obtaining such compliance.

(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.

* * * *

SEC. 3. REPORTS TO CONGRESS

At least once every 60 days, the President shall submit to the Congress a summary of the status of efforts to obtain compliance by Iraq with the resolutions adopted by the United Nations Security Council in response to Iraq's aggression.

In his signing statement, excerpted below, President Bush welcomed the action of Congress while preserving the executive branch view as to the President's constitutional authority in this area. 27 WEEKLY COMP. PRES. DOC. 48 (Jan. 21, 1991). The War Powers Resolution, referenced in the President's statement, is also discussed in A.5.a and b. below. *See also Digest 1973* at 560–63 for a discussion of the War Powers Act at the time of its enactment over a Presidential veto.

. . . By passing H.J. Res. 77, the Congress of the United States has expressed its approval of the use of U.S. Armed Forces consistent

with U.N. Security Council Resolution 678. I asked the Congress to support implementation of the U.N. Security Council Resolution 678 because such action would send the clearest possible message to Saddam Hussein that he must withdraw from Kuwait without condition or delay. . . . To all, I emphasize again my conviction that this resolution provides the best hope for peace.

. . . This resolution provides unmistakable support for the international community's determination that Iraq's ongoing aggression against, and occupation of, Kuwait shall not stand. As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution. . . . I shall continue to consult closely with the Congress in the days ahead.

c. U.S. intervention

On January 16, 1991, U.S. armed forces commenced combat operations against Iraqi forces and military targets in Iraq and Kuwait together with forces from a number of other countries. President George H.W. Bush reported this action to Congress in a letter of January 18, 1991, excerpted below.

The full text of the letter is available at 1991 Pub. Papers vol. I at 42 (Jan. 16, 1991). *See also* address to the nation by President Bush, January 16, 1991, 27 WEEKLY COMP. PRES. DOC. 50 (Jan. 21, 1991).

On January 16, 1991, I made available to you, consistent with section 2(b) of the Authorization for Use of Military Force Against Iraq Resolution . . . , my determination that appropriate diplomatic and other peaceful means had not and would not compel Iraq to withdraw unconditionally from Kuwait and meet the other requirements of the U.N. Security Council and the world community. With great reluctance, I concluded, as did the other coalition leaders, that only the use of armed force would achieve

an Iraqi withdrawal together with the other U.N. goals of restoring Kuwait's legitimate government, protecting the lives of our citizens, and reestablishing security and stability in the Persian Gulf region. Consistent with the War Powers Resolution, I now inform you that pursuant to my authority as Commander in Chief, I directed U.S. Armed Forces to commence combat operations on January 16, 1991, against Iraqi forces and military targets in Iraq and Kuwait. The Armed Forces of Saudi Arabia, Kuwait, the United Kingdom, France, Italy, and Canada are participating as well.

* * * *

The operations of U.S. and other coalition forces are contemplated by the resolutions of the U.N. Security Council, as well as H.J. Res. 77, adopted by Congress on January 12, 1991. They are designed to ensure that the mandates of the United Nations and the common goals of our coalition partners are achieved and the safety of our citizens and Forces is ensured.

* * * *

d. U.S. views on the law applicable to the conflict in the Persian Gulf

(1) International Committee of the Red Cross memorandum on the applicability of international humanitarian law

In December 1990, representatives of the International Committee of the Red Cross ("ICRC") provided each nation that might participate in the Iraqi-Kuwait conflict with a "Memorandum on the Applicability of International Humanitarian Law in the Gulf Region." The memorandum was provided to officials at the Department of State on December 11. In a telegram dated January 11, 1991, excerpted below, the United States set forth the memorandum, in paragraphs 3–7, and U.S. comments on its content, as paragraph 8.

---

* * * *

3. Protection Of Persons Not Participating Or No Longer Participating In Hostilities.

A. The four Geneva Conventions of 12 August 1949 are applicable as soon as armed hostilities break out between two or more parties to the Conventions.
B. Under the Conventions, persons not participating or no longer participating in the hostilities, such as the wounded, the sick, the shipwrecked, prisoners of war and civilians, must be respected and protected in all circumstances.
C. In this respect the ICRC wishes to recall the general scope of the Conventions:
   (1) The first Geneva Convention, for the amelioration of the condition of wounded and sick in armed forces in the field, is intended to ensure that wounded and sick combatants are respected and cared for;
   (2) The second Geneva Convention, for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, adapts the provisions of the first Convention to war at sea;
   (3) The third Geneva Convention, relative to the treatment of prisoners of war, entitles members of armed forces and certain other categories of combatants to prisoner-of-war status when captured and specifies the humane treatment to which they are entitled;
   (4) The fourth Geneva Convention, relative to the protection of civilian persons in time of war and applicable in particular in occupied territories, prohibits violence to life and person, the taking of hostages, deportations, outrages upon personal dignity, and the passing of sentences and carrying out of executions without fair trial. It also governs the conditions under which civilians may be interned and provides special protection for children.

4. Conduct of Hostilities

A. The parties to an armed conflict must also observe a number of rules on the conduct of hostilities. These rules

are laid down, in particular, in the Hague Conventions of 1899 and 1907, most of which have become part of customary law.

B. These rules have been reaffirmed and in some cases supplemented in 1977 Protocol I additional to the Geneva Conventions. The following general rules are recognized as binding on any party to an armed conflict:
   (1) A distinction must be made in all circumstances between combatants and military objectives on the one hand, and civilians and civilian objects on the other. It is forbidden to attack civilian persons or objects or to launch indiscriminate attacks.
   (2) All feasible precautions must be taken to avoid loss of civilian life or damage to civilian objects, and attacks that would cause incidental loss of life or damage which would be excessive in relation to the direct military advantage anticipated are prohibited.
   (3) It is prohibited to have recourse to means and methods of warfare which uselessly aggravate the sufferings of disabled combatants or which render their death inevitable (prohibition of causing superfluous injury or unnecessary suffering).
   (4) When a choice is possible between several military objectives for obtaining a similar military objective, the objective selected shall be that the attack on which may be expected to cause the least danger to civilian lives and civilian objects.
   (5) Effective advance warning must be given of attacks which may affect the civilian population, unless circumstances do not permit.
   (6) Acts or threats of violence the main purpose of which is to spread terror among the civilian population are prohibited.
   (7) It is prohibited to order that there shall be no survivors. Defenseless combatants, such as those who have surrendered, the wounded, the sick, the shipwrecked and pilots bailing out of aircraft in distress may not be attacked.

(8) It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy.

C. The following rules apply to the use of certain weapons in the event of armed conflict:
   (1) It is prohibited to use asphyxiating, poisonous or other gases or to use bacteriological methods of warfare (1925 Geneva Protocol); this was formally reaffirmed at the 1989 Paris Conference.
   (2) It is prohibited to develop, produce or stockpile bacteriological (biological) and toxin weapons (1972 Convention).
   (3) It is prohibited to use bullets which expand or flatten easily in the human body (for example, dum-dum bullets; 1899 Hague Declaration).
   (4) It is prohibited to use certain explosive projectiles (1868 St. Petersburg Declaration).
   (5) The use of sea mines is restricted (1907 Hague Convention).
   (6) The use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects is prohibited or restricted: 1890 Convention, with Protocols I (non-detectable fragments), II (prohibitions or restrictions on the use of mines, booby-traps and other devices) and III (prohibitions and restrictions on the use of incendiary weapons).

D. The ICRC also wishes to point out that the use of weapons . . . of mass destruction is subject to the general rules of international humanitarian law and in particular the basic principle of the distinction between combatants and civilians and the immunity of the latter from attack.

E. The ICRC invites states which are not party to the 1977 Protocol I to respect, in the event of armed conflict, the following articles of the Protocol, which stem from the basic principle of civilian immunity from attack:

(1) Article 54: Protection of objects indispensable to the survival of the civilian population;
(2) Article 55: Protection of the natural environment;
(3) Article 56: Protection of works and installations containing dangerous forces.

5. Respect For The Emblem And Medical Activities

A. The Red Cross and Red Crescent emblems must be respected in all circumstances. Medical and religious personnel, ambulances, hospitals and other medical units and means of transport shall in particular be identified by one of the emblems and respected accordingly.
B. The States concerned shall comply with the provisions of the 1949 Geneva Conventions relating to such protection. . . .
C. The States concerned are also invited to observe the rules of 1977 Protocol I which supplement these provisions. . . .

6. Dissemination Of International Humanitarian Law—It is extremely important for the members of armed forces stationed in the Gulf to be aware of their obligations under international humanitarian law. Proper instructions must be issued to this effect. The teaching of the law to the armed forces is, moreover, an obligation expressly stipulated by the Geneva Conventions and their additional Protocols.

7. Role Of The ICRC And Obligations Of States

A. The ICRC's primary function is to protect and assist military and civilian victims of armed conflicts. It also has the task of working for the faithful application of international humanitarian law.
B. As a specifically neutral and independent institution, the ICRC may also act as a neutral intermediary.
C. International humanitarian law entrusts the ICRC with certain specific tasks.
D. With regard to prisoners of war protected under the third Geneva Convention, the ICRC wishes to point out in particular the obligation of the detaining power to register

and notify prisoners of war to the ICRC by the most rapid means (Article 122). The same obligation exists for civilians deprived of their liberty under the fourth Geneva Convention (Article 137).

E. The wounded, the sick and the dead of the adverse party protected under the first Convention must also be registered and notified to the ICRC (Article 16). The second Geneva Convention contains a similar provision (Article 19), relating to the shipwrecked as well as the wounded, the sick and the dead.

F. In accordance with Articles 126 and 143 of the third and fourth Geneva Conventions respectively, the ICRC is entitled to visit all prisoners of war and civilians protected under the fourth Geneva Convention and to speak with them in private.

G. The ICRC reaffirms the need to apply international humanitarian law in the event of armed conflict and remains at the disposal of the States concerned to contribute, as far as its means allow, to the implementation of the humanitarian rules and to perform the tasks entrusted to it by international humanitarian law.

8. Following comments clarify U.S. interpretations regarding ICRC memorandum:

A. Paragraph 3A. Iraq and all nations participating as allies of the U.S. in Desert Shield Operations are parties to the four Geneva Conventions of August 12, 1949.

B. Paragraph 3C(4). As noted in U.N. Security Council Resolutions 666, 670, and 674, the fourth Geneva Convention is regarded as applicable to the Iraqi occupation of Kuwait.

C. Paragraph 4A. For military political and humanitarian reasons, the United States in 1987 announced that it would not become a party to the 1977 Protocol I additional to the 1949 Geneva Conventions; therefore, the U.S. is not bound by Protocol I. The U.S. signed Protocol II (dealing with internal armed conflict) and submitted it to the Senate for its advice and consent to ratification in 1987, which remains pending. As Iraq is not a party to Protocols I and

II, the obligations of those treaties are not binding upon any nation involved in combat operations against Iraq. However, as Kuwait is a party to Protocol II, the standards set forth in Article 4, 5, and 6 thereof may be regarded as guidelines for minimum human rights standards within Kuwait once restoration of Kuwait begins. . . .

D. Paragraph 4B, second sentence. The ICRC statement that "the following general rules are recognized as binding . . ." is misleading. Some are viewed as not binding, while some statements require substantial qualification or clarification. The following comments are offered in clarification.

E. Paragraph 4B(1). The obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such. An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population, consistent with mission accomplishment and allowable risk to the attacking force. A defender must exercise reasonable precaution to separate the civilian population and civilian objects from military objectives. Civilians must exercise reasonable precaution to remove themselves from the vicinity of military objectives or military operations. The force that has control over the civilians has an obligation to place them in a safe place. In no case may a combatant force utilize individual civilians or the civilian population to shield a military objective from attack. A nation that utilizes civilians to shield a target from attack assumes responsibility for their injury, so long as an attacker exercises reasonable precaution in executing its operations. Likewise, civilians working within or in the immediate vicinity of a legitimate military objective assume a certain risk of injury.

F. Paragraph 4B(2). "Feasible precautions" are reasonable precautions, consistent with mission accomplishment and allowable risk to attacking forces. While collateral damage to civilian objects should be minimized, consistent with the above, collateral damage to civilian objects should not be given the same level of concern as incidental injury to

civilians. Measures to minimize collateral damage to civilian objects should not include steps that will place U.S. and allied lives at greater or unnecessary risk. The concept of "incidental loss of life excessive in relation to the military advantage anticipated" generally is measured against an overall campaign. While it is difficult to weigh the possibility of collateral civilian casualties on a target-by-target basis, minimization of collateral civilian casualties is a continuing responsibility at all levels of the targeting process. Combat is a give-and-take between attacker and defender, and collateral civilian casualties are likely to occur notwithstanding the best efforts of either party. What is prohibited is wanton disregard for possible civilian casualties.

G. Paragraph 4B(3). The weapons and tactics employed by U.S. forces are entirely consistent with the law of war obligations of the United States.

H. Paragraph 4B(4) contains the language of Article 57(3) of Protocol I, and is not a part of customary law. The provision applies "when a choice is possible . . . ;" it is not mandatory. An attacker may comply with it if it is possible to do so, subject to mission accomplishment and allowable risk, or he may determine that it is impossible to make such a determination.

I. Paragraph 4B(5). A warning need not be specific. It may be a blanket warning, delivered by leaflets and/or radio, advising the civilian population of an enemy nation to avoid remaining in proximity to military objectives. The "unless circumstances do not permit" recognizes the importance of the element of surprise. Where surprise is important to mission accomplishment and allowable risk to friendly forces, a warning is not required.

J. Paragraphs 4B(6) through (8). U.S. practice is consistent with the obligations/prohibitions stated. With respect to 4B(7), the protections stated apply to all aircrew rather than pilots only.

K. Paragraphs 4C(1) and (2). The U.S. accepts the prohibition on chemical weapons contained in the 1925 Geneva Gas Protocol as binding upon first use only. Use of chemical

weapons, riot control agents and chemical herbicides are governed by Executive Order 11850, as implemented by JSCAP. The U.S. unilaterally renounced the use of biological/bacteriological weapons in 1969.

L. Paragraphs 4C(3) through (5). No U.S. weapon or employment doctrine violates the provisions stated in these paragraphs. All weapons in the U.S. inventory are lawful. None are subject to any special employment consideration(s) beyond those set forth in comments E. and F. above.

M. Paragraph 4C(6). Neither the United States nor Iraq is a party to the 1980 Conventional Weapons Convention. While the treaty is not regarded as binding in the present crisis, U.S. forces meet their law of war obligations regarding weapons employment through the general provisions E. and F. above.

N. Paragraph 4D. U.S. practice is consistent with this paragraph.

O. Paragraph 4E(1). U.S. practice does not involve methods of warfare that have as their intention the starvation of the enemy civilian population.

P. Paragraph 4E(2). U.S. practice does not involve methods of warfare that would constitute widespread, long-term and severe damage to the environment.

Q. Paragraph 4E(3). While the U.S. shares the concern expressed in Article 56 of Protocol I regarding carrying out an attack against a target that may result in release of "dangerous forces," targeting decisions regarding the attack of such facilities are policy decisions that must be made based upon all relevant factors. Military objectives may not be placed in proximity to structures containing "dangerous forces" in order to shield those military objectives from attack. The U.S. does not recognize a protected status for enemy air and ground defenses placed in proximity to structures containing such "dangerous forces."

R. Paragraph 5. The U.S. agrees with these provisions. It is noted, however, that . . . the technical means of protection for medical transports are limited in their effect, particularly

in an electronic warfare environment. In a meeting of nations at Geneva in August 1990, the provisions of Annex I to Protocol I were found to be inadequate. Moreover, a revised Annex I to Protocol I, not yet approved by any nation, states (in part) that these technical means are provided merely to facilitate identification of medical transportation, and are not intended to provide protection as such.

S. Paragraph 6. The U.S. strongly supports this paragraph. DOD Directive 5100.77, in implementation of U.S. law of war obligations, requires that all military personnel receive law of war training commensurate with their duties and responsibilities. This training is a command responsibility.

T. Paragraph 7. The obligations set forth in this paragraph generally are subject to the consent of the parties to the conflict, as noted in Article 9 of the GPW and 10 of the GC. Although the U.S. historically has called upon the ICRC to assist it in implementation of the provisions of the 1949 Geneva Conventions, ultimately any decision to seek assistance of the ICRC or any other humanitarian organization is subject to the consent of the parties to the conflict in general and the host nation in particular.

(2) Treatment of prisoners of war

On January 19, 1991, Central Command for the coalition forces announced the capture of Iraqi prisoners of war ("POWs") by coalition forces. The United States then advised Iraq, by diplomatic note, that the United States would abide by its obligations under the 1949 Geneva Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), and that the United States expected Iraq to do the same. The United States also reminded Iraq of its obligations generally under the law of armed conflict. The January 19 diplomatic note read in full as follows.

The Government of the United States calls upon the Government of Iraq to respect its obligations under the international laws of armed conflict, including the Geneva Conventions on the protection of the victims of war and the Hague Conventions on the conduct of hostilities on land and at sea. The Government of the United States expects the Government of Iraq to respect its obligations under the Geneva Protocol of 1925 not to use chemical or biological weapons.

Hostilities must be conducted in a manner so as to minimize injury to civilians. The civilian population, as such, as well as individual civilians, should not be the object of attack. Medical personnel, medical facilities and hospital ships must be respected and protected at all times. In Resolution 670 and 674, the United Nations Security Council specifically called upon Iraq to abide by its obligations under the Fourth Geneva Convention.

The Government advises the Government of Iraq that the United States intends to treat captured members of the Armed Forces of Iraq in accordance with the Geneva Convention Relative to the Protection of Prisoners of War. Iraqi prisoners of war will not be mistreated and will be provided humane and safe detention and medical care. They will not be exposed to danger, insults or public curiosity. They will not be maltreated or misused to obtain military information or for propaganda purposes. They will not be denied food, water, or medical treatment. They will be safeguarded against harm during combat operations.

The United States expects Iraq to provide the same treatment to members of the U.S. and other coalition Armed Forces captured by Iraq, in accordance with Iraq's obligations under the Geneva Conventions. We specifically expect the Government of Iraq to provide documentation on prisoners of war in accordance with the Convention and to provide the International Committee of the Red Cross with access to prisoners of war, as will be done by the United States.

The Government of the United States reminds the Government of Iraq that under international law, violations of the Geneva Conventions, the Geneva Protocol of 1926, or related international laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecutions at any time, without

any statute of limitations. This includes members of the Iraqi Armed Forces and civilian government officials.

By the next day, January 20, the United States had information that Iraq was holding U.S. POWs under conditions contrary to the GPW. By diplomatic note of that date, the United States protested the apparent mistreatment of U.S. POWs and reminded Iraq that such mistreatment constituted a war crime. The United States demanded full Iraqi compliance with the GPW and requested immediate access for the International Committee of the Red Cross to any POWs held by Iraq. The January 20 diplomatic note to Iraq follows in full.

On January 19, 1991, the Government of the United States informed the Government of Iraq that it intends to treat members of the Iraqi Armed Forces fully in accordance with the Third Geneva Convention Relative to the Protection of Prisoners of War, and that the United States expected Iraq also to comply fully with this humanitarian convention.

The Government of the United States has heard audio recordings of Iraqi television broadcasts which purport to be interviews with captured American and coalition military personnel, and has heard other accounts of such broadcasts. The Government of Iraq appears to have subjected these men to unlawful treatment for propaganda purposes and coercion—physical and mental—in order to secure information and statements from them. If these broadcasts are authentic, Iraq has committed serious violations of the Third Geneva Convention.

The Government of the United States protests the apparently unlawful coercion and misuse of prisoners of war for propaganda purposes, the failure to respect their honor and well-being, and the subjection of such individuals to public humiliation. All of these actions are in violation of the Convention.

The mistreatment of prisoners of war is a war crime, and the inhumane treatment of prisoners of war is a grave breach of the Convention. The United States demands that Iraq immediately

desist from any further illegal action and that it respect its obligations under the Geneva Convention.

The Government of the United States again reminds the Government of Iraq that prisoners of war must at all times be humanely treated and must be afforded food, water, clothing, and every guarantee of hygiene and healthfulness. It is requested that the International Committee of the Red Cross, which has representatives in Baghdad, be provided immediate access to any prisoners of war.

On January 21, the United States sent an additional diplomatic note, responding to information that the Government of Iraq intended to locate coalition POWs in Iraq at likely strategic targets of coalition forces. In the note, provided in full below, the United States protested any move to endanger coalition POWs.

Baghdad radio has reported that the Government of Iraq intends to locate United States and Iraqi prisoners at likely strategic targets of coalition forces. The United States strongly protests the Government of Iraq's threat to so endanger POWs.

Under Article 19 of the Third Geneva Convention, prisoners of war are to be evacuated as soon as possible after their capture to camps situated in an area away from the combat zone, so that they will be out of danger. Under Article 23 of the Third Geneva Convention, no prisoner of war may be sent to, or detained in, areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations. Moreover, prisoners of war are to have shelters against air bombardment and other hazards of war to the same extent as the local civilian population. Iraqi POWs captured by the United States will be accorded these protections.

The United States and other coalition forces are only attacking targets of military value in Iraq; the civilian population, as such, is not the object of attack. Consequently the Government of Iraq is capable of placing coalition POWs in areas where military attacks will not occur.

If the Government of Iraq places coalition POWs at military targets in Iraq, then the Government of Iraq will be in violation of the Third Geneva Convention, and Iraqi officials—whether members of the Iraqi Armed Forces or civilian government personnel—will have committed a serious war crime. The Government of the United States reminds the Government of Iraq that Iraqi individuals who are guilty of such war crimes, as well as other war crimes such as the exposure of POWs to mistreatment, coerced statements, public curiosity and insult, are personally liable and subject to prosecution at any time.

(3) Department of Defense report to Congress on role of the law of armed conflict

Section 501 of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102–25, 105 Stat. 75 (codified as amended in scattered sections of 10 U.S.C.), required the Department of Defense to submit to Congress a report on the conduct of hostilities in the Persian Gulf. Section 501(b)(12) required that the report contain a discussion of "[t]he role of the law of armed conflict in the planning and execution of military operations by United States forces and the other coalition forces and the effects on operations of Iraqi compliance or noncompliance with the law of armed conflict. . . ." Pursuant to Section 501, the Department of Defense submitted the report to Congress on April 10, 1992. Appendix O to the report, addressing the role of the law of war in the conflict, *reprinted in* 31 I.L.M. 612 (1992), is excerpted below.

THE ROLE OF THE LAW OF WAR

BACKGROUND

The United States, its Coalition partners, and Iraq are parties to numerous law of war treaties intended to minimize unnecessary suffering by combatants and noncombatants during war. The US

military's law of war program is one of the more comprehensive in the world. As indicated in this appendix, it is US policy that its forces will conduct military operations in a manner consistent with US law of war obligations. This appendix discusses the principal law of war issues that arose during Operation Desert Storm.

As defined in Joint Publication 1–02, Department of Defense (DOD) Dictionary of Military and Associated Terms (1 December 1989), the law of war is "That part of international law that regulates the conduct of armed hostilities. It is often termed the law of armed conflict." While the terms are synonymous, this appendix will use "law of war" for consistency. Both concepts of jus ad bellum and jus in bello are covered in this appendix.

In addition to the United Nations Charter, with its prohibition against the threat or use of force against the territorial integrity or political independence of any state, treaties applicable to the Persian Gulf War include:

- Hague Convention IV and its Annex Respecting the Laws and Customs of War on Land of 18 October 1907 ("Hague IV").
- Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907 ("Hague V").
- Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines of 18 October 1907 ("Hague VIII").
- Hague Convention IX Concerning Bombardment by Naval Forces in Time of War of 18 October 1907 ("Hague IX").
- Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925 ("1925 Geneva Protocol").
- Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ("the Genocide Convention").
- The four Geneva Conventions for the Protection of War Victims of August 12, 1949:

- Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field ("GWS").
- Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter "GWS [Sea]").
- Geneva Convention Relative to the Treatment of Prisoners of War ("GPW").
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("GC").
- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 ("1954 Hague"). Since Iraq, Kuwait, France, Egypt, Saudi Arabia, and other Coalition members are parties to this treaty, the treaty was binding between Iraq and Kuwait, and between Iraq and those Coalition members in the Persian Gulf War. Canada, Great Britain, and the United States are not parties to this treaty. However, the armed forces of each receive training on its provisions, and the treaty was followed by all Coalition forces in the Persian Gulf War.

The United States is a party to all of these treaties, except the 1954 Hague Cultural Property Convention. While Iraq is not a party to Hague IV, the International Military Tribunal (Nuremberg, 1946) stated with regard to it that:

> The rules of land warfare expressed in . . . [Hague IV] undoubtedly represented an advance over existing International Law at the time of their adoption . . . but by 1939 these rules . . . were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.

As customary international law, its obligations are binding upon all nations. Neither is Iraq a party to Hague V, Hague VIII, or Hague IX. However, the provisions of each cited herein are

regarded as a reflection of the customary practice of nations, and therefore binding upon all nations.

The United States, other Coalition members, and Iraq are parties to the 1925 Geneva Protocol which prohibits the use of chemical (CW) or bacteriological (biological) weapons (BW) in time of war. Both Iraq and the United States filed a reservation to this treaty at the time of their respective ratifications. Iraq's reservation accepted the 1925 Geneva Protocol as prohibiting first use of CW or BW weapons; the United States, having unilaterally renounced the use of BW in 1969, accepted without reservation the prohibition on BW and first use of CW. (The United States also is a party to the Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological [Biological] and Toxin Weapons and on Their Destruction of 10 April 1972; Iraq is not.) All nations party to the Persian Gulf conflict, including Iraq, are parties to the four 1949 Geneva Conventions for the protection of war victims. The precise applicability of these treaties will be addressed in the discussion of each topic in this appendix.

Three other law of war treaties were not legally applicable in the Persian Gulf War, but nonetheless bear mention. They are:

- 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("ENMOD Convention"). While the United States and many of its Coalition partners are parties to this treaty, Iraq has signed but not ratified the ENMOD Convention; therefore it was not legally applicable to Iraqi actions during the Persian Gulf War.
- 1977 Protocol I Additional to the Geneva Conventions of 12 August 1949 ("Protocol I"). From 1974 to 1977 the United States and more than 100 other nations participated in a Diplomatic Conference intended to supplement the 1949 Geneva Conventions and modernize the law of war. That conference produced two new law of war treaties: Protocol I deals with the law of war in international armed conflicts, while Protocol II addresses the law of war applicable to internal armed conflicts. Iraq and several

Coalition members, including the United States, Great Britain, and France, are not parties to Protocol I; therefore it was not applicable during the Persian Gulf War. For humanitarian, military, and political reasons, the United States in 1987 declined to become a party to Protocol I; France reached a similar decision in 1984.

- 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. Iraq and most of the Coalition partners, including the United States, are not parties to this treaty; it had no applicability in the Persian Gulf War. However, US and Coalition actions were consistent with its language. Iraqi actions were consistent with the treaty except as to its provisions on land mines and booby traps.

* * * *

TAKING OF HOSTAGES

Whatever the purpose, whether for intimidation, concessions, reprisal, or to render areas or legitimate military objects immune from military operations, the taking of hostages is unequivocally and expressly prohibited by Article 34, GC.[1]

Applicability of the GC was triggered by Iraq's invasion of Kuwait on 2 August; thereafter Iraq was an Occupying Power in Kuwait, with express obligations. Under articles 5, 42, and 78, GC, Iraq could intern foreign nationals only if internal security made it "absolutely necessary" (in Iraq) or "imperative" (in Kuwait). Iraq asserted no rights under any of these provisions in defense of its illegal taking of hostages in Iraq and Kuwait.

United Nations Security Council (UNSC) Resolution 664 (18 August) overrode authority inconsistent with its obligations under the GC that Iraq might have claimed to restrict the departure of US citizens and other third-country nationals in Kuwait or Iraq, and clarified the legal status of noncombatants.

---

[1] The United States is party to the International Convention Against Taking of Hostages of 17 December 1979, under which hostage taking is identified as an act of international terrorism.

Hostage taking by Iraq can be divided into four categories:

- The taking of Kuwaiti nationals as hostages and individual and mass forcible deportations to Iraq, in violation of Articles 34 and 49, GC;
- The taking of third-country nationals in Kuwait as hostages and individual and mass forcible deportations from Kuwait to Iraq, in violation of Articles 34 and 49, GC;
- The taking of foreign nationals within Iraq as hostages, with individual and mass forcible transfers, in violation of Articles 34 and 35, GC; and
- Compelling Kuwaiti and other foreign citizens to serve in the armed forces of Iraq, in violation of Article 51, GC.

The taking of hostages, their unlawful deportation, and compelling hostages to serve in the armed forces of Iraq constitute Grave Breaches (that is, major violations of the law of war) under Article 147, GC.

US and other hostages in Iraq, including civilians forcibly deported from Kuwait, were placed in or around military targets as "human shields", in violation of Articles 28 and 38(4), GC. . . .

* * * *

TREATMENT OF CIVILIANS IN OCCUPIED TERRITORY

The GC governs the treatment of civilians in occupied territories. As previously indicated, all parties to the conflict, including Iraq, are parties to this convention. The treaty's application was triggered by the Iraqi invasion, and was specifically recognized in UNSC resolutions that addressed that crisis.

An earlier law of war treaty that remains relevant is Hague IV, which contains regulations relating to the protection of civilian property (public and private) in occupied territory; in contrast, the GC sets forth the obligations of an occupying power in providing protection for civilians in occupied territory. Cultural property in Kuwait also was protected by the 1954 Hague Cultural Property Convention.

Iraqi actions read like a very long list of violations of Hague IV, GC, and the 1954 Hague Cultural Property Convention. From

the beginning of its invasion of Kuwait, Iraq exhibited an intent not only to refuse to conduct itself as an occupying power, but to deny that it was an occupying power. Its intention was to annex Kuwait as a part of Iraq, and remove any vestige of Kuwait's previous existence as an independent, sovereign nation. (Its transfer of a part of its own civilian population into occupied Kuwait for the purpose of annexation and resettlement constitutes a violation of Article 49, GC.)

A case can be made that Iraqi actions may violate the Genocide Convention, which defines genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group; or
- Forcibly transferring children of the group to another group.

Iraq carried out every act of the types condemned by the Genocide Convention, except for forcibly transferring children. Many Kuwaiti citizens were deported forcibly to Iraq; many others were tortured and/or murdered. There were instances of Kuwaiti women of child-bearing age being brutally rendered incapable of having children. Collective executions of innocent Kuwaiti civilians took place routinely. Kuwaiti public records were removed or destroyed, apparently to prevent or impede the reconstitution of Kuwait if Kuwait were liberated. Kuwaiti identification cards and license plates were revoked and replaced with Iraqi credentials, identifying Kuwait as Iraq's 19th province.

In violation of Hague IV and the 1954 Hague Cultural Property Convention, cultural, private and public (municipal and national) property was confiscated; pillage was widespread. (Confiscation of private property is prohibited under any circumstance, as is the

confiscation of municipal public property. Confiscation of movable national public property is prohibited without military need and cash compensation, while immovable national public property may be temporarily confiscated under the concept of usufruct—the right to use another's property so long as it is not damaged.)

Iraqi confiscation appears to have been primarily, if not entirely, part of a program:

- Of erasing any record of the sovereign state of Kuwait;
- Of looting directed by the Iraqi leadership to provide consumer goods for the Iraqi public; and
- Of looting by individual Iraqi soldiers, which was tolerated by Iraqi military commanders and higher civilian and military authorities.

Civilians who remained in Kuwait were denied the necessities for survival, such as food, water, and basic medical care, in violation of Articles 55 and 56, GC. Kuwaiti doctors were forcibly deported to Iraq; Filipino nurses working in the hospitals were raped repeatedly by Iraqi soldiers. Kuwaiti civilians were not permitted any medical care unless they presented Iraqi identification cards; presentation of an Iraqi identification card by a Kuwaiti citizen seldom resulted in any genuine medical care. Medical supplies and equipment in Kuwaiti hospitals necessary for the needs of the civilian population of Kuwait were illegally taken, in violation of Article 57, GC, in brutal disregard for Kuwaiti lives. . . .

The slightest perceived offense could lead to torture and execution of the purported offender, often in front of family members. Torture and murder of civilians is prohibited by Article 32, GC. Iraqi policy provided for the collective punishment of the family of any individual who served in or was suspected of assisting the Kuwaiti resistance. This punishment routinely took the form of destruction of the family home and execution of all family members. Collective punishment is prohibited expressly by Article 33, GC.

The Iraqi occupation remained brutal until the very end; civilians were murdered in the final days of that occupation to eliminate witnesses to Iraqi repression. The Government of Kuwait

estimates that 1,082 civilians were murdered during the occupation. Many more were forcibly deported to Iraq; several thousand remain missing. On their departure, Iraqi forces set off previously placed explosive charges on Kuwait's oil wells, a vengeful act of wanton destruction.

Coalition forces acted briefly as an occupying power. When the Operation Desert Storm ground offensive began, Coalition forces moved into Iraq. Physical seizure and control of Iraqi territory triggered the application of Hague IV and the GC. Both treaties initially had little practical application, since Coalition forces occupied uninhabited desert. As hostilities diminished, the internal conflict that erupted in Iraq caused thousands of civilians to flee the fighting (such as in Al-Basrah, between Iraqi military units and Shi'ite forces) and to enter territory held by Coalition forces. Allied forces provided food, water and medical care to these refugees. As Coaltion forces prepared to withdraw from Iraq, no international relief agency was ready to assume this relief effort. Consequently, refugees were offered the opportunity to move to the refugee camp at Rafha, Saudi Arabia. Approximately 20,000 refugees (including more than 8,000 from the Safwan area) accepted this offer.

In the conflict's latter phases, public and private international relief agency representatives entered the area of conflict, often without sufficient advance notification and coordination with Coalition authorities. While relief agencies undoubtedly were anxious to perform humanitarian missions, their entry onto the battlefield without the advance consent of the parties to the conflict is not consistent with Article 9, GWS (a provision common to all four 1949 Geneva Conventions), Article 125, GPW, and Article 63, GC. It impeded Coalition efforts to end hostilities as rapidly as possible, and placed these organizations' members at risk from the ongoing hostilities. Coalition aviation units searching for mobile Scud missile launchers in western Iraq were inhibited in their efforts to neutralize that threat by vehicles from those organizations moving through Scud missile operating areas that otherwise were devoid of civilians. The lack of timely, proper coordination by relief agencies with Coalition forces adversely affected air strikes against other Iraqi targets on other occasions. While well-intentioned, these

intrusions required increased diligence by Coalition forces, placed Coalition forces at increased risk, and were factors in the failure to resolve the Scud threat.

Whether in territory Coalition forces occupied or in parts of Iraq still under Iraqi control, US and Coalition operations in Iraq were carefully attuned to the fact those operations were being conducted in an area encompassing "the cradle of civilization," near many archaeological sites of great cultural significance. Coalition operations were conducted in a way that balanced maximum possible protection for those cultural sites against protection of Coalition lives and accomplishment of the assigned mission.

While Article 4(1) of the 1954 Hague Convention provides specific protection for cultural property, Article 4(2) permits waiver of that protection where military necessity makes such a waiver imperative; such "imperative military necessity" can occur when an enemy uses cultural property and its immediate surroundings to protect legitimate military targets, in violation of Article 4(1). Coalition forces continued to respect Iraqi cultural property, even where Iraqi forces used such property to shield military targets from attack. However, some indirect damage may have occurred to some Iraqi cultural property due to the concussive effect of munitions directed against Iraqi targets some distance away from the cultural sites.

Since US military doctrine is prepared consistent with US law of war obligations and policies, the provisions of Hague IV, GC, and the 1954 Hague Convention did not have any significant adverse effect on planning or executing military operations.

TARGETING, COLLATERAL DAMAGE AND CIVILIAN CASUALTIES

The law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination; that is, the necessity for distinguishing between combatants, who may be attacked, and noncombatants, against whom an intentional attack may not be directed, and between legitimate military targets and civilian objects. Although this is a major part of the foundation on which the law of war is built, it is one of the least codified portions of that law.

As a general principle, the law of war prohibits the intentional destruction of civilian objects not imperatively required by military necessity and the direct, intentional attack of civilians not taking part in hostilities. The United States takes these proscriptions into account in developing and acquiring weapons systems, and in using them in combat. Central Command (CENTCOM) forces adhered to these fundamental law of war proscriptions in conducting military operations during Operation Desert Storm through discriminating target selection and careful matching of available forces and weapons systems to selected targets and Iraqi defenses, without regard to Iraqi violations of its law of war obligations toward the civilian population and civilian objects.

Several treaty provisions specifically address the responsibility to minimize collateral damage to civilian objects and injury to civilians. Article 23(g) of the Annex to Hague IV prohibits destruction not "imperatively demanded by the necessities of war," while Article 27 of that same annex offers protection from intentional attack to "buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." Similar language is contained in Article 5 of Hague IX, while the conditions for protection of cultural property in the 1954 Hague Cultural Property Convention were set forth in the preceding discussion on the treatment of civilians in occupied territory. In summary, cultural and civilian objects are protected from direct, intentional attack unless they are used for military purposes, such as shielding military objects from attack.

While the prohibition contained in Article 23(g) generally refers to intentional destruction or injury, it also precludes collateral damage of civilian objects or injury to noncombatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives, as discussed below. As previously indicated, Hague IV was found to be part of customary international law in the course of war crimes trials following World War II, and continues to be so regarded.

An uncodified but similar provision is the principle of proportionality. It prohibits military action in which the negative

effects (such as collateral civilian casualties) clearly outweigh the military gain. This balancing may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives. CENTCOM conducted its campaign with a focus on minimizing collateral civilian casualties and damage to civilian objects. Some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects.

Coalition forces took several steps to minimize the risk of injury to noncombatants. To the degree possible and consistent with allowable risk to aircraft and aircrews, aircraft and munitions were selected so that attacks on targets within populated areas would provide the greatest possible accuracy and the least risk to civilian objects and the civilian population. Where required, attacking aircraft were accompanied by support mission aircraft to minimize attacking aircraft aircrew distraction from their assigned mission. Aircrews attacking targets in populated areas were directed not to expend their munitions if they lacked positive identification of their targets. When this occurred, aircrews dropped their bombs on alternate targets or returned to base with their weapons.

One reason for the maneuver plan adopted for the ground campaign was that it avoided populated areas, where Coalition and Iraqi civilian casualties and damage to civilian objects necessarily would have been high. This was a factor in deciding against an amphibious assault into Kuwait City.

The principle of proportionality acknowledges the unfortunate inevitability of collateral civilian casualties and collateral damage to civilian objects when noncombatants and civilian objects are mingled with combatants and targets, even with reasonable efforts by the parties to a conflict to minimize collateral injury and damage.

This proved to be the case in the air campaign. Despite conducting the most discriminate air campaign in history, including extraordinary measures by Coalition aircrews to minimize collateral civilian casualties, the Coalition could not avoid causing some collateral damage and injury.

There are several reasons for this. One is the fact that in any modern society, many objects intended for civilian use also may be used for military purposes. A bridge or highway vital to daily commuter and business traffic can be equally crucial to military traffic, or support for a nation's war effort. Railroads, airports, seaports, and the interstate highway system in the United States have been funded by the Congress in part because of US national security concerns, for example; each proved invaluable to the movement of US military units to various ports for deployment to Southwest Asia (SWA) for Operations Desert Shield and Desert Storm. Destruction of a bridge, airport, or port facility, or interdiction of a highway can be equally important in impeding an enemy's war effort.

The same is true with regard to major utilities; for example, microwave towers for everyday, peacetime civilian communications can constitute a vital part of a military command and control (C2) system, while electric power grids can be used simultaneously for military and civilian purposes. Some Iraqi military installations had separate electrical generators; others did not. Industries essential to the manufacturing of CW, BW and conventional weapons depended on the national electric power grid.

Experience in its 1980–1988 war with Iran caused the Government of Iraq to develop a substantial and comprehensive degree of redundancy in its normal, civilian utilities as back-up for its national defense. Much of this redundancy, by necessity, was in urban areas. Attack of these targets necessarily placed the civilian population at risk, unless civilians were evacuated from the surrounding area. Iraqi authorities elected not to move civilians away from objects they knew were legitimate military targets, thereby placing those civilians at risk of injury incidental to Coalition attacks against these targets, notwithstanding efforts by the Coalition to minimize risk to innocent civilians.

When objects are used concurrently for civilian and military purposes, they are liable to attack if there is a military advantage to be gained in their attack. ("Military advantage" is not restricted to tactical gains, but is linked to the full context of a war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait.)

Attack of all segments of the Iraqi communications system was essential to destruction of Iraqi military C2. C2 was crucial to Iraq's integrated air defense system; it was of equal importance for Iraqi ground forces. Iraqi C2 was highly centralized. With Saddam Hussein's fear of internal threats to his rule, he has discouraged individual initiative while emphasizing positive control. Iraqi military commanders were authorized to do only that which was directed by highest authority. Destruction of its C2 capabilities would make Iraqi combat forces unable to respond quickly to Coalition initiatives.

Baghdad bridges crossing the Euphrates River contained the multiple fiberoptic links that provided Saddam Hussein with secure communications to his southern group of forces. Attack of these bridges severed those secure communication links, while restricting movement of Iraqi military forces and deployment of CW and BW warfare capabilities. Civilians using those bridges or near other targets at the time of their attack were at risk of injury incidental to the legitimate attack of those targets.

Another reason for collateral damage to civilian objects and injury to civilians during Operation Desert Storm lay in the policy of the Government of Iraq, which purposely used both Iraqi and Kuwaiti civilian populations and civilian objects as shields for military objects. Contrary to the admonishment against such conduct contained in Article 19, GWS, Articles 18 and 28, GC, Article 4(1), 1954 Hague, and certain principles of customary law codified in Protocol I (discussed below), the Government of Iraq placed military assets (personnel, weapons, and equipment) in civilian populated areas and next to protected objects (mosques, medical facilities, and cultural sites) in an effort to protect them from attack. For this purpose, Iraqi military helicopters were dispersed into residential areas; and military supplies were stored in mosques, schools, and hospitals in Iraq and Kuwait. Similarly, a cache of Iraqi Silkworm surface-to-surface missiles was found inside a school in a populated area in Kuwait City. UN inspectors uncovered chemical bomb production equipment while inspecting a sugar factory in Iraq. The equipment had been moved to the site to escape Coalition air strikes. This intentional mingling of military objects with civilian objects naturally placed the civilian population

living nearby, working within, or using those civilian objects at risk from legitimate military attacks on those military objects.

The Coalition targeted specific military objects in populated areas, which the law of war permits; at no time were civilian areas as such attacked. Coalition forces also chose not to attack many military targets in populated areas or in or adjacent to cultural (archaeological) sites, even though attack of those military targets is authorized by the law of war. The attack of legitimate Iraqi military targets, notwithstanding the fact it resulted in collateral injury to civilians and damage to civilian objects, was consistent with the customary practice of nations and the law of war.

The Government of Iraq sought to convey a highly inaccurate image of indiscriminate bombing by the Coalition through a deliberate disinformation campaign. Iraq utilized any collateral damage that occurred—including damage or injury caused by Iraqi surface-to-air missiles and antiaircraft munitions falling to earth in populated areas—in its campaign to convey the misimpression that the Coalition was targeting populated areas and civilian objects. This disinformation campaign was factually incorrect, and did not accurately reflect the high degree of care exercised by the Coalition in attack of Iraqi targets.

* * * *

Minimizing collateral damage and injury is a responsibility shared by attacker and defender. Article 48 of the 1977 Protocol I provides that:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Paragraph one of Article 49 of Protocol I states that " 'Attacks' means acts of violence against the adversary, whether in offense or defense." Use of the word "attacks" in this manner is etymologically inconsistent with its customary use in any of the

six official languages of Protocol I. Conversely, the word "attack" or "attacks" historically has referred to and today refers to offensive operations only. Article 49(1) otherwise reflects the applicability of the law of war to actions of both attacker and defender, including the obligation to take appropriate measures to minimize injury to civilians not participating in hostilities.

* * * *

In the effort to minimize collateral civilian casualties, a substantial responsibility for protection of the civilian population rests with the party controlling the civilian population. Historically, and from a common sense standpoint, the party controlling the civilian population has the opportunity and the responsibility to minimize the risk to the civilian population through the separation of military objects from the civilian population, evacuation of the civilian population from near immovable military objects, and development of air raid precautions. Throughout World War II, for example, both Axis and Allied nations took each of these steps to protect their respective civilian populations from the effects of military operations.

The Government of Iraq elected not to take routine air-raid precautions to protect its civilian population. Civilians were not evacuated in any significant numbers from Baghdad, nor were they removed from proximity to legitimate military targets. There were air raid shelters for less than 1 percent of the civilian population of Baghdad. The Government of Iraq chose instead to use its civilians to shield legitimate military targets from attack, exploiting collateral civilian casualties and damage to civilian objects in its disinformation campaign to erode international and US domestic support for the Coalition effort to liberate Kuwait.

The presence of civilians will not render a target immune from attack; legitimate targets may be attacked wherever located (outside neutral territory and waters). An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population or damage to civilian objects, consistent with mission accomplishment and allowable risk to the attacking forces. The defending party must exercise reasonable precautions to separate the civilian population and civilian objects from military objectives,

and avoid placing military objectives in the midst of the civilian population. As previously indicated, a defender is expressly prohibited from using the civilian population or civilian objects (including cultural property) to shield legitimate targets from attack.

The Government of Iraq was aware of its law of war obligations. In the month preceding the Coalition air campaign, for example, a civil defense exercise was conducted, during which more than one million civilians were evacuated from Baghdad. No government evacuation program was undertaken during the Coalition air campaign. As previously indicated, the Government of Iraq elected instead to mix military objects with the civilian population. Pronouncements that Coalition air forces would not attack populated areas increased Iraqi movement of military objects into populated areas in Iraq and Kuwait to shield them from attack, in callous disregard of its law of war obligations and the safety of its own civilians and Kuwaiti civilians.

Similar actions were taken by the Government of Iraq to use cultural property to protect legitimate targets from attack; a classic example was the positioning of two fighter aircraft adjacent to the ancient temple of Ur (as depicted in the photograph in Volume II, Chapter VI, "Off Limits Targets" section) on the theory that Coalition respect for the protection of cultural property would preclude the attack of those aircraft. While the law of war permits the attack of the two fighter aircraft, with Iraq bearing responsibility for any damage to the temple, Commander-in-Chief, Central Command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple. Other cultural property similarly remained on the Coalition no-attack list, despite Iraqi placement of valuable military equipment in or near those sites.

Undoubtedly, the most tragic result of this intentional commingling of military objects with the civilian population occurred in the 13 February attack on the Al-Firdus Bunker (also sometimes referred to as the Al-'Amariyah bunker) on Baghdad.

Originally constructed during the Iran-Iraq War as an air raid shelter, it had been converted to a military C2 bunker in the middle of a populated area. While the entrance(s) to a bomb shelter permit easy and rapid entrance and exit, barbed wire had been placed around the Al-Firdus bunker, its entrances had been secured to prevent unauthorized access, and armed guards had been posted. It also had been camouflaged. Knowing Coalition air attacks on targets in Baghdad took advantage of the cover of darkness, Iraqi authorities permitted selected civilians—apparently the families of officer personnel working in the bunker—to enter the Al-'Amariyah Bunker at night to use the former air raid shelter part of the bunker, on a level above the C2 center. Coalition authorities were unaware of the presence of these civilians in the bunker complex. The 13 February attack of the Al-'Amariyah bunker—a legitimate military target—resulted in the unfortunate deaths of those Iraqi civilians who had taken refuge above the C2 center.

An attacker operating in the fog of war may make decisions that will lead to innocent civilians' deaths. The death of civilians always is regrettable, but inevitable when a defender fails to honor his own law of war obligations—or callously disregards them, as was the case with Saddam Hussein. In reviewing an incident such as the attack of the Al-'Amariyah bunker, the law of war recognizes the difficulty of decision making amid the confusion of war. Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight.

Protocol I establishes similar legal requirements. Articles 51(7) and 58 of the 1977 Protocol I expressly prohibit a defender from using the civilian population or individual civilians to render certain points or areas immune from military operations, in particular in an attempt to shield military objectives from attack or to shield, favor or impede military operations; obligate a defender to remove the civilian population, individual civilians and civilian objects under the defender's control from near military objectives; avoid locating military objectives within or near densely populated areas; and to take other necessary precautions to protect the civilian population, individual civilians and civilian objects under its control against the dangers resulting from military operations.

It is in this area that deficiencies of the 1977 Protocol I become apparent. As correctly stated in Article 51(8) of Protocol I, a nation confronted with callous actions by its opponent (such as the use of "human shields") is not released from its obligation to exercise reasonable precaution to minimize collateral injury to the civilian population or damage to civilian objects. This obligation was recognized by Coalition forces in the conduct of their operations. In practice, this concept tends to facilitate the disinformation campaign of a callous opponent by focusing international public opinion upon the obligation of the attacking force to minimize collateral civilian casualties and damage to civilian objects—a result fully consistent with Iraq's strategy in this regard. This inherent problem is worsened by the language of Article 52(3) of Protocol I, which states:

> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

This language, which is not a codification of the customary practice of nations, causes several things to occur that are contrary to the traditional law of war. It shifts the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts, i.e., from defender to attacker. This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian population, individual civilians and civilian objects from military objectives, as the Government of Iraq illustrated during the Persian Gulf War.

In the case of the Al-Firdus bunker, for example—repeatedly and incorrectly referred to by the Government of Iraq and some media representatives as a "civilian bomb shelter"—the Coalition forces had evidence the bunker was being used as an Iraqi command and control center and had no knowledge it was concurrently being used as a bomb shelter for civilians. Under the rule of international

law known as military necessity, which permits the attack of structures used to further an enemy's prosecution of a war, this was a legitimate military target. Coalition forces had no obligation to refrain from attacking it. If Coalition forces had known that Iraqi civilians were occupying it as a shelter, they may have withheld an attack until the civilians had removed themselves (although the law of war does not require such restraint). Iraq had an obligation under the law of war to refrain from commingling its civilian population with what was an obviously military target. Alternatively, Iraq could have designated the location as a hospital, safety zone, or a neutral zone, as provided for in Articles 14 and 15, GC.

ENEMY PRISONER OF WAR PROGRAM

This section contains similar information to that contained in Appendix L, but is a more condensed version of that appendix, with emphasis on the legal aspects of the Enemy Prisoner of War (EPW) program. Appendix L used the same base information as Appendix O, but expands to include more operational issues.

Coalition care for EPWs was in strict compliance with the 1949 Geneva Convention relative to the treatment of Prisoners of War (hereafter "GPW"). Centralized management of EPW operations began during Operation Desert Shield and continued throughout Operation Desert Storm. The US National Prisoner of War Information Center (NPWIC) became operational before ground operations began and a new automated information program for preserving, cataloging, and accounting for captured personnel (as required by the GPW) was fielded in Operation Desert Shield. Trained Reserve Component (RC) EPW units were activated, and camp advisory teams were sent to Saudi Arabia to account for and to provide technical assistance on custody and treatment of US-transferred EPWs.

EPWs captured by Coalition forces during Operations Desert Shield and Desert Storm were maintained in either a US or Saudi EPW camp. The United States accepted EPWs captured by the United Kingdom (UK) and France, while Saudi Arabia managed a consolidated camp for those EPWs captured by the remaining Coalition forces.

* * * *

US and other Coalition forces treated EPWs and displaced civilians in accordance with the 1949 Geneva Conventions for the Protection of War Victims. The first three conventions mandate humane treatment and full accountability for all prisoners of war from the moment of capture until their repatriation, release, or death. The fourth convention (GC) requires humane treatment for displaced civilians. The International Committee of the Red Cross (ICRC) was provided access to Coalition EPW facilities and reviewed their findings with Coalition representatives in periodic meetings in Riyadh, Saudi Arabia. While US and Coalition forces worked closely with the ICRC on EPW matters throughout Operation Desert Storm, neither the ICRC nor any other human rights organization played any other role affecting the course of the war. The ICRC was ineffective in providing any protection for US and Coalition POWs in Iraq's custody.

NPWIC was established at the Pentagon during Operation Desert Shield using active duty personnel and became fully operational with Reserve staffing on 21 January. Its mission was to account for EPWs in US custody and to ensure compliance with the 1949 Geneva Conventions. Article 122, GPW requires a captor to establish a National Information Bureau within the shortest time possible after the onset of hostilities. The NPWIC, manned by Army Reserve Individual Mobilization Augmentees, volunteer Reservists and retired personnel, served as a central repository for information relative to EPWs captured by or transferred to US forces, and coordinated information pertaining to EPWs and US POWs in Iraqi hands with the ICRC.

The US and Saudi governments concluded an agreement which allowed the US to transfer captured EPWs to Saudi control after processing by US EPW elements. This agreement was applicable to EPWs captured by the French and British, as those EPWs were processed and maintained in US EPW camps. The US provided camp advisory teams to work with the Government of Saudi Arabia to assist in compliance with the 1949 Geneva Conventions, to facilitate logistic and administrative cooperation, and to maintain accountability for US-transferred EPWs. The size of the host nation EPW camps limited the number of EPWs the United States could transfer, and required that EPWs remain longer in US EPW camps.

After active hostilities ended, in order to transfer all EPWs still under US control, the Brooklyn (West) EPW camp, along with its EPWs, was transferred to the Saudi Arabian National Guard.

* * * *

Eight EPWs died while in US custody, all as a result of injuries or sickness contracted before capture. One died of malnutrition/dehydration, five as a result of injuries or wounds, and two from unknown causes. Three US-transferred EPWs died in Saudi Arabian camps from wounds received in the Saudi camp, either during an EPW riot or inflicted by another EPW. These deaths were investigated and reported to the ICRC, as required by Articles 120, 122, and 123, GPW.

When Operation Desert Storm began, psychological operations were undertaken to encourage maximum defection or surrender of Iraqi forces. Leaflets to be used as safe conduct passes were widely disseminated over and behind Iraqi lines with great success.

Photographs and videotapes of the first Iraqi EPWs captured were taken and shown by the public media. The capture or detention of EPWs is recognized as newsworthy events and, as such, photography of such events is not prohibited by the GPW. However, Article 13, GPW does prohibit photography that might humiliate or degrade any EPW. Media use of photographs of EPWs raised some apprehension in light of formal US condemnation of the forced videotapes of US and Coalition POWs being made and shown by Iraq. CENTCOM and other DOD officials also expressed concern for the safety of the family of any Iraqi defector who might be identified from media photographs by Iraqi officials. Because of these sensitivities, and consistent with Article 13, GPW, DOD developed guidelines for photographing EPWs. These guidelines limited both the opportunities for photography and the display of EPW photographs taken, while protecting Iraqi EPWs and their families from retribution by the Government of Iraq.

Operation Desert Storm netted a large number of persons thought to be EPWs who were actually displaced civilians. Subsequent interrogations determined that they were innocent civilians who had taken no hostile action against Coalition forces. In some cases, individuals had surrendered to Coalition forces to

receive food, water, and lodging, while others were captured because they appeared to be part of hostile forces. Tribunals were conducted to verify the status of detainees.* Upon determination of their status as innocent civilians, detainees were transferred from US custody to Safwan, a US-operated refugee camp, or to Rafha, a Saudi Arabian refugee camp.

In March, Coalition forces and Iraqi military representatives signed an agreement for the repatriation of prisoners of war, to be conducted under ICRC auspices. Repatriation of EPWs not in medical channels occurred at Judaydat Ar-ar, near the Jordanian border. Those in medical channels were flown directly to Baghdad on ICRC aircraft.

TREATMENT OF PRISONERS OF WAR

US and Coalition personnel captured by Iraq were POWs protected by the GWS (if wounded, injured, or sick) and GPW. All US POWs captured during the Persian Gulf War were moved to Baghdad by land after their capture. With some exceptions, depending on their location at the time of capture, their route usually was through Kuwait City to Al-Basrah and then on to Baghdad. Those taken to Kuwait City and Al-Basrah usually were detained there for no more than a few hours or overnight. Limited interrogation of POWs occurred in these cities. Although some were physically abused during their transit to Baghdad, most were treated reasonably well.

---

* Editors' Note: Appendix L contained the following description of compliance with Article 5 of GPW:

> Under Article 5 of the GPW, tribunals were conducted to determine whether civilians were entitled to be granted POW status. For those detainees whose status was questionable, tribunals were conducted to verify status, based upon the individual's relationship to the military and participation in the war. A total of 1,196 tribunal hearings were conducted. As a result, 310 persons were granted POW status; the others were determined to be displaced civilians and were treated as refugees. No civilian was found to have acted as an unlawful combatant.

On arrival in Baghdad, most Air Force, Navy, and Marine POWs were taken immediately to what the POWs referred to as "The Bunker" (most probably at the Directorate of Military Intelligence) for initial interrogation. They then were taken to what appeared to be the main long-term incarceration site, located in the Iraqi Intelligence Service Regional Headquarters (dubbed "The Biltmore" by the POWs). Since this building was a legitimate military target, the detention of POWs in it was a violation of Article 23, GPW; POWs thus were unnecessarily placed at risk when the facility was bombed on 23 February.

In contravention of Article 26, GPW, all US POWs incarcerated at the "Biltmore" experienced food deprivation. US POWs also were provided inadequate protection from the cold, in violation of Article 25, GPW.

After the 23 February bombing of the "Biltmore" by Coalition aircraft, the POWs were relocated to either Abu Abu Ghurayb Prison (dubbed "Joliet Prison") or Al-Rashid Military Prison ("The Half-Way House"), both near Baghdad. The Army POWs, on the other hand, were believed to have been sent directly to the Al-Rashid Military Prison, where they remained until their repatriation. All US POWs were repatriated from the Al-Rashid Military Prison. The detention of prisoners of war in a prison generally is prohibited by Article 22, GPW.

All US POWs suffered physical abuse at the hands of their Iraqi captors, in violation of Articles 13, 14, and 17, GPW. Most POWs were tortured, a grave breach, in violation of Article 130, GPW. Some POWs were forced to make public propaganda statements, in violation of Article 13. In addition, none was permitted the rights otherwise afforded them by the GPW, such as the right of correspondence authorized by Article 70. Although the ICRC had access to Iraqi EPWs captured by the Coalition, ICRC members did not see Coalition POWs until the day of their repatriation.

Lack of access to non-US Coalition POW debriefs precludes comment on their treatment. From US POW debriefings, it is known that several Coalition POWs, especially the Saudi and Kuwaiti pilots, were abused physically by their Iraqi captors, in violation of Articles 13 and 17, GPW.

Iraqi POW handling procedures and treatment of Coalition POWs were reasonably predictable, based on a study of Iraqi treatment of Iranians during the eight-year Iran-Iraq war. Iraqi mistreatment of Coalition POWs constituted a Grave Breach of the GPW, as set forth in Article 130 of that treaty.

REPATRIATION OF PRISONERS OF WAR

Article 118, GPW, establishes a POW's right to be repatriated. In conflicts since the GPW's adoption, this principle has become conditional: Each POW must consent to repatriation rather than being forced to return. This proved to be the case after hostilities in this war ended.

No EPW was forcibly repatriated. Coalition forces identified to the ICRC those Iraqi EPWs not desiring repatriation. Once an Iraqi EPW scheduled for repatriation reached the repatriation site, the ICRC reconfirmed his willingness to be repatriated. Those who indicated they no longer desired to return to Iraq were returned to the custody of the detaining power.

On 4 March, Iraq released the first group of 10 Coalition prisoners of war, six of whom were US personnel. The United States simultaneously released 294 Iraqi EPWs for repatriation to Iraq. Of the 294, 10 refused repatriation at the repatriation site and were returned to US custody.

Iraq and the Coalition forces continued repatriation actions through August 1991, at which time 13,318 Iraqi EPWs who refused repatriation remained under Saudi control. On 5 August 1991, Iraqi EPWs still refusing repatriation were reclassified as refugees by the United States (in coordination with Saudi Arabia and the ICRC), concluding application of the GPW.

When US custody of Iraqi EPWs ended, ICRC officials informed the 800th Military Police Brigade (PW) that the treatment of Iraqi EPWs by US forces was the best compliance with the GPW by any nation in any conflict in history. Coalition measures to comply with the GPW had no adverse effect on planning and executing military operations; if anything, by encouraging the surrender of Iraqi military personnel, they improved those operations.

USE OF RUSES AND ACTS OF PERFIDY

Under the law of war, deception includes those measures designed to mislead the enemy by manipulation, distortion, or falsification of evidence to induce him to react in a manner prejudicial to his interests. Ruses are deception of the enemy by legitimate means, and are specifically allowed by Article 24, Annex to Hague IV, and Protocol I. As correctly stated in Article 37(2) of Protocol I:

> Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of [the law of war] and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of ruses: the use of camouflage, decoys, mock operations and misinformation.

Coalition actions that convinced Iraqi military leaders that the ground campaign to liberate Kuwait would be focused in eastern Kuwait, and would include an amphibious assault, are examples of legitimate ruses. These deception measures were crucial to the Coalition's goal of minimizing the number of Coalition casualties and, in all likelihood, resulted in fewer Iraqi casualties as well.

In contrast, perfidy is prohibited by the law of war. Perfidy is defined in Article 37(1) of Protocol I as:

> Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the [law of war], with intent to betray that confidence. . . .

Perfidious acts include the feigning of an intent to surrender or negotiate under a flag of truce, or the feigning of protected status through improper use of the Red Cross or Red Crescent distinctive emblem.

Perfidious acts are prohibited on the basis that perfidy may damage mutual respect for the law of war, may lead to unnecessary

escalation of the conflict, may result in the injury or death of enemy forces legitimately attempting to surrender or discharging their humanitarian duties, or may impede the restoration of peace.

There were few examples of perfidious practices during the Persian Gulf War. The most publicized were those associated with the battle of Ras Al-Khafji, which began on 29 January. As that battle began, Iraqi tanks entered Ras Al-Khafji with their turrets reversed, turning their guns forward only at the moment action began between Iraqi and Coalition forces. While there was some media speculation that this was an act of perfidy, it was not; a reversed turret is not a recognized indication of surrender per se. Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only upon clear indication of hostile intent, or some hostile act.

However, individual acts of perfidy did occur. On one occasion, Iraqi soldiers waved a white flag and laid down their weapons. When a Saudi Arabian patrol advanced to accept their surrender, it was fired upon by Iraqi forces hidden in buildings on either side of the street. During the same battle, an Iraqi officer approached Coalition forces with his hands in the air, indicating his intention to surrender. When near his would-be captors, he drew a concealed pistol from his boot, fired, and was killed during the combat that followed.

Necessarily, these incidents instilled in Coalition forces a greater sense of caution once the ground offensive began. However, there does not appear to have been any centrally directed Iraqi policy to carry out acts of perfidy. The fundamental principles of the law of war applied to Coalition and Iraqi forces throughout the war. The few incidents that did occur did not have a major effect on planning or executing Coalition military operations.

WAR CRIMES

Iraqi war crimes were widespread and premeditated. They included the taking of hostages, forcible deportation, torture and murder of civilians, in violation of the GC; looting of civilian property in violation of Hague IV; looting of cultural property, in violation of the 1954 Hague Cultural Property Convention;

indiscriminate attacks in the launching of Scud missiles against cities rather than specific military objectives, in violation of customary international law; violation of Hague VIII in the method of using sea mines; and unnecessary destruction in violation of Article 23(g) of the Annex to Hague IV, as evidenced by the unlawful and wanton release of oil into the Persian Gulf and the unlawful and wanton sabotage of hundreds of Kuwaiti oil wells. The latter acts also constitute a violation of Article 53, GC and a Grave Breach under Article 147, GC.

As indicated earlier, the United States, Iraq, and the members of the Coalition that liberated Kuwait are parties to several law of war treaties. Each assumes good faith in its application and enforcement. Common Article 1 of the four 1949 Geneva Conventions for the Protection of War Victims requires that parties to those treaties "respect and ensure respect" for each of those treaties. The obligation to "respect and ensure respect" was binding upon all parties to the Persian Gulf War. It is an affirmative requirement to take all reasonable and necessary steps to bring individuals responsible for war crimes to justice. In a separate article common to the four 1949 Geneva Conventions, no nation has the authority to absolve itself or any other nation party to those treaties of any liability incurred by the commission of a Grave Breach (Article 50, GWS; Article 51, GWS (Sea); Article 130, GPW; and Article 147, GC).

The United States has one of the more comprehensive law of war programs in existence. DOD Directive 5100.77 is the foundation for the US military law of war program. It contains four policies:

- The law of war and obligations of the US Government under that law . . . [will be] observed and enforced by the US Armed Forces.
- A program, designed to prevent violations of the law of war . . . [will be] implemented by the US Armed Forces.
- Alleged violations of the law of war, whether committed by or against US or enemy personnel, . . . [will be] promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

- Violations of the law of war alleged to have been committed by or against allied military or civilian personnel shall be reported through appropriate military command channels for ultimate transmission to appropriate agencies of allied governments.

The Joint Staff, each military department, the unified and specified commands, and subordinate commands have issued implementing directives. It is within this framework that war crimes investigations were conducted in the course of Operations Desert Shield and Desert Storm.

* * * *

Interagency meetings in late August established a process for informal coordination on war crimes issues, and ensured policy makers were kept informed. On 15 October, the President warned Iraq of its liability for war crimes. The United States was successful in incorporating into UNSC Resolution 674 (29 October) language regarding Iraq's accountability for its war crimes, in particular its potential liability for Grave Breaches of the GC, and inviting States to collect relevant information regarding Iraqi Grave Breaches and provide it to the Security Council.

* * * *

Following Iraq's breach of international peace and security by its invasion of Kuwait, the UNSC, in Resolution 667, decided to take further concrete measures "in response to Iraq's continued violation of the [UN] Charter, of resolutions of the Council and of international law." Specific Iraqi war crimes include:

- The taking of Kuwaiti nationals as hostages, and their individual and mass forcible deportation to Iraq, in violation of Articles 34, 49 and 147, GC.
- The taking of third-country nationals in Kuwait as hostages, and their individual and mass forcible deportation to Iraq, in violation of Articles 34, 49, and 147, GC.
- The taking of third-country nationals in Iraq as hostages, and their individual and mass forcible transfer within Iraq, in violation of Articles 34, 35, and 147, GC.

- Compelling Kuwaiti and other foreign nationals to serve in the armed forces of Iraq, in violations of Articles 51 and 147, GC.
- Use of Kuwaiti and third country nationals as human shields in violation of Articles 28 and 38(4), GC.
- Inhumane treatment of Kuwaiti and third country civilians, to include rape and willful killing, in violation of Articles 27, 32 and 147, GC.
- As noted previously, possible violation of the Genocide Convention, through acts committed with the intent to destroy, in whole or in part, a national group (that is, the Kuwaiti people).
- The transfer of its own civilian population into occupied Kuwait, in violation of Article 49, GC.
- Torture and other inhumane treatment of POWs, in violation of Articles 13, 17, 22, 25, 26, 27, and 130, GPW.
- Using POWs as a shield to render certain points immune from military operations, in violation of Article 23, GPW.
- Unnecessary destruction of Kuwaiti private and public property, in violation of Article 23 (g), Annex to Hague IV.
- Pillage, in violation of Article 47, Annex to Hague IV.
- Illegal confiscation/inadequate safeguarding of Kuwaiti public property, in violation of Article 55, Annex to Hague IV, and Article 147, GC.
- Pillage of Kuwaiti civilian hospitals, in violation of Articles 55, 56, 57, and 147, GC.
- In its indiscriminate Scud missile attacks, unnecessary destruction of Saudi Arabian and Israeli property, in violation of Article 23 (g), Annex to Hague IV.
- In its intentional release of oil into the Persian Gulf and its sabotage of the Al-Burqan and Ar-Rumaylah oil fields in Kuwait, unnecessary destruction in violation of Articles 23 (g) and 55, Annex to Hague IV, and Articles 53 and 147, GC.
- In its use of drifting naval contact mines and mines lacking devices for their self-neutralization in the event of their breaking loose from their moorings, in violation of Article 1, Hague VIII.

Iraq is a party to the 1925 Geneva Protocol, which prohibits use of CW/BW. Iraq, through its reservation at the time of ratification, pledged no first use of either CW or BW. Although Iraq did not use CW/BW in this war, it violated this treaty in its 1980–88 war against Iran. During the Persian Gulf War, Iraq threatened the use of CW/BW and deployed CW. Although prepared to do so, Iraqi forces did not use either of these weapons of mass destruction during this conflict, perhaps in part due to the success of Coalition efforts to destroy Iraqi CW/BW capabilities, Iraqi C2, and Iraq's inability to move its weapons to forward sites.

Article 29, GC, states that "The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred." Similarly, Article 12, GPW, declares that "Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them." Responsibility for the treatment (and mistreatment) of civilian detainees and POW in Iraqi hands, clearly lay with the Government of Iraq and its senior officials.

Criminal responsibility for violations of the law of war rests with a commander, including the national leadership, if he (or she):

- Orders or permits the offense to be committed, or
- Knew or should have known of the offense (s), had the means to prevent or halt them, and failed to do all which he was capable of doing to prevent the offenses or their recurrence.

In addition, the invasion of Kuwait was ordered by Saddam Hussein and is a crime against peace for which he, as well as the Ba'ath Party leadership and military high command, bear direct responsibility.

The crimes committed against Kuwaiti civilians and property, and against third party nationals, are offenses for which Saddam Hussein, officials of the Ba'ath Party, and his subordinates bear

direct responsibility. However, the principal responsibility rests with Saddam Hussein. Saddam Hussein's C2 of Iraqi military and security forces appeared to be total and unequivocal. There is substantial evidence that each act alleged was taken as a result of his orders, or was taken with his knowledge and approval, or was an act of which he should have known.

It is important to note that, with the possible exception of the Coalition's need to direct considerable effort toward the hunt for Iraqi Scud missiles, no Iraqi action leading to or resulting in a violation of the law of war gained Iraq any military advantages. This "negative gain from negative actions" in essence reinforces the validity of the law of war.

ENVIRONMENTAL TERRORISM

Between seven and nine million barrels of oil were set free in the Gulf by Iraqi action. Five hundred ninety oil well heads were damaged or destroyed. 508 were set on fire, and 82 were damaged so that oil was flowing freely from them.

There has been international examination of these acts. From 9 to 12 July 1991, the Government of Canada, working with the UN Secretary General, hosted a conference of international experts in Ottawa to consider Iraq's wanton acts of destruction and their law of war implications. There was general agreement the actions constituted violations of the law of war, namely:

- Article 23g of the Annex to Hague IV, which forbids the destruction of "enemy property, unless . . . imperatively demanded by the necessities of war;" and
- Article 147 of the GC, which makes a Grave Breach the "extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly."

The Ottawa Conference of Experts also noted UNSC Resolution 687 (3 April 1991), which reaffirmed that Iraq was liable under international law to compensate any environmental damage and the depletion of natural resources.

Other treaties the Conference of Experts considered were the ENMOD Convention and the 1977 Protocol I, articles 35 and 55

of which contain provisions for the protection of the environment. It was the general conclusion of the experts that the former did not apply to actions of the kinds perpetrated by Iraq, while the latter was not applicable during the Persian Gulf War for reasons previously stated.

Even had Protocol I been in force, there were questions as to whether the Iraqi actions would have violated its environmental provisions. During that treaty's negotiation, there was general agreement that one of its criteria for determining whether a violation had taken place ("long term") was measured in decades. It is not clear the damage Iraq caused, while severe in a layman's sense of the term, would meet the technical-legal use of that term in Protocol I. The prohibitions on damage to the environment contained in Protocol I were not intended to prohibit battlefield damage caused by conventional operations and, in all likelihood, would not apply to Iraq's actions in the Persian Gulf War.

The Ottawa Conference of Experts did not conclude that new laws or treaties were required; rather, it was the belief of those present that respect for and enforcement of the existing law of war was of greatest importance.

* * * *

. . . Review of Iraqi actions makes it clear the oil well destruction had no military purpose, but was simply punitive destruction at its worst. . . .

CONDUCT OF NEUTRAL NATIONS

Neutrality normally is based on a nation's proclamation of neutrality or assumption of a neutral posture with respect to a particular conflict. Iran and Jordan each issued proclamations of neutrality during the Persian Gulf crisis and, as described, refrained from active participation in the war. Other nations, such as Austria and Switzerland, enjoy relative degrees of international guarantees of their neutrality.

Neutrality in the Persian Gulf War was controlled in part by the 1907 Hague V Convention; but traditional concepts of neutral rights and duties are substantially modified when, as in this case,

the United Nations authorizes collective action against an aggressor nation.

It was the US position during the Persian Gulf crisis that, regardless of assertions of neutrality, all nations were obligated to avoid hindrance of Coalition operations undertaken pursuant to, or in conjunction with, UNSC decisions, and to provide whatever assistance possible. By virtue of UNSC Resolution 678 (29 November), members were requested "to provide appropriate support for the actions undertaken" by nations pursuant to its authorization of use of all necessary means to uphold and implement prior resolutions. The language of UNSC Resolution 678 is consistent with Articles 2(5), 2(6), 25, and 49 of the UN Charter. Article 2(5) states:

> All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

Article 2(6) provides:

> The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

Article 25 provides:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 49 declares:

> The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

This section focuses on the conduct of Jordan, Iran, India and traditionally neutral European nations (primarily Austria and Switzerland) during the course of the hostilities, and the effect of Coalition maritime interceptions on neutral shipping.

UNSC Resolution 661, which called for an economic embargo of Iraq, pursuant to Article 41 of the UN Charter, obligated all member nations to refrain from aiding Iraq. The declarations of "neutrality" by Jordan and Iran were subordinate to their obligation as UN members to comply with UNSC resolutions. Although Jordan's attitude toward Iraq and the Coalition appeared inconsistent with its UN obligations, mere sympathy for one belligerent does not constitute a violation of traditional neutral duties, nor even a rejection of the obligations imposed by the UNSC resolutions cited. Conduct is the issue.

There were reports that Jordan supplied materials (including munitions) to Iraq during Operations Desert Shield and Desert Storm. Furnishing supplies and munitions to a belligerent traditionally has been regarded as a violation of a neutral's obligations. In this case, it would have been an even more palpable contravention of Jordan's obligations—both because of the request of UNSC Resolution 678 that all States support those seeking to uphold and implement the relevant resolutions, and because the sanctions Resolution 661 established expressly prohibited the supply of war materials to Iraq.

As the US became aware of specific allegations of Jordanian failure to comply with UNSC sanctions, they were raised with the Government of Jordan. Some were without foundation; some were substantiated. Regarding the latter, the Government of Jordan acted to stop the actions and reassured the United States those instances had been the result of individual initiative rather than as a result of government policy. Such logistical assistance as Jordan may have provided Iraq did not substantially improve Iraq's ability to conduct operations, nor did it have an appreciable effect on Coalition forces' operational capabilities.

During actual hostilities, Saudi Arabia stopped pumping oil to Jordan; Jordan obtained petroleum from Iraq, taking delivery by truck. Although not a violation of a neutral's duties under traditional principles of international law, such purchases were inconsistent with UNSC Resolutions 661 and 678. While the

Jordanian importation of oil products from Iraq did not substantially affect Coalition military operations, additional steps were required by Coalition forces to protect Iraqi and Jordanian civilians from the risks of military operations. Jordan imported Iraqi oil by truck across roads in western Iraq during the day and night. These oil trucks were commingled with military and civilian vehicles. At night, some oil trucks were mistaken for mobile Scud launchers or other military vehicles; other trucks and civilian vehicles were struck incidental to attack of legitimate military targets.

This collateral damage and injury, which occurred despite previously described Coalition efforts to minimize damage to civilian objects and injury to noncombatant civilians, is attributable to Jordan's failure to ensure adherence to UNSC sanctions and to warn its nationals of the perils of travel on main supply routes in a combat zone. It also is attributable to mixing of Iraqi military vehicles and convoys with Jordanian civilian traffic traveling in Iraq. Coalition forces continued to take reasonable precautions to minimize collateral damage to civilian vehicles and incidental injury to noncombatant civilians. As a result, the ability to target Iraqi military vehicles and convoys, including mobile Scud missile launchers and support equipment, was impeded.

Iran's conduct during Operations Desert Shield and Desert Storm essentially was consistent with that expected of a neutral under traditional principles of international law, including Hague V. Immediately after the Operation Desert Storm air campaign began, many Iraqi civil and military aircraft began fleeing to Iran, presumably to avoid damage or destruction by Coalition air forces. Under Article 11 of Hague V and traditional law of war principles regarding neutral rights and obligations, when belligerent military aircraft land in a nation not party to a conflict, the neutral must intern the aircraft, aircrew, and accompanying military personnel for the duration of the war. Both Switzerland and Sweden took such actions in the course of World War II, for example, with respect to Allied and German aircraft and aircrews. Some civil (and possibly some military) transport aircraft may have returned to Iraq. With respect to tactical aircraft, however, it appears Iran complied with the traditional obligations of a neutral. US forces nonetheless remained alert to the possibility of a flanking attack by Iraqi aircraft operating from Iran.

Although the situation never arose, the United States advised Iran that, in light of UNSC Resolution 678, Iran would be obligated to return downed Coalition aircraft and aircrew, rather than intern them. This illustrates the modified nature of neutrality in these circumstances. It also was the US position that entry into Iranian (or Jordanian) airspace to rescue downed aviators would be consistent with its international obligations as a belligerent, particularly in light of Resolution 678.

On several occasions, Iran protested alleged entry of its airspace by Coalition aircraft or missiles. The United States expressed regret for any damage that may have occurred within Iranian territory by virtue of inadvertent entry into Iranian airspace. The US replies did not, however, address whether Iranian expectations of airspace inviolability were affected by UNSC Resolution 678.

Although military aircraft must gain permission to enter another State's airspace (except in distress), both Switzerland and Austria routinely granted such clearance for US military transport aircraft prior to the Iraqi invasion of Kuwait. Early in the Persian Gulf crisis, the United States approached the Governments of Austria and Switzerland, seeking permission for overflight of US military transport aircraft carrying equipment and personnel to SWA. Despite initial misgivings, based upon their traditional neutrality, each nation assented. That there was a reluctance to grant permission early in the crisis—that is, when the United States was not involved in the hostilities, and thus not legally a belligerent—demonstrates that the view by these two States of neutrality may be more expansive than the traditional understanding of the role of neutrality in the law of war. At the same time, while Switzerland is not a UN member, its support for the US effort (through airspace clearances for US military aircraft) preceded UNSC Resolution 678.

Given their reluctance to permit pre-hostilities overflights, it was natural to expect that Switzerland and Austria would weigh very carefully any requests for overflights once offensive actions began, which each did. In light of the UNSC request that all States support the efforts of those acting to uphold and implement UNSC resolutions, each government decided that overflights by US military transport aircraft would not be inconsistent with its neutral

obligations. Accordingly, permission for overflights was granted, easing logistical support for combat operations.

In contrast, overflight denial by the Government of India required Marine combat aviation assets in the Western Pacific to fly across the Pacific, the continental US, the Atlantic, and through Europe to reach SWA, substantially increasing the transit route. Air Force transport aircraft delivering ammunition to the theater of operations also were denied overflight permission.

UNSC Resolution 661 directed member states to prevent the import or transshipment of materials originating in Iraq or Kuwait, and further obligated member states to prevent imports to or exports from Iraq and Kuwait. In support of Resolution 661, on 16 August, the United States ordered its warships to intercept all ships believed to be proceeding to or from Iraq or Kuwait, and all vessels bound to or from ports of other nations carrying materials destined for or originating from Iraq or Kuwait. On 25 August, the Security Council adopted Resolution 665, which called upon UN members to enforce sanctions by means of a maritime interception operation. This contemplated intercepting so-called "neutral" shipping as well as that of non-neutral nations. These resolutions modified the obligation of neutral powers to remain impartial with regard to Coalition UN members.

The law of war regarding neutrality traditionally permits neutral nations to engage in non-war-related commerce with belligerent nations. During the Persian Gulf crisis, however, the Coalition Maritime Interception Force (MIF) was directed to prevent all goods (except medical supplies and humanitarian foodstuffs expressly authorized for Iraqi import by the UNSC Sanctions Committee) from leaving or entering Iraqi-controlled ports or Iraq, consistent with the relevant UNSC resolutions. The claim of neutral status by Iran and Jordan, or any of the traditional neutral nations, did not adversely affect the conduct of the Coalition's ability to carry out military operations against Iraq.

THE CONCEPT OF "SURRENDER" IN THE CONDUCT OF COMBAT OPERATIONS

The law of war obligates a party to a conflict to accept the surrender of enemy personnel and thereafter treat them in

accordance with the provisions of the 1949 Geneva Conventions for the Protection of War Victims. Article 23(d) of Hague IV prohibits the denial of quarter, that is the refusal to accept an enemy's surrender, while other provisions in that treaty address the use of flags of truce and capitulation.

However, there is a gap in the law of war in defining precisely when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or an individual soldier) and an ability to accept on the part of his opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon—an attempt at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

A combatant force involved in an armed conflict is not obligated to offer its opponent an opportunity to surrender before carrying out an attack. To minimize Iraqi and Coalition casualties, however, the Coalition engaged in a major psychological operations campaign to encourage Iraqi soldiers to surrender before the Coalition ground offensive. Once that offensive began, the Coalition effort was to defeat Iraqi forces as quickly as possible to minimize the loss of Coalition lives. In the process, Coalition forces continued to accept legitimate Iraqi offers of surrender in a manner consistent with the law of war. The large number of Iraqi prisoners of war is evidence of Coalition compliance with its law of war obligations with regard to surrendering forces.

* * * *

2. Cease-fire and Post-Gulf War Activity in Iraq

a. Cease-fire

On March 3, 1991, Iraqi and coalition military commanders reached a truce agreement on the cessation of hostilities in the Persian Gulf, including restoration of the Iraq-Kuwait border. On April 3, 1991, the UN Security Council acted under

Chapter VII of the UN Charter to adopt Resolution 687, U.N. Doc. S/RES/687 (1991), which set forth the terms of a formal cease-fire. That resolution provided in part as follows.

The Security Council,

* * * *

Affirming the commitment of all Member States to the sovereignty, territorial integrity and political independence of Kuwait and Iraq, and noting the intention expressed by the Member States cooperating with Kuwait under paragraph 2 of resolution 678 (1990) to bring their military presence in Iraq to an end as soon as possible consistent with paragraph 8 of resolution 686 (1991),

* * * *

Bearing in mind its objective of restoring international peace and security in the area as set out in recent resolutions of the Security Council,

* * * *

1. Affirms all thirteen resolutions [adopted between August 2, 1990 and March 2, 1991], except as expressly changed below to achieve the goals of this resolution, including a formal cease-fire;

2. Demands that Iraq and Kuwait respect the inviolability of the international boundary and the allocation of islands set out in the "Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters", signed by them in the exercise of their sovereignty at Baghdad on 4 October 1963 and registered with the United Nations and published by the United Nations in document 7063, United Nations, Treaty Series, 1964;

* * * *

5. Requests the Secretary-General, after consulting with Iraq and Kuwait, to submit within three days to the Security Council for its approval a plan for the immediate deployment of a United Nations observer unit to monitor the Khor Abdullah and a

demilitarized zone, which is hereby established . . . ; to deter violations of the boundary through its presence in and surveillance of the demilitarized zone . . . ;

6. Notes that as soon as the Secretary-General notifies the Security Council of the completion of the deployment of the United Nations observer unit, the conditions will be established for the Member States cooperating with Kuwait in accordance with resolution 678 (1990) to bring their military presence in Iraq to an end consistent with resolution 686 (1991);

* * * *

33. Declares that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990);

34. Decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.

* * * *

Part C of the resolution addressed Iraq's weapons of mass destruction. Sections 8 and 12 are set forth below.

8. Decides that Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:

(a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities;

(b) All ballistic missiles with a range greater than 150 kilometres and related major parts, and repair and production facilities;

* * * *

12. Decides that Iraq shall unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above . . . ; to accept . . . urgent on-site inspection and the destruction, removal or rendering harmless as appropriate of all items specified above . . . ;

Among other things, Part C also required Iraq to declare fully its weapons of mass destruction programs and to "unconditionally undertake not to use, develop, or construct or acquire any [weapons of mass destruction]"; provided for the establishment of a Special Commission to verify the elimination of Iraq's chemical and biological weapons (UNSCOM) and mandated that the International Atomic Energy Agency verify elimination of Iraq's nuclear weapons program; and invited Iraq to reaffirm its obligations under the Nuclear Non-Proliferation Treaty, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, and the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 95, and to ratify the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, TIAS No. 8062.

As discussed in Chapter 8.A.9., Part E of the resolution provided for payment of damages and claims arising from Iraq's unlawful invasion of Kuwait. Under Part G, the Council required Iraq to cooperate with the International Committee of the Red Cross to locate missing Kuwaitis and third-State nationals and to cooperate with all Red Cross activities.

Part H of Resolution 687 required Iraq "to inform the Security Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism."

b. Security Council response to humanitarian crisis

Shortly after the cessation of hostilities in Iraq, Kurdish rebels seized control of several towns in northern Iraq. In response, Iraqi forces launched a harsh counteroffensive that included the use of napalm and chemical attacks. Fearful that Iraq would continue to use force against them, more than one million Kurdish refugees fled for Iran and Turkey. On April 5, 1991, the Security Council responded to the humanitarian crisis with Resolution 688, U.N. Doc. S/RES/688 (1991). This resolution, not adopted under Chapter VII, condemned Iraq's repression of its civilian population and, specifically, of its Kurdish population, and asked member states to assist the Kurds and other refugees in northern Iraq. The resolution also demanded that Iraq cooperate with any relief efforts. Excerpts from Resolution 688 provide as follows.

The Security Council,

* * * *

Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas which led to a massive flow of refugees towards and across international frontiers and to cross border incursions, which threaten international peace and security in the region,

Deeply disturbed by the magnitude of the human suffering involved,

* * * *

1. Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region;

2. Demands that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression and expresses the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected;

3. Insists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations;

* * * *

6. Appeals to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts;

7. Demands that Iraq cooperate with the Secretary-General to these ends;

* * * *

c. Establishment and enforcement of no-fly zones

(1) Northern no-fly zone

In response to Resolution 688, a combined task force of U.S., French, and British forces instituted Operation Provide Comfort (later known as Operation Northern Watch), based out of Incirlik Air Base in Turkey, to provide humanitarian relief in northern Iraq. The task force dropped its first supplies to Kurdish refugees on April 7, 1991. On April 10, U.S. officials advised Iraq that, to ensure that Iraqi planes would not impede the relief effort, Iraq was not to fly any planes in Iraq north of the 36th parallel. In June 1991, as Provide Comfort ground units began withdrawing from northern Iraq, the United States restated its earlier ban on Iraqi flights north of the 36th parallel. In testimony before the Subcommittee on Europe and the Middle East, House Foreign Affairs Committee, on June 17, 1991, Assistant Secretary of State for Near Eastern and South Asian Affairs John H. Kelly explained that the purposes of the ban were to protect the Kurds from further aggression and to monitor Iraqi compliance with Resolutions 687 and 688, as excerpted below. 2 Dep't St. Dispatch No. 25 at 459 (June 24, 1991), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

In response to the massive outflow of refugees fleeing Saddam Hussein's repression, the United States on April 7 launched "Operation Provide Comfort" which, together with similar efforts by many of our coalition partners and allies, saved the lives of uncounted numbers of Kurdish refugees. The initial aims of "Operation Provide Comfort" have largely been met. These include supply of food and shelter to remote mountain camps, construction of transit camps, and the establishment of conditions to facilitate the safe return of refugees to their homes in northern Iraq.

We do not intend to maintain US troops in northern Iraq any longer than necessary. . . . The UN assumed administrative authority for the relief operation on June 7. We expect US forces to withdraw from Iraq as their mission in the relief operation is completed.

An extensive UN presence is mandated by UNSC Resolution 688, which requires Iraq to provide access to those in need of assistance in all parts of Iraq. Behind UNSC Resolution 688 are the enforcement provisions of Resolution 687 dealing with conditions to alleviate sanctions and reparations; the Iraqi government knows that the international community, in monitoring Iraq's compliance with UNSC Resolution 688, will take into account its treatment of Iraqi citizens.

* * * *

(2) Southern no-fly zone

In August 1992, in response to Iraq's attacks on the Shi'a population in southern Iraq, the coalition imposed a second no-fly zone over the Iraqi territory south of the 32nd parallel. A combined task force, Operation Southern Watch, was instituted to protect the zone. On August 26, President H.W. Bush made the following statement with respect to the second no-fly zone. 28 WEEKLY COMP. PRES. DOC. 1512 (Aug. 26, 1992).

---

* * * *

. . . In recent weeks and months, we have heard and seen new evidence of harsh repression by the government of Saddam Hussein

against the men, women, and children of Iraq. What emerges from eyewitness accounts, as well as from the detailed August 11 testimony before the UN Security Council of UN human rights envoy Max van der Stoel, is further graphic proof of Saddam's brutality.

We now know of Saddam's use of helicopters and, beginning this spring, fixed-wing aircraft to bomb and strafe civilians and villages there in the south, his execution last month of merchants in Baghdad, and his gradual tightening of the economic blockade against the people of the north. These reports are further confirmation that the Government of Iraq is failing to meet its obligations under UN Security Council Resolution 688.

This resolution, passed in April of 1991, demands that Saddam Hussein end repression of the Iraqi people. By denying access to human rights monitors and other observers, Saddam has sought to prevent the world from learning of his brutality. It is time to ensure the world does know.

And, therefore, the United States and its coalition partners have today informed the Iraqi Government that 24 hours from now, coalition aircraft, including those of the United States, will begin flying surveillance missions in southern Iraq, south of the 32 degrees north latitude, to monitor the situation there. This will provide coverage of the areas where a majority of the most significant recent violations of Resolution 688 have taken place.

The coalition is also informing Iraq's government that in order to facilitate these monitoring efforts, it is establishing a "no-fly zone" for all Iraqi fixed- and rotary-wing aircraft. This new prohibition will also go into effect in 24 hours over this same area. It will remain in effect until the coalition determines that it is no longer required.

It will be similar to the "no-fly zone" the collation imposed on northern Iraq more than 1 year ago. I want to emphasize that these actions are designed to enhance our ability to monitor developments in southern Iraq. These actions are consistent with long-standing US policy toward Iraq. We seek Iraq's compliance, not its partition.

The United States continues to support Iraq's territorial unity and bears no ill will toward its people. We continue to look forward

to working with a new leadership in Baghdad, one that does not brutally suppress its own people and violate the most basic norms of humanity. Until that day, no one should doubt our readiness to respond decisively to Iraq's failure to respect the "no-fly zone."

Moreover, the United States and our coalition partners are prepared to consider additional steps should Saddam continue to violate this or other UN resolutions. . . .

d. Enforcement of no-fly zones

(1) Coalition air strike in southern Iraq

In late December 1992 and early January 1993, Iraq deployed missile batteries into the southern no-fly zone, seized military equipment in the UN-supervised neutral zone between Iraq and Kuwait, and unsuccessfully launched a missile against a U.S. F-15E aircraft. On January 6, 1993, Russia, France, the United Kingdom and the United States demanded that Iraq remove surface-to-air missile sites from below the 32nd parallel and that it stop violating the northern and southern no-fly zones. Iraq rebuffed that demarche and, on January 11 and 12, 1993, warned coalition aircraft to stop patrolling in the no-fly zones. Coalition forces responded on January 13, 1993, with an intense air strike against Iraqi fixed air-defense and mobile missiles sites in southern Iraq. *See* letter from President George H.W. Bush to congressional leaders, dated January 19, 1993, reporting, among other things, use of force by coalition forces against Iraq for its activities in the southern no-fly zone and interference with weapons inspectors. 29 WEEKLY COMP. PRES. DOC. 67 (Jan. 25, 1993).

On the day of the strikes, UN Secretary General Boutros Boutros-Ghali confirmed that Iraq continued to violate relevant UN resolutions, and that the mandate to member states in Resolution 678 to use "all necessary means to uphold and implement" the Security Council's resolutions, applied to Iraq's violation of the terms of the cease-fire set forth in Resolution 687. Secretary General Boutros-Ghali's

statement at a January 4, 1993 press conference is excerpted below.

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

Question: Do you approve of yesterday's raid against Iraq?

The SECRETARY-GENERAL: The raid was carried out in accordance with a mandate from the Security Council under resolution 678 (1991), and the motive for the raid was Iraq's violations of that resolution, which concern the cease-fire. As Secretary-General of the United Nations, I can tell you that the action was taken in accordance with the resolutions of the Security Council and the Charter of the United Nations.

* * * *

. . . I have been in contact with the Iraqis for almost 12 months, in an attempt to convince them that it is in their interest to implement the resolutions of the United Nations. It is in their interest, through implementation of the resolutions of the United Nations, to bring the embargo and the situation they are in to an end. Unfortunately, I have not been successful and have not managed either with respect to the cease-fire or the other relevant resolutions, to convince the Iraqis that it is in their interest, more particularly in the interest of the Iraqi people, to implement the resolutions they have accepted.

* * * *

(2) U.S. involvement in enforcement of no-fly zones

Consistent with the Authorization of Use of Military Force Against Iraq Resolution, Pub. L. No. 102–1, 105 Stat. 3 (1991), discussed in A.1.b., *supra*, President William J. Clinton filed periodic reports with Congress providing a summary of the status of efforts to obtain Iraq's compliance with the resolutions adopted by the UN Security Council in response to Iraq's acts of aggression.

In one of the reports, submitted April 7, 1994, President Clinton reported to the Speaker of the House of Representatives and the President *pro tempore* of the Senate concerning the status of the no-fly zones and their continuing necessity. As excerpted below, President Clinton explained that the northern no-fly zone had so far deterred Iraq from engaging in major military operations in that region, but that Iraq continued to use land-based artillery against civilians living in the southern no-fly zone. 30 WEEKLY COMP. PRES. DOC. 739 (Apr. 11, 1994).

---

* * * *

The "no-fly zones" over northern and southern Iraq permit the monitoring of Iraq's compliance with UNSCRs 687 and 688. Over the last 2 years, the northern no-fly zone has deterred Iraq from a major military offensive in the region. Since the no-fly zone was established in southern Iraq, Iraq's use of aircraft against its population in the region has stopped. However, Iraqi forces have responded to the no-fly zone by stepping up their use of land-based artillery to shell marsh villages.

Indeed, the ongoing military campaign against the civilian population of the marsh villages intensified during the beginning of March. A large search-and-destroy operation is taking place. The offensive includes the razing of villages and large-scale burning operations, concentrated in the triangle bounded by Al Nasiriya, Al Qurnah, and Basrah. The magnitude of the operation is causing civilian inhabitants to flee toward Iran, as well as deeper into the marshes toward the outskirts of southern Iraqi cities.

In northern Iraq, in the vicinity of Mosul, there is both Iraqi troop movement and some increase in the number of troops. Iraqi intentions are not clear and we are watching this situation closely.

The Special Rapporteur of the U.N. Commission on Human Rights, Max van der Stoel, presented a new report in February 1994 on the human rights situation in Iraq describing the Iraqi military's continuing repression against its civilian populations in the marshes. The Special Rapporteur asserts that the Government of Iraq has engaged in war crimes and crimes against humanity,

and may have committed violations of the 1948 Genocide Convention. Regarding the Kurds, the Special Rapporteur has judged that the extent and gravity of reported violations places the survival of Kurds in jeopardy. The Special Rapporteur judged that there are essentially no freedoms of opinion, expression, or association in Iraq. Torture is widespread in Iraq and results from a system of state-terror successfully directed at subduing the population. . . .

* * * *

On October 27, 1994, President Clinton reported that, earlier that month, Iraq had relocated a number of troops to southern Iraq, approximately twenty kilometers from the border with Kuwait. In addition, Iraq had oriented its artillery assets toward Kuwait. As indicated in the President's report, excerpted below, on October 15, 1994, the UN Security Council adopted Resolution 949, U.N. Doc. S/RES/949 (1994), demanding that Iraq withdraw its relocated troops and not utilize its forces to threaten its neighbors or UN operations or to redeploy or enhance its position in southern Iraq. President Clinton ordered additional U.S. deployments to the Persian Gulf, after which the Iraqi troops relocated to their original positions. 30 WEEKLY COMP. PRES. DOC. 2173 (Oct. 31, 1994).

---

* * * *

Iraq's recent behavior with respect to Kuwait has shown the world that it has not changed its threatening ways and cannot be trusted. In early October 1994, elements of the Hammurabi Division of the elite Iraqi Republican Guard were detected relocating to positions at Shaihah airfield in southern Iraq. This was the southernmost deployment of Republican Guard forces since the 1990–1991 Gulf War. By October 8, the 15th Mechanized Brigade of the Hammurabi Division had deployed to approximately 20 kilometers from the Kuwait border. Its artillery assets were oriented south toward Kuwait. At the same time, the Al Nida Division of the Republican Guard began moving from the Mosul rail yard

and the Baghdad area to positions in southern Iraq. All these units were fully equipped with ammunition, food, and fuel, leading us to conclude that this was no mere exercise.

By October 8, these troop movements, combined with forces already in southern Iraq, brought Iraqi troop strength in southern Iraq to 64,000, organized into 8 divisions. By October 9, indications were present that logistic sites were being established in the vicinity of these deployments. Iraqi movements to the south continued, and by October 11, it was assessed that Iraq would be capable of launching an attack by October 13.

This provocation required a strong response. Accordingly, on October 8, 1994, I ordered the immediate deployment of additional U.S. military forces to the Persian Gulf. These deployments included the USS George Washington Carrier Battle Group and its accompanying cruise missile ships, a U.S. Marine Corps Expeditionary Unit, a U.S. Army Mechanized Task Force, and personnel to operate two additional Patriot missile batteries. On October 10, I further ordered the deployment of over 500 U.S. Air Force and Marine Corps combat and supporting aircraft to the region.

In response to these measures, the Iraqi government began ordering its forces to move to positions in the rear, around Nasariya and Qalat Salih, north of Basra, but still within several hours of the Kuwaiti border. Had these forces remained deployed around Nasariya, it would have constituted a significant enhancement of Iraq's capabilities in southern Iraq. By October 15, there were clear indications that most Iraqi forces that had been moved south since late September were being redeployed to their original locations. On October 15, 1994, the international community also demonstrated its strong resolve regarding this latest provocation when it passed unanimously U.N. Security Council Resolution (UNSCR) 949, which condemned Iraq's provocative behavior and demanded that Iraq immediately withdraw the units deployed in the south to their original positions, not utilize its forces to threaten its neighbors or U.N. operations, not redeploy or enhance its military capacity in southern Iraq, and cooperate fully with the U.N. Special Commission (UNSCOM).

* * * *

On November 4, 1996, President Clinton noted that, in response to Saddam Hussein's recent military action in northern Iraq, the United States had expanded the southern no-fly zone from 32 degrees to 33 degrees north latitude, and it struck against certain sites and facilities south of the 33rd parallel to ensure the safety of U.S. forces enforcing the now expanded no-fly zone. In his report, excerpted below, President Clinton also noted that Turkey would have to determine before December 1996 whether to renew permission for the combined task force to use Incirlik as a base for the northern operation (Operation Provide Comfort). 32 WEEKLY COMP. PRES. DOC. 2339 (Nov. 11, 1996).

Saddam Hussein's attack on Irbil in late August and his continuing efforts to manipulate local rivalries in northern Iraq to his advantage, provide new evidence that he remains a threat to his own people, to his neighbors, and to the peace of the region. As I detailed in my last report, the United States responded to Saddam's military action in the north by expanding the Southern no-fly zone from 32 degrees to 33 degrees north latitude. The U.S. response included strikes against surface-to-air missile sites, command and control centers, and air defense control facilities south of the 33rd parallel in order to help ensure the safety of our forces enforcing the expanded no-fly zone.

* * * *

United Nations Security Council Resolution (UNSCR) 949, adopted in October 1994, demands that Iraq not threaten its neighbors or UN operations in Iraq and that it not redeploy or enhance its military capacity in southern Iraq. In view of Saddam's reinforced record of unreliability, it is prudent to retain a significant U.S. force presence in the region in order to maintain the capability to respond rapidly to possible Iraqi aggression or threats against its neighbors.

* * * *

On May 8, 1997, President Clinton reported that Iraq had disregarded the southern no-fly zone to transport Iraqi

pilgrims from their homes near the Iraqi-Saudi border to religious sites in Iraq, and back. Because of the religious sensitivity of the situation, the non-threatening nature of the flights, and the potential danger to innocent civilians, the coalition agreed not to take any military action in response. 33 WEEKLY COMP. PRES. DOC. 687 (May 12, 1997).

On November 26, 1997, President Clinton reported that Iraq had been intentionally violating the no-fly zones to test the extent to which the coalition would enforce them and described the coalition response, as excerpted below. 33 WEEKLY COMP. PRES. DOC. 1931 (Dec. 8, 1997).

---

* * * *

Regarding military operations, the United States and its coalition partners continue to enforce the no-fly zones over Iraq under Operation Northern Watch and Operation Southern Watch. We have detected myriad intentional Iraqi violations of both no-fly zones. While these incidents (Iraqi violations of the no-fly zones) started several hours after an Iranian air raid on terrorist bases inside Iraq, it was clear that Iraq's purpose was to try and test the coalition to see how far it could go in violating the ban on flights in these regions. A maximum effort by Operation Southern Watch forces complemented by early arrival in theater of the USS NIMITZ battle group, dramatically reduced violations in the southern no-fly zone. An increase in the number of support aircraft participating in Northern Watch allowed increased operating capacity that in turn significantly reduced the number of violations in the north. We have repeatedly made clear to the Government of Iraq and to all other relevant parties that the United States and its partners will continue to enforce both no-fly zones, and that we reserve the right to respond appropriately and decisively to any Iraqi provocations.

* * * *

United Nations Security Council Resolution 949 adopted in October 1994, demands that Iraq not use its military or any other

forces to threaten its neighbors or U.N. operations in Iraq and that it not redeploy troops or enhance its military capacity in southern Iraq. In view of Saddam's accumulating record of unreliability, it is prudent to retain a significant U.S. force presence in the region in order to deter Iraq and maintain the capability to respond rapidly to possible Iraqi aggression or threats against its neighbors.

* * * *

On May 19, 1999, President Clinton reported that the United States and coalition partners enforcing the no-fly zones had repeatedly been subject to anti-aircraft firings and radar illuminations and that he had authorized aircrews to respond directly and forcibly in self defense. Excerpts follow. 35 WEEKLY COMP. PRES. DOC. 945 (May 24, 1999).

---

* * * *

The United States and coalition partners enforcing the no-fly zones over Iraq under Operations Northern Watch and Southern Watch continue to be subject to multiple anti-aircraft artillery firings and radar illuminations, and have faced more than 35 surface-to-air missile attacks. Additionally, since the conclusion of Desert Fox*, Iraqi aircraft have committed over 120 no-fly zone violations.

In response to Iraq's repeated no-fly-zone violations and attacks on our aircraft, I have authorized our aircrews to respond directly and forcibly to the increased Iraqi threat. United States and coalition forces are fully prepared and authorized to defend themselves against any Iraqi threat while carrying out their no-fly zone enforcement mission and have, when circumstances warranted, engaged various components of the Iraqi integrated air defense system. As a consequence, the Iraqi air defense system has been degraded substantially since December 1998.

* * * *

---

* Editors' Note: Operation Desert Fox refers to the December 1998 bombing campaign discussed in 2.f. below.

e. 1993 strikes in response to Iraq's attempted assassination of former President Bush

In the spring of 1993 the United States learned that the Government of Iraq had attempted to assassinate former President George H.W. Bush in April 1993 when he was visiting Kuwait City. In June 1993 President William J. Clinton responded to that attempted assassination by directing missile strikes on the principal command and control complex of the Iraqi Intelligence Service, which was directly implicated in the attempted assassination. In a June 28, 1993, report from President Clinton to the Speaker of the House of Representatives and the President *pro tempore* of the Senate advising them of the strikes, the President explained:

> I ordered this military response only after I considered the results of a thorough and independent investigation by U.S. intelligence and law enforcement agencies. The reports by Attorney General Reno and Director of Central Intelligence Woolsey provided compelling evidence that the operation that threatened the life of President Bush in Kuwait City in April was directed and pursued by the Iraqi Intelligence Service and that the Government of Iraq bore direct responsibility for this effort.

29 WEEKLY COMP. PRES. DOC. 1183 (July 5, 1993).

The President's report indicated that the United States acted in self defense in accordance with Article 51 of the UN Charter. The United States had reported its action under Article 51 in a letter to the Security Council dated June 26, 1993, set forth below. U.N. Doc. S/26003 (1993).

In accordance with Article 51 of the United Nations Charter, I wish, on behalf of my Government, to report that the United States has exercised its right of self-defense by responding to the Government of Iraq's unlawful attempt to murder the former Chief Executive of the United States Government, President George Bush, and to its continuing threat to United States nationals.

The Government of Iraq bears direct responsibility for the failed attempt to assassinate the former President of the United States for actions he took while he was President. The United States has reached this conclusion based on clear and compelling evidence of the Government of Iraq's actions in the attempted murder.

Based on the pattern of the Government of Iraq's behaviour, including the disregard for international law and Security Council resolutions, the United States has concluded that there is no reasonable prospect that new diplomatic initiatives or economic measures can influence the current Government of Iraq to cease planning future attacks against the United States. Accordingly, as a last resort, the United States has decided that it is necessary to respond to the attempted attack and the threat of further attacks by striking at an Iraqi military and intelligence target that is involved in such attacks. The United States has chosen its target carefully so as to minimize risks of collateral damage to civilians.

It is the sincere hope of the United States Government that such limited and proportionate action may frustrate future unlawful actions on the part of the Government of Iraq and discourage or preempt such activities.

* * * *

f. 1998 strikes in response to Iraq's failure to comply with weapons inspections obligations under UN resolutions

The cease-fire established by UN Security Council Resolution 687 called for the elimination, under international supervision, of Iraq's weapons of mass destruction and ballistic missiles with a range of greater than 150 kilometers, and for the elimination of related items and production facilities. Resolution 687 also called for measures to ensure that Iraq did not resume the acquisition and production of prohibited weapons. The United Nations Special Commission ("UNSCOM") was established to implement the non-nuclear provisions of Resolution 687 and to assist the International Atomic Energy Agency in the nuclear areas. The terms of

UNSCOM's mandate are set forth in paragraphs 7 to 13 of Resolution 687.

On April 3, 1998, President Clinton reported to Congress, in accordance with the Authorization of Use of Military Force Against Iraq Resolution, Pub. L. No. 102–1, 105 Stat. 3 (1991), discussed in A.1.b. *supra*, that Iraq had not been cooperating with UNSCOM weapons inspectors until it signed a memorandum of understanding ("MOU") between the Iraqi Deputy Prime Minister and U.N. Secretary General Kofi Annan. That MOU, endorsed by the Security Council in Resolution 1154, U.N. Doc. S/RES/1154 (1998), reiterated Iraq's commitment to allow UNSCOM unconditional access to designated sites. President Clinton also reported that he had increased the U.S. presence in the region and that such increase would remain in effect until Iraq's compliance with the terms of the MOU could be assured. Finally, President Clinton explained that the U.S. and its coalition partners engaged in Iraq had made clear that, although they sought a diplomatic resolution to Iraq's violation of its commitments, the coalition would resort to military force, if necessary. 34 WEEKLY COMP. PRES. DOC. 569 (Apr. 13, 1998).

For much of the period covered by this report, Iraq was engaged in a serious challenge to the authority of the UNSC and the will of the international community. As documented in my last report, Iraq refused to allow U.N. Special Commission (UNSCOM) inspectors to carry out their work at a number of sites last December; Iraq's refusal to cooperate in spite of repeated warnings continued until the signing of the Memorandum of Understanding (MOU) between U.N. Secretary General Kofi Annan and Iraqi Deputy Prime Minister Tariq Aziz on February 23, and the endorsement of this agreement by the UNSC on March 2 when it adopted UNSCR 1154. Both the MOU and UNSCR 1154 reiterate Iraq's commitment to provide immediate, unconditional, and unrestricted access to UNSCOM and the International Atomic Energy Agency (IAEA). UNSCR 1154 also stresses that any further Iraqi violation of the relevant UNSC resolutions would result in

the severest consequences for Iraq. Iraq's commitment is now in the process of being tested.

* * * *

Throughout the crisis created by Iraq's refusal to cooperate with U.N. weapons inspectors, the objective of my Administration was to achieve effective inspections, preferably through a diplomatic solution. Our vigorous diplomatic efforts were backed by the credible threat to use force, if necessary. . . .

* * * *

Until Iraqi intent to comply with the MOU is verified, it will be necessary to maintain our current augmented force posture in the region. The ongoing inspections of the so-called "presidential sites" mark the next critical phase in the UNSCOM inspections process. Once Iraqi compliance is assured, we will consider whether we can reduce our present force posture.

* * * *

On August 5, 1998, Iraq unilaterally decided to suspend its cooperation with UNSCOM and the International Atomic Energy Agency ("IAEA"). On September 9, the UN Security Council acted under Chapter VII of the UN Charter to adopt unanimously Resolution 1194, U.N. Doc. S/RES/1194 (1998). The resolution condemned Iraq's decision to suspend cooperation as a "totally unacceptable contravention of its obligations," and demanded that Iraq resume cooperation. On October 31, Iraq announced that it was ceasing all cooperation with UNSCOM.

On November 14, 1998, Iraq committed itself to comply unconditionally with the Security Council's resolutions. It withdrew its objectionable conditions and permitted the resumption of all activities of the weapons inspectors. Despite Iraq's apparent decision to cooperate with UNSCOM and IAEA, it did not do so. After exhausting all diplomatic efforts to resolve the problem of Iraq's failure to cooperate, the United States and Great Britain resorted to the use of force.

On December 16, 1998, coalition forces struck military and strategic targets in Iraq for the purpose of degrading Iraq's ability to reconstitute and deliver its weapons of mass destruction. In a letter of the same date, the United States reported to the Security Council that the forces were "acting under the authority provided by the resolutions of the Security Council." U.N. Doc. S/1998/1181. The letter to the Security Council is excerpted below.

Coalition forces have begun operations against military targets in Iraq. Our ongoing military action is substantial. We are attacking Iraq's weapons of mass destruction programmes and its ability to threaten its neighbours.

Coalition forces are acting under the authority provided by the resolutions of the Security Council. This action is a necessary and proportionate response to the continued refusal of the Iraqi Government to comply with the resolutions of the Security Council and the threat to international peace and security which Iraq's non-compliance represents. In carrying out this action, our forces have taken appropriate measures to defend themselves from any interference by Iraq, and have made every possible effort to avoid civilian casualties and collateral damage.

As the Council is well aware, this resort to military force was undertaken only when it became evident that diplomacy had been exhausted. The coalition acted out of necessity, and the Government of Iraq bears full responsibility for the consequences of this military operation. We did not act precipitately. On the contrary, the United States of America has worked with its partners in the Security Council over the past months in a sincere and sustained effort to bring about a peaceful resolution of the confrontation created by Iraq. For reasons best known to Saddam Hussein, Iraq chose to reject that effort.

Following the liberation of Kuwait from Iraqi occupation in 1991, the Security Council, in its resolution 687 (1991) of 3 April 1991, mandated a ceasefire; but it also imposed a number of essential conditions on Iraq, including the destruction of Iraqi weapons of mass destruction and acceptance by Iraq of United Nations inspections.

In its resolutions including, in addition to resolution 687 (1991), resolutions 707 (1991) of 15 August 1991, 715 (1991) of 11 October 1991, 1154 (1998) of 2 March 1998, 1194 (1998) of 9 September 1998, 1205 (1998) of 5 November 1998 and others—the Council has elaborated and reiterated those conditions, including "full, final and complete disclosure" of all aspects of its programmes to develop weapons of mass destruction, and "immediate, unconditional and unrestricted access" for the United Nations Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA) "to any and all areas, facilities, equipment, records and means of transportation which they wish to inspect." Iraqi compliance with all these requirements is a fundamental element of international peace and security in the region.

Nevertheless, Iraq has repeatedly taken actions which constitute flagrant, material breaches of these provisions. On a number of occasions, the Council has affirmed that similar Iraqi actions constituted such breaches, as well as a threat to international peace and security. In our view, the Council need not state these conclusions on each occasion.

Just one month ago, on 14 November 1998, the Government of Iraq committed itself to providing full and unconditional cooperation with UNSCOM, as required by Security Council resolutions. The Iraqi Government described it as a "clear and unconditional decision by the Iraqi Government to resume cooperation with UNSCOM and IAEA." Iraq stated that the weapons inspectors could "immediately resume all their activities according to the relevant resolutions of the Security Council." It must be noted that Iraq rescinded its restrictions on UNSCOM and IAEA and offered those assurances only in the face of a credible threat of force. Military force was not employed at that time, however, because the United States, along with other members of the Security Council, sought a peaceful resolution to the situation created by Iraq and opted to go the extra mile to test Iraqi intentions.

In that event, Iraq failed to fulfill its assurances. As the UNSCOM report of 15 December 1998 makes clear, Iraq failed to provide the full cooperation it promised on 14 November, and thus left UNSCOM unable to conduct the substantive disarmament work mandated to it by the Security Council.

By refusing to make available documents and information requested by UNSCOM within the scope of its mandate, by imposing new restrictions on the weapons inspectors and by repeatedly denying access to facilities which UNSCOM wished to inspect, Iraq, once again, acted in flagrant and material breach of Security Council resolution 687 (1991).

Following Iraq's repeated, flagrant and material breaches of its obligations under Security Council resolutions . . . in addition to its failure to fulfill its own commitments, the coalition today exercised the authority given by the Security Council in its resolution 678 (1990) of 29 November 1990 for Member States to employ all necessary means to secure Iraqi compliance with the Council's resolutions and to restore international peace and security in the area. Any Iraqi attempt to attack coalition forces or to initiate aggressive action against a neighbouring State will be met with a swift response by the coalition.

* * * *

Also on December 16, Secretary of State Madeleine K. Albright made the following remarks, released by the Office of the Spokesman, U.S. Department of State.

The full text of the statement is available at *http://secretary.state.gov/www/statements/1998/981216.html*

---

* * * *

. . . I want to emphasize the extent to which the United States sought a diplomatic outcome to the confrontation between Iraq and the UN Security Council. Show-downs last fall, last winter and last month were all concluded without air strikes, after Iraq promised to cooperate fully with UN weapons inspectors.

Throughout, we worked hard to maintain Security Council unity by allowing time and then more time for Iraq to live up to those promises. . . .

Although we were criticized by some for persevering in our diplomatic efforts for so long, the truth is that these efforts were both necessary and successful. They helped to preserve Council unity and isolate Iraq internationally. They were not successful,

however, in gaining full Iraqi compliance with its obligations. This is not because the requests the Security Council made were unreasonable or unachievable or unjustified, but because compliance would have required something Saddam Hussein is simply unwilling to do, which is to come fully clean about his weapons of mass destruction programs.

US policy is based on principles established by the Security Council in the aftermath of the Gulf War more than seven and a half years ago. These principles have been reaffirmed on literally dozens of occasions, and they are designed to ensure that Saddam Hussein's Iraq does not again threaten its neighbors or the world with weapons of mass destruction. This is a deadly serious objective, given Saddam's demonstrated willingness to use such weapons both against foreign adversaries and his own people.

Saddam's capacity to develop and brandish such armaments poses a threat to international security and peace that cannot be ignored. One way or another, it must be countered; and degrading that capacity is the purpose of the strikes on military targets in Iraq that the President has ordered today.

* * * *

The joint U.S. and British operation against Iraq was completed in seventy hours. On December 19, after completion of the operation, President Clinton made an address to the nation, excerpted below. 34 WEEKLY COMP. PRES. DOC. 2516 (Dec. 28, 1998).

---

* * * *

Our objectives in this military action were clear: to degrade Saddam's weapons of mass destruction program and related delivery systems, as well as his capacity to attack his neighbors. It will take some time to make a detailed assessment of our operation, but based on the briefing I've just received, I am confident we have achieved our mission. We have inflicted significant damage on Saddam's weapons of mass destruction programs, on the command structures that direct and protect that capability, and on his military and security infrastructure. . . .

So long as Saddam remains in power, he will remain a threat to his people, his region, and the world. With our allies, we must pursue a strategy to contain him and to constrain his weapons of mass destruction program, while working toward the day Iraq has a government willing to live at peace with its people and with its neighbors.

Let me describe the elements of that strategy going forward. First, we will maintain a strong military presence in the area, and we will remain ready to use it if Saddam tries to rebuild his weapons of mass destruction, strikes out at his neighbors, challenges allied aircraft, or moves against the Kurds. We also will continue to enforce no-fly zones in the north and from the southern suburbs of Baghdad to the Kuwaiti border.

Second, we will sustain what have been among the most extensive sanctions in U.N. history. To date, they have cost Saddam more than $120 billion, resources that otherwise would have gone toward rebuilding his military. At the same time, we will support a continuation of the oil-for-food program, which generates more than $10 billion a year for food, medicine, and other critical humanitarian supplies for the Iraqi people. We will insist that Iraq's oil be used for food, not tanks.

Third, we would welcome the return of UNSCOM and the International Atomic Energy Agency back into Iraq to pursue their mandate from the United Nations—provided that Iraq first takes concrete, affirmative, and demonstrable actions to show that it will fully cooperate with the inspectors. But if UNSCOM is not allowed to resume its work on a regular basis, we will remain vigilant and prepared to use force if we see that Iraq is rebuilding its weapons programs.

Now, over the long-term, the best way to end the threat that Saddam poses to his own people in the region is for Iraq to have a different government. We will intensify our engagement with the Iraqi opposition groups, prudently and effectively. We will work with Radio Free Iraq to help news and information flow freely to the country. And we will stand ready to help a new leadership in Baghdad that abides by its international commitments and respects the rights of its own people. We hope it will return Iraq to its rightful place in the community of nations.

* * * *

3. Strikes in Sudan and Afghanistan in Response to Embassy Bombings

On August 7, 1998, bombs exploded at the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, killing nearly 300 people, including twelve Americans. Based on evidence of the involvement of Osama bin Laden, a Saudi expatriate who lived in Afghanistan and had developed an extensive terrorist network, on August 20, 1998, the United States launched Tomahawk missiles against terrorist training camps in Afghanistan and against a Sudanese pharmaceutical plant that appeared to be manufacturing chemical weapons.

President Clinton announced the strikes, explaining:

> I ordered this action for four reasons: First, because we have convincing evidence these groups played the key role in the Embassy bombings in Kenya and Tanzania; second, because these groups have executed terrorist attacks against Americans in the past; third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa; and fourth, because they are seeking to acquire chemical weapons and other dangerous weapons.
>
> Terrorists must have no doubt that, in the face of their threats, America will protect its citizens and will continue to lead the world's fight for peace, freedom, and security. . . .

Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan, 34 WEEKLY COMP. PRES. DOC. 1642 (Aug. 24, 1998).

By letter of August 20, the Permanent Representative of the United States to the United Nations, Ambassador Bill Richardson, informed the President of the Security Council that the United States had acted in self-defense, in accordance with Article 51 of the UN Charter, as set forth below. UN Doc. S/1998/780 (1998).

---

* * * *

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America has exercised its right of self-defence in responding to a series of armed attacks against United States embassies and United States nationals.

My Government has obtained convincing information from a variety of reliable sources that the organization of Usama Bin Ladin is responsible for the devastating bombings on 7 August 1998 of the United States embassies in Nairobi and Dar Es Salaam. Those attacks resulted in the deaths of 12 American nationals and over 250 other persons, as well as numerous serious injuries and heavy property damage. The Bin Ladin organization maintains an extensive network of camps, arsenals and training and supply facilities in Afghanistan, and support facilities in Sudan, which have been and are being used to mount terrorist attacks against American targets. These facilities include an installation at which chemical weapons have been produced.

In response to these terrorist attacks, and to prevent and deter their continuation, United States armed forces today struck at a series of camps and installations used by the Bin Ladin organization to support terrorist actions against the United States and other countries. In particular, United States forces struck a facility being used to produce chemical weapons in the Sudan and terrorist training and basing camps in Afghanistan.

These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization. That organization has issued a series of blatant warnings that "strikes will continue from everywhere" against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing.

In doing so, the United States has acted pursuant to the right of self-defence confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage

to civilians and to comply with international law, including the rules of necessity and proportionality.

It is the sincere hope of the United States Government that these limited actions will deter and prevent the repetition of unlawful terrorist attacks on the United States and other countries. We call upon all nations to take the steps necessary to bring such indiscriminate terrorism to an end.

I ask that you circulate the text of the present letter as a document of the Security Council.

On the same date, Secretary of State Madeleine K. Albright and National Security Advisor Samuel Berger held a press briefing concerning the strikes. Among other things, Mr. Berger stated:

> We have been concerned about the threat that Osama bin Laden and his network posed to U.S. interests for quite some time. In 1996, we pressured the Sudanese government to disassociate themselves from bin Laden, and for some time we have sought to have him expelled from Afghanistan. . . . These efforts were unsuccessful.
>
> In May, as you know, the bin Laden group issued a so-called fatwah against the United States, indicating that they had targeted the United States for a systematic campaign of terror. That obviously increased our sense of attention and focus on this group.

See http://secretary.state.gov/www/statements/1998/980820.html.

4. Intervention in the Former Yugoslavia

a. Bosnia-Herzegovina

Beginning in April 1993, the United States provided support for the United Nations and NATO efforts to resolve the conflict in the former Yugoslavia, discussed in Chapter 17.A.1. and B.2. In a letter of April 13, 1993, reporting this action to Congress, President Clinton explained that the UN Security

Council had established a ban on unauthorized military flights over Bosnia-Herzegovina in Resolution 781 (1992). In response to violations of that resolution, the Security Council decided, in Resolution 816 (1993), to extend the ban to all unauthorized flights over Bosnia-Herzegovina; NATO agreed to provide NATO air enforcement for the no-fly zone. The President explained:

> The United States actively supported these decisions. At my direction, the Joint Chiefs of Staff sent an execute order to all U.S. forces participating in the NATO force, for the conduct of phased air operations to prevent flights not authorized by the United Nations over Bosnia-Herzegovina. . . .

See 1993 Pub. Papers vol. I at 429 (Apr. 13, 1993).

In a subsequent report, September 1, 1995, President Clinton reported U.S. participation in the commencement of two weeks of NATO air strikes, excerpted below. 1995 Pub. Papers vol. II at 1279 (Sept. 1, 1995).

. . . I am today reporting on the use of U.S. combat and support aircraft commencing on August 29, 1995 (EDT), in a series of NATO air strikes against Bosnian Serb Army (BSA) forces in Bosnia-Herzegovina that were threatening the U.N.-declared safe areas of Sarajevo, Tuzla, and Gorazde. The NATO air strikes were launched following an August 28, 1995, BSA mortar attack on Sarajevo that killed 37 people and injured over 80. This tragic and inexcusable act was the latest in a series of BSA attacks on unarmed civilians in the safe areas.

* * * *

. . . Under United Nations Security Council Resolution (UNSCR) 824 of May 6, 1993, certain portions of Bosnia-Herzegovina, including the city of Sarajevo, were established as safe areas that should be "free from armed attacks and from any other hostile act." Additionally, under UNSCR 836 of June 4, 1993, member states and regional organizations are authorized,

in close coordination with the Untied Nations, to take all necessary measures, through the use of air power, to support the United Nations Protection Force (UNPROFOR) in the performance of its mandate related to the safe areas. This mandate includes deterring attacks and replying to bombardments on the safe areas. Consistent with these and other resolutions, and in light of the recent events described above, the United Nations requested and NATO initiated air strikes on August 29, 1995. The air strikes were fully coordinated with the simultaneous artillery attacks by the Rapid Reaction Force.

* * * *

I authorized these actions in conjunction with our NATO allies to implement the relevant U.N. Security Council resolutions and NATO decisions. As I have reported in the past and as our current diplomatic actions clearly indicate, our efforts in the former Yugoslavia are intended to assist the parties to reach a negotiated settlement to the conflict. . . .

* * * *

On September 18, 1995, President Clinton announced that "the Bosnian Serbs had agreed to comply with a condition set by NATO and the United Nations for ending the NATO air strikes" and that the air operations had therefore been suspended. 6 Dep't State Dispatch No. 38 at 692 (Sept. 18, 1995), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*. The President explained:

> . . . [T]he Bosnian Serbs have stated that they will end all offensive operations within the Sarajevo exclusion zone, withdraw their heavy weapons from the zone within six days, and allow road and air access to Sarajevo within 24 hours. NATO and the UN, therefore, have suspended air operations temporarily and will carefully monitor the Serb compliance with these commitments.
>
> * * * *
>
> Now the Bosnian Serbs must carry out their commitments and then turn their energies toward a

> political settlement that will end this terrible conflict for good. They should have no doubt that NATO will resume the air strikes if they fail to keep their com-mitments-if they strike again at Sarajevo or the other safe areas.

b. Kosovo

(1) NATO military intervention

Kosovo was an autonomous region within Serbia until 1989, when Serbian leader Slobodan Milosevic brought the region under Belgrade's direct control. In early 1998, open conflict broke out between the government of the Federal Republic of Yugoslavia ("FRY") and the Kosovar Albanians. The conflict resulted in the deaths of approximately 1,500 Kosovar Albanians and forced approximately 400,000 people from their homes.

On September 23, 1998, the United Nations Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1199. U.N. Doc. S/RES/1199 (1998). In that resolution, the Security Council affirmed that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region. The Security Council expressed deep concern about the FRY's excessive use of force. The Security Council demanded, inter alia, a cease fire by all parties to the conflict and that the "authorities of the [FRY] . . . take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe; . . . cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression; . . . [and] facilitate . . . the safe return of refugees and displaced persons to their homes." On October 24, 1998, the United Nations Security Council, again acting under Chapter VII, adopted Resolution 1203 reiterating its demand that the FRY "comply fully and swiftly" with Resolution 1199. U.N. Doc. S/RES/1203 (1998). The

Security Council also endorsed two missions that had been established to observe Serbia's compliance with Resolution 1199.

Despite international efforts to resolve the conflict, fighting in Kosovo again flared up in the beginning of 1999. At that point, renewed international efforts were made to bring about a peaceful resolution to the conflict. In February 1999, the Contact Group, consisting of the United States, the United Kingdom, France, Germany, Russia and Italy, brought the FRY and the Kosovar Albanians together in Rambouillet, near Paris. Negotiations took place from February 6 to February 23, and again from March 15 to March 18. At the end of the conference, the FRY delegation continued to refuse the terms of a settlement proposed by the Contact Group. Immediately thereafter, Serbian forces intensified their operations against the ethnic Albanians in Kosovo.

On March 24, the United States and its NATO allies commenced air strikes against the FRY. On March 23, Assistant Secretary of State for Public Affairs James P. Rubin had responded to a question from the press concerning the justification for undertaking such air strikes:

> There has been extensive consideration of this issue with our NATO allies. We and our allies have looked to numerous factors in making our judgment, including—there have been serious and widespread violations of international law; there has been the use of excessive and indiscriminate force; Yugoslavia has failed to comply with OSCE and NATO agreements, with UN Security Council resolutions, with its obligation to cooperate with the War Crimes Tribunal, as well as with numerous other commitments.
>
> With Belgrade giving every indication of conducting a new offensive against Kosovar Albanians, we face the prospect of a new explosion if the international community doesn't take preventive action. It could be an explosion that exceeds the suffering of last fall. In short, Serbia's actions constitute a threat to the region,

> particularly Albania and Macedonia and potentially NATO allies Greece and Turkey.
>
> On the basis of such considerations, we and our NATO allies believe there are legitimate grounds to threaten and, if necessary, use force. . . .

State Dept. Noon Briefing, James P. Rubin (Mar. 23, 1999).

Also on March 24, Chargé d'Affaires of the U.S. Mission to the United Nations A. Peter Burleigh delivered the following statement to the Security Council on the situation in Kosovo, provided in full below. UN Doc. S/PV.3988 (1999).

The current situation in Kosovo is of grave concern to all of us. We and our allies have begun military action only with the greatest reluctance. But we believe that such action is necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully, and recent military buildup in Kosovo, all of which foreshadow a humanitarian catastrophe of immense proportions.

We have begun today's action to avert this humanitarian catastrophe and to deter further aggression and repression in Kosovo. Serb forces numbering 40,000 are now in action in and around Kosovo. 30,000 Kosovars have fled their homes just since March 19. As a result of Serb action in the last five weeks, there are more than 60,000 new refugees and displaced persons. The total number of displaced persons is approaching a quarter of a million.

The continuing offensive by the Federal Republic of Yugoslavia is generating refugees and creating pressure on neighboring countries, threatening the stability of the region. Repressive Serb action in Kosovo has already resulted in cross-border activity in Albania, Bosnia and Herzegovina, and The Former Yugoslav Republic of Macedonia. Recent actions by Belgrade also constitute a threat to the safety of international observers and humanitarian workers in Kosovo.

Security Council resolutions 1199 and 1203 recognized that the situation in Kosovo constitutes a threat to peace and security

in the region and invoked Chapter VII of the Charter. In Security Council resolution 1199, the Security Council demanded that Serbian forces take immediate steps to improve the humanitarian situation and avert the impending humanitarian catastrophe.

In October of 1998, Belgrade entered into agreements and understandings with the North Atlantic Treaty Organization (NATO) and the Organization for Security and Cooperation in Europe (OSCE) to verify its compliance with Security Council demands, particularly on reduction of security forces, cooperation with international observers, cooperation with humanitarian relief agencies, and negotiations on a political settlement for substantial autonomy. Belgrade has refused to comply.

Belgrade's actions also violate its commitments under the Helsinki Final Act, as well as its obligations under the international law of human rights. Belgrade's actions in Kosovo cannot be dismissed as an internal matter.

For months, Serb actions have led to escalating explosions of violence. It is imperative that the international community take quick measures to avoid humanitarian suffering and widespread destruction which could exceed that of the 1998 offensive.

Mr. President, I reiterate that we have initiated action today with the greatest reluctance. Our preference has been to achieve our objectives in the Balkans through peaceful means. Since fighting erupted in February 1998, we have been actively engaged in seeking resolution of the conflict through diplomacy under the auspices of the Contact Group backed by NATO. These efforts led to talks in Rambouillet and Paris, which produced a fair, just, and balanced agreement. The Kosovar Albanians signed the agreement, but Belgrade rejected all efforts to achieve a peaceful solution.

We are mindful that violations of the cease-fire and provocations by the Kosovo Liberation Army have also contributed to this situation. However, it is Belgrade's systematic policy of undermining last October's agreements and thwarting all diplomatic efforts to resolve the situation which have prevented a peaceful solution and led us to today's action.

In this context, we believe that action by NATO is justified and necessary to stop the violence and prevent an even greater humanitarian disaster. As President Clinton said today, "... we and

our allies have a chance to leave our children a Europe that is free, peaceful, and stable. But we must—we must—act now to do that."

In a statement to the nation on March 24, 1999, President Clinton set forth a brief history of the conflict and explained the reasons for NATO's intervention. 35 WEEKLY COMP. PRES. DOC. 516 (Mar. 29, 1999). Excerpts follow.

---

* * * *

In 1989, Serbia's leader, Slobodan Milosevic, the same leader who started the wars in Bosnia and Croatia, and moved against Slovenia in the last decade, stripped Kosovo of the constitutional autonomy its people enjoyed thus denying them their right to speak their language, run their schools, shape their daily lives. For years, Kosovars struggled peacefully to get their rights back. When President Milosevic sent his troops and police to crush them, the struggle grew violent.

Last fall our diplomacy, backed by the threat of force from our NATO Alliance, stopped the fighting for a while, and rescued tens of thousands of people from freezing and starvation in the hills where they had fled to save their lives. And last month, with our allies and Russia, we proposed a peace agreement to end the fighting for good. The Kosovar leaders signed that agreement last week. Even though it does not give them all they want, even though their people were still being savaged, they saw that a just peace is better than a long and unwinnable war.

The Serbian leaders, on the other hand, refused even to discuss key elements of the peace agreement. As the Kosovars were saying "yes" to peace, Serbia stationed 40,000 troops in and around Kosovo in preparation for a major offensive—and in clear violation of the commitments they had made.

Now, they've started moving from village to village, shelling civilians and torching their houses. . . .

Ending this tragedy is a moral imperative. It is also important to America's national interest. Take a look at this map. Kosovo is a small place, but it sits on a major fault line between Europe, Asia and the Middle East, at the meeting place of Islam and both

the Western and Orthodox branches of Christianity. To the south are our allies, Greece and Turkey; to the north, our new democratic allies in Central Europe. And all around Kosovo there are other small countries, struggling with their own economic and political challenges—countries that could be overwhelmed by a large, new wave of refugees from Kosovo. All the ingredients for a major war are there: ancient grievances, struggling democracies, and in the center of it all a dictator in Serbia who has done nothing since the Cold War ended but start new wars and pour gasoline on the flames of ethnic and religious division.

Sarajevo, the capital of neighboring Bosnia, is where World War I began. World War II and the Holocaust engulfed this region. In both wars Europe was slow to recognize the dangers, and the United States waited even longer to enter the conflicts. Just imagine if leaders back then had acted wisely and early enough, how many lives could have been saved, how many Americans would not have had to die.

We learned some of the same lessons in Bosnia just a few years ago. The world did not act early enough to stop that war, either. . . .

* * * *

Over the last few months we have done everything we possibly could to solve this problem peacefully. Secretary Albright has worked tirelessly for a negotiated agreement. Mr. Milosevic has refused.

On Sunday I sent Ambassador Dick Holbrooke to Serbia to make clear to him again, on behalf of the United States and our NATO allies, that he must honor his own commitments and stop his repression, or face military action. Again, he refused.

Today, we and our 18 NATO allies agreed to do what we said we would do, what we must do to restore the peace. Our mission is clear: to demonstrate the seriousness of NATO's purpose so that the Serbian leaders understand the imperative of reversing course. To deter an even bloodier offensive against innocent civilians in Kosovo and, if necessary, to seriously damage the Serbian military's capacity to harm the people of Kosovo. In short, if President Milosevic will not make peace, we will limit his ability to make war.

* * * *

Hopefully, Mr. Milosevic will realize his present course is self-destructive and unsustainable. If he decides to accept the peace agreement and demilitarize Kosovo, NATO has agreed to help to implement it with a peace-keeping force. If NATO is invited to do so, our troops should take part in that mission to keep the peace. But I do not intend to put our troops in Kosovo to fight a war.

* * * *

On March 26, President Clinton reported to Congress, consistent with the War Powers Resolution, explaining in detail the military operation and the bases for NATO action. 35 WEEKLY COMP. PRES. DOC. 527 (Mar. 29, 1999).

---

* * * *

The FRY government has failed to comply with U.N. Security Council resolutions, and its actions are in violation of its obligations under the U.N. Charter and its other international commitments. The FRY government's actions in Kosovo are not simply an internal matter. The Security Council has condemned FRY actions as a threat to regional peace and security. The FRY government's violence creates a conflict with no natural boundaries, pushing refugees across borders and potentially drawing in neighboring countries. The Kosovo region is a tinderbox that could ignite a wider European war with dangerous consequences to the United States.

United States and NATO forces have targeted the FRY government's integrated air defense system, military and security police command and control elements, and military and security police facilities and infrastructure. United States naval ships and aircraft and U.S. Air Force aircraft are participating in these operations. Many of our NATO allies are also contributing aircraft and other forces.

In addition, since this air operation began, the U.S. Embassy in Skopje, Macedonia, has been subjected to increasingly hostile demonstrations by a large number of Serbian sympathizers. In response, I have authorized a unit consisting of about 100 combat-equipped Marines from USS NASSAU (LHA 4), which is

supporting the air operations in Kosovo, to deploy to Skopje to enhance security at our embassy. These Marines will remain deployed so long as is necessary to protect our embassy and U.S. persons.

* * * *

I have taken these actions pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. In doing so, I have taken into account the views and support expressed by the Congress in S. Con. Res. 21 and H. Con. Res. 42. I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution. I appreciate the support of the Congress in this action.

On April 12, 1999, at an "extraordinary meeting" of the North Atlantic Council held in Brussels, NATO set forth its objectives with respect to the military operation in Kosovo. Those objectives included: the termination of all violence and repression in the region; the withdrawal from Kosovo of military, police, and paramilitary forces; the stationing in Kosovo of an international military presence; the safe return of all displaced persons and the unhindered access to them by humanitarian aid organizations; and the establishment of a new political framework for Kosovo. The heads of state of the NATO countries reaffirmed those objectives, and set forth the conditions to an end of the air strike, in the following statement, issued in Washington on April 23, 1999.

The full text of the statement is available at *www.nato.int/docu/pr/1999/p99-062e.htm*.

---

1. The crisis in Kosovo represents a fundamental challenge to the values for which NATO has stood since its foundation: democracy, human rights and the rule of law. It is the culmination of a deliberate policy of oppression, ethnic cleansing and violence pursued by the Belgrade regime under the direction of President Milosevic. We will not allow this campaign of terror to succeed. NATO is determined to prevail.

2. NATO's military action against the Federal Republic of Yugoslavia (FRY) supports the political aims of the international community, which were reaffirmed in recent statements by the UN Secretary-General and the European Union: a peaceful, multi-ethnic and democratic Kosovo where all its people can live in security and enjoy universal human rights and freedoms on an equal basis.

3. Our military actions are directed not at the Serb people but at the policies of the regime in Belgrade, which has repeatedly rejected all efforts to solve the crisis peacefully. President Milosevic must:

> Ensure a verifiable stop to all military action and the immediate ending of violence and repression in Kosovo;
> Withdraw from Kosovo his military, police and paramilitary forces;
> Agree to the stationing in Kosovo of an international military presence;
> Agree to the unconditional and safe return of all refugees and displaced persons, and unhindered access to them by humanitarian aid organisations; and
> Provide credible assurance of his willingness to work for the establishment of a political framework agreement based on the Rambouillet accords.

4. There can be no compromise on these conditions. As long as Belgrade fails to meet the legitimate demands of the international community and continues to inflict immense human suffering, Alliance air operations against the Yugoslav war machine will continue. We hold President Milosevic and the Belgrade leadership responsible for the safety of all Kosovar citizens. We will fulfill our promise to the Kosovar people that they can return to their homes and live in peace and security.

5. We are intensifying NATO's military actions to increase the pressure on Belgrade. . . .

6. NATO is prepared to suspend its air strikes once Belgrade has unequivocally accepted the above mentioned conditions and demonstrably begun to withdraw its forces from Kosovo according to a precise and rapid timetable. This could follow the passage of

a United Nations Security Council resolution, which we will seek, requiring the withdrawal of Serb forces and the demilitarisation of Kosovo and encompassing the deployment of an international military force to safeguard the swift return of all refugees and displaced persons as well as the establishment of an international provisional administration of Kosovo under which its people can enjoy substantial autonomy within the FRY. NATO remains ready to form the core of such an international military force. It would be multinational in character with contributions from non-NATO countries.

7. Russia has a particular responsibility in the United Nations and an important role to play in the search for a solution to the conflict in Kosovo. . . . We want to work constructively with Russia, in the spirit of the Founding Act.

8. The long-planned, unrestrained and continuing assault by Yugoslav military, police and paramilitary forces on Kosovars and the repression directed against other minorities of the FRY are aggravating the already massive humanitarian catastrophe. This threatens to destabilise the surrounding region.

9. NATO, its members and its Partners have responded to the humanitarian emergency and are intensifying their refugee and humanitarian relief operations in close cooperation with the UNHCR, the lead agency in this field, and with other relevant organisations. We will continue our assistance as long as necessary. NATO forces are making a major contribution to this task.

10. We pay tribute to the servicemen and women of NATO whose courage and dedication are ensuring the success of our military and humanitarian operations.

11. Atrocities against the people of Kosovo by FRY military, police and paramilitary forces represent a flagrant violation of international law. Our governments will cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY) to support investigation of all those, including at the highest levels, responsible for war crimes and crimes against humanity. NATO will support the ICTY in its efforts to secure relevant information. There can be no lasting peace without justice.

12. We acknowledge and welcome the courageous support that states in the region are providing to our efforts in Kosovo. . . .

13. We will not tolerate threats by the Belgrade regime to the security of its neighbours. We will respond to such challenges by Belgrade to its neighbours resulting from the presence of NATO forces or their activities on their territory during this crisis.

14. We reaffirm our support for the territorial integrity and sovereignty of all countries in the region.

15. We reaffirm our strong support for the democratically elected government of Montenegro. Any move by Belgrade to undermine the government of President Djukanovic will have grave consequences. FRY forces should leave the demilitarised zone of Prevlaka immediately.

16. The objective of a free, prosperous, open and economically integrated Southeast Europe cannot be fully assured until the FRY embarks upon the transition to democracy. . . .

17. It is our aim to make stability in Southeast Europe a priority of our transatlantic agenda. . . .

(2) The cease-fire in Kosovo and the deployment of the international security presence

On June 9, 1999, NATO and the FRY executed a military-technical agreement to establish a durable cessation to the hostilities in Kosovo. The agreement provided for the phased withdrawal of FRY forces from Kosovo, and from certain newly established safety zones. The agreement also set forth the terms for the deployment in Kosovo of an international security force ("KFOR"), which, in accordance with a UN resolution then pending before the Security Council, would operate under UN auspices. Under the agreement, the KFOR was authorized to use force, if necessary, to ensure security in the region and compliance with the military-technical agreement. Specifically, the KFOR was authorized

> to take such actions as are required, including the use of necessary force, to ensure compliance with this Agreement and protection of the international security force . . . , and to contribute to a secure environment for the international civil implementation presence, and

other international organisations, agencies and non-governmental organisations. . . .

The full text of the military-technical agreement is available at *www.nato.int/kosovo/docu/a990609a.htm*.

On June 10, 1999, after an air campaign that lasted seventy-seven days, and in accordance with the military-technical agreement between NATO and the FRY, NATO Secretary General Javier Solana announced the temporary suspension of the air operation against the FRY. *See also* 35 WEEKLY COMP. PRES. DOC. 1074 (June 14, 1999).

Also on June 10, the Security Council adopted Resolution 1244. U.N. Doc. S/RES/1244 (1999). In that resolution, the Security Council acted under Chapter VII of the UN Charter to deploy in Kosovo an international civil presence, in addition to the KFOR (for which the Security Council set forth certain responsibilities). Resolution 1244 provides in part as follows.

The Security Council,

* * * *

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region . . . ,

Reaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo,

Determining that the situation in the region continues to constitute a threat to international peace and security,

Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,

* * * *

3. Demands in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary

forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized;

4. Confirms that after the withdrawal an agreed number of Yugoslav and Serb military and police personnel will be permitted to return to Kosovo to perform [certain] functions . . . ;

5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the Federal Republic of Yugoslavia to such presences;

* * * *

7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo . . . with all necessary means to fulfil its responsibilities under paragraph 9 below;

8. Affirms the need for the rapid early deployment of effective international civil and security presences to Kosovo, and demands that the parties cooperate fully in their deployment;

9. Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:

(a) Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2;

(b) Demilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups as required in paragraph 15 below;

(c) Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;

(d) Ensuring public safety and order until the international civil presence can take responsibility for this task;

(e) Supervising demining until the international civil presence can, as appropriate, take over responsibility for this task;

(f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence;

(g) Conducting border monitoring duties as required;

(h) Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organizations;

10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;

* * * *

12. Emphasizes the need for coordinated humanitarian relief operations, and for the Federal Republic of Yugoslavia to allow unimpeded access to Kosovo by humanitarian aid organizations and to cooperate with such organizations so as to ensure the fast and effective delivery of international aid;

* * * *

15. Demands that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization . . . ;

16. Decides that the prohibitions imposed by paragraph 8 of resolution 1160 (1998) shall not apply to arms and related materiel for the use of the international civil and security presences;

(3) Proceedings instituted before the International Court of Justice

On April 29, 1999, the FRY instituted proceedings before the International Court of Justice ("ICJ") against each of the ten NATO member states for violations of international obligations related to the use of force and sovereignty. With respect to the FRY's case against the United States, the FRY defined the dispute as follows:

> The subject-matter of the dispute are acts of the United States of America by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty

> of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group.

The full text of the FRY's application is available at *www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm*.

The FRY asserted that the ICJ had jurisdiction in the case against the United States under Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on December 9, 1948 (the "Genocide Convention"), and Article 38, paragraph 5, of the Rules of the Court.

Immediately after filing its application with the ICJ, the FRY also submitted a request for provisional measures to halt the air campaign that was then in progress. On June 2, 1999, the ICJ refused to order interim measures against any NATO member state, finding that it lacked *prima facie* jurisdiction to entertain the FRY's application, and that it therefore could not indicate any provisional measures in response to that application. With respect to two NATO member states, Spain and the United States, the ICJ found that it manifestly lacked jurisdiction. The ICJ therefore dismissed entirely the cases against these two states. *See Case Concerning Legality of Use of Force (Yugo. v. U.S.)*, 1999 I.C.J. 114 (June 2) (order rejecting request for the indication of provisional measures), excerpted below and available at *www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm*.

---

* * * *

19. Whereas the Court, under its Statute, does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States to whom access to the Court has been granted; whereas the Court has repeatedly stated "that one

of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction" (East Timor, Judgment, I.C.J. Reports 1995, p. 101, para. 26); and whereas the Court can therefore exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned;

* * * *

22. Whereas the United States contends that "[its] reservation [to Article IX] is clear and unambiguous"; that "[t]he United States has not given the specific consent [that reservation] requires [and] . . . will not do so"; and that Article IX of the Convention cannot in consequence found the jurisdiction of the Court in this case, even prima facie; whereas the United States also observed that reservations to the Genocide Convention are generally permitted; that its reservation to Article IX is not contrary to the Convention's object and purpose; and that, "[s]ince . . . Yugoslavia did not object to the . . . reservation, [it] is bound by it"; and whereas the United States further contends that there is no "legally sufficient . . . connection between the charges against the United States contained in the Application and [the] supposed jurisdictional basis under the Genocide Convention"; and whereas the United States further asserts that Yugoslavia has failed to make any credible allegation of violation of the Genocide Convention, by failing to demonstrate the existence of the specific intent required by the Convention to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such", which intent could not be inferred from the conduct of conventional military operations against another State;

23. Whereas Yugoslavia disputed the United States interpretation of the Genocide Convention, but submitted no argument concerning the United States reservation to Article IX of the Convention;

24. Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to the United States reservation to Article IX; and whereas the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties;

25. Whereas in consequence Article IX of the Genocide Convention cannot found the jurisdiction of the Court to entertain a dispute between Yugoslavia and the United States alleged to fall within its provisions; and whereas that Article manifestly does not constitute a basis of jurisdiction in the present case, even prima facie;

* * * *

27. Whereas the United States observes that it "has not consented to jurisdiction under Article 38, paragraph 5, [of the Rules of Court] and will not do so";

28. Whereas it is quite clear that, in the absence of consent by the United States, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction in the present case, even prima facie;

* * * *

29. Whereas it follows from what has been said above that the Court manifestly lacks jurisdiction to entertain Yugoslavia's Application; whereas it cannot therefore indicate any provisional measure whatsoever in order to protect the rights invoked therein; and whereas, within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice;

* * * *

5. Presidential Authority to Deploy Armed Forces

a. Military intervention: Kosovo

In April 1999 the U.S. House of Representatives considered several measures relevant to the situation in Kosovo. On April 28, the House defeated a joint resolution that would have declared a state of war between the United States and the FRY (discussed below); a concurrent resolution, passed by the Senate, that would have expressly authorized the President to conduct military air operations and missile

strikes against the FRY; and a concurrent resolution that would have directed the President to remove U.S. Armed Forces from their positions in connection with operations against the FRY (also discussed below). On the same day, the House passed a bill, never acted on by the Senate, to prohibit the use of funds for deployment of U.S. ground forces without specific congressional authorization.

In a hearing of the House International Relations Committee on April 22, 1999, the Department of State submitted a letter providing the views of the Administration in opposing House Concurrent Resolution 82 ("H.Con.Res.82") and House Joint Resolution 44, as excerpted below.

---

* * * *

The Administration objects to H.Con.Res.82, which would purport to direct the President, pursuant to section 5C of the War Powers Resolution, to remove United States Armed Forces from their positions in connection with the present operations against the Federal Republic of Yugoslavia.

The United States' military operations with respect to Kosovo are profoundly in the interests of the United States. . . .

Moreover, H.Con.Res.82 is based on a part of the War Powers Resolution, Section 5C, that is unconstitutional under the Supreme Court's decision in [*INS v. Chadha*, 462 U.S. 919 (1983)]. Under *Chadha*, Congress cannot legislate through a concurrent resolution.

* * * *

House Joint Resolution 44 would declare a State of War between the United States and the government of the Federal Republic of Yugoslavia. However, neither NATO nor the United States believes that a State of War exists. The President has not requested a declaration of war.

A declaration of war would be entirely counterproductive as a matter of policy, and is unnecessary as a matter of law. On only five occasions in the United States' history, and never since World War II, has the Congress declared war, reflecting the extraordinary nature of, and implications attendant on such a declaration.

While . . . [President] Milosevic should not doubt the resolve of the United States and the NATO to preserve the security and stability of Europe and to uphold international humanitarian norms, we are not at war with the F.R.Y. or its people.

Furthermore, this resolution would convey the message that this is a bilateral war, between the United States and the F.R.Y., rather than an allied effort by NATO.

Finally, a declaration of war would press front-line states to make a potentially difficult decision between belligerence and neutrality, with possibly harmful consequences for NATO access to their territory and airspace, as well as the stability of the Balkans.

As a matter of law, there is no need for a declaration of war. Every use of U.S. Armed Forces, since World War II, has been undertaken pursuant to the President's constitutional authority, in some cases with congressional authorization, but never by declaration of war.

This administration, like previous administrations, takes the view that the President has broad authority as Commander-in-Chief. And under his authority to conduct foreign relations, to authorize the use of force in the national interest.

* * * *

Michael J. Matheson, Deputy Legal Adviser, U.S. Department of State, responded to a question in the context of Kosovo concerning the distinction between armed conflict and war under international law and Presidential powers under the Constitution, as excerpted below. House International Relations Committee, Hearing on War Powers Act, April 22, 1999. A transcript of the hearing, including the text of the letter, *supra*, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

[T]he position of the United States is that we are involved in an armed conflict. . . .You will find in all of the international instruments governing the use of armed force since World War II references to armed conflict.

* * * *

. . . Armed conflict, as it is used in all of the modern international instruments, includes any significant fighting between states and for example, in the 1949 Geneva Conventions you will find that the declaration of its applicability includes both declared war and any other armed conflict between states. . . .

. . . [T]he point is that in modern international law, it was recognized that the old notion of state of war was so ambiguous that it was important to have a clear objective standard of armed conflict, and that is why the 1949 Conventions applied to armed conflict regardless of whether the states recognized the state of war. . . . Armed conflict is military action between the forces of states. This need not involve, and typically in international practice does not involve, a declared and recognized state of war which has much more far reaching consequences.

* * * *

United States Presidents of this and all previous Administrations have believed that the President has very wide constitutional authority as commander-in-chief to use the armed forces of the United States for purposes of protecting U.S. national interest. . . . At the moment, we are involved in an armed conflict which the President believes he clearly has constitutional authority to engage in.

* * * *

(1) Litigation in U.S. courts

During the bombing campaign, thirty-one members of Congress filed suit against the President in the U.S. District Court for the District of Columbia seeking a declaration that U.S. air strikes in the FRY violated the War Powers Clause of the Constitution and the War Powers Resolution, 50 U.S.C. § 1541–1548. The complaint alleged that the President had violated these provisions by authorizing air strikes for a period of more than sixty days without congressional authorization. The district court dismissed the suit for lack of standing, *Campbell v. Clinton*, 52 F.Supp. 2d 34 (D.D.C. 1999), and the

court of appeals affirmed, concluding that congressmen must rely on the broad range of legislative authority available to them in this area rather than the courts. 203 F.3d 19 (D.C. Cir. 2000). *See Digest 2000* at 758–65.

(2) Office of Legal Counsel opinion

The War Powers Resolution, Pub. L. No. 93–148, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541–1548 (1994) (the "WPR"), referred to in *Campbell v. Clinton, supra*, sets forth procedures for authorizing and reporting on hostilities. *See Digest 1973* at 560–63 for a discussion of the War Powers Resolution at the time of its enactment over a Presidential veto.

On May 21, 1999, President Clinton signed Pub. L. No. 106–31, 113 Stat. 57 (1999), providing emergency supplemental appropriations for military operations in Kosovo. A memorandum prepared by Assistant Attorney General Randolph Moss, U.S. Department of Justice, Office of Legal Counsel ("OLC"), memorialized legal advice provided in May 1999 that Pub. L. No. 106–31 constituted authorization for continuing hostilities consistent with the War Powers Resolution. Memorandum from Assistant Attorney General Randolph Moss for the Attorney General re: Authorization for Continuing Hostilities in Kosovo, December 19, 2000. After summarizing relevant provisions of the War Powers Resolution, the memorandum demonstrated, by reference to the relevant case law, to historical practice, and to basic principles of constitutional law, that appropriations laws such as the one at issue may authorize military combat, particularly where, as here, it was clear that Congress intended to enable the President to continue military operations in Kosovo. Excerpts from the memorandum opinion are set forth below.

The full text is available at *www.usdoj.gov/olc/2000opinions.htm.*

---

* * * *

The "core" of the WPR "resides in sections 4(a)(1) and 5(b)." John Hart Ely, *War and Responsibility* 48 (1993). Section 4(a)(1) of the WPR requires the President to submit a report to Congress whenever, "[i]n the absence of a declaration of war," United States Armed Forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1543(a)(1). Section 5(b) requires the President to "terminate any use of the United States Armed Forces with respect to which [a] report [under section 4(a)(1)] was submitted (or required) [within 60 days thereafter]" unless the Congress takes certain enumerated actions to authorize continuing combat or "is physically unable to meet as a result of an armed attack upon the United States." 50 U.S.C. § 1544(b). The 60 day period may be extended for an additional 30 days if the President certifies to Congress that "unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in bringing about a prompt removal of such forces." *Id*. Thus, when a report under section 4(a)(1) is filed (or required to be filed), section 5(b)'s 60 day (or, in appropriate circumstances, 90 day) "clock" begins to run.

Under section 5(b), Congress may, within the 60 day period, authorize continuing hostilities after that period by any one of three methods: (1) by a declaration of war; (2) by enacting a "specific authorization for such use of United States Armed forces"; or (3) by "extend[ing] by law such sixty-day period." 50 U.S.C. § 1544(b). The section thus functions essentially as a burden-shifting device.

* * * *

II. Appropriations and Authorization of Military Combat

The Supreme Court has recognized that, as a general matter, appropriation statutes may "stand[] as confirmation and ratification of the action of the Chief Executive." *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947). Congress may also "amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440 (1992). "[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt

that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' *United States v. Dickerson*, 310 U.S. 554, 555 (1940). 'The whole question depends on the intent of Congress as expressed in the statutes.' *United States v. Mitchell*, 109 U.S. 146, 150 (1883)." *United States v. Will*, 449 U.S. 200, 222 (1980).

* * * *

The most conspicuous example of Congress authorizing hostilities through its appropriations power occurred during the War in Vietnam. *See* William C. Banks & Peter Raven-Hansen, *National Security Law and the Power of the Purse* 119 (1994) ("The paradigm of what we have called legitimating appropriations—appropriation measures from which the executive infers authority for national security actions—is the succession of appropriations for military activities in Southeast Asia during the Vietnam War."). In that war, the State Department Legal Adviser argued that Congress had authorized the conflict, not only through the Gulf of Tonkin Resolution, 78 Stat. 384 (1964), but also by enacting supplemental appropriations bills. . . . Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 Dep't St. Bull. 474, 487–88 (1966) (footnote omitted).

* * * *

. . . Section 8(a) of the WPR . . . provides that authority "shall not be inferred . . . from any provision of law . . . including any provision contained in any appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter." 50 U.S.C. § 1547(a). In assessing whether an appropriation statute can constitute authorization, the critical question thus becomes how to understand section 8(a)(1).

* * * *

. . . If section 8(a)(1) were read to block all possibility of inferring congressional approval of military action from any

appropriation, unless that appropriation referred in terms to the WPR and stated that it was intended to constitute specific authority for the action under that statute, then it would be unconstitutional. . . .

In order to avoid this constitutional problem, we do not interpret section 8(a)(1) as binding future Congresses but instead as having the effect of establishing a background principle against which Congress legislates. In our view, section 8(a)(1) continues to have operative legal effect, but only so far as it operates to inform how an executive or judicial branch actor should interpret the intent of subsequent Congresses that enact appropriation statutes that do not specifically reference the WPR. On the question whether an appropriation statute enacted by a subsequent Congress constitutes authorization for continued hostilities, it is the intent of the subsequent Congress, as evidenced by the text and legislative history of the appropriation statute, that controls the analysis. The existence of section 8(a)(1) might affect this analysis.

* * * *

V. Pub. L. No. 106–31 and the War Powers Resolution

. . . [T]he the text of Pub. L. No. 106–31 and the legislative record as a whole make clear that Congress intended, by enacting the President's request, to enable the President to continue U.S. participation in Operation Allied Force for as long as funding remained available, *i.e.*, through at least the end of the fiscal year on September 30, and indeed even longer. . . .

In this context, the concerns that have been voiced about finding congressional authorization in general appropriation statutes are not applicable. The purposes of both H.R. 1664 and H.R. 1141 were plain on the face of the bills. . . . In this case, "Congress as a whole was aware of" the basic terms of the special, emergency appropriation for continuing military operations in Kosovo. . . . The bill was surely among the most visible and important pieces of legislation introduced before the first session of the 106th Congress, and both the Administration and individual members pointedly and publicly underscored its significance. . . .

* * * *

Finally, it is worth observing that, in this case, the underlying purpose of the WPR's "clock" was fully satisfied. That clock functions to ensure that, where the President commits U.S. troops to hostilities without first obtaining congressional authorization, Congress has the opportunity to consider the merits of the President's actions and to decide whether those hostilities may continue. Here, the President ordered a series of air strikes in the Federal Republic of Yugoslavia "to demonstrate the seriousness of NATO's purpose so that the Serbian leaders understand the imperative of reversing course; to deter an even bloodier offensive against innocent civilians in Kosovo; and, if necessary, to seriously damage the Serbian military's capacity to harm the people of Kosovo." Letter for the Speaker from the President, March 26, 1999, at 1. Congress then had the opportunity to deliberate on the wisdom of the President's actions, which it did, considering several resolutions relating to the military efforts in Kosovo. After all of those deliberations, Congress decided to use one of its most important constitutional powers over war and peace—its appropriation power—specifically to fund the ongoing military effort. By doing so, it authorized the President to continue military activities in the region.

* * * *

b. Peacekeeping

(1) Haiti

On September 15, 1994, Senators Robert Dole, Alan K. Simpson, Strom Thurmond, and William S. Cohen requested from OLC a copy or summary of any legal opinion that that Office may have rendered concerning the lawfulness of President Clinton's planned deployment of U.S. forces into Haiti without authorization by Congress. By letter dated September 27, 1994, Assistant Attorney General Walter Dellinger responded to the Senators' request, providing an analysis of the applicable law, concluding that "the President had legal and constitutional authority to order United States

troops to be deployed into Haiti." Assistant Attorney General Dellinger's letter is excerpted below (footnotes excluded). *See* discussion of U.S. involvement in Haiti throughout the 1991–1994 period in Chapter 16.A.2. and U.S. peacekeeping efforts in Haiti in Chapter 17.B.5.

The full text of the letter is available at *www.usdoj.gov/olc/haiti.htm*.

---

* * * *

In this case, a combination of three factors provided legal justification for the planned deployment. . . .

I. First, the Haitian deployment accorded with the sense of Congress, as expressed in section 8147 of the Department of Defense Appropriations Act, 1994, Pub. L. No. 103–139. That provision was sponsored by, among others, Senators Dole, Simpson and Thurmond. *See* 139 Cong. Rec. S14,021–22 (daily ed. Oct. 20, 1993).

Section 8147(b), 107 Stat. 1474, of the Act states the sense of Congress that "funds appropriated by this Act should not be obligated or expended for United States military operations in Haiti" unless certain conditions (including, in the alternative, prior Congressional authorization) were met. Section 8147(c), 107 Stat. 1475, however, added that

> [i]t is the sense of Congress that the limitation in subsection (b) should not apply if the President reports in advance to Congress that the intended deployment of United States Armed Forces into Haiti—
>
> (1) is justified by United States national security interests;
>
> (2) will be undertaken only after necessary steps have been taken to ensure the safety and security of United States Armed Forces, including steps to ensure that United States Armed Forces will not become targets due to the nature of their rules of engagement;
>
> (3) will be undertaken only after an assessment that—
>
> (A) the proposed mission and objectives are most appropriate for the United States Armed Forces rather

> than civilian personnel or armed forces from other nations, and
> (B) that the United States Armed Forces proposed for deployment are necessary and sufficient to accomplish the objectives of the proposed mission;
> (4) will be undertaken only after clear objectives for the deployment are established;
> (5) will be undertaken only after an exit strategy for ending the deployment has been identified; and
> (6) will be undertaken only after the financial costs of the deployment are estimated.

In short, it was the sense of Congress that the President need not seek prior authorization for the deployment in Haiti provided that he made certain specific findings and reported them to Congress in advance of the deployment. The President made the appropriate findings and detailed them to Congress in conformity with the terms of the resolution. *See* Letter to the Speaker of the United States House of Representatives from the President (Sept. 18, 1994). Accordingly, this is not, for constitutional purposes, a situation in which the President has "take[n] measures incompatible with the expressed or implied will of Congress," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 637 (Jackson, J., concurring). Rather, it is either a case in which the President has acted "pursuant to an . . . implied authorization of Congress," so that "his authority is at its maximum," *id.* at 635, or at least a case in which he may "rely upon his own independent powers" in a matter where Congress has "enable[d], if not invite[d], measures on independent presidential responsibility." *Id.* at 637.

II. Furthermore, the structure of the War Powers Resolution (WPR) recognizes and presupposes the existence of unilateral Presidential authority to deploy armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1543(a)(1). The WPR requires that, in the absence of a declaration of war, the President must report to Congress within 48 hours of introducing armed forces into such circumstances and must terminate the use of United

States armed forces within 60 days (or 90 days, if military necessity requires additional time to effect a withdrawal) unless Congress permits otherwise. *Id.* § 1544(b). This structure makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress: the WPR regulates such action by the President and seeks to set limits to it.

To be sure, the WPR declares that it should not be "construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1547(d)(2). But just as clearly, the WPR *assumes* that the President already has such authority, and indeed the WPR states that it is not "intended to alter the constitutional authority of the . . . President." *Id.* § 1547(d)(1). Furthermore, although the WPR announces that, in the absence of specific authorization from Congress, the President may introduce armed forces into hostilities only in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces," *id.* § 1541(c), even the defenders of the WPR concede that this declaration—found in the "Purpose and Policy" section of the WPR—either is incomplete or is not meant to be binding. *See, e.g.*, Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. Pa. L. Rev. 79, 81 (1984).

The WPR was enacted against a background that was "replete with instances of presidential uses of military force abroad in the absence of prior congressional approval." Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980). While Congress obviously sought to structure and regulate such unilateral deployments, its overriding interest was to prevent the United States from being engaged, without express congressional authorization, in major, prolonged conflicts such as the wars in Vietnam and Korea, rather than to prohibit the President from using or threatening to use troops to achieve important diplomatic objectives where the risk of sustained military conflict was negligible.

Further, in establishing and funding a military force that is capable of being projected anywhere around the globe, Congress

has given the President, as Commander in Chief, considerable discretion in deciding how that force is to be deployed. *See Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950); *cf. Maul v. United States*, 274 U.S. 501, 515–16 (1927) (Brandeis and Holmes, J.J., concurring) (President "may direct any revenue cutter to cruise in any waters in order to perform any duty of the service"). By declining, in the WPR or other statutory law, to prohibit the President from using his conjoint statutory and constitutional powers to deploy troops into situations like that in Haiti, Congress has left the President both the authority and the means to take such initiatives.

In this case, the President reported to Congress, consistent with the WPR, that United States military forces, together with units supplied by foreign allies, began operations in Haitian territory, including its territorial waters and airspace. The President stated in his report that he undertook those measures "to further the national security interests of the United States; to stop the brutal atrocities that threaten tens of thousands of Haitians; to secure our borders; to preserve stability and promote democracy in our hemisphere; and to uphold the reliability of the commitments we make, and the commitments others make to us, including the Governors Island Agreement and the agreement concluded on September 18 in Haiti." Letter to the Speaker of the United States House of Representatives from the President, at 2 (Sept. 21, 1994). We believed that the deployment was fully consistent with the WPR, and with the authority Congress reserved to itself under that statute to consider whether affirmative legislative authorization for the continuance of the deployment should be provided.

III. Finally, in our judgment, the Declaration of War Clause, U.S. Const., art. I, § 8, cl. 11 ("[t]he Congress shall have Power . . . [t]o declare War"), did not of its own force require specific prior congressional authorization for the deployment of troops at issue here. That deployment was characterized by circumstances that sufficed to show that the operation was not a "war" within the meaning of the Declaration of War Clause. The deployment was to have taken place, and did in fact take place, with the full consent of the legitimate government of the country involved. Taking that and other circumstances into account, the President, together with

his military and intelligence advisors, determined that the nature, scope and duration of the deployment were not consistent with the conclusion that the event was a "war."

In reaching that conclusion, we were guided by the initial premise, articulated by Justice Robert Jackson, that the President, as Chief Executive and Commander in Chief, "is exclusively responsible" for the "conduct of diplomatic and foreign affairs," and accordingly that he may, absent specific legislative restriction, deploy United States armed forces "abroad or to any particular region." *Johnson v. Eisentrager*, 339 U.S. at 789. Presidents have often utilized this authority, in the absence of specific legislative authorization, to deploy United States military personnel into foreign countries at the invitation of the legitimate governments of those countries. For example, during President Taft's Administration, the recognized government of Nicaragua called upon the United States to intervene because of civil disturbance. According to President Taft, "[t]his led to the landing of marines and quite a campaign. . . . This was not an act of war, because it was done with the consent of the lawful authorities of the territory where it took place." William Howard Taft, *The Presidency* 88–89 (1916).

In 1940, after the fall of Denmark to Germany, President Franklin Roosevelt ordered United States troops to occupy Greenland, a Danish possession in the North Atlantic of vital strategic interest to the United States. This was done pursuant to an agreement between the United States and the Danish Minister in Washington, and was welcomed by the local officials on Greenland. Congress was not consulted or even directly informed. *See* James Grafton Rogers, *World Policing and the Constitution* 69–70 (1945). Later, in 1941, the President ordered United States troops to occupy Iceland, an independent nation, pursuant to an agreement between himself and the Prime Minister of Iceland. The President relied upon his authority as Commander in Chief, and notified Congress only after the event. *Id.* at 70–71. More recently, in 1989, at the request of President Corazon Aquino, President Bush authorized military assistance to the Philippine government to suppress a coup attempt. *Pub. Papers of George Bush* 1615 (1989).

Such a pattern of Executive conduct, made under claim of right, extended over many decades and engaged in by Presidents

of both parties, "evidences the existence of broad constitutional power." Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. at 187.

We are not suggesting, however, that the United States cannot be said to engage in "war" whenever it deploys troops into a country at the invitation of that country's legitimate government. Rather, we believe that "war" does not exist where United States troops are deployed at the invitation of a fully legitimate government in circumstances in which the nature, scope, and duration of the deployment are such that the use of force involved does not rise to the level of "war."

In deciding whether prior Congressional authorization for the Haitian deployment was constitutionally necessary, the President was entitled to take into account the anticipated nature, scope and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment. Indeed, it was the President's hope, since vindicated by the event that the Haitian military leadership would agree to step down before exchanges of fire occurred. Moreover, while it would not be appropriate here to discuss operational details, other aspects of the planned deployment, including the fact that it would not involve extreme use of force, as for example preparatory bombardment, were also relevant to the judgment that it was not a "war."

On the basis of the reasoning detailed above, we concluded that the President had the constitutional authority to deploy troops into Haiti even prior to the September 18 agreement.

(2) Bosnia

In a memorandum opinion of November 30, 1995, OLC followed a similar analysis in concluding that the President, "acting without specific statutory authorization, may lawfully introduce United States ground troops into Bosnia in order to assist North Atlantic Treaty Organization to ensure compliance with a peace agreement." Memorandum for the Counsel to the President from Walter Dellinger, Assistant

Attorney General, Office of Legal Counsel re: Proposed Deployment of United States Armed Forces into Bosnia. As discussed in Chapter 17.B.2., on December 17, 1995, President Clinton ordered 20,000 U.S. military personnel to participate in IFOR, the NATO force in Bosnia.

The full text of the memorandum opinion, excerpted below, is available at *www.usdoj.gov/olc/bosnia2.htm*.

---

* * * *

Several circumstances of the proposed deployment have led some to take a different view of this question. Unlike the Haitian intervention, this operation arguably is not a case where "the risk of sustained military conflict [is] negligible." OLC Haiti Letter at 1, 4. With the exception of the limited commitment of ground troops to Macedonia, the United States' previous military involvement in the Yugoslav theater has been undertaken only by its naval or aerial forces. The deployment of 20,000 troops on the ground is an essentially different, and more problematic, type of intervention: it raises the risk that the United States will incur (and inflict) casualties. Disengagement of ground forces can be far more difficult than the withdrawal of forces deployed for air strikes or naval interdictions. Because of the difficulties of disengaging ground forces from situations of conflict, and the attendant risk that hostilities will escalate, arguably there is a greater need for approval at the outset for the commitment of such troops to such situations; otherwise, Congress may be confronted with circumstances in which the exercise of its power to declare war is effectively foreclosed.

Nevertheless, we do not believe that these arguments against the President's unilateral authority to deploy forces into Bosnia are persuasive. The deployment would be in aid of a peace agreement that will be guaranteed by NATO and the United Nations Security Council. The parties to the agreement already are in substantial, though perhaps not total, compliance with an earlier cease-fire agreement, and have invited the deployment of NATO forces and guaranteed their safety. To send United States forces to the region, in these circumstances, does not constitute

"war" in any sense of the word. Historical practice reinforces the most natural reading of the constitutional language: at the least, the President may deploy United States forces here without express authorization to protect the national interests, even if the deployment is not without some risk.

* * * *

6. Issues Before the International Court of Justice

During the 1990s the United States participated in two proceedings before the ICJ involving use of force issues, discussed below. *See also* A.4.a.(3) *supra*.

a. Nuclear weapons advisory opinion

On August 27, 1993, the Director General of the World Health Organization ("WHO"), Dr. Hiroshi Nakajima, sent a letter to the registrar of the International Court of Justice ("ICJ") requesting an advisory opinion on the following question: "In the view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?" The WHO's request for an advisory opinion is available at *www.icj-cij.org/icjwww/icases/ianw/ianwframe.htm*.

On December 19, 1994, UN Secretary General Boutros Boutros-Ghali informed the ICJ of UN General Assembly Resolution 49/75 K, adopted on December 15 pursuant to Article 96, paragraph 1 of the UN Charter. G.A. Res. 49/75 K, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/75 (1994). In that resolution, the General Assembly decided to request the ICJ "urgently to render its advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?' " By order dated February 1, 1995, the ICJ decided that states entitled to appear before it and before the United Nations could submit their views on the General Assembly's question until June 20, 1995. On June 20, 1995, the United States

submitted its views, *inter alia*, that the ICJ should exercise its discretion under Article 65 of its statute not to issue an opinion, and that in any event international law did not prohibit the threat or use of nuclear weapons in armed conflict *per se*. Excerpts from the U.S. submission on the latter issue are provided below (footnotes omitted).

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

* * * *

A. *Introduction*

Some states have by agreement undertaken not to possess or use nuclear weapons under any circumstances and others have undertaken not to use such weapons in certain defined geographical areas. Apart from this, there is no prohibition in conventional or customary international law on the threat or use of nuclear weapons. On the contrary, international law is replete with agreements that regulate the possession or use of nuclear weapons, providing compelling evidence that their use is not deemed to be generally unlawful. The practice of States, including the Permanent Members of the Security Council, all of which maintain stocks of nuclear weapons, further proves this point.

In addition, nothing in the body of the international humanitarian law of armed conflict indicates that nuclear weapons are prohibited *per se*. As in the case of other weapons, the legality of use depends on the conformity of the particular use with the rules applicable to such weapons. This would, in turn, depend on factors that can only be guessed at, including the characteristics of the particular weapon used and its effects, the military requirement for the destruction of the target in question and the magnitude of the risk to civilians. Judicial speculation on a matter of such fundamental importance would be inappropriate.

B. *There is No General Prohibition on the Use of Nuclear Weapons*

It is a fundamental principle of international law that restrictions on States cannot be presumed but must be found in

conventional law specifically accepted by them or in customary law generally accepted by the community of nations. There is no general prohibition on the use of nuclear weapons in any international agreement. There is likewise no such prohibition in customary international law. Such a customary prohibition could only result from a general and consistent practice of States followed by them from a sense of legal obligation. We submit, based on the following analysis of the agreements, conduct and expressed views of States, that there is no such practice.

1. *Customary Law*. Customary international law is created by a general and consistent practice of States followed by them from a sense of legal obligation. Evidence of a customary norm requires indication of "extensive and virtually uniform" State practice, including States whose interests are "specially affected." Among the actions of States that contribute to the development of customary international law are international agreements concluded by them, governmental acts, and official statements of what the law is considered to be. (However, mere hortatory declarations or acts not based on a perception of legal obligation would not suffice.)

With respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected. Nor could customary law be created by abstaining from the use of nuclear weapons for humanitarian, political or military reasons, rather than from a belief that such abstention is required by law. Among the more important indicators of State practice in this area are the international agreements that regulate but do not prohibit nuclear weapons, the fact of the acquisition and deployment of nuclear weapons by the major military powers, and the official views expressed by States on this question.

2. *International Agreements*. We are aware of no international agreement—and certainly none to which the United States is a Party—that contains a general prohibition on the use of nuclear weapons. On the contrary, it is evident that existing agreements proceed from the assumption that there is no such general prohibition.

* * * *

3. *Conduct of States*. It is well known that the Permanent Members of the Security Council possess nuclear weapons and have developed and deployed systems for their use in armed conflict. These States would not have borne the expense and effort of acquiring and maintaining these weapons and delivery systems if they believed that the use of nuclear weapons was generally prohibited. On the contrary, the possible use of these weapons is an important factor in the structure of their military establishments, the development of their security doctrines and strategy, and their efforts to prevent aggression and provide an essential element of the exercise of their right of self-defense. (These deployments and doctrines are discussed in the 1990 Report of the Secretary-General on nuclear weapons [A/45/373, September 18, 1990]). This pattern of conduct is inconsistent with the existence of any general legal prohibition on the use of nuclear weapons.

The fact that such weapons have actually been used in only one armed conflict does not suggest the contrary. Certainly nuclear-weapon States have preserved the option to use nuclear weapons if necessary, and (as is explained below) have not refrained from further use of these weapons *because* they believed such use to be unlawful—which is an essential element in the development of customary international law.

4. *Expressed Views of States*. Various States have taken differing views on the legality of the use of nuclear weapons. As the United Nations Secretary-General has recently concluded, "no uniform view has emerged as yet on the legal aspects of the possession of nuclear weapons and their use as a means of warfare." This is confirmed by the WHO resolution that requested an advisory opinion, which refers to the fact that "marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons." The variety and disparity of views expressed by States demonstrates that there is no generally-accepted prohibition on the use of nuclear weapons. Under these circumstances, customary international law cannot be said to include such a general prohibition.

The position of the nuclear-weapon States is best illustrated by their official statements on nuclear-weapons use in the context of the Non-Proliferation Treaty and the Treaty of Tlatelolco. On

April 5, 1995, Secretary of State Christopher announced that President Clinton had declared the following in the context of the Conference on the extension of the Non-Proliferation Treaty:

> The United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon [State].

Statements identical in substance were made at the same time by France, Russia and the United Kingdom. The Security Council unanimously took note of these statements 'with appreciation", [UN Security Council Resolution 984 (1985)] and no exception was taken to the reservation by these States of the right to use nuclear weapons in certain circumstances.

Likewise, at the time of its ratification of Additional Protocols I and II to the Tlatelolco Treaty, the United States made a formal statement of understandings and declarations, including a statement that effectively reserved its right to use nuclear weapons against one of the Contracting Parties in the event of "an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State. . . ." [28 I.L.M. 1423]. Similar statements were made by the United Kingdom and the Soviet Union. France stated that nothing in the Protocol could present an obstacle to "the full exercise of the right of self-defense confirmed by Article 51 of the United Nations Charter."

Although these statements differ in some respects, they have certain important common features. In particular, none acknowledges any general prohibition on the use of nuclear weapons; on the contrary, each clearly reserves the right to use nuclear weapons in some circumstances. Further, limits are offered only with respect to certain States, thus indicating that there are no comparable constraints on the use of nuclear weapons against States generally.

Additional statements of nuclear-weapon States on the use of nuclear weapons are contained in Appendix I to the Secretary-General's 1990 Report [UN Doc. A/45/373 (1990)]. In each case, the government in question stated its resolve to act in such a manner as to avoid the necessity for the use of nuclear weapons, but in no case is there a recognition of any general prohibition on the use of nuclear weapons.

Beginning with Resolution 16/1653 in 1961, the U.N. General Assembly has adopted a series of resolutions declaring that the use of nuclear weapons is contrary to the U.N. Charter and international law generally. It is well established, however, that aside from certain administrative matters, the General Assembly does not have the authority to "legislate" or create legally binding obligations on its members. Further, such General Assembly resolutions could only be declarative of the existence of principles of customary international law to the extent that such principles had been recognized by the international community, including the States most directly affected. In fact, there were a significant number of U.N. Member States that did not accept these resolutions: in particular, these resolutions were not accepted by a majority of the nuclear-weapon States.

For example, Resolution 1653 was adopted by a vote of 55 to 20, with 26 abstentions, and each of the subsequent resolutions attracted at least 16 negative votes and a number of abstentions. In each case, the United States, the United Kingdom and France voted against the resolution. The representative of the United Kingdom, in explaining his Government's vote on Resolution 1653, stated that "so long as States possess nuclear weapons, they will use them in self-defense." The representative of the United States stated that:

> . . . it is simply untrue to say that the use of nuclear weapons is contrary to the Charter and to international law. . . . Indeed, the very provisions of the Charter approve, and demand, the exercise of self-defense against armed attack. It is very clear that the Charter says nothing whatever about any particular weapon or method which may be used for self-defense.

[U.N. Doc. A/13/PV.1063(1961)]

During the 1980s, the General Assembly adopted a series of resolutions urging the nuclear-weapon States to adopt a policy of refraining from the first use of nuclear weapons and to begin negotiations on a legally binding regime including the obligation not to be the first to use nuclear weapons. Like the resolutions cited above, these resolutions on first use were not accepted by a significant number of U.N. Member States and in particular were not accepted by most nuclear-weapon States. Further, the adoption of these resolutions implicitly indicates a general understanding that there is no existing prohibition on all uses of nuclear weapons, since there would be no need for first-use resolutions and agreements if all uses were already prohibited.

Taken together, these various expressions of the views of States demonstrate that there is no consensus on the question of the legality of the use of nuclear weapons. In particular, there is nothing approaching the degree of acceptance by States, and of acceptance by the States most specifically affected, that would be required to create obligations under customary international law.

Finally, there is nothing in the United Nations Charter, or in rules of customary international law embodied in it, that *per se* precludes the use of nuclear weapons. For example, States may use force when authorized by the Security Council under Chapter VII or in the exercise of individual or collective self-defense. The exercise of self-defense is subject to the rules of necessity and proportionality, but the application of those rules to any use of nuclear weapons depends on the precise circumstances involved and cannot be judged in the abstract.

C. *The Law of Armed Conflict Does Not Prohibit the Use of Nuclear Weapons*

The United States has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare. This in no way means, however, that the use of nuclear weapons is precluded by the law of war. As the following will demonstrate, the issue of the legality depends on

the precise circumstances involved in any particular use of a nuclear weapon.

It has been argued that the use of nuclear weapons is inherently precluded by the principles of international humanitarian law, regardless of the circumstances of their use. It seems to be assumed that any use of nuclear weapons would inevitably escalate into a massive strategic nuclear exchange, with the deliberate destruction of the population centers of the opposing sides.

Such assumptions are speculative in the extreme, and cannot be the basis for judgments by the Court on the legality of hypothetical uses of nuclear weapons that otherwise comply with the principles of international humanitarian law. In fact, any serious analysis of the legality of a hypothetical use of nuclear weapons would of necessity have to consider the precise circumstances of that use. Such circumstances cannot be evaluated in the abstract, and any attempt by the Court to do so would, in our view, be inappropriate.

Various arguments have been advanced in support of the conclusion that the use of nuclear weapons is precluded by the law of armed conflict. In the following, we shall consider these arguments in turn and indicate why we believe each to be incorrect.

* * * *

6. *1977 Additional Protocol I.* Additional Protocol I to the 1949 Geneva Conventions contains a number of new rules on means and methods of warfare, which of course apply only to States that ratify Protocol I. (For example, the provisions on reprisals and the protection of the environment are new rules that have not been incorporated into customary law.) It is, however, clear from the negotiating and ratification record of Protocol I that the new rules contained in the Protocol were not intended to apply to nuclear weapons.

At the outset of the negotiations that led to Protocol I, the International Committee of the Red Cross (ICRC) stated that:

> Prohibitions relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft

> Additional Protocols the ICRC does not intend to broach these problems.

Explicit statements to the same effect were made during the negotiations by various delegations, including France, the Soviet Union, the United Kingdom and the United States.

Furthermore, in creating an ad hoc committee to consider specific restrictions on the use of Conventional weapons thought to present special dangers to the civilian population, the Conference rejected a proposal to expand the scope of this study to nuclear weapons. The Committee concluded that the predominant view was acceptance of "the limitation of the work of this Conference to conventional weapons", noting in particular the important function of nuclear weapons in deterring the outbreak of armed conflict.

Nevertheless, in light of the importance of this point, a number of States made clear formal statements upon signature or ratification emphasizing that the new rules adopted in the Protocol would not apply to nuclear weapons. For example, the signature of the United Kingdom was based on the formal understanding that:

> . . . the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.

Similar express formal statements have been made on signature or ratification by Belgium, Canada, Italy, Germany, the Netherlands, Spain and the United States.

To our knowledge, no State made any comment or objection to any of these formal and clear statements and declarations, nor did any State express a contrary view in connection with its own signature or ratification of Protocol I. In short, the record of signature and ratification of the Protocol reflect a manifest understanding that nuclear weapons were not prohibited or restricted by the new rules established by the Protocol.

This conclusion is consistent with the analysis of those experts on international humanitarian law who are best informed on the Conference's work. For example, the Commentary of the ICRC concluded: that "there is no doubt that during the four sessions of

the Conference agreement was reached not to discuss nuclear weapons"; that the principles reaffirmed in the Protocol "do not allow the conclusion that nuclear weapons are prohibited as such by international humanitarian law"; and that "the hypothesis that States acceding to the Protocol bind themselves without wishing to—or even without knowing—with regard to such an important question as the use of nuclear weapons, is not acceptable." Likewise, the extensive commentary of Bothe, Partsch and Solf on the Protocols [*New Rules for Victims of International Armed Conflict* (1982)] concludes that the negotiating record "shows a realization by the Conference that the scope of its work excluded the special problems of the use of nuclear weapons."

* * * *

9. *Reprisals*. It has been argued that the use of nuclear weapons would not be consistent with the law of reprisals. For the purpose of the law of armed conflict, reprisals are lawful acts of retaliation in the form of conduct that would otherwise be unlawful, resorted to by one belligerent in response to violations of the law of war by another belligerent. Such reprisals would be lawful if conducted in accordance with the applicable principles governing belligerent reprisals. Specifically, the reprisals must be taken with the intent to cause the enemy to cease violations of the law of armed conflict, other means of securing compliance should be exhausted, and the reprisals must be proportionate to the violations. As in the case of other requirements of the law of armed conflict, a judgment about compliance of any use of nuclear weapons with these requirements would have to be made on the basis of the actual circumstances in each case, and could not be made in advance or in the abstract. (Of course, as shown elsewhere in this submission, possible lawful use of nuclear weapons is not limited to reprisals.)

Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including the civilian population or individual civilians (Article 51(6)), civilian objects (Article 52(1)), cultural objects and places or worship (Article 53 (c)), objects indispensable to the survival of the civilian population (Article 54(4)), the natural environment (Article 55(2)), and works and installations containing dangerous

forces (Article 56(4)). These are among the new rules established by the Protocol that, as explained above, do not apply to nuclear weapons.

10. *Neutrality*. It has been asserted that the rules of neutrality in the law of armed conflict apply to and prohibit the use of nuclear weapons. However, the principle of neutrality is not a broad guarantee to neutral States of immunity from the effects of war, whether economic or environmental. Its purpose was to preclude military invasion or bombardment of neutral territory, and otherwise to define complementary rights and obligations of neutrals and belligerents. We are aware of no case in which a belligerent has been held responsible for collateral damage to neutral territory for lawful acts of war committed outside that territory.

Further, the argument that the principle of neutrality prohibits the use of nuclear weapons is evidently based on the assertion that the use of such weapons would inevitably cause severe damage in the territory of neutral States. This assumption is incorrect and in any event highly speculative. The Court could not find that such damage would occur without knowing the precise circumstances of a particular use. Like any other weapon, nuclear weapons could be used to violate neutrality, but this in no way means that nuclear weapons are prohibited *per se* by neutrality principles.

* * * *

On July 8, 1996, the ICJ issued two decisions, one with respect to the request made by the WHO, and the other with respect to the request made by the General Assembly. As to the WHO's request, the ICJ found that the WHO lacked competence to inquire into the legality of the use of nuclear weapons because that question falls outside the scope of the WHO's mandate. The WHO is concerned not with the use of nuclear weapons itself, but with the effects of such use. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. 93 (July 8).

With respect to the General Assembly's request, however, the ICJ rendered an advisory opinion. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 95 (July 8), available at

www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm. The ICJ decided that "the most directly relevant applicable law . . . is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant." After reviewing this body of law, the Court found that neither customary nor conventional international law authorizes or prohibits the threat or use of nuclear weapons *per se* and that any use of nuclear weapons is governed by the restrictions on use of force in the UN Charter. Finding that the established principles and rules of humanitarian law applicable in armed conflict apply to nuclear weapons, the Court noted that although "the use of such weapons in fact seems scarcely reconcilable with respect for such requirements," it did not have "sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance." The Court concluded:

> 96. . . . [T]he Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.
>
> 97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal,

> the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

b. Oil platforms (Iran v. U.S.)

On November 2, 1992, the Islamic Republic of Iran filed in the Registry of the International Court of Justice ("ICJ") an Application instituting proceedings against the United States of America concerning a dispute "aris[ing] out of the attack [on] and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively." In its Application, Iran contended that these acts constituted a "fundamental breach" of Articles I and X(1) of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, signed in Tehran on August 15, 1955, entered into force June 16, 1957, and of "international law." Iran relied on Article XXI, paragraph 2, of the treaty as the basis for the Court's jurisdiction. Iran's application asked for reparations "in an amount to be determined by the Court at a subsequent stage of the proceedings" and "any other remedy the Court may deem appropriate." In its Memorial, Iran added a claim of violation of Article IV of the treaty.

The Court's judgment on U.S. preliminary objections, issued December 12, 1996, and its order on a counter-claim by the United States, issued March 10, 1998, are addressed below. The Court issued its judgment on the merits in 2003, denying both Iran's claim and the U.S. counterclaim. The 2003 judgment contains a summary of the detailed facts relevant to Iran's claims and U.S. counterclaim. *See Digest 2003* at 1036–66. Pleadings, decisions, and transcripts of oral proceedings in the case are available at *www.icj-cij.org*.

(1) Jurisdiction

In Preliminary Objections filed December 16, 1993, the United States raised a preliminary objection to the jurisdiction of the Court. pursuant to Article 79, paragraph 1 of the Rules of the Court. The United States argued that the Court lacked jurisdiction because Iran's claims in fact raised issues relating to the use of force:

> Although Iran seeks to characterize this case as one involving violations of the 1955 Treaty, it is clear from its Application and Memorial that Iran is attempting to use the Treaty in order to bring before the Court claims that the United States violated provisions of the United Nations Charter and principles of customary international law relating to the use of force by one state against another. As Iran is well aware, the Court has no jurisdiction to hear such complaints against the United States. Iran's efforts to recast the 1995 Treaty, addressing purely commercial and consular matters as addressing the fundamental issues of war and peace fly in the face of the terms of the 1955 Treaty and its history as well as the jurisprudence of the Court.

The United States denied that its actions had violated any of the "conventions, principles, or rules of customary international law" asserted by Iran, but in any event, since "there is no claim that the Court has jurisdiction under Article 36(2) of the statute of the Court," its consideration of Iran's application was "limited to alleged violations of the terms of the 1955 Treaty." Turning to the 1955 Treaty, the United States argued that the Court lacked jurisdiction as alleged by Iran under Articles I, IV(1), or X(1) of the Treaty, because "[e]ven a cursory review of these articles . . . shows that they have no reasonable connection to the incidents of 19 October 1987 and 18 April 1988." Oral proceedings on the U.S. preliminary objections were held September 16 and 24, 1996.

On December 12, 1996, the ICJ issued a Preliminary Opinion, concluding that it had jurisdiction over Iran's claim

under Article X(1), but not under Article I or IV. The Court rejected the U.S. position that Iran's claims in fact raised issues relating to the use of force, concluding that "[a] violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955."

The Court then turned to the U.S. argument that Iran's claims were irrelevant to the subject matter contemplated by the Treaty. Article I of the Treaty provides that "[t]here shall be firm and enduring peace and sincere friendship between the United States . . . and Iran." The Court rejected Iran's contention that the language imposed "actual obligations on the Contracting Parties" rather than constituting, in the words of the United States, a "statement of aspiration":

> . . . [T]he Court considers that the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions, and in particular of Articles IV and X. Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court.

Paragraph 31.

As to Article IV(1), which provides for reciprocal treatment of nationals and companies of each party, the Court concluded that "these detailed provisions concern the treatment by each party of the nationals and companies of the other party, as well as their property and enterprises. Such provisions do not cover the actions carried out in this case by the United States against Iran. Article IV, paragraph 1, thus does not lay down any norms applicable to this particular case. This Article cannot therefore form the basis of the Court's jurisdiction." Paragraph 36.

Article X(1) provides that "[b]etween the territories of the two High Contracting parties there shall be freedom of commerce and navigation." The United States argued that

Iran did not allege action by the United States to hinder the freedom of maritime commerce: "[q]uite to the contrary, all of the actions by the United States were taken to advance freedom of navigation, consistent with the views expressed by the Security Council in Resolution 552." While not deciding the meaning of Article X, the Court concluded that "there exists between the Parties a dispute as to the interpretation and the application of [this provision]; and that as a consequence the Court has jurisdiction to entertain this dispute." Paragraph 53.

The United States had also asserted that "[a]ny doubts as to the applicability of the 1955 Treaty to Iran's claims is dispelled by Article XX of the Treaty, paragraph (1) which provides: "1. The present Treaty shall not preclude the application of measures: . . . (d) necessary . . . to protect [a party's] essential security interests." The Court rejected this argument as a basis for challenging jurisdiction, concluding that "Article XX, paragraph 1(d), does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits to be used should the occasion arise." Paragraph 20.

The Court did not rule at this time on the U.S. assertions that its actions were necessary to the protection of national interests and self defense and therefore consistent with Article XX of the Treaty.

(2) U.S. counterclaim

The United States filed its counter-memorial on June 23, 1997, including in it a counterclaim asking the Court to find that "in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987–1988 that were dangerous and detrimental to maritime commerce," Iran breached its obligations to the United States under Article X of the 1955 Treaty and is under an obligation to make "full reparation to the United States for violating the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings."

By Order of March 10, 1998, the Court held that the counter-claim presented by the United States in its Counter-Memorial was admissible as such and formed part of the proceedings. In so doing, it rejected Iran's argument that the counterclaim did not meet the requirements of Article 80 of the Rules of Court concerning "jurisdiction" and "direct connection." The Court found that the actions alleged by the United States were "capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court" and that the Court had jurisdiction to entertain the counterclaim "in so far as the facts alleged may have prejudiced the freedoms guaranteed" by that provision. It also found that the claims of the two Parties "rest on facts of the same nature" and "form part of the same factual complex," and that the Parties "pursue the same legal aim, namely the establishment of legal responsibility for violations of the 1955 Treaty." Paragraph 38. Finding further that the counterclaim was "directly connected with the subject-matter of the claims of Iran, Paragraph 39, the Court concluded that the counterclaim "satisfies the conditions set forth in Article 80, paragraph 1, of the Rules of court." Paragraph 40.

7. Conventional Weapons Convention and Protocols

a. Transmittal of convention and two protocols

On May 12, 1994, President William J. Clinton transmitted to the Senate for advice and consent to ratification the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ("CCW"), together with its Protocol on Non-Detectable Fragments ("Protocol I") and its Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices ("Protocol II"). S. Treaty Doc. No. 103–25. *See also* 88 Am. J. Int'l. L. 719, 748 (1994); 19 I.L.M 1524 (1980). Excerpts from the President's letter of transmittal and from

the report of the Department of State submitting the treaty to the President follow. The statement of Secretary of State Lawrence Eagleburger at the signing of the convention, January 13, 1993, and related documents are all available at 4 Dep't St. Dispatch No. 3 at 26 (Jan. 18, 1993); *see also* fact sheet at 6 Dep't St. Dispatch No. 11 at 193 (Mar. 13, 1995), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

I transmit herewith, for the advice and consent of the Senate to ratification, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects (the Convention), and two accompanying Protocols on Non-Detectable Fragments (Protocol I) and on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). Also transmitted for the information of the Senate is the report of the Department of State with respect to the Convention and its Protocols.

The Convention was concluded at Geneva on October 10, 1980, was signed by the United States on April 8, 1982, and entered into force on December 2, 1983. More than 30 countries have become Party to the Convention. It constitutes a modest but significant humanitarian effort to protect the victims of armed conflict from the effects of particular weapons. It will supplement prohibitions or restrictions on the use of weapons contained in existing treaties and customary international law, including the prohibition on the use in war of chemical and bacteriological weapons in the Geneva Protocol of June 17, 1925. It will provide a basis for effective controls on the widespread and indiscriminate use of landmines, which have caused widespread civilian casualties in recent conflicts.

The Convention and its Protocols restrict, for humanitarian reasons, the use in armed conflicts of three specific types of conventional weapons. Protocol I prohibits the use of weapons that rely on fragments not detectable by X-rays. Protocol II regulates the use of landmines and similar devices for the purpose

of reducing the danger to the civilian population caused by the indiscriminate use of such weapons, and prohibits certain types of booby-traps. Protocol III restricts the use of incendiary weapons in populated areas.

The United States signed the Convention on April 8, 1982. Since then, it has been subject to detailed interagency reviews. Based on these reviews, I have concluded that the United States should become a Party to the Convention and to its Protocols I and II. As described in the report of the Secretary of State, there are concerns about the acceptability of Protocol III from a military point of view that require further examination. I therefore recommend that in the meantime the United States exercise its right under Article 4 of the Convention to accept only Protocols I and II.

I believe that United States ratification of the Convention and its Protocols I and II will underscore our commitment to the principle that belligerents must refrain from weapons or methods of warfare that are inhumane or unnecessary from a military standpoint. . . .

More specifically, by becoming Party, we will encourage the observance by other countries of restrictions on landmines and other weapons that U.S. Armed Forces and those of our allies already observe as a matter of humanity, common sense, and sound military doctrine. The United States will be able to take the lead in negotiating improvements to the Mines Protocol so as to deal more effectively with the immense threat to the civilian population caused by the indiscriminate use of those weapons. It will strengthen our efforts to encourage adoption of a moratorium on export of all anti-personnel landmines.

I therefore recommend that the Senate give early and favorable consideration to the Convention and its Protocols I and II and give its advice and consent to ratification subject to the conditions contained in the report of the Department of State.

LETTER OF SUBMITTAL

* * * *

The Convention is part of the legal regime dealing with the conduct of international armed conflict, including the four 1949 Geneva Conventions on the Protection of the Victims of War and the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land. These significant treaties attempt to reduce the suffering caused by armed conflicts and to provide protection to the victims of war, including the civilian population and members of the armed forces who have been wounded or captured. They are an attempt to reduce the inevitable suffering and damage present during any war in a manner consistent with legitimate military requirements.

* * * *

At the time the Convention was negotiated, there were already a number of international rules on the use of particular weapons in time of war. These include: the prohibition in the 1907 Hague Regulations on the Laws and Customs of War on the use of poison or poisoned weapons and the use of "* * * arms, projectiles, or material calculated to cause unnecessary suffering"; the prohibition on explosive anti-personnel projectiles in the 1868 St. Petersburg Declaration; the prohibition on expanding (or "dum-dum") bullets in the 1899 Hague Declaration; and the important prohibition on the use of chemical and bacteriological weapons contained in the Geneva Protocol of June 17, 1925. However, these rules did not significantly affect the use of landmines and incendiaries, which were commonly thought to present special risks to the civilian population.

* * * *

SECTION-BY-SECTION ANALYSIS OF PROVISIONS

* * * *

One provision in these articles is objectionable. Paragraph 4 of Article 7 of that article provides that the Convention applies to the wars of "national liberation" identified in Article 1(4) of Protocol I Additional to the 1949 Geneva Conventions. (Article 1(4) of Additional Protocol I would apply the rules of international armed conflict to any armed conflict "in which peoples are fighting

against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. * * *") In the case of a state that is party to the Convention but not to Additional Protocol I, an "authority" representing a "liberation movement" would, under this provision, be entitled to the protections of the 1949 Geneva Conventions (including those conferring prisoner-of-war status) if it accepts and applies those Conventions.

In our view, Article 1(4) of Additional Protocol I injects subjective and politically controversial standards into international humanitarian law and undermines the important traditional distinction between international and non-international armed conflicts. Accordingly, the United States should not accept the validity of Article 1(4) as a basis for the application of the rules of humanitarian law. We recommend that the United States declare, at the time of ratification of the Convention, that Article 7 will have no effect. During the coming Review Conference on the Convention, it is our intention to support an amendment extending the Convention to all internal armed conflicts. This would have the effect of applying the requirements of the Convention to all armed conflicts, whatever their political character, without giving special preference and status to "liberation wars."

To demonstrate our support for humanitarian concerns, we should formally state, at the time of U.S. ratification, our intention to apply the provisions of the Convention to all international and non-international armed conflicts, as defined in common Articles 2 and 3 of the Geneva Conventions.

* * * *

The Senate adopted a resolution giving advice and consent to ratification of the Convention and the two protocols, subject to certain conditions, on March 24, 1995. 141 CONG. REC. S4568 (daily ed. Mar. 24, 1995), as excerpted below. The CCW and two protocols entered into force for the United States on September 25, 1995.

---

* * * *

(a) The advice and consent of the Senate . . . is given subject to the following conditions, which shall be included in the instrument of ratification of the Convention:

(1) RESERVATION.—Article 7(4)(b) of the Convention shall not apply with respect to the United States.
(2) DECLARATION.—The United States declares, with reference to the scope of application defined in Article 1 of the Convention, that the United States will apply the provisions of the Convention, Protocol I, and Protocol II to all armed conflicts referred to in Articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949.
(3) UNDERSTANDING.-The United States understands that Article 6(1) of Protocol II does not prohibit the adaptation for use as booby-traps of portable objects created for a purpose other than as a booby-trap if the adaptation does not violate paragraph (1)(b) of the Article.
(4) UNDERSTANDING.—The United States considers that the fourth paragraph of the preamble to the Convention, which refers to the substance of provisions of Article 35(3) and Article 55(1) of Additional Protocol I to the Geneva Conventions for the Protection of War Victims of August 12, 1949, applies only to States which have accepted those provisions.

(b) The advice and consent of the Senate . . . is given subject to the following conditions, which are not required to be included in the instrument of ratification of the Convention:

(1) DECLARATION.-Any amendment to the Convention, Protocol I, or Protocol II . . . any adherence by the United States to Protocol III to the Convention, or the adoption of any additional protocol to the Convention, will enter into force with respect to the United States only pursuant to the treaty-making power of the President, by and with the advice and consent of the Senate, as set forth in Article II, Section 2, Clause 2 of the Constitution of the United States.
(2) DECLARATION.—The Senate notes the statements by the President and the Secretary of State in the letters

accompanying transmittal of the Convention to the Senate that there are concerns about the acceptability of Protocol III to the Convention from a military point of view that require further examination and that Protocol III should be given further study by the United States Government on an interagency basis. Accordingly, the Senate urges the President to complete the process of review with respect to Protocol III and to report the results to the Senate on the date of submission to the Senate of any amendments which may be concluded at the 1995 international conference for review of the Convention.

* * * *

b. Additional and amended protocols to the CCW

As suggested in the President's transmittal of the CCW, the United States led efforts to strengthen the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. This U.S.-led effort resulted in the amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, adopted at Geneva on May 3, 1996 ("amended Mines Protocol") which places tighter restrictions on landmine use and transfer. On January 7, 1997 President Clinton transmitted to the Senate for its advice and consent to ratification the amended Mines Protocol, along with two other Protocols: the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, adopted at Geneva on October 10, 1980 ("Incendiary Weapons Protocol" or "Protocol III") and the Protocol on Blinding Laser Weapons, adopted at Geneva on May 3, 1996 ("Blinding Laser Protocol"). S. Treaty Doc. No. 105–1 (1997). The President's letter of transmittal is excerpted below.

---

* * * *

The most important of these Protocols is the amended Mines Protocol. It is an essential step forward in dealing with the problem

of anti-personnel landmines (APL) and in minimizing the very severe casualties to civilians that have resulted from their use. It is an important precursor to the total prohibition of these weapons that the United States seeks.

Among other things, the amended Mines Protocol will do the following: (1) expand the scope of the original Protocol to include internal armed conflicts, where most civilian mine casualties have occurred; (2) require that all remotely delivered anti-personnel mines be equipped with self-destruct devices and backup self-deactivation features to ensure that they do not pose a long-term threat to civilians; (3) require that all nonremotely delivered anti-personnel mines that are not equipped with such devices be used only within controlled, marked, and monitored minefields to protect the civilian population in the area; (4) require that all anti-personnel mines be detectable using commonly available technology to make the task of mine clearance easier and safer; (5) require that the party laying mines assume responsibility for them to ensure against their irresponsible and indiscriminate use; and (6) provide more effective means for dealing with compliance problems to ensure that these restrictions are actually observed. These objectives were all endorsed by the Senate in its Resolution of Ratification of the Convention in March 1995.

The amended Mines Protocol was not as strong as we would have preferred. In particular, its provisions on verification and compliance are not as rigorous as we had proposed, and the transition periods allowed for the conversion or elimination of certain non-compliant mines are longer than we thought necessary. . . .

Nonetheless, I am convinced that this amended Protocol will, if generally adhered to, save many lives and prevent many tragic injuries. It will, as well, help to prepare the ground for the total prohibition of anti-personnel landmines to which the United States is committed. In this regard, I cannot overemphasize how seriously the United States takes the goal of eliminating APL entirely. The carnage and devastation caused by anti-personnel landmines—the hidden killers that murder and maim more than 25,000 people every year—must end.

On May 16, 1996, I launched an international effort to this end. This initiative sets out to concrete path to a global ban on anti-personnel landmines and is one of my top arms control

priorities. At the same time, the policy recognizes that the United States has international commitments and responsibilities that must be taken into account in any negotiations on a total ban. As our work on this initiative progresses, we will continue to consult with the Congress.

The second of these Protocols—the Protocol on Incendiary Weapons—is part of the original Convention but was not sent to the Senate for advice and consent with the other 1980 Protocols in 1994 because of concerns about the acceptability of the Protocol from a military point of view. Incendiary weapons have significant potential military value, particularly with respect to flammable military targets that cannot so readily be destroyed with conventional explosives.

At the same time, these weapons can be misused in a manner that could cause heavy civilian casualties. In particular, the Protocol prohibits the use of air-delivered incendiary weapons against targets located in a city, town, village, or other concentration of civilians, a practice that caused very heavy civilian casualties in past conflicts.

The Executive branch has given very careful study to the Incendiaries Protocol and has developed a reservation that would, in our view, make it acceptable from a broader national security perspective. This proposed reservation, the text of which appears in the report of the Department of State, would reserve the right to use incendiaries against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and less collateral damage than alternative weapons.

The third of the Protocols—the new Protocol on Blinding Lasers—prohibits the use or transfer of laser weapons specifically designed to cause permanent blindness to unenhanced vision (that is, to the naked eye or to the eye with corrective devices). The Protocol also requires Parties to take all feasible precautions in the employment of other laser systems to avoid the incidence of such blindness.

These blinding lasers are not needed by our military forces. They are potential weapons of the future, and the United States is committed to preventing their emergence and use. The United States supports the adoption of this new Protocol.

* * * *

On May 20, 1999, the Senate gave its advice and consent to ratification of the amended Mines Protocol subject to one reservation, nine understandings and 13 declarations binding on the President, excerpted below. 145 CONG. REC. S5780–3 (1999). The protocol entered into force for the United States on November 24, 1999. The Senate took no action on the other two pending protocols.

---

* * * *

The Senate's advice and consent to the ratification of the Amended Mines Protocol is subject to the reservation, which shall be included in the United States instrument of ratification and shall be binding upon the President, that the United States reserves the right to use other devices (as defined in Article 2(5) of the Amended Mines Protocol) to destroy any stock of food or drink that is judged likely to be used by an enemy military force, if due precautions are taken for the safety of the civilian population.

* * * *

The Senate's advice and consent to the ratification of the Amended Mines Protocol is subject to the following understandings, which shall be included in the United States instrument of ratification and shall be binding upon the President:

(1) UNITED STATES COMPLIANCE.—The United States understands that—

(A) any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken; and

(B) Article 14 of the Amended Mines Protocol (insofar as it relates to penal sanctions) shall apply only in a situation in which an individual—

(i) knew, or should have known, that his action was prohibited under the Amended Mines Protocol;

(ii) intended to kill or cause serious injury to a civilian; and

(iii) knew or should have known, that the person he intended to kill or cause serious injury was a civilian.

(2) Effective Exclusion.—The United States understands that, for the purposes of Article 5(6)(b) of the Amended Mines Protocol, the maintenance of observation over avenues of approach where mines subject to that Article are deployed constitutes one acceptable form of monitoring to ensure the effective exclusion of civilians.

(3) Historic Monuments.—The United States understands that Article 7(1)(i) of the Amended Mines Protocol refers only to a limited class of objects that, because of their clearly recognizable characteristics and because of their widely recognized importance, constitute a part of the cultural or spiritual heritage of peoples.

(4) Legitimate Military Objectives.—The United States understands that an area of land itself can be a legitimate military objective for the purpose of the use of landmines, if its neutralization or denial, in the circumstances applicable at the time, offers a military advantage.

(5) Peace Treaties.—The United States understands that the allocation of responsibilities for landmines in Article 5(2)(b) of the Amended Mines Protocol does not preclude agreement, in connection with peace treaties or similar arrangements, to allocate responsibilities under that Article in a manner that respects the essential spirit and purpose of the Article.

(6) Booby-Traps and Other Devices.—For the purposes of the Amended Mines Protocol, the United States understands that—

(A) the prohibition contained in Article 7(2) of the Amended Mines Protocol does not preclude the expedient adaptation or adaptation in advance of other objects for use as booby-traps or other devices;

(B) a trip-wired hand grenade shall be considered a "booby-trap" under Article 2(4) of the Amended Mines Protocol and shall not be considered a "mine" or an "anti-personnel mine" under Article 2(1) or Article 2(3), respectively; and

(C) none of the provisions of the Amended Mines Protocol, including Article 2(5), applies to hand grenades other than trip-wired hand grenades.

(7) NON-LETHAL CAPABILITIES.—The United States understands that nothing in the Amended Mines Protocol may be construed as restricting or affecting in any way non-lethal weapon technology that is designed to temporarily disable, stun, signal the presence of a person, or operate in any other fashion, but not to cause permanent incapacity.
(8) INTERNATIONAL TRIBUNAL JURISDICTION.—The United States understands that the provisions of Article 14 of the Amended Mines Protocol relating to penal sanctions refer to measures by the authorities of States Parties to the Protocol and do not authorize the trial of any person before an international criminal tribunal. The United States shall not recognize the jurisdiction of any international tribunal to prosecute a United States citizen for a violation of the Protocol or the Convention on Conventional Weapons.

* * * *

The Senate's advice and consent to the ratification of the Amended Mines Protocol is subject to the following conditions, which shall be binding upon the President:
(1) PURSUIT DETERRENT MUNITION.—

(A) UNDERSTANDING.—The Senate understands that nothing in the Amended Mines Protocol restricts the possession or use of the Pursuit Deterrent Munition, which is in compliance with the provisions in the Technical Annex.

* * * *

8. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and The Hague Protocol

On January 6, 1999, President William J. Clinton transmitted to the Senate for advice and consent to ratification the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Convention"), and for advice and consent to accession to the Hague Protocol, both concluded on May 14, 1954, and entered into force on August 7, 1956, 249 U.N.T.S. 240. In his transmittal letter, the President

also reiterated support for the prompt approval of Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977, *reprinted in* 38 I.L.M. 769 (1999). The May 12, 1998, report of the Department of State submitting the instruments to the President and included with the transmittal in S. Treaty Doc. No. 106–1 (1999) is excerpted below. Senate action was still pending as this volume was going to press.

---

* * * *

The Hague Convention—Background

The Hague Convention is part of the legal regime dealing with the conduct of armed conflict, both international and non-international. It constitutes the first comprehensive treaty for the protection of cultural property during armed conflict.

A number of provisions for the protection of cultural property were included in law of war agreements prior to World War II, but the experience of that war clearly demonstrated a need for more effective and comprehensive protections. Accordingly, a diplomatic conference was convened at The Hague in 1954 under the auspices of UNESCO (the United Nations Educational, Scientific and Cultural Organization) to negotiate a new instrument.

The United States participated actively in the negotiation and drafting of the Convention. The U.S. delegation favored its ratification by the United States and the head of the delegation signed the Convention. However, after review of the Convention, certain concerns were raised and it was not submitted to the Senate. A number of these concerns have not been borne out in the decades of experience with the Convention since its entry into force. U.S. military forces have not only followed but exceeded its terms in the conduct of military operations. The minor concerns that remain relate to ambiguities in language that should be addressed through appropriate understandings or conditions as set forth herein and detailed in the section-by-section analysis.

Historically, the United States has recognized special protection for cultural property in armed conflict. The U.S. Army codified

the obligation to protect cultural property in Articles 34–36 of General Order No. 100 (1863), which was regarded as a reflection of the customary practice of nations, including, as it did, provision for waiver of the protection in the event of military necessity.

The essence of the position historically taken by U.S. military forces is contained in a memorandum issued on December 29, 1943, by General Dwight D. Eisenhower to U.S. forces in Italy:

> Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is ours. We are bound to respect those monuments so far as war allows.
>
> If we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count infinitely more and the building must go. But the choice is not always so clear-cut as that. In many cases the monuments can be spared without any detriment to operational needs. Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase "military necessity" is sometimes used where it would be more truthful to speak of military convenience or even personal convenience. I do not want it to cloak slackness or indifference.
>
> It is the responsibility of higher commanders to determine * * * the locations of historical monuments whether they be immediately ahead of our front lines or in areas occupied by us. This information passed to lower echelons through normal channels places the responsibility on all commanders of complying with the spirit of this letter.

For practical purposes, U.S. military operations since the promulgation of the Convention have been entirely consistent with its provisions. During Operation Desert Storm, for example, intelligence resources were utilized to look for cultural property in order to properly identify it. Target intelligence officers identified cultural property or cultural property sites in Iraq; a "no-strike"

target list was prepared, placing known cultural property off limits from attack, as well as some otherwise legitimate targets if their attack might place nearby cultural property at risk of damage.

In attacking legitimate targets in the vicinity of cultural objects, to the extent possible, weapons were selected that would accomplish destruction of the target while minimizing the risk of collateral damage to nearby cultural or civilian property. However, the proximity of military objectives to cultural property did not render those military objectives immune from attack, nor would it under the Convention.

The Hague Convention—Summary

The Convention consists of a preamble, seven chapters, final provisions, and regulations for the execution of the Convention.

Primarily, the Convention elaborates obligations contained in earlier treaties, including the prohibition on attacks directed against cultural property and against misappropriation of such property. (These principles may be found in Articles 27 and 56, respectively, of the Annex to the 1907 Hague Convention IV.) It also provides expanded protection by establishing a regime for special protection of a highly limited category of cultural property included on an International Register. The Convention provides both for preparations in peacetime for safeguarding cultural property against foreseeable effects of armed conflict, and also for respect for such property in time of war or military occupation. In conformity with the customary practice of nations, the protection of cultural property is not absolute. If cultural property is used for military purposes or in the event of imperative military necessity, the protection afforded by the Convention is waived in accordance with the Convention's terms.

The Hague Protocol

The Protocol to the Convention was concluded on the same day as the Convention itself, but is a separate agreement from the Convention. The Hague Protocol contains provisions which require the prevention of exportation of cultural property from occupied territory, and the taking into custody and return of exported cultural property. The Hague Protocol also contains provisions for the

deposit of cultural property by one Party in the territory of another Party for protective purposes and the return of such property.

The United States did not sign the Hague Protocol in 1954 because of certain objections to both the drafting and substantive provisions of Section I of the Hague Protocol, particularly the provision requiring indemnification by an occupying Party to "holders in good faith" of cultural property exported from territory occupied by it. Regarding the drafting, there was concern that, for example, the term "export" was undefined and invited confusion and debate. The main substantive provision of concern dealt with the obligation of indemnification. With respect to this indemnification obligation, concern centered on the complexities and burdens of implementation under both U.S. and other legal systems. These objections require further consideration.

Given these objections, it is our view that the United States should declare, at the time of accession of the Protocol, that the United States will not be bound by the provisions of Section I of the Hague Protocol. This procedure is specifically permitted by Section III, paragraph 9 of the Hague Protocol.

* * * *

Conclusion

The United States has participated actively in all of the significant international negotiations on the laws of armed conflict. Each treaty produced has received extensive inter-agency review to determine whether it is consistent with our humanitarian values and legitimate military requirements and whether the United States should become a Party. This is true also for the Hague Cultural Property Convention and the Hague Protocol and I believe the United States should proceed now with ratification and accession.

Following the Gulf War, Congress expressed interest in the issue of cultural protection in the context of a request for a review of the matter by the Senate Committee on Appropriations in its report on the Department of Defense Appropriations Bill, 1992 (Senate Report 102–154, page 46).

In addition, there has been renewed interest in the Convention as the issues surrounding the disposition of Nazi assets from World

War II have commanded increased attention. (The Convention, however, is understood not to apply retroactively and hence would have no legal impact on the matter. Nonetheless, our ratification at this time would underscore our commitment to the just resolution of this important issue.)

Also, there have been international meetings over the last four years to consider possible future amendments. These meetings will enter a more formal phase this year with a review conference of state parties to be held in the Spring of 1999. As only parties may adopt amendments, U.S. ratification would enable us to play an appropriate role in this initiative, as well as the future course of the Convention generally.

I believe that the Convention contains reasonable provisions which are already consistent with U.S. military policy and practices. Action by the United States to ratify the Convention will underscore our commitment to afford better protection to the world's cultural resources and advance efforts to promote its object and purpose.

The Department of State and the Department of Defense join in recommending that the Convention and the Hague Protocol be submitted to the Senate for advice and consent to ratification and accession at an early date, subject to the above understandings and declaration.

Protocol II Additional to the Geneva Conventions

In a letter dated January 29th, 1987, the Reagan Administration requested the advice and consent of the Senate to ratification of Protocol II. The Senate, however, did not act on Protocol II. I believe renewed consideration of this important law of war instrument is appropriate.

Protocol II deals with non-international armed conflict and, unlike its companion law of war agreement, Protocol I, which deals with international armed conflict, Protocol II has not been a source of controversy. Protocol I was not submitted for ratification at the time Protocol II was transmitted. This decision was based on certain military, humanitarian and terrorism-related objections.

With respect to Protocol II, we are not aware of any serious substantive objections to its ratification and believe its ratification

would assist us in continuing to exercise leadership in the international community in matters relating to the law of war.

With respect to Protocol I, the comprehensive military review of all past military objections that you directed is underway. This review will take some time. It need not, however, delay progress on Protocol II, which essentially expands upon fundamental rules contained in the 1949 Geneva Conventions with respect to internal armed conflicts. In particular, Protocol II makes clear that any deliberate killing of a noncombatant in the course of a non-international armed conflict is a violation of the law of war, punishable as murder. Clearly, observance of these fundamental provisions in civil wars over the past several decades would have avoided many of the worst human tragedies we have witnessed.

Most of our closest allies have ratified Protocol II. Given our position of leadership in the law of war area, U.S. ratification would give a significant boost to the Protocol's visibility and would enhance efforts to further ease the suffering of war's victims—especially, in this case, civilian victims of internal armed conflicts.

I therefore recommend that you request the Senate renew its consideration of Protocol II and give its advice and consent to ratification, subject to the understandings and reservations that are described fully in the report attached to the original January 29, 1987 letter of transmittal to the 100th Congress (Treaty Doc. 100–2).

* * * *

Section-by-Section Analysis of the Hague Convention and the Hague Protocol

* * * *

Article 4 requires Parties to ". . . respect cultural property . . . by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict. . . ."

In this regard, we recommend that the ratification of the Convention be subject to the following understanding:

> It is the understanding of the United States of America that, as is true for all civilian objects, the primary responsibility for the protection of cultural property rests with the party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose.
>
> * * * *

Article 11 introduces the notion of reciprocity into the arrangements for special protection. It specifies that if a Party fails to fulfill its obligations not to use protected property for military purposes or in the event of "exceptional cases of unavoidable military necessity," the protection may be lost. Special protection is thus limited. The "unavoidable military necessity" waiver, however, requires a determination "by the officer commanding a force the equivalent of a division in size or larger."

The criteria for special protection are relatively rigorous and, in practice there has been no proliferation of sites designated for special protection. In fact, only eight sites worldwide have been designated for special protection. All are located in Western Europe and include the Vatican and art storage areas in the Netherlands, Germany and Austria.

An early DoD concern which contributed to the decision not to submit the Convention during the 1950's derived from this Chapter. The concern was that the Kremlin would be designated for special protection to make it immune from attack. It was never so designated. Such a designation would, in any case, have been contrary to the terms of Chapter II and would not have prevented its attack in any case. No concern remains in this regard today.

However, there is a more realistic concern deriving from this Chapter. Due to ambiguous modifiers such as those in the Article 11 phrase " 'exceptional' cases of 'unavoidable' military necessity," the provisions may be misconstrued to impose an unreasonable and disproportionate responsibility on the attacker to avoid damage to cultural property. Clarification would help avoid a suggestion that strict compliance with the Convention would mean that any collateral damage would constitute a violation of the Convention. While such an interpretation would be entirely inconsistent with customary international law, the following understanding would

confirm that the treaty conforms to customary international law and minimize possibilities of misinterpretation:

> It is the understanding of the United States of America that "special protection", as defined in Chapter II of the Convention, codifies customary international law in that it, first, prohibits the use of any cultural property to shield any legitimate military targets from attack, second, allows all property to be attacked using any lawful and proportionate means if required by military necessity and notwithstanding possible collateral damage to such property.

Accordingly, we recommend that the ratification of the Convention be subject to this understanding.

A like consideration, and one that pertains more broadly, is the possibility of failure of the custodian of cultural property to mark that property to facilitate its identification, or for persons planning an attack to be held to an unreasonable standard with respect to identification of all cultural property. In either case, the commander authorizing an attack is responsible only for acting on the basis of information reasonably available to him at the time of the attack; that is, there is no strict liability standard for decisions made in the fog of war. Given past misinterpretations of the law of war that might be asserted with respect to the Convention, we also believe the United States should include the following understanding, at the time of ratification of the Convention:

> It is the understanding of the United States of America that decisions by military commanders and others responsible for planning, deciding upon, and executing attacks can only be judged on the basis of their assessment of the information reasonably available to them at the relevant time.

Finally, it is clear from the negotiating record that the Convention applies only to situations in which conventional weapons could be used. Both the Conference and the Convention

followed the same approach as other conferences on international humanitarian law in which the issue of weapons of mass destruction, such as nuclear weapons, was left aside. Accordingly, the United States should make clear that:

> It is the understanding of the United States of America, that the rules established by the Convention apply only to conventional weapons, and are without prejudice to the rules of international law governing other types of weapons, including nuclear weapons.

* * * *

The Protocol to the Convention contains provisions intended to prevent the exportation of cultural property from occupied territory. Section I obligates an occupying Party to prevent the exportation of cultural property from territory it occupies, and for each Party to take into its custody cultural property exported contrary to the Protocol, and to return such cultural property at the close of hostilities. An occupying power whose duty it was to prevent such exportation of cultural property is obligated to indemnify holders in good faith of the cultural property which has to be returned.

* * * *

We have certain concerns with respect to Section I of the Protocol. Indeed, the United States did not sign the Protocol in 1954 because of certain objections to both the drafting and substantive provisions of Section I of the Protocol. Regarding the drafting, there was concern that, for example, the term "export" was undefined and invited confusion and debate. Regarding the substance, the main objectionable provision, paragraph 4 of Section I, requires indemnification by an occupying state to "holders in good faith" of cultural property exported from territory occupied by it. Objections, in this regard, centered on the complexities and burdens of implementation under both U.S. and other legal systems.

Given these objections, it is our view that the United States should declare, at the time of accession to the Protocol, that the

United States will not be bound by the provisions of Section I of the Protocol. This procedure is specifically permitted by Section III, paragraph 9 of the Protocol.

* * * *

B. ARMS CONTROL & DISARMAMENT

1. START

Negotiations for what was to become the Treaty on the Reduction and Limitation of Strategic Offensive Arms ("START") took place between the United States and the Soviet Union beginning in 1982 and culminated in the signing of the treaty in Moscow on July 31, 1991. Fact sheets released by the Department of State related to START are available at *www.state.gov/www/global/arms/bureau_ac/factsheets_ac.html.*

a. Transmittal for advice and consent to ratification

On November 25, 1991, President George H.W. Bush transmitted START to the Senate for its advice and consent to ratification. Brief excerpts from the report, included in S. Treaty Doc. No. 102–20 (1991), are set forth below. According to the President's transmittal letter, START incorporated "the most extensive verification regime in history." The letter continued:

> START represents a critical watershed in our long-term effort to stabilize the strategic balance through arms control. Stabilization of the strategic balance will help cement one of the most fundamental tenets of our preferred world order—that conflict must not and shall not be resolved through the use of nuclear weapons. Moreover, recent events underscore the need to ensure stability and to broaden the dialogue between our countries. Implementation of START would reinforce these efforts.

The transmittal included two annexes (on Agreed Statements and on Definitions); six protocols (on Conversion or Elimination, on Inspection, on Notification, on Throw-Weight, on Telemetry, and on the Joint Compliance and Inspection Commission); and the Memorandum of Understanding on the Establishment of Data Base Relating to [START], all integral parts of the treaty. The President also provided, for the information of the Senate, documents associated with, but not integral parts of, the treaty. Key features of the treaty were further outlined in a report of the Department of State accompanying the President's letter. Brief excerpts from the report follow (internal headings have been omitted). *See also III Cumulative Digest* 1981–1988 at 3575–83 and 86 Am. J. Int'l L. 346, 354 (1992) for more extensive treatment.

---

* * * *

At the core of the Treaty is the obligation undertaken to reduce and limit ICBMs, ICBM launchers, SLBMs, SLBM launchers, heavy bombers, ICBM warheads, SLBM warheads, and heavy bomber armaments, such that, seven years after entry into force of the Treaty, the aggregate numbers of each of the Parties do not exceed: 1600 for deployed ICBMs and their associated launchers (including 154 for deployed heavy ICBMs and their associated launchers), deployed SLBMs and their associated launchers, and deployed heavy bombers; and 6000 for warheads attributed to deployed ICBMs, deployed SLBMs, and deployed heavy bombers; including 4900 for warheads attributed to deployed ICBMs and deployed SLBMs, of which no more than 1100 can be attributed to deployed ICBMs on mobile launchers of ICBMs, and no more than 1540 attributed to deployed heavy ICBMs.

The Treaty provides for the reductions to take place in three phases—36, 60 and 84 months after entry into force of the Treaty—with separate aggregate limits for the first two phases, culminating in achievement of the full limits by the end of the third phase. (As [the President] stated on September 27, 1991,

however, the United States will accelerate its elimination of ICBMs scheduled for deactivation once START is ratified.) The central limits also include a restriction on the aggregate throw-weight of deployed ICBMs and deployed SLBMs, which is to become effective seven years after entry into force of the Treaty.

The Definitions Annex of the Treaty is the Treaty glossary. . . .

The Treaty sets forth numerous prohibitions pertaining to strategic offensive arms. . . .

The Treaty contains special provisions for mobile ICBM launchers. . . .

The Memorandum of Understanding establishes a data base of information exchanged in accordance with the Treaty.

In order to provide assurance that each Party has met the various limits set forth in the Treaty, the Parties are required to eliminate specified Treaty-limited items or to convert them to items not governed by the Treaty's central limits in accordance with procedures established in the Treaty . . . The Conversion or Elimination Protocol sets forth specific means for conducting conversion or elimination of mobile ICBMs and their launchers, silo launchers and SLBM launchers, and heavy bombers and certain associated equipment and structures. . . .

The Parties are required to make on-board technical measurements and to broadcast all telemetric information obtained from such measurements during each flight test of an ICBM or SLBM. With limited exceptions, no activity, including encryption, encapsulation, or jamming, that denies full access to telemetric information during flight tests . . . is permitted. . . .

The Treaty provides for verification by national technical means of verification and prohibits use of measures of concealment or other measures that would interfere with such means. . . .

The Treaty contains the most extensive and intrusive inspection regime ever included in an arms control agreement. . . .

To promote the objectives and implementation of the provisions of the Treaty, the Parties have established the Joint Compliance and Inspection Commission (JCIC).

* * * *

The treaty is to remain in force for 15 years unless superseded earlier. . . .

The Treaty also provides that each Party may, in exercising its national sovereignty, withdraw from the Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests.

b. Lisbon Protocol

On June 19, 1992, President George H.W. Bush transmitted to the Senate for advice and consent to ratification the Protocol to START, signed at Lisbon, Portugal, on May 23, 1992, by representatives of the United States, the Republic of Belarus, the Republic of Kazakhstan, the Russian Federation, and Ukraine ("Lisbon Protocol"). S. Treaty Doc. No. 102–32 (1992); *see also* 86 Am. J. Int'l L. 792, 799 (1992). The Protocol constituted an amendment to START and was designed to allow for implementation of the treaty following the dissolution of the former Union of Soviet Socialist Republics. The President also transmitted for the information of the Senate letters containing legally binding commitments from the respective heads of state of the Republic of Belarus, the Republic of Kazakhstan, and Ukraine concerning the removal of nuclear weapons and strategic offensive arms from their respective territories. The President's transmittal letter was accompanied by a report of the Department of State, dated June 17, 1992, including an article-by-article analysis of the Protocol, and analyses of the three letters. Key sections of the report, included in S. Treaty Doc. No. 102–32, are excerpted below.

* * * *

. . . Shortly after submission of the START Treaty to the Senate, the Union of Soviet Socialist Republics was dissolved and was replaced with a number of independent states, four of which have strategic offensive arms and declared START-related facilities on

their territories. The unprecedented chain of events surrounding the demise of the Soviet Union has resulted in a delay in consideration of the START Treaty by the Senate so that the necessary steps could be taken that would allow for implementation of the START Treaty under the changed political circumstances. The results of these efforts are a new Protocol to the START Treaty with associated letters, which enable and facilitate implementation of the START Treaty.

* * * *

THE PROTOCOL

All strategic offensive arms are based, and all declared START-related facilities are located, in four former Soviet republics: the Republic of Byelarus, the Republic of Kazakhstan, the Russian Federation, and Ukraine. Each of theses states has consistently stated its intention to observe and implement the START Treaty. In order to give legal effect to these intentions in the changed political circumstances following the demise of the Soviet Union, the United States and the four former Soviet republics have signed the Protocol, which is an integral part of the START Treaty. Under the provision of the Protocol, each of the four states will become a Party to the START Treaty.

The Protocol provides that the Republic of Byelarus, the Republic of Kazakhstan, the Russian Federation, and Ukraine together shall assume the obligations of the former Union of Soviet Socialist Republics under the START Treaty. It obligates these four states to make such arrangements among themselves as are required to implement the START Treaty's limits and restrictions, to allow functioning of the verifications provisions of the START Treaty throughout the territory of the four states, and to allocate those costs that would have been borne by the Soviet Union. The Protocol also clarifies how certain terms used in the START Treaty will be applied, now that the four states will be Parties in place of the former Soviet Union.

Of great importance, the protocol obligates Byelarus, Kazakhstan, and Ukraine to adhere to the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968, as non-nuclear-weapon States Parties in the shortest possible period of

time and to begin immediately to take appropriate steps toward this end. Thus, the Protocol will not only allow the implementation of the START Treaty, but will also constitute a critical element in the furtherance of the United States' nuclear non-proliferation objectives.

The START Treaty, including the Protocol, is subject to ratification and shall enter into force on the date of the final exchange of instruments of ratification. The Protocol, as an integral part of the START Treaty, shall remain in force throughout the duration of the START Treaty. All provisions of the START Treaty that are not explicitly addressed by the Protocol remain unchanged. . . .

* * * *

c. Entry into force

On October 1, 1992, the Senate gave its advice and consent to ratification of the treaty with annexes and protocols transmitted November 25, 1991, Corrigenda of December 19, 1991, and the Lisbon Protocol. 138 CONG. REC. S15,955–56 (daily ed. Oct. 1, 1992). These documents are referred to collectively as the START Treaty or START. The resolution of ratification was subject to seven conditions and declarations. Key provisions are set forth below. *See also III Cumulative Digest 1981–1988* at 3584–85 and 87 Am. J. Int'l L. 108 (1993).

START entered into force on December 5, 1994, with Belarus, Kazakhstan, the Russian Federation, Ukraine, and the United States as State Parties.

---

* * * *

(c) CONDITIONS: The Senate's advice and consent to the ratification of the START Treaty is subject to the following conditions, which shall be binding upon the President:

(1) BINDING OBLIGATIONS: That upon entry into force of the START Treaty, including the May 23, 1992 Protocol, the Republic of Byelarus, the Republic of Kazakhstan, the

Russian Federation and Ukraine shall be legally bound under international law to all obligations of the Union of Soviet Socialist Republics set forth in the START Treaty, its two Annexes, six Protocols, Memorandum of Understanding and Corrigenda.

(2) LEGAL AND POLITICAL OBLIGATIONS OF U.S.S.R.: That the legal and political obligations of the Union of Soviet Socialist Republics reflected in the four related separate agreements, seven legally binding letters, four areas of correspondence, two politically binding declarations, thirteen joint statements and ten other statements on related issues transmitted in Treaty Doc. 102–20 for the information of the Senate with the START Treaty are included in the "obligations of the former Union of Soviet Socialist Republics under the Treaty" assumed by the Republic of Byelarus, the Republic of Kazakhstan, the Russian Federation, and Ukraine pursuant to Article I of the May 23, 1992 Protocol, and that the legal obligations assumed therein are of the same force and effect as the provisions of the Treaty. The United States shall regard actions inconsistent with these legal obligations as equivalent under international law to actions inconsistent with the START Treaty. This condition shall be communicated by the President to the Republic of Byelarus, the Republic of Kazakhstan, the Russian Federation and Ukraine, in such form as he deems appropriate.

(3) BYELARUS, KAZAKHSTAN AND UKRAINE LETTERS: That the letter from Chairman Shushkevich of the Supreme Soviet of the Republic of Byelarus to President Bush dated May 20, 1992; the letter from President Nazarbayev of the Republic of Kazakhstan to President Bush dated May 19, 1992; and the letter from President Kravchuk of Ukraine to President Bush dated May 7, 1992 (all having been submitted to the Senate as associated with the May 23, 1992 Protocol in Treaty Doc. 102–32), being obligations legally binding only in the event of ratification of the START Treaty, are of the same force and effect as the provisions of the Treaty. The United States shall regard actions inconsistent with these obligations as equivalent under international law to actions

inconsistent with the START Treaty. This condition shall be communicated by the President to the Republic of Byelarus, the Republic of Kazakhstan and Ukraine, in such form as he deems appropriate.

(4) NUCLEAR NON-PROLIFERATION TREATY: That the obligations of the Republic of Byelarus, the Republic of Kazakhstan and Ukraine to adhere to the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968 as non-nuclear-weapon States Parties in the shortest possible time, set forth in Article V of the May 23, 1992 Protocol, are of the same force and effect as the provisions of the Treaty. The United States shall regard actions inconsistent with these obligations as equivalent under international law to actions inconsistent with the START Treaty. This condition shall be communicated by the President to the Republic of Byelarus, the Republic of Kazakhstan and Ukraine in such form as he deems appropriate.

* * * *

(6) ELIMINATION OF NUCLEAR WEAPONS FROM BYELARUS, KAZAKHSTAN AND UKRAINE: If the Republic of Byelarus, the Republic of Kazakhstan and Ukraine have not eliminated all nuclear weapons located on their territory and have not eliminated, in accordance with the procedures of the START Treaty, all strategic offensive arms located on their territory, within seven years following the date of entry into force of the START Treaty, as agreed to in legally binding letters submitted to the Senate in connection with the May 23, 1992 Protocol in Treaty Doc. 102–32, then the President—

(A) shall consult with the Senate regarding the effect on the START Treaty of such developments.

(B) shall, if the President determines that failure to eliminate, within seven years following the date of entry into force of the START Treaty, all nuclear weapons, including all strategic offensive arms, located on the territories of the Republic of Byelarus, the Republic of Kazakhstan and Ukraine is of such significance as to constitute a changed circumstance effecting

the Treaty's object and purpose, and if the President decides not to invoke the withdrawal right under Article XVII of the Treaty, the President shall request a meeting of the Joint Compliance and Inspection Commission in accordance with Article XV of the Treaty, to assess the viability of the treaty and to ascertain if an amendment is needed to accommodate the change of circumstance, or the President shall undertake other appropriate diplomatic steps; and

(C) shall, if the President has made the determination and decision described in subparagraph (B)—

(i) submit for the Senate's advice and consent to ratification any change in the obligations of the States Parties under the Treaty that is designed to accommodate such circumstance and is agreed to by all State Parties, unless such change is a minor matter of an administrative or technical nature; or

(ii) if no such change in the obligations of the State Parties is agreed to by all State Parties but the President determines nonetheless that continued adherence to the START Treaty would serve the national security interests of the United States, the President shall seek a Senate resolution of support of such continued adherence, notwithstanding the changes circumstance affecting the Treaty's object and purpose.

* * * *

(8) NUCLEAR STOCKPILE WEAPONS ARRANGEMENT: In as much as the prospect of a loss of control of nuclear weapons or fissile material in the former Soviet Union could pose a serious threat to the United States and to international peace and security, in connection with any further agreement reducing strategic offensive arms, the President shall seek an appropriate arrangement, including the use of reciprocal inspections, data exchanges, and other cooperative measures, to monitor—

(A) the numbers of nuclear stockpile weapons on the territory of the parties to this Treaty; and

(B) the location and inventory of facilities on the territory of the parties to this Treaty capable of producing or processing significant quantities of fissile materials.

(b) DECLARATIONS: The Senate's advice and consent to ratification of the START Treaty is subject to following declarations, which express the intent of the Senate:

(1) SUBSTANTIAL FURTHER REDUCTIONS: Cognizant of the United States' obligation under article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1998 "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control," the Senate finds that the President entered into a Joint Understanding of June 17, 1992, on behalf of the United States, with President Yeltsin, on behalf of the Russian Federation, agreeing to conclude promptly a treaty providing for substantial further reductions in strategic offensive arms. The Senate encourages the concluding of such a treaty at the earliest possible date and will give it prompt consideration upon submission by the President for advice and consent to ratification. In anticipation of the completion, ratification, and entry into force of a treaty with the Russian Federation for substantial further reductions in strategic arms, the Senate calls upon the other nuclear-weapons states to give careful and early consideration to corresponding reductions of their own nuclear arsenals.

(2) MISSILE TECHNOLOGY CONTROL REGIME: The Senate urges the President to seek the adherence by the Republic of Byelarus, the Republic of Kazakhstan and Ukraine to the guidelines of the Missile Technology Control Regime.

(3) ELIMINATION AND DISMANTLEMENT OF NUCLEAR WARHEADS: The Senate commends the Republic of Byelarus, the Republic of Kazakhstan, and Ukraine for eliminating the tactical nuclear warheads from their territories and urges the rapid elimination of the strategic nuclear warheads from their territories pursuant to their obligations under the START Treaty. The Senate urges the President to instruct the Safety, Security and Dismantlement negotiators to proceed expeditiously to obtain the destruction of all nuclear warheads from eliminated systems and to facilitate

secure safeguarded storage of the special nuclear materials withdrawn from eliminated weapons.

* * * *

2. START II

As noted in the Senate resolution of ratification, *supra*, Presidents Bush and Yeltsin signed the Joint Understanding on Reductions in Strategic Offensive Arms on June 17, 1992, at a summit in Washington, June 15–17, 1992 ("Joint Understanding"). In the Joint Understanding, the Presidents stated that "the two sides have agreed upon and will promptly conclude a Treaty with the following provisions," followed by an enumeration of reductions in strategic forces to be taken within the seven-year period following entry into force of the START Treaty and further reductions by the year 2003 or by the end of the year 2000 "if the United States can contribute to the financing of the destruction or elimination of strategic offensive arms in Russia." The text of the Joint Understanding is available at 28 WEEKLY COMP. PRES. DOC. 1082 (June 22, 1992); *see also* 3 Dep't St. Dispatch No. 25 at 481–504 (1992) at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html* (containing the text of the Joint Understanding and other instruments resulting from the June 1992 summit), *III Cumulative Digest 1981–1988* at 3585–86, and fact sheets available at *www.state.gov/www/global/arms/bureau_ac/factsheets_ac.html*.

The anticipated treaty was signed at Moscow on January 3, 1993. Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms ("START II"). On January 15, 1993, President George H.W. Bush transmitted START II to the Senate for advice and consent to ratification. S. Treaty Doc. No. 103–1 (1993).

Unlike START, START II was bilateral, with only the United States and the Russian Federation as parties. In connection with the Lisbon Protocol, B.1.b., *supra*, the other START Parties

(Belarus, Kazakhstan, and Ukraine) had pledged to eliminate strategic offensive arms located on their territories in legally-binding letters, discussed *supra*.

START II also included: The Protocol on Procedures Governing Elimination of Heavy ICBMs and on Procedures Governing Conversion of Silo Launchers of Heavy ICBMs Relating to the Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms ("Elimination and Conversion Protocol"); The Protocol on Exhibitions and Inspections of Heavy Bombers Relating to the Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms ("Exhibitions and Inspections Protocol"); and The Memorandum of Understanding on Warhead Attribution and Heavy Bomber Data Relating to the Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms ("Memorandum on Attribution"). Excerpts from the President's letter of transmittal, included in S. Treaty Doc. No. 103–1, follow. *See also III Cumulative Digest 1981–1988* at 3586–87.

---

* * * *

The START II Treaty is a milestone in the continuing effort by the United States and the Russian Federation to address the threat posed by strategic offensive nuclear weapons, especially multiple-war head ICBMs [intercontinental ballistic missiles]. It builds upon and relies on the Treaty Between the United States of America and Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms (the START Treaty) signed at Moscow on July 31, 1991. At the same time, the START II Treaty goes even further than the START Treaty.

The START Treaty was the first treaty actually to reduce strategic offensive arms of both countries, with overall reductions of 30–40 percent and reductions of up to 50 percent in the most threatening systems. It enhances stability in times of crisis.

It . . . limits strategic arms but also reduces them significantly below current levels.

* * * *

The START II Treaty builds upon and surpasses the accomplishments of the START Treaty by further reducing strategic offensive arms in such a way that further increases the stability of the strategic nuclear balance. It bans deployment of the most destabilizing type of nuclear weapons system—land-based intercontinental ballistic missiles with multiple independently targetable nuclear warheads. At the same time, the START II Treaty permits the United States to maintain a stabilizing sea-based force.

The central limits of the START II Treaty require reductions by January 1, 2003, to 3000–3500 warheads. Within this, there are sub-limits of between 1700–1750 warheads on deployed SLBMS [submarine-launch ballistic missiles] for each Party, or such lower number as each Party shall decide for itself; and zero for warheads on deployed heavy ICBMs. Thus, the Treaty reduces the current overall deployments of strategic nuclear weapons on each side by more than two-thirds from current levels. These limits will be reached by the end of the year 2000 if both Parties reach agreement on a program of assistance to the Russian Federation with regard to dismantling strategic offensive arms within a year after entry into force of the Treaty. Acceptance of these reductions serves as a clear indication of the ending of the Cold War.

. . . START II will result in the complete elimination of heavy ICBMs (the SS-18) and the elimination or conversion of their launchers. All heavy ICBMs and launch canisters will be destroyed. All but 90 heavy ICBM silos will . . . be destroyed and these 90 silos will be modified to be incapable of launching SS-18s. To address the Russians' stated concern over the cost of implementing the transition to a single-warhead ICBM force, the START II Treaty provides for the conversion of up to 90 of the 154 Russian SS-18 silos that will remain after the START Treaty reductions. The Russians have unilaterally undertaken to use the converted silos only for the smaller, SS-25 type single-warhead ICBMs. When implemented, the Treaty's conversion provisions, which include extensive on-site inspection rights, will preclude the use of these

silos to launch heavy ICBMs. Together with the elimination of SS-18 missiles, these provisions are intended to ensure that the strategic capability of the SS-18 system is eliminated.

START II allows some reductions to be taken by downloading, i.e., reducing the number of warheads attributed to existing missiles. This will allow the United States to achieve the reductions required by the Treaty in a cost-effective way by downloading some or all our sea-based Trident ICBMs and land-based Minuteman III ICBMs. The Treaty also allows downloading, in Russia, of 105 of the 170 SS-19 multiple-warheads missiles in existing silos to a single-warhead missile. All other Russian launchers of multiple-warhead ICBMs—including the remaining 65 SS-19s—must be converted for single-warhead ICBMs or eliminated in accordance with START procedures.

START II can be implemented in a fashion that is fully consistent with U.S. national security. To ensure that we have the ability to respond to worldwide conventional contingencies, it allows for the reorientation, without any conversion procedures, of 100 START-accountable heavy bombers to a conventional role. These heavy bombers will not be count against START II warhead limits.

The START Treaty and the START II Treaty remain in force concurrently and have the same duration. Except as explicitly modified by the START II Treaty, the provisions of the START Treaty will be used to implement START II.

* * * *

On January 26, 1996, the Senate gave its advice and consent to ratification of the START II Treaty, including the Elimination and Conversion Protocol, the Exhibitions and Inspections Protocol, and the Memorandum of Attribution, which are integral parts thereof. 142 CONG. REC. S461–63 (daily ed. Jan. 26, 1996). The resolution of ratification was subject to six conditions and seven declarations. The Senate conditioned ratification on an understanding that START II would not affect the existing rights and obligations of the Parties under the Anti-Ballistic Missile Treaty, 23 U.S.T. 3435 (1972) ("ABM Treaty"). Excerpts below provide additional conditions and declarations.

START II has not been ratified by the United States. *See Digest 2002* at 1027–28.

---

* * * *

CONDITIONS—The advice and consent of the Senate to the ratification of the START II Treaty is subject to the following conditions, which shall be binding upon the President:

* * * *

(4) EXCHANGE OF LETTERS.—The exchange of letters—

(A) between Secretary of State Lawrence Eagleburger and Minister of Foreign Affairs Andrey Kozyrev, dated December 29, 1992, regarding SS-18 missiles and launchers now on the territory of Kazakhstan,

(B) between Secretary of State Eagleburger and Minister of Foreign Affairs Kozyrev, dated December 29, 1992, and December 31, 1992, regarding heavy bombers, and

(C) between Minister of Defense Pavel Grachev and Secretary of Defense Richard Cheney, dated December 29, 1992, and January 3, 1993, making assurance on Russian intent regarding the conversion and retention of 90 silo launchers of RS-20 [SS-18] heavy intercontinental ballistic missiles (ICBMs) (all having been submitted to the Senate as associated with the START II Treaty), are of the same force and effect as the provisions of the START II Treaty. The United States shall regard actions inconsistent with obligations under those exchanges of letters as equivalent under international law to actions inconsistent with the START II Treaty.

* * * *

(c) DECLARATIONS.—The advice and consent of the Senate to ratification of the START II Treaty is subject to the following declarations, which express the intent of the Senate:

(1) COOPERATIVE THREAT REDUCTIONS.—Pursuant to the Joint Statement on Transparency and Irreversibility of the Process of Reducing Nuclear Weapons [*see* B.6. below], agreed to in Moscow, May 10, 1995, between the President

of the United States and the President of the Russian Federation, it is the sense of the Senate that both parties to the START II Treaty should attach high priority to—

(A) the exchange of detailed information on aggregate stockpiles of nuclear warheads, on stocks of fissile materials, and on their safety and security;

(B) the maintenance at distinct and secure storage facilities, on a reciprocal basis, of fissile materials removed from nuclear warheads and declared to be excess to national security requirements for the purpose of confirming the irreversibility of nuclear weapons reduction; and

(C) the adoption of other cooperative measures to enhance confidence in the reciprocal declarations on fissile material stockpiles.

* * * *

(5) MISSILE TECHNOLOGY CONTROL REGIME.—The Senate urges the President to insist that the Republic of Belarus, the Republic of Kazakhstan, Ukraine, and the Russian Federation abide by the guidelines of the Missile Technology Control Regime (MTCR) [*see* E.3 below]. For purposes of this paragraph, the term "Missile Technology Control Regime" means the policy statement between the United States, the United Kingdom, the Federal Republic of Germany, France, Italy, Canada, and Japan announced April 16, 1987, to restrict sensitive missile-revenant transfers based on the MTCR Annex, and any amendments thereto.

* * * *

3. Conventional Armed Forces in Europe

a. Treaty on Conventional Armed Forces in Europe

The United States and twenty-one other states signed the Treaty on Conventional Armed Forces in Europe ("CFE Treaty") on November 19, 1990, in Paris. *See Digest*

1989–1990 at 578–79, *III Cumulative Digest 1981–1988* at 3587–94. Within the relevant geographical area, the CFE established numerical limits on five categories of conventional armaments and equipment: battle tanks, armored combat vehicles, artillery, combat aircraft, and attack helicopters. It also established a verification system, including on-site inspections, to confirm compliance. A separate non-legally binding declaration of the parties covering Naval Land-Based Aircraft was signed on the same date ("LBNA Declaration").

President George H.W. Bush transmitted the CFE Treaty, with associated instruments, to the Senate for advice and consent to ratification on July 9, 1991. S. Treaty Doc. No. 102–8 (1991). Transmittal had been delayed due to disputes concerning the holdings of the Soviet conventional armed forces within the area of application of the treaty. Excerpts below from the section-by-section analysis contained in the report of the Department of State accompanying President Bush's transmittal and included in S. Treaty Doc. No. 102–8 explain the issues involved.

. . . The dispute arose upon signature of the Treaty on November 19, 1990, when the 22 States Parties exchanged information about the holdings of their conventional armed forces within the area of application of the Treaty. Among other problems, the information provided at that time by the Soviet Union failed to count against the Treaty's numerical limitations over 6,000 items of conventional armaments and equipment limited by the Treaty held within the area of application by its Naval Infantry units, Coastal Defense forces, Strategic Rocket forces, Civil Defense and DOSAAF organizations, and internal security organizations. . . . The Soviet Union claimed that conventional armaments and equipment held by such organizations were not subject to the counting rules in Article III. Led by the United States, this position was consistently rejected by the 21 other Treaty Signatories as being without foundation in either the Treaty text or the negotiating record of the Treaty.

* * * *

[In addition], the Soviet Union [had moved] thousands of conventional armaments and equipment of a type limited by the Treaty out of the area of application between January 1989 and November 19, 1990 . . . [M]any States Parties, including the United States, found such a large build-up of armaments and equipment just outside the area of application to be inconsistent with the goals of the Treaty and potentially destabilizing. Consequently, the United States led diplomatic efforts during the negotiation of the Treaty and for several months thereafter to prevail upon the Soviet Union to provide commitments to alleviate the potential threat posed by such armaments and equipment.

* * * *

In order to address these concerns, a series of legally binding agreements followed that covered all of the transferred items indirectly and ensured that, in the future, items held by such units would count against treaty limitations. The package of agreements, expressed as statements, was accepted by all States Parties on June 14, 1991, at Vienna. The equipment that had been moved outside the area of application ("east of the Urals") was addressed in a political commitment (non-legally binding statement) by the Soviet Union. President Bush's transmittal letter described the CFE Treaty and accompanying instruments as set forth below.

I transmit herewith, for the advice and consent of the Senate to ratification, the Treaty on Conventional Armed Forces in Europe (CFE). The Treaty includes the following documents, which are integral parts thereof: the Protocol on Existing Types (with an Annex thereto), the Protocol on Aircraft Reclassification, the Protocol on Reduction, the Protocol on Helicopter Recategorization, the Protocol on Information Exchange (with an Annex on Format), the Protocol on Inspection, the Protocol on the Joint Consultative Group, and the Protocol on Provisional Application. The Treaty, together with the Protocols, was signed at Paris on November 19, 1990. I transmit also, for the information of the Senate, the Report of the Department of State on the Treaty.

In addition, I transmit herewith, for the information of the Senate, six documents associated with, but not part of, the Treaty that are relevant to the Senate's consideration of the Treaty: Statement by the Union of Soviet Socialist Republics, dated June 14, 1991; Statement by the Government of the United States of America, dated June 14, 1991, responding to the Statement by the Union of Soviet Socialist Republics (Statements identical in content were made by the 20 other signatory states on the same date. Copies of these Statements are also transmitted.); Declaration by the Government of the Federal Republic of Germany on the Personnel Strength of German Armed Forces, dated November 19, 1990; Declaration of the States Parties to the Treaty on Conventional Armed Forces in Europe With Respect to Personnel Strength, dated November 19, 1990; Declaration of the States Parties to the Treaty on Conventional Armed Forces in Europe With Respect to Land-Based Naval Aircraft, dated November 19, 1990; and Statement by the Representative of the Union of Soviet Socialist Republics to the Joint Consultative Group, dated June 14, 1991. The first two Statements are legally binding and constitute a separate international agreement, while the latter four documents represent political commitments.

The CFE Treaty is the most ambitious arms control agreement ever concluded. The complexities of negotiating a treaty involving 22 nations and tens of thousands of armaments spread over an area of more than two and a half million square miles were immense. Difficult technical issues such as definitions, counting rules, methods for destroying reduced equipment, and inspection rights were painstakingly negotiated.

The Treaty is the first conventional arms control agreement since World War II. It marks the first time in history that European nations, together with the United States and Canada, have agreed to reduce and numerically limit their land-based conventional military equipment, especially equipment necessary to conduct offensive operations. Significantly, the reductions will eliminate the overwhelming Soviet numerical advantage in conventional armaments that has existed in Europe for more than 40 years. The Treaty's limits enhance stability by ending force disparities, and they limit the capability for launching surprise attack and initiating large-scale offensive action in Europe.

The Treaty contains a wide-ranging verification regime. Under this regime, in which intrusive on-site inspection complements national technical means to monitor compliance, ground and air forces of the participating states in the area of application of the Treaty will be subject to inspection, either at declared sites or with challenge inspections. The Treaty also provides for a detailed information exchange on the command organization of each participating state's land, air, and air defense forces as well as information about the number and location of each participating state's military equipment, subject to the limitations and other provisions of the Treaty. This information will be updated periodically and as significant changes to such data and reductions of equipment take place.

The military equipment to be reduced and limited consists of battle tanks, armored combat vehicles, artillery, attack helicopters, and combat aircraft in service with the conventional armed forces of the States Parties in Europe from the Atlantic to the Urals. Inclusion of the Baltic military district within the area of application of the Treaty ensures that the Treaty's limits apply comprehensively to all Soviet forces within the area. This does not represent any change in the long-standing U.S. policy of non-recognition of the forcible incorporation of the Baltic States into the Soviet Union. At the conclusion of the 40-month reduction period, the numerical limits on this equipment in the area of application for each group of participating states will be as follows: 20,000 battle tanks, 30,000 armored combat vehicles, 20,000 pieces of artillery, 2,000 attack helicopters, and 6,800 combat aircraft. All military equipment subject to and in excess of these limits that was in the area of application at the time of Treaty signature or entry into force (whichever amount is greater) must be destroyed or, within specified limits, converted to nonmilitary or other purposes. Subceilings are established for specific geographical zones within the area of application, the purpose of these being to thin out forces on the central front while forestalling buildups in the flank areas. Under the so-called "sufficiency rule" of the Treaty, no State Party may hold more than approximately one-third of the total amount of equipment in these five categories permitted within the area of application as a whole.

Above and beyond eliminating force disparities and limiting the capability for launching large-scale offensive action, the CFE Treaty will be of major importance in laying the indispensable foundation for the post-Cold War security architecture in Europe.

Only with this foundation in place can we move from a European security order based on confrontation to one based on cooperation. I believe that the CFE Treaty is in the best interests of the United States and represents an important step in defining the new security regime in Europe. It achieves unprecedented arms reductions that strengthen U.S., Canadian, and European security. Therefore, I urge the Senate to give early and favorable consideration to the Treaty and its related Protocols and Annexes, and to give advice and consent to its ratification.

The section-by-section analysis of the treaty contained in the accompanying report of the Department of State noted as follows concerning a key provision on consent in paragraph 5 of Article IV.

---

* * * *

. . . [P]aragraph 5 of Article IV provides that States Parties belonging to the same group of States Parties may locate battle tanks, armored combat vehicles, and artillery in active units in each of the areas described . . . provided that no State Party stations conventional armed forces on the territory of another State Party without the agreement of that State Party.

There is one additional point regarding paragraph 5 concerning the issue of stationing States Parties. Paragraph 5 reiterates a principle of customary international law that, with certain exceptions (e.g., as part of a United Nations Security Council enforcement action carried out in accordance with Chapter VII of the UN Charter), no State Party may station forces on another State Party's territory without the permission of that State Party. Within the context of the CFE Treaty, for example, this means that, as a general rule, the Soviet Union cannot station forces in Hungary without Hungary's permission.

* * * *

After extensive hearings, on November 25, 1991, the Senate gave its advice and consent to ratification subject to conditions related to the pre-signature Soviet transfers of CFE-limited items, host State consent, and the possible emergence of new states from the territory of the Soviet Union. The Senate resolution also included four declarations relating to accession to the CFE Treaty by certain new states, treaty interpretation, the requirement that further arms reduction obligations be approved only as treaties with the advice and consent of two-thirds of the Senate, and compliance issues and future strategic arms treaties. 137 CONG. REC. S18,018 (daily ed. Nov. 25, 1991).

Prior to ratification of the CFE Treaty, the United States enacted implementing legislation amending the Arms Export Control Act. Conventional Forces in Europe Treaty Implementation Act of 1991, Pub. L. No. 102–228, § 1, 105 Stat. 1691, 22 U.S.C. § 2751 (1991). The amendments authorized the President, with certain conditions and additional authorities, to

> transfer to any NATO/CFE country, in accordance with NATO plans, defense articles—
> (1) that are battle tanks, armoured combat vehicles, or artillery included within the CFE Treaty's definition of "conventional armaments and equipment limited by the Treaty";
> (2) that were, as of the date of signature of the CFE Treaty, in the stocks of the Department of Defense and located in the CFE Treaty's area of application; and
> (3) that the President determines are not needed by United States military forces within the CFE Treaty's area of application.

22 U.S.C. § 2799b. The United States deposited its instrument of ratification on July 17, 1992.

Due to delays in ratification by Armenia, Belarus and Kazakhstan, the States Parties agreed at the Conference on Security and Cooperation in Europe ("CSCE") Helsinki

Summit Conference in July 1992 to apply the CFE Treaty provisionally. The Final Act provided that the States Parties agreed:

> 1. Without prejudice to the provisions of Article XXII of the Treaty and notwithstanding the Protocol on Provisional Application of the Treaty, the States Parties shall apply provisionally all of the provisions of the Treaty, beginning on July 17, 1992, on the basis of the agreement reached by all States Parties expressed hereby. The States Parties deem that such provisional application constitutes an improvement to the Treaty.

The full text is available at *www.state.gov/s/l/c8183.htm*. The CFE Treaty entered into force November 9, 1992.

The Concluding Act of the Negotiation on Personnel Strength of Conventional Armed Forces in Europe, known as "CFE-1A," was also signed on July 10, 1992. A fact sheet released by the Department of State November 7, 1995, described the CFE-1A as excerpted below. The fact sheet, which also addresses the CFE Treaty, is available at *http://dosfan.lib.uic.edu/acda/factshee/conwpn/cfe-1.htm*. The Concluding Act is available at *www.osce.org/docs/english/1990–1999/cfe/cfe-1ae.htm*.

---

* * * *

CFE-1A constitutes a political commitment by its signatories to limit (and, where applicable, reduce) the personnel strength of their conventional armed forces. In contrast to the CFE Treaty, CFE-1A is not a legally binding agreement, and thus not subject to ratification by parliaments.

The heart of the CFE-1A agreement is a "ceiling" on the military personnel of each participating state within the CFE Treaty's area of application. Each participating state determined its own ceiling, taking into consideration its national defense plans and security interests. These numerical ceilings were not subject to negotiation among the participants, although the levels were open to discussion prior to adoption of the agreement. In general terms,

the CFE-1A limitation applies to military personnel based on land in the area of application.

* * * *

b. CFE "Flank Document"

On April 7, 1997, President William J. Clinton transmitted to the Senate for advice and consent to ratification the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe of November 19, 1990, adopted at Vienna May 31, 1996 (also known as the "Flank Document"), as Annex A to the Final Document of the first CFE Review Conference. S. Treaty Doc. No. 105–5 (1997). The Flank Document responded to Russian concerns about its ability to meet its security requirements because of limitations imposed by the CFE Treaty in the "flank" region, described in paragraph 1(A) of Article V of the CFE Treaty. Although the States Parties had agreed to apply the Flank Document provisionally, the President noted that the provisional application extended only until May 15, 1997, and urged advice and consent before that date. Excerpts from the President's letter of transmittal explain the development of this instrument, which substantially increased the amount of Russian armaments and equipment permitted in the original flank region, modified the geographical limits of that region, provided for an interim limit until entry into force, and provided for increased verification measures.

---

* * * *

The CFE Treaty has resulted in the verified reduction of more than 50,000 pieces of heavy military equipment, including tanks, armored combat vehicles, artillery pieces, combat aircraft, and attack helicopters. By the end of 1996, CFE states had accepted and conducted more than 2,700 intrusive, on-site inspections. Contacts between the military organizations charged with implementing CFE are cooperative and extensive. The CFE Treaty has

helped to transform a world of two armed camps into a Europe where dividing lines no longer hold.

The Flank Document is part of that process. It is the culmination of over 2 years of negotiations and months of intensive discussions with the Russian Federation, Ukraine, our NATO Allies, and our other CFE Treaty partners. The Flank Document resolves in a cooperative way the most difficult problem that arose during the Treaty's first 5 years of implementation: Russian and Ukrainian concerns about the impact of the Treaty's equipment limits in the flank zone on their security and military flexibility. The other Treaty states—including all NATO Allies—agreed that some of those concerns were reasonable and ought to be addressed.

The Flank Document is the result of a painstaking multilateral diplomatic effort that had as its main goal the preservation of the integrity of the CFE Treaty and achievement of the goals of its mandate. It is a crucial step in adaptation of the CFE Treaty to the dramatic political changes that have occurred in Europe since the Treaty was signed. The Flank Document confirms the importance of subregional constraints on heavy military equipment. More specifically, it revalidates the idea, unique to CFE, of limits on the amount of equipment particular nations in the Treaty area can locate on certain portions of their own national territory. Timely entry into force of the Flank Document will ensure that these key principles are not a matter of debate in the negotiations we have just begun in Vienna to adapt the CFE Treaty to new political realities, including the prospect of the enlarged NATO.

* * * *

On May 14, 1997, the Senate adopted its resolution of ratification to the Flank Agreement. 143 CONG. REC. S4451 (daily ed. May 14, 1997). The resolution of ratification was subject to fourteen conditions, including the following:

> (1) POLICY OF THE UNITED STATES.—Nothing in the CFE Flank Document shall be construed as altering the policy of the United States to achieve the immediate and complete withdrawal of any armed forces and military equipment under the control of the Russian Federation that are deployed on the territories of the independent

states of the former Soviet Union (as defined in section 3 of the FREEDOM Support Act) without the full and complete agreement of those states.

(2) Violations of state sovereignty.—

* * * *

(C) Statement of policy.—Prior to the deposit of the United States instrument of ratification, the President shall certify to the Senate that the United States and the governments of Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, and the United Kingdom have issued a joint statement affirming that—

(i) the CFE Flank Document does not give any State Party the right to station (under Article IV, paragraph 5 of the Treaty) or temporarily deploy (under Article V, paragraphs 1(B) and (C) of the Treaty) conventional armaments and equipment limited by the Treaty on the territory of other States Parties to the Treaty without the freely expressed consent of the receiving State Party;

(ii) the CFE Flank Document does not alter or abridge the right of any State Party under the Treaty to utilize fully its declared maximum levels for conventional armaments and equipment limited by the Treaty notified pursuant to Article VII of the Treaty; and

(iii) the CFE Flank Document does not alter in any way the requirement for the freely expressed consent of all States Parties concerned in the exercise of any reallocations envisioned under Article IV, paragraph 3 of the CFE Flank Document.

* * * *

See also S. Exec. Rep. No. 105–5 (1997).

Because of the extensive list of conditions and certification requirements contained in the resolution of ratification, President Clinton issued two statements to the Congress, both dated May 14, 1997. In the first, excerpted in Chapter 4.B.6.a.(3)(ii), the President stated that he would

"interpret the Conditions of concern in the resolution in a manner consistent with the responsibilities entrusted to me as President under the Constitution. Nevertheless, without prejudice to my Constitutional authorities, I will implement the Conditions in the resolution." The certification called for in Condition 2(C) *supra,* was included in the second letter. *See* 143 CONG. REC. S4588. The Flank Document entered into force on May 15, 1997.

The United States had earlier issued a joint statement with Azerbaijan dated May 21, 1996, on the Flank Document. The statement had confirmed the same points set out in Condition 2(C); excerpts below from the statement address further issues. The full text of the joint statement is available at *www.state.gov/s/l/c8183.htm*.

. . . The United States and Azerbaijan affirm their joint understanding that with respect to the region covered by the Treaty on Conventional Forces in Europe of November 19, 1990, a State's military forces should be deployed on the territory of another State only with the freely expressed consent of the host country.

* * * *

The United States acknowledges the absence of foreign military bases on the territory of the Azerbaijan Republic and supports the position taken by Azerbaijan that the temporary presence of foreign troops on its territory may be based only on a duly concluded agreement with Azerbaijan according to its constitution and in conformity with international law.

The United States and Azerbaijan reiterate their concern with regard to conventional armaments and equipment of types limited by the Treaty, which are unaccounted for and uncontrolled within the Treaty. They recognize the obligation of all States Parties to work in a cooperative manner within the Joint Consultative Group to develop practical steps toward fulfilling the commitment of the States Parties, as expressed in the Review Conference Final Document, to resolve the issue of unaccounted-for-TLE as soon as possible and achieve full implementation of all Treaty provisions.

The United States supports the sovereign right of Azerbaijan, as a free and independent State, to take the position under the CFE Treaty contained in the statement of the Chairman of the First CFE Review Conference on May 31, 1996, that temporary deployment and reallocation of quotas referred to in Section IV, paragraphs 2 and 3 of the CFE Flank Agreement will not be used in the context of the Azerbaijan Republic.

c. Adaptation

After the entry into force of the Flank agreement, the States Parties of the CFE Treaty initiated the process of "adaptation," a process that would amend the Treaty to account for the vast changes in the European security situation that had occurred since the signature of the original CFE Treaty. In the course of the adaptation negotiations, the chief U.S. negotiator, Ambassador Greg Govan, reaffirmed the position of the United States Government on the issue of host State consent. Statement in the Joint Consultative Group, Vienna, March 9, 1999, excerpted below and available at *www.state.gov/s/l/c8183.htm*.

The concept of consent by any state to a foreign military presence on its sovereign territory is derived from fundamental precepts of sovereign authority. That concept of consent was laid down in the original Treaty. . . . Due notice must also be taken of the fact that consent is required for "forces", not just for armaments and equipment limited by the Treaty. It is our understanding that the intent of this provision was to make foreign military presence without host nation consent a violation of the CFE Treaty, if States Parties were involved, in addition to such an act or circumstance being against other international laws and norms of behavior. We strongly adhere to this interpretation and reject any contrary explanation.

Although Article IV, paragraph 5 uses the term "stations", we believe that it covers all forces present, regardless of type,

composition, or purpose. There is no exemption in the consent clause for what, in one Treaty region, might be called "temporary deployments", nor for any other kind of presence, such as transits or military exercises. In short, although "stationed forces" has come to refer informally to foreign forces present on another's territory "permanently" or for extended duration, the CFE Treaty consent requirement for stationing, as that term is used in paragraph 5, Article IV, applies to all foreign forces present, for whatever purpose, and under whatever CFE Treaty status.

We believe that consent is conditional, as determined by the host, to include:

- The size or composition of foreign forces, to include limits on its [treaty-limited equipment] TLE
- The duration for all or part of the foreign presence;
- The locations where foreign forces are permitted or from which they are prohibited;
- The requirement that the forces comply with all CFE obligations
- Distribution of costs for inspection and other activities of a Treaty nature that incur to the host by virtue of the foreign military presence;
- Other measures, to include environmental protection, that are often part of so-called "status of forces agreements" between host and stationing state.

We also firmly hold that consent may be withdrawn as well as given. At any time, a host state may withdraw consent, and the foreign forces must initiate a timely and prompt withdrawal. . . . The existence of a prior bilateral agreement that is not associated with the CFE Treaty cannot serve as a basis for circumventing the CFE consent requirement, or for claims that the requirement has been fulfilled in the face of a contemporary denial of consent by the host State Party.

It is precisely because we consider consent so important that we have wholeheartedly endorsed repetition of the requirement for consent in each and every case where the adapted CFE Treaty speaks about a foreign military presence. This does not mean that

we in any way restrict consent to this or that foreign military presence only. . . .

There is a straight and unwavering line from Article IV, paragraph 5 running through all of NATO's proposals for express consent for use of headroom, for transits, for military exercises—in short, for any foreign military presence under an adapted CFE Treaty. We believe this general principle should be reinforced. We believe that it should be made explicit and specific in notifications that act as a public manifestation of host State Party consent to or rejection of the presence of foreign military forces. And because abuse or circumvention of the consent requirement is a direct violation of the CFE Treaty as well as of international law, we shall judge any such occurrences very seriously and react accordingly.

The negotiations culminated at the OSCE Istanbul Summit on November 19, 1999, with the signature of the Agreement on Adaptation of the Treaty on Conventional Forces in Europe ("Agreement on Adaptation") and the adoption of the CFE Final Act of the States Parties to the Treaty on Conventional Armed Forces in Europe ("Final Act"), with 14 attached Annexes. Twelve of the Final Act Annexes incorporated voluntary, independent, unilateral national measures of self-restraint. The thirteenth Annex was a declaration by the Government of Moldova that the Moldovan Constitution prohibited the presence of foreign military forces on its territory. The fourteenth Annex constituted an agreement between the Republic of Georgia and the Russian Federation regarding the partial withdrawal and limited continuing presence of Russian forces in Georgia. The Final Act specifically referred to its fourteenth Annex and to the Russian commitment to withdraw its forces from Moldova, stating that the States Parties:

> Have welcomed the joint statement by Georgia and the Russian Federation of 17 November 1999, which is attached to this Final Act; [and]
>
> Have taken note of the statement by the Republic of Moldova, which is attached to this Final Act, concerning

> its renunciation of the right to receive a temporary deployment on its territory and have welcomed the commitment of the Russian Federation to withdraw and/or destroy Russian conventional armaments and equipment limited by the Treaty by the end of 2001, in the context of its commitment referred to in paragraph 19 of the Istanbul Summit Declaration. . . .

The full text of the Final Act is available at *www.osce.org/docs/english/1990-1999/cfe/cfefinact99e.htm*. The text of the Agreement on Adaptation is available at *www.osce.org/docs/english/1990-1999/cfe/cfeagree.htm*.

Various political commitments that facilitated the conclusion of the Agreement on Adaptation were embodied in the 1999 OSCE Istanbul Summit Declaration, including key commitments regarding the reduction of Russian military equipment in Georgia and withdrawal of Russian troops from Moldova. The Istanbul Summit Declaration, also issued on November 19, 1999, is available at *www.osce.org/docs/english/1990-1999/summits/istadecl99e.htm*.

In a statement at the time of the signing of the Agreement on Adaptation, President Clinton described the importance of the agreement and conditioned transmittal to the Senate for advice and consent on fulfillment by the Russian Federation of its Istanbul commitments. The President's statement is set forth below in full.

Today I joined the leaders of 30 nations in signing an Agreement that will adapt the Treaty on Conventional Armed Forces in Europe (CFE) to the post-Cold War world.

The original CFE Treaty limited the armaments of the Eastern and Western blocs, a division that has happily been erased since the collapse of the Warsaw Pact. The adapted Treaty will place legally binding limits on the armed forces of every individual country that is party to it, from the Atlantic to the Urals. It will require nations to provide more information about their deployment of military equipment. It will strengthen the requirement that host

nations must consent to the deployment of foreign forces on their territory, which speaks directly to the interests of a number of nations of the former Soviet Union, including Ukraine, Moldova, Georgia, and Azerbaijan.

The Adaptation Agreement will also open the Treaty to accession by other European countries. And it will preserve NATO's ability to fulfill its post-Cold War responsibilities.

In all these ways, the adapted Treaty will enhance peace, security and stability throughout Europe. Therefore, it is in America's national interest to sign it now, and to lock in the commitment of other nations to its terms. At the same time, in order to reap these benefits, we must have confidence that there will be real compliance.

Russia has pledged that it will comply with the flank provisions of the adapted Treaty by reducing its forces in the North Caucasus. This must be done as soon as possible. I will only submit this Agreement to the Senate for advice and consent to ratification when Russian forces have in fact been reduced to the flank levels set forth in the adapted Treaty.

4. Open Skies Treaty

The Treaty on Open Skies, negotiated by the then-members of NATO and the Warsaw Pact, was signed in Helsinki, Finland, on March 24, 1992. *See www.state.gov/t/ac/rls/fs/12691.htm*. The treaty established a regime of unarmed aerial observation flights over the entire territory of its participants. On August 12, 1992, President George H.W. Bush transmitted the treaty to the Senate for advice and consent to ratification. S. Treaty Doc. No. 102–37 (1992). Excerpts below from the President's transmittal letter set forth the views of the United States on key provisions. Since signature of the treaty on March 24, 1992, the former Czechoslovakia has divided into two separate states (the Czech and Slovak Republics), and both have reaffirmed their participation in the treaty. *See* North Atlantic Cooperation Council Communiqué Statement

issued following the Ministerial Meeting of the North Atlantic Cooperation Council ("NACC"), Istanbul, Turkey, June 10, 1994, 5 Dep't St. Dispatch No. 25 at 404 (June 20, 1994), *available at http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html.*

I transmit herewith, for the advice and consent of the Senate to ratification, the Treaty on Open Skies. I believe that the Treaty on Open Skies is in the best interest of the United States. By engaging all participating States actively in cooperative observation, the Treaty on Open Skies will strengthen international stability. The Treaty also provides an important means of increasing mutual understanding of military forces and activities, thus easing tensions and strengthening confidence and security, not only in the area covered by the Treaty, but in other areas as well.

* * * *

The Open Skies Treaty establishes a regime of unarmed aerial observation flights over the entire territory of its 25 signatories (North Atlantic Treaty Organization Allies, Eastern European members of the former Warsaw Pact, and Russia, Ukraine, Belarus, and Georgia). The Treaty is designed to enhance mutual understanding and confidence by giving all participants, regardless of size, a direct role in observing military or other activities of concern to them. Covering territory from Vancouver to Vladivostok, Open Skies is the widest-ranging international effort to date to promote openness and transparency of military forces and activities. The Treaty allows for consensus decisions to improve sensors, to adjust quotas, and to admit new participants in order to enhance its effectiveness. The Open Skies principles may be applicable to States in other regions of the world as well.

The Treaty's operative provisions focus on four subjects:

—Territory: The entire territory of all participants will be accessible to aerial observation. Whereas the former Soviet Union had insisted on closing areas for national security

reasons, the Treaty provides that only flight safety considerations may restrict the conduct of observation flights.
—Aircraft: Unarmed fixed-wing aircraft provided by either the observing or observed Party can be used. All Open Skies aircraft and sensors must pass specified certification and inspection procedures to ensure that they meet the standards of the Treaty.
—Sensors: Open Skies aircraft may have video, 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., distinguishing a tank from a truck-allowing significant transparency of military forces and activities. Sensor categories and capabilities can be improved by agreement among the States Parties. All equipment used in Open Skies must be commercially available to all participants. Data collected from the flights will be immediately shared by the observing and observed Parties, and may also be obtained by other States Parties.
—Quotas: Loosely scaled to size, each State Party has agreed to an annual quota of observation flights it is willing to receive (42 for the United States and Russia/Belarus to 2–4 for the smallest States Parties). States Parties may conduct as many observation flights as they are willing to receive.

The Treaty establishes an Open Skies Consultative Commission, composed of representatives designated by each State Party, to meet in Vienna, to promote the objectives and to facilitate the implementation of the provisions of the Treaty.

Therefore, I urge the Senate to give early and favorable consideration to the Treaty and its related Annexes, and to give advice and consent to its ratification.

On August 6, 1993, the Senate adopted its resolution of ratification of the Open Skies Treaty, subject to two conditions and one declaration. 139 CONG. REC. S10,800 (daily ed.

Aug. 6, 1993). The United States ratified the Open Skies Treaty in 1993, and it entered into force January 1, 2002. *See Digest 2002* at 1028–32.

5. Other Security Building and Cooperative Security Measures

a. Organization for Security and Cooperation in Europe

During the 1990s, the Organization for Security and Cooperation in Europe ("OSCE"), formerly known as the Conference on Security and Cooperation in Europe ("CSCE"), coordinated a variety of security-building measures and agreements. In December 1996 the then 54 member states of the OSCE, including a delegation from the United States headed by Vice President Albert Gore, held a summit meeting in Lisbon, Portugal. A June 30, 1997, U.S. Department of State fact sheet provided a brief overview of the work of the OSCE during the Lisbon Summit of 1996. *See* w*ww.state.gov/www/global/arms/factsheets/secbldg/oscesb.html*.

On November 16, 1999, in Istanbul, the Plenary Meeting of the OSCE Forum for Security Cooperation adopted the 1999 Vienna Document. The provisions of the 1999 Vienna Document established confidence- and security-building measures ("CSBMs") that involved, *inter alia*, annual exchanges of information on military forces, major weapons systems and equipment, and defense planning; prior negotiation and observance of certain military activities, and compliance and verification inspections and evaluations. Excerpts below from a fact sheet provided by the Department of the Navy describe the history and application of the Vienna documents. The fact sheet is available at *www.nawcwpns.navy.mil/~treaty/VNADOC.html*.

The full text of the 1999 Vienna Document is available at *www.osce.org/docs/english/1990–1999/csbms2/vienn99e.htm*. The full text of the 1994 Vienna Document, referred to in the text below, is available at *www.state.gov/t/np/trty/18460.htm*.

Purpose:
The Vienna Document seeks to undertake, in stages, new, effective and concrete actions designed to make progress in strengthening confidence and security and in achieving disarmament, so as to give effect and expression to the duty of States to refrain from the threat or use of force in their mutual relations as well as in their international relations in general.

Background:

On 17 November 1990, CSCE (predecessor of OSCE) participating States adopted the Vienna Document 1990, which built upon and added to the confidence- and security-building measures contained in the Document of the Stockholm Conference 1986. On 4 March 1992, the Vienna Document 1992 was adopted, which built upon Vienna Document 1990. On 28 November 1994, the participating States similarly adopted the Vienna Document 1994. On 16 November 1999, the Vienna Document 1999 was adopted in Istanbul at the Plenary Meeting of the OSCE Forum for Security Co-operation.

Provisions:

The confidence- and security-building provisions of the Vienna Document are not as restrictive or stringent as the verification measures under the CFE treaty. . . .

The measures apply to the whole of Europe as well as the adjoining sea area and air space from the Atlantic to the Urals (ATTU) region. The comprehensive coverage includes NATO members, the former Warsaw Pact members, and the neutral and nonaligned states. Former states of the Soviet Union, whose territory lies within the zone, have accepted the Vienna Document, with the exception of Georgia and the Baltic states. The Russian territory falling outside the ATTU region is excluded from the agreement.

The Vienna Document requires the annual exchange of information on their military forces concerning the military organization, manpower and major weapon and equipment systems

(battle tanks, helicopters, armored combat vehicles including armored personnel carriers, armored infantry fighting vehicles, heavy armament combat vehicles, armored personnel carrier look-alikes and armored infantry fighting vehicle look-alikes, anti-tank guided missile launchers permanently/integrally mounted on armored vehicles, self-propelled and towed artillery pieces, mortars and multiple rocket launchers (100 mm caliber and above), and armored vehicle launched bridges in the zone of application. The information will be provided in an agreed format to all other participating States not later than 15 December of each year. It will be valid as of 1 January of the following year.

Under the Vienna Document, there are three ways signatory countries may observe activities in another country: Inspections, evaluations and visits.

* * * *

b. NATO Expansion and Russia-NATO Cooperation

In 1997, following the dissolution of the Soviet Union, NATO invited three additional countries to join its ranks. On February 11, 1998, President Clinton transmitted to the Senate for advice and consent to ratification the Protocols to the North Atlantic Treaty of 1949 on the accession of Poland, Hungary, and the Czech Republic. S. Treaty Doc. No. 105–36 (1998). *See* Chapter 7.C.

6. Other Instruments with Russia and Former Soviet States

Presidents William J. Clinton and Boris N. Yeltsin met in further summits between 1993 to 1998 to discuss an array of issues, including arms control, demilitarization, cooperative threat reduction, and nonproliferation. The Presidents met in Vancouver from April 3–4, 1993, in Moscow from January 12–15, 1994, on September 28, 1994, in Washington D.C., in Moscow from May 9–10, 1995, and April 26, 1996, then in Helsinki on March 21, 1997, and again in Moscow on

September 2, 1998. At these summits they signed instruments including the Joint Statement on Strategic Stability and Nuclear Security, Joint Statement on the Transparency and Irreversibility of the Process of Reducing Nuclear Weapons, two joint statements on European Security, Joint Statement on Missile Systems, Joint Statement on Nonproliferation, Joint Statement on the Highly Enriched Uranium Agreement (*see* C.6.a. below), Joint Statement Concerning the Anti-Ballistic Missile Treaty, Joint Statement on Parameters on Future Reduction in Nuclear Forces, Joint Statement on Chemical Weapons, Joint Statement on Plutonium Disposition (*see* C.6.b. below. below), Joint Statement on Security Challenges at the Threshold of the Twenty-First Century, Joint Statement on a Protocol to the Convention on the Prohibition of Biological Weapons, Joint Statement on the Exchange of Information on Missile Launches and Early Warning. Explanations and excerpts from a few statements concerning arms control and cooperative threat reduction follow.

A statement on the mutual detargeting of strategic nuclear systems was released by the White House Office of the Press Secretary at Moscow on January 14, 1994, excerpted below. 5 Dep't St. Dispatch Supp. 1 at 25 (Jan. 1994) at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*; *see also* 88 Am. J. Int'l L. 753, 757–58 (1994).

United States and Russian experts have discussed for several months possible measures to improve strategic stability, increase mutual confidence, and step back from Cold War nuclear force postures. These discussions have included proposals for mutual detargeting of strategic nuclear systems. Based on these talks, the Presidents announced that they will direct the detargeting of strategic nuclear missiles under their respective commands. . . .

Intercontinental and submarine-launched ballistic missiles are capable of being launched against one of several targets or sets of targets stored in weapon system computers. Historically, a target setting associated with actual war plans had been the routine alert assignment of U.S. missile systems. Detargeting will involve

changing weapon-system control settings so that on a day-to-day basis no country, including Russia, Ukraine, or any other former Soviet territory, will be targeted by U.S. strategic forces. Russia has told the United States that their detargeting measures are comparable.

* * * *

Presidents Clinton of the United States, Yeltsin of the Russian Federation, and Kravchuk of Ukraine, meeting in Moscow on January 14, 1994, also issued a trilateral statement, excerpted below. 5 Dep't St. Dispatch Supp. 1 at 19 (Jan. 1994) at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*; *see also* 88 Am. J. Int'l L. 753, 758–59 (1994).

The three Presidents reiterated that they will deal with one another as full and equal partners and that relations among their countries must be conducted on the basis of respect for the independence, sovereignty and territorial integrity of each nation.

* * * *

The Presidents emphasized the importance of ensuring the safety and security of nuclear weapons pending their dismantlement.

The Presidents recognize the importance of compensation to Ukraine, Kazakhstan and Belarus for the value of the highly-enriched uranium in nuclear warheads located on their territories. Arrangements have been worked out to provide fair and timely compensation to Ukraine, Kazakhstan and Belarus as the nuclear warheads on their territory are transferred to Russia for dismantling.

Presidents Clinton and Yeltsin expressed satisfaction with the completion of the highly-enriched uranium contract, which was signed by appropriate authorities of the United States and Russia. By converting weapons-grade uranium into uranium which can only be used for peaceful purposes, the highly-enriched uranium agreement is a major step forward in fulfilling the countries' mutual non-proliferation objectives.

The three Presidents decided on simultaneous actions on transfer of nuclear warheads from Ukraine and delivery of

compensation to Ukraine in the form of fuel assemblies for nuclear power stations.

Presidents Clinton and Yeltsin informed President Kravchuk that the United States and Russia are prepared to provide security assurances to Ukraine. In particular, once the START I Treaty enters into force and Ukraine becomes a non-nuclear-weapon[s] state party to the Nuclear Non-Proliferation Treaty (NPT), the United States and Russia will:

> Reaffirm their commitment to Ukraine, in accordance with the principles of the CSCE Final Act, to respect the independence and sovereignty and the existing borders of the CSCE member states and recognize that border changes can be made only by peaceful and consensual means; and reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of any state, and that none of their weapons will ever be used except in self-defense or otherwise in accordance with the Charter of the United Nations; . . .
>
> * * * *

On May 10, 1995, Presidents Clinton and Yeltsin issued the Joint Statement on the Transparency and Irreversibility of the Process of Reducing Nuclear Weapons, excerpted below. 6 Dep't St. Dispatch No. 20 at 403 (May 15, 1995) available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

---

* * * *

Taking into account the proposal by President B.N. Yeltsin for a treaty on nuclear safety and strategic stability among the five nuclear powers, they declare that:

Fissile materials removed from nuclear weapons being eliminated and excess to national security requirements will not be used to manufacture nuclear weapons;

No newly produced fissile materials will be used in nuclear weapons; and

Fissile materials from or within civil nuclear programs will not be used to manufacture nuclear weapons.

The United States of America and the Russian Federation will negotiate agreements to increase the transparency and irreversibility of nuclear arms reduction that, inter alia, establish:

An exchange on a regular basis of detailed information on aggregate stockpiles of nuclear warheads, on stocks of fissile materials and on their safety and security;

A cooperative arrangement for reciprocal monitoring at storage facilities of fissile materials removed from nuclear warheads and declared to be excess to national security requirements to help confirm the irreversibility of the process of reducing nuclear weapons, recognizing that progress in this area is linked to progress in implementing the joint U.S.-Russian program for the fissile material storage facility at Mayak; and

Other cooperative measures, as necessary to enhance confidence in the reciprocal declarations on fissile material stockpiles.

* * * *

The United States of America and the Russian Federation will seek to conclude in the shortest possible time an agreement for cooperation between their governments enabling the exchange of information as necessary to implement the arrangements called for above, by providing for the protection of that information. No information will be exchanged until the respective arrangement enters into force.

7. Anti-Personnel Mines

As discussed in A.7., *supra*, during the 1990s the United States ratified the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ("CCW"), together with its Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices ("Protocol II" or "Mines Protocol") and the amended Mines Protocol, which was a result of U.S.-led efforts to

place tighter restrictions on landmine use and transfer. *See* A.7.b. *supra.*

On September 17, 1997, the White House issued three fact sheets addressing U.S. efforts to eliminate the threat of anti-personnel landmines ("APL") and issues related to ongoing negotiations of the 1997 Convention on the Prohibition and the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction ("Mine Ban Treaty" or "Ottawa Convention"). In December 1997 the Mine Ban Treaty was opened for signature in Ottawa, Canada. Although the United States had actively participated in its negotiation, ultimately it declined to sign due to unmet concerns, as reflected in excerpts from the fact sheets below.

The first fact sheet provides an overview of U.S. efforts, in addition to becoming party to the CCW and its protocols, to eliminate the threat of anti-personnel landmines during the 1990s, as excerpted below.

The full texts of the fact sheets are available at *www.clintonpresidentialcenter.org/legacy/091797-fact-sheet-on-landmine.htm*.

In May, 1996, we announced that the United States plans to destroy by the end of 1999 about three million non-self-destructing APL. Destruction of these mines is well underway and on schedule (1.5 million have been destroyed to date). The United States retains only those non-self-destructing APL needed for training and for defense in Korea.

On January 17, 1997, we announced that the United States would observe a permanent ban on export and transfer of APL. We will work to put this policy into law.

On January 17, 1997, the United States also announced that we would cap our APL stockpile at the current level of inventory.

Today, the President announced that by 2003 we will no longer use anti-personnel landmines outside Korea, and, within Korea, our objective is to have alternatives to anti-personnel landmines ready by 2006. The Department of Defense is pursuing an aggressive research and development effort to enable us to achieve

these objectives. Requested funding for this program is $3M in FY98 and $5M in FY99.

* * * *

On September 26, 1994, at the UN General Assembly, President Clinton called for the elimination of anti-personnel landmines, the first world leader to do so.

On December 10, 1996, in the UN General Assembly, nations voted overwhelmingly (156–0) in favor of the U.S.-initiated resolution urging states to pursue an agreement to ban anti-personnel landmines.

At the opening of the Conference on Disarmament (CD) on January 20, the United States began work with other member nations to initiate negotiations on a comprehensive, global agreement to ban APL.

Today, the President announced we would renew our commitment to work aggressively to establish negotiations in the CD, and to reach agreement on an export ban as a first step.

* * * *

The second fact sheet explained U.S. requirements for landmines in Korea.

The security situation in Korea is unique, requiring the United States to maintain the option of using anti-personnel landmines there until alternatives are available or the risk of aggression has been removed. Our objective is to have alternatives to our anti-personnel landmines there ready by 2006.

* * * *

Because North Korean forces are so close to Seoul and so outnumber allied forces in place, the United Nations command [led by a U.S. Army General pursuant to the U.N. Armistice Agreement of 1953] relies on pre-planned and emplaced minefields to counter and slow a possible North Korean advance. These minefields are well marked with fences and signs and are monitored by South Korean troops. They do not pose a threat to the local

civilian population. In hostilities, additional APL would be deployed to delay and to disrupt the attack long enough for us to bring in air power and other reinforcements with the objective of halting the attack and preventing the enormous loss of life that would result if North Korean forces were to overrun Seoul. Any U.S. anti-personnel landmines that are not marked and monitored will self-destruct within a maximum of 15 days, leaving no residual threat to the civilian population.

The third fact sheet addressed anti-tank munitions.

The United States believes that any treaty designed to ban anti-personnel landmines must not ban anti-tank mines, as would have been the case for the U.S. were we to have signed the Ottawa process treaty. The U.S. has an inventory of high-tech anti-tank systems with submunitions, i.e., anti-handling devices, that are designed to protect the anti-tank mines. Deployed around the anti-tank mines, these submunitions are essential to the effectiveness of the anti-tank minefield by preventing rapid breaching or removal by enemy footsoldiers.

These systems are only used in the case of imminent hostilities and can be air or ground delivered. . . .

Because they are self-destructing and self-deactivating, the anti-tank mines and their submunitions do not present a threat to the civilian population after hostilities have ended. . . .

* * * *

8. Small Arms and Light Weapons

a. Overview

A fact sheet issued by the U.S. Department of State on February 15, 2000, provided an overview of U.S. efforts to combat international trafficking in small arms and light weapons during the 1990s. The excerpt below describes U.S. initiatives in several areas; the OAS Convention and arms

brokering legislation, also addressed in the fact sheet, are discussed in 8.d. and 12 below.

The full text of the fact sheet, excerpted below, is available at *www.cfr.org/public/armstrade/LightWeaponsFacts.html.*

---

* * * *

As Secretary Albright told the United Nations in September 1999, "The international community must develop an integrated, comprehensive response—in countries of origin and countries of conflict, among buyers, sellers and brokers, and with governments as well as international and non-governmental organizations." The U.S. contribution to this effort is summarized below.

* * * *

Greater Accountability

The United States maintains the world's most open arms export procedures, and is promoting greater openness in the practices of other nations. In 1996, the President signed legislation amending the Foreign Assistance Act of 1961 to require the annual publication of information about arms authorized for commercial export by the United States that fall below the previously existing reporting thresholds for U.S. arms transfers. The report includes detailed, country-by-country information on the numbers of firearms, ammunition, and other "small-ticket" defense items authorized by the United States for export, setting a world standard for transparency. The United States has presented this report as a model to the 33-nation Wassenaar Arrangement, which promotes restraint and transparency in the export of conventional arms. The United States also publishes reports on arms flows to regions of conflict in order to raise public awareness of the issue. Last July, for example, the State Department released Arms and Conflict in Africa. It is available at: www.state.gov.

Careful Scrutiny of Export Licenses

If arms export license applications exceed the normal, reasonable domestic needs of a given importing country or show other abnormalities, the United States will audit and, if necessary,

cut off exports to that country. On that basis, the United States has suspended exports to Paraguay since 1996. In addition, as U.S. law prohibits arms and munitions exported from the United States to be re-transferred by the recipient without prior U.S. approval, audits are conducted if diversions or transshipments are suspected.

* * * *

Cracking Down on Financing of Illicit Arms

Illicit markets in valuable commodities such as diamonds have helped finance arms flows, particularly to embargoed groups and nations. The United States and other concerned countries are identifying ways to track and intercept illicit trafficking in precious gemstones used in financing conflicts in Africa. One possibility is legislation that would require each diamond to be sold with a certificate of origin guaranteeing its legality. Such an initiative would require working closely with the diamond industry, whose cooperation is essential for any dependably effective regime.

* * * *

International Diplomacy

The United States is working with many nations and international organizations on the problem of illicit small arms.

U.S.-EU. At their December 1999 summit in Washington, the United States and the European Union released a statement of "Common Principles on Small Arms and Light Weapons," in which they pledged to observe the "highest standards of restraint" in their small arms export policies, and took further steps to harmonize their export practices and policies. They approved a 10-point "Action Plan," and established a formal working group through which they will continue their activities.

* * * *

Norway. The United States has worked closely with a group of like-minded nations led by Norway that is helping to set the international agenda for addressing the problem of small arms proliferation. The statement released by the 18 countries attending the last such conference in Oslo in December 1999 focused

special attention on the importance of regulating the activities of arms brokers. President Clinton and Norwegian Prime Minister Bondevik also announced a bilateral task force on small arms and light weapons, focusing on efforts to destroy surplus small arms in conflict zones.

* * * *

b. International Traffic in Arms Regulations

The International Traffic in Arms Regulations (implemented pursuant to the Arms Export Control Act, 22 U.S.C. § 2751, 35 seq.), provide that it is the policy of the United States to deny licenses for the import of certain defense articles originating in certain countries (the "ITAR" list). *See* 22 C.F.R. § 126.1.

In the mid-1990s the Administration amended the list to include additional countries and to remove Russia from the ITAR list to eliminate former Cold War restrictions on trade and economic cooperation with Russia. In order to avoid possible compromise of public safety, the Administration undertook to negotiate voluntary export restraints with Russia. In 1996 the Office of Legal Counsel, U.S. Department of Justice, provided a memorandum opinion advising that the President had authority under the Arms Export Control Act, 22 U.S.C. § 2778 (1996), in the furtherance of U.S. foreign policy, to restrict the import of Russian munitions to certain classes of firearms and ammunition. Memorandum Opinion for the Special Assistant to the President and Legal Adviser to the National Security Council, from Walter Dellinger, Assistant Attorney General, February 9, 1996.

The opinion, excerpted below, is available at: *www.usdoj.gov/olc/arms02.htm.*

---

* * * *

. . . The question has been raised whether the President possesses authority under the AECA to limit the import of

munitions from Russia. We have concluded that restricting the import of Russian munitions to certain classes of firearms and ammunition is a legitimate use of the President's authority under the AECA to restrict the import of munitions in furtherance of United States foreign policy.

Section 38 of the AECA authorizes the President to control the import and the export of defense articles and defense services "[i]n furtherance of world peace and the security and foreign policy of the United States." 22 U.S.C. § 2778(a)(1). Section 38 further authorizes the President "to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services." *Id*. The Act generally requires a license as a condition of exporting or importing any defense articles so designated by the President. 22 U.S.C. § 2778(b)(1)(B)(2).

* * * *

Pursuant to [a Presidential] delegation of authority, the Departments of State and Treasury issued regulations to implement the Act. See International Traffic in Arms Regulations, 22 C.F.R. pts. 120–130 (1995) (State Department regulations); Importation of Arms, Ammunition and Implements of War, 27 C.F.R. pt. 47 (1995) (Treasury Department regulations). The designation of defense articles subject to import restrictions is set forth in the U.S. Munitions Import List at 27 C.F.R. 47.21 and includes categories for firearms and ammunition.

We understand that one part of the Administration's trade negotiation with Russia involves the possible importation into the United States from Russia of arms for sporting and hunting purposes. The Administration intends to continue to prevent imports of certain classes of weapons that are deemed to pose an unacceptable risk to public safety. In our view, the AECA would authorize imposition of controls on such imports.

. . . The Federal Circuit recently affirmed the President's authority under the AECA to prohibit the import of arms in furtherance of foreign policy objectives. *B-West Imports, Inc. v. United States*, No. 95–1326, 1996 WL 29106 (Fed. Cir. Jan. 25,

1996). We understand that the Administration's objective in removing Russia from the ITAR list is to improve American-Russian trade relations, remove Cold War restrictions to economic cooperation, and expand economic opportunities for both countries. These objectives reflect significant United States foreign policy goals. Thus, there can be no doubt that the bilateral trade reform contemplated by the Administration is designed to further the foreign policy of the United States. Accordingly, the contemplated import controls fall squarely within the statutory authorization of section 38.

We note that it could be argued that protecting public safety —the reason for limiting the importation of munitions into the United States—is a domestic, not a foreign policy concern. Even assuming that protecting public safety is viewed as exclusively a domestic issue, we do not believe this calls into question the President's authority under section 38 (as delegated to the Secretaries of Treasury and State) to control import of munitions. United States foreign policy usually includes as one component the promotion of domestic goals or the avoidance of a negative impact on domestic concerns in the process of pursuing a foreign policy objective. Taking into account the domestic effects of foreign policy does not change the fact that it is foreign policy that is being set. *See, e.g., Missouri v. Holland*, 252 U.S. 416 (1920) (President possesses authority to promote foreign policy through treaty power even where object affected is a local concern). Indeed, it would be artificial as well as practically impossible to separate the two. . . .

* * * *

. . . In determining how far to open United States markets to Russian arms manufacturers, the President is faced with just such a delicate confluence of factors that requires that United States foreign policy integrate international commercial policy with domestic policy concerns.

For these reasons, we conclude that restricting the import of Russian munitions to certain classes of firearms and ammunition is a legitimate use of the President's authority under the AECA as delegated to the Secretaries of Treasury and State.

c. Litigation concerning re-importation of small arms into the United States

In 1996 Intrac Arms International, a licensed U.S. importer of firearms, sought to import from Austria several thousand World War II U.S.-manufactured rifles to sell to collectors. The U.S. Department of Treasury (Bureau of Alcohol Tobacco and Firearms), in consultation with the U.S. Department of State, denied Intrac's application to import these arms in 1997. Intrac then filed a lawsuit in the U.S. District Court for the District of Columbia. The district court granted summary judgment for defendants, upholding the Departments' determination and interpreting the requirements for the import of certain firearms originating in the United States. *Intrac Arms Int'l v. Albright*, 1998 U.S. Dist. LEXIS 21858 (D.D.C.).

Excerpts from the court opinion below address the statutory scheme applicable to such importation, including the requirement for consent to transfer of weapons provided by the United States to foreign countries through military assistance programs and statutes regulating importation of firearms. (Most footnotes have been omitted.)

---

* * * *

II. Statutory Background

It is well established that the President of the United States has broad powers to control foreign policy. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 324, 81 L.Ed. 255, 57 S.Ct. 216 (1936) (acknowledging that Congress has generally left exercise of President's power in foreign relations matters to President's unrestricted judgment); *B-West Imports, Inc. v. United States*, 75 F.3d 633, 636 (Fed. Cir. 1996) (holding that statutes granting President authority to act on foreign policy matters are to be liberally construed); *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 167 Ct. Cl. 236, 334 F.2d 622, 631–32 (Ct. Cl. 1964), cert. denied, 379 U.S. 964, 13 L.Ed.2d 558, 85 S.Ct. 654

(1965) (holding that when Congress uses broad language in delegating authority to President in the area of foreign relations, that authority must be liberally construed, so long as there is no contrary statutory provision). Therefore, in reviewing the executive branch decision in this case, the broad authority granted to the President in foreign affairs must be kept in mind as a guiding principle.

There are two statutory schemes which are relevant: the retransfer consent statutes, and the importation of firearms statutes. In Exec. Order No. 11958, 42 Fed. Reg. 4,311 (1977), the President delegated his authority regarding retransfer consent to the State Department. In that same Executive Order, the President delegated his authority regarding the importation of arms to the Treasury Department, although its decisions are to be guided by the views of the State Department.

A. Retransfer Consent

* * * *

The retransfer consent statutes require that when the United States provides a foreign country with weapons through a military assistance program, that country must agree to obtain the consent of the President before it transfers those weapons to any other person or entity. This required consent from the United States is referred to as "retransfer consent".

The current statutory provisions requiring such retransfer consent are contained in Section 3(a) of the Arms Export Control Act ("AECA") (codified at 22 U.S.C. § 2753(a) (1998)) (dealing with firearms sold or leased to foreign countries), and Section 505(a)(1)(B) of the Foreign Assistance Act of 1961 ("FAA") (codified at 22 U.S.C. § 2314 (1998)) (dealing with firearms granted to foreign countries).

. . . [I]t is clear that the retransfer consent statutes were in effect when Austria acquired the weapons in 1956, and have remained in effect by virtue of savings provisions enacted by Congress. These statutes give the President broad control over the movement of U.S.-provided arms by requiring those who obtained them under military assistance programs to obtain his approval before transferring them to any other entity.

B. Importation of Firearms

The importation of firearms provided under military assistance programs is governed by two statutory provisions. The first is Section 38(b)(1) of the AECA (codified at 22 U.S.C. § 2778(b)). The second is Section 925 of the Gun Control Act of 1968 ("GCA") (codified at 18 U.S.C. § 925 (1998)).

Section 38(b)(1)(A) of the AECA creates a general prohibition against the importation into the United States of any arms originally provided under military assistance programs. This general prohibition is lifted if an importer is seeking to import firearms classified as curios or relics under Treasury Department guidelines, and the foreign government owning those arms certifies to the United States that it does in fact own them.

* * * *

Congress made clear in Section 201 of the GCA (codified at 26 U.S.C. § 5847 (1998)) that it never intended to have the GCA supersede Section 38(b)(1) of the AECA. Section 201 provides:[10]

> Nothing in this chapter shall be construed as modifying or affecting the requirements of section 414 of the Mutual Security Act of 1954, as amended, with respect to the manufacture, exportation, and importation of arms, ammunition, and implements of war.

Therefore, Intrac's right to import rifles under Section 925(e) is subject to and limited by Section 38(b) of the AECA.

* * * *

[10] As the Government notes, Section 414 of the Mutual Security Act was repealed, but a savings provision was included in Section 212(b)(1) of the International Security Assistance and Arms Export Control Act of 1976, that explicitly provides that any reference to Section 414 of the Mutual Security Act shall be deemed a reference to the AECA.

IV. Analysis

A. Statutory Framework

As already set forth above, the retransfer consent statutes apply to firearms provided under military assistance programs. ATF assumed, in the absence of any information to the contrary from Intrac, that the firearms in question were provided to Austria (or the original source from which Austria obtained them) under a military assistance program. This assumption was reasonable given the information known about these types of weapons. See Owen Decl. at 4–5.

Consequently, Intrac is required to complete a two-step process prior to obtaining a permit to import the arms into the United States. First, pursuant to Section 3(a) of the AECA, Intrac must obtain the President's consent to retransfer the firearms from Austria to Intrac. [In addition,] . . . Section 38(b)(1)(B) requires Intrac to show that the firearms are curios or relics, and requires the foreign government to certify that it owns the firearms. Without completing both steps of this two-step process, Intrac cannot obtain a permit to import these firearms into the United States.

B. Retransfer Consent

Intrac argues that since these weapons were provided under a sales program, rather than a military assistance program, the retransfer statutes do not apply. Intrac also argues that retransfer consent is unnecessary because there is no evidence of a contract between Austria and the United States requiring Austria to obtain retransfer consent prior to selling the firearms to Intrac.

Intrac's first argument is unpersuasive. . . . Since it was reasonable for the Government to assume, on the basis of the existing Administrative Record, that the firearms were provided under a military assistance program, Owen Decl. at 4–5, the retransfer statutes must apply in this case.

Intrac's second argument rests on Section 3(a) of the AECA, which conditions the granting of military assistance on acceptance of the retransfer consent requirement, making that requirement a

contract term. Intrac argues that because no contract exists between Austria and the United States, the statutory requirement does not apply in this case, and even if a contract did exist, it would not bar importation of these firearms.

. . . The purpose of the retransfer consent statutes is to give the President control over the movement of U.S. firearms provided under military assistance programs. This purpose would be completely subverted if, as Intrac argues, "a breach of any such contract [made pursuant to a military assistance program] would not bar the rifles from importation." As the Government notes, Intrac's reading of the AECA would prevent the President from imposing embargos against importation of curios and relics from unfriendly nations, such as China, Libya, Iraq, or Cuba. Congress surely did not intend to nullify the statutes in this way, and risk the possibility of transfers of weapons to unfriendly nations, or the possibility of "unfettered trafficking of U.S. military weapons".

* * * *

The State Department's policy is to grant retransfer consent to private parties only when a public interest for granting such consent can be shown. Situations where such a public interest might exist include demilitarizing the firearms and placing them in a public display, or using them for a federal contract. *Id*. Before granting retransfer consent, the State Department requires assurances as to the end-use of the firearms, and requires that this end-use serve the public interest.

* * * *

The State Department's policy is, on its face, a reasonable and permissible construction of the retransfer statutes, and will be upheld, for two reasons. First, the President has broad powers to control foreign policy, and his powers under the retransfer consent statutes must be broadly construed. Second, Congress has failed to narrow the President's powers under the retransfer consent statutes, despite having had many opportunities to do so since the original statute was passed in 1949.

[Because there] are no judicially manageable standards by which to judge the State Department's exercise of its discretion in

[the application of the policy to Intrac], . . . the State Department's exercise of discretion will be upheld.

C. Importation of Firearms

Even after an importer obtains retransfer consent to acquire United States manufactured arms from a foreign country, it must still meet the requirements of the importation statutes before importing them into the United States. . . . The first requirement is that such weapons are classified as curios or relics, as defined by Treasury Department guidelines; both parties agree that Intrac has met this requirement.

The second requirement is that the foreign government holding these weapons must certify to the United States that it actually owns them. When Intrac submitted its application for a permit to ATF in December 1996, it included a letter from the Austrian government certifying that Austria owned the weapons.

* * * *

The State Department and ATF require that a foreign government continue to own the firearms until final approval of the importation application. A.R. Tab 10 at 3. Given the silence of the statute on this point, the agency's construction is both reasonable and permissible. By requiring ownership of the firearms by the foreign country up until final approval of their importation, both the State Department and ATF can address any foreign policy concerns before final consummation of the transaction, and can properly administer the retransfer consent statutes, as they may apply to a particular situation. *Id.*

* * * *

D. Due Process Violation

Intrac argues that the Government violated its due process rights under the Fifth Amendment by denying its application to import firearms. Specifically, Intrac alleges that the Government violated its liberty and property interests in the issuance of a permit to import the firearms. Intrac claims that these interests were

created by the mandatory language in the relevant statutes, as well as the substantive limitations placed on official discretion by these statutes.

* * * *

Intrac has not, however, shown that it has any entitlement to a permit to import the firearms. It has cited to no statutory provision that mandates issuance of a permit in this case. . . .

* * * *

d. OAS Convention

On June 9, 1998, President William J. Clinton transmitted the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials, signed at Washington, D.C. on November 11, 1997, for the Senate's advice and consent to ratification. S. Treaty Doc. No. 105–49 (1998). The President's transmittal letter follows. The United States has not yet become party to the treaty.

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (the "Convention"), adopted at the Special Session of the General Assembly of the Organization of American States (OAS) at Washington on November 13, 1997. The Convention was signed by the United States and 28 other OAS Member States on November 14, 1997, at the OAS Headquarters in Washington. So far, 31 States have signed the Convention and one (Belize) has ratified it. In addition, for the information of the Senate, I transmit the report of the Department of State with respect to the Convention.

The Convention is the first multilateral treaty of its kind in the world. The provisions of the Convention are explained in the accompanying report of the Department of State. The Convention should be an effective tool to assist in the hemispheric effort to combat the illicit manufacturing and trafficking in firearms, ammunition, explosives, and other related materials, and could also enhance the law enforcement efforts of the States Parties in other areas, given the links that often exist between those offenses and organized criminal activity, such as drug trafficking and terrorism.

The Convention provides for a broad range of cooperation, including extradition, mutual legal assistance, technical assistance, and exchanges of information, experiences, and training, in relation to the offenses covered under the treaty. The Convention also imposes on the Parties an obligation to criminalize the offenses set forth in the treaty if they have not already done so. The Convention will not require implementing legislation for the United States.

This treaty would advance important U.S. Government interests, and would enhance hemispheric security by obstructing the illicit flow of weapons to criminals such as terrorists and drug traffickers. In addition, ratification of this Convention by the United States would be consistent with, and give impetus to, the active work being done by the United States Government on this subject in other fora, such as the United Nations, the P-8 Group, and the OAS Inter-American Drug Abuse Control Commission (CICAD).

I recommend that the Senate give early and favorable consideration to the Convention, and that it give its advice and consent to ratification.

9. Transfers of Conventional Weapons and Dual-Use Technologies

On January 16, 1994, the United States and Russia issued the U.S.-Russian Federation Joint Statement on Issues of Export Controls and Policy in the Area of Transfers of Conventional Weapons and Dual-Use Technologies ("Joint Statement"). The Joint Statement, set forth below in full, is

available with the referenced Memorandum of Intent Between the Government of the United States of America and the Government of the Russian Federation on Cooperation in the Area of Export Control at *www.state.gov/www/global/arms/factsheets/exptcon/expctrlc.html*.

The Secretary of State of the United States of America and the Minister of Foreign Affairs of the Russian Federation underscored the staunch commitment of their countries to efforts to curb the proliferation of weapons of mass destruction and to enhance global and regional stability. In keeping with the spirit of the new strategic partnership between the United States and Russia the Ministers have agreed on development of wide-ranging cooperation in the field of export control. Moreover, they have agreed that all necessary steps in this field be taken expeditiously, and have established a senior-level working group for this purpose, as well as to initiate bilateral cooperation in the areas specified in a Memorandum of Intent signed this day in Moscow.

The Ministers expressed satisfaction with steps taken since the last meeting of the President of the United States and the President of the Russian Federation to eliminate the vestiges of the Cold War, such as the Coordinating Committee for Multilateral Export Controls (COCOM), which according to the understanding reached by COCOM members will be terminated not later than March 31, 1994. They also welcomed the decision to establish a new multilateral regime for enhancing responsibility and transparency in the transfers of armaments and sensitive dual-use technologies. This new arrangement would not be directed against any state or group of states, and would prevent the acquisition of such items for military end uses if the behavior of a state is or becomes a cause for serious concern as determined by the participants of the new multilateral regime.

The United States and Russia, as leading exporters of conventional weapons, military equipment and dual-use technologies, are convinced that additional measures are needed on an international basis to increase responsibility, transparency and, where appropriate, restraint in this area. They expressed their willingness to

work with other countries in bringing about the early establishment of a new multilateral regime in order to achieve these objectives, which would supplement existing non-proliferation regimes in particular through arrangements to exchange information for the purpose of meaningful consultations.

10. Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies

The Wassenaar Arrangement ("WA"), instituted in 1996 by thirty-three co-founding countries, including the United States, covers both conventional weapons and sensitive dual-use goods and technologies.

The WA was established following the dissolution of the Coordinating Committee on Multilateral Export Controls ("COCOM"), which had addressed export controls during the Cold War era. On November 16, 1993, in The Hague, representatives of the seventeen COCOM member states agreed to terminate COCOM, and to establish a new multilateral arrangement, temporarily known as the "New Forum." This decision was confirmed at a High Level Meeting at Wassenaar, the Netherlands in March 1994. COCOM ceased to exist as of March 31, 1994. *See www.wassenaar.org/docs/History.html.* The following excerpts from a U.S. Department of State fact sheet briefly describe the role of the WA.

The full text of the fact sheet is available at: *www.state.gov/t/np/rls/fs/2001/5285.htm.*

---

* * * *

The WA is designed to prevent destabilizing accumulations of arms and dual-use goods and technologies. The Arrangement encourages transparency, consultation and, where appropriate, national policies of restraint. In doing so, the WA fosters greater responsibility and accountability in transfers of arms and dual use goods and technologies. The Arrangement also provides

a venue in which governments can consider collectively the implications of various transfers on their international and regional security interests. This is the principal security benefit of membership.

WA members maintain export controls on the WA Munitions and Dual-Use lists. These lists regularly are reviewed by experts of the Participating States and revised as needed. However, the decision to transfer or deny any controlled item remains the responsibility of individual member states. To facilitate meeting the WA's principal objective of preventing destabilizing accumulations, members report on their decisions to transfer or deny to nonmembers certain classes of weapons and dual-use technologies.

In order to enhance transparency in arms transfers, Wassenaar members report semiannually on deliveries to nonmembers of weapons in categories derived from the UN Register of Conventional Arms.

. . . Wassenaar members also report on their transfers to nonmembers of dual-use goods. The Wassenaar Dual-Use List comprises a Basic List of controlled technology, on which members semiannually report aggregated license denials. The Basic List is subdivided into a Sensitive List of technologies on which members report individual denials of licenses within 30–60 days. In addition to these individual denials, members also report semiannually aggregated numbers of licenses issued or transfers made. Finally, the Sensitive List is further subdivided into a Very Sensitive List, consisting of technology subject to extreme vigilance in national licensing decisions.

Although no country is an explicit target of the WA, members are committed to dealing firmly with states whose behavior is a cause for serious concern. There is broad agreement that these states presently are Iran, Iraq, Libya and North Korea. Wassenaar members deal with these "countries of concern" by preventing, through shared national policies of restraint, their acquisition of armaments and sensitive dual use goods and technologies for military end-use.

* * * *

11. UN Register of Conventional Arms

The United States participated in the development of the UN Register of Conventional Arms, the purpose of which is to promote transparency in the transfer and sales of conventional arms. On May 1, 1995, the United States issued a statement reporting its April 28 submission to the United Nations and describing the UN Register. The statement, excerpted below, is available at *www.state.gov/www/global/arms/factsheets/conwpn/convun.html*.

---

* * * *

. . . [The submission of the United States includes] data . . . on the number of US international transfers (exports and imports) of seven categories of major conventional arms during 1994, as well as available background information on US military holdings and procurement through national production in 1994 and on US arms import and export policies, legislation, and administrative procedures.

* * * *

The UN Register represents both an old idea, first raised in the League of Nations before World War II, and an innovative new direction for the post-Cold War international security agenda. It reflects a change in emphasis from preoccupation with the danger of nuclear war to measures that can increase confidence, reduce suspicions, and help expose and stem the proliferation of destabilizing and excessive accumulations of conventional armaments, especially in regions of tension.

The Register was established by UN Resolution 46/36L on Transparency in Armaments and adopted without dissent on December 9, 1991 by a vote of 150–0, with Iraq and Cuba abstaining and China and Syria not participating in the vote. Resolution 46/36L put in motion a multi-dimensional process which, among other things, instituted the Register of Conventional Arms and called on all member countries to report the number of

arms in seven categories exported or imported from their territory during the calendar year.

This resolution, initiated by the European Community and Japan and co-sponsored by the United States, sent an important message to the international community and helped set a desirable new direction and tone to the international security agenda. The Register is intended to serve as an important global confidence-building measure and a political gesture symbolizing this new direction.

Information contributed by countries to the UN Register of Conventional Arms is available to all countries and will be compiled by the Secretary General in a report to the UN General Assembly. . . .

The United States believes the UN Register will encourage countries to develop national procedures for reviewing the potential impact of arms transfers on regional and international security. It may also encourage countries to develop appropriate means of control over the export and import of arms. . . .

* * * *

12. "Brokering" Amendment to Arms Export Control Act

The "brokering" amendment to the Arms Export Control Act ("AECA") (also known as the Foreign Military Sales Act), Pub. L. No. 90–629, 82 Stat. 1320 (1968), was enacted July 21, 1996. Pub. L. No. 104–164 § 151, 110 Stat. 1421 (1996) (codified as amended at 22 U.S.C. § 2278 (1996)). The purpose of the amendment was to regulate and prevent the brokering of defense articles and technology that had not previously been covered by the AECA, namely overseas brokering and the brokering of non-U.S. defense articles or technology.

The text of the 1996 brokering amendment to the AECA follows.

---

* * * *

(a) IN GENERAL.—Section 38(b)(1)(A) of the Arms Export Control Act (22 U.S.C. 2778(b)(1)(A)) is amended—

* * * *

(2) by adding at the end the following new clause:
"(ii)(I) As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States Government acting in official capacity) who engages in the business of brokering activities with respect to the manufacture, export, import, or transfer of any defense article or defense service designated by the President under subsection (a)(1), or in the business of brokering activities with respect to the manufacture, export, import, or transfer of any foreign defense article or defense service (as defined in subclause (IV)), shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations.
"(II) Such brokering activities shall include the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service.
"(III) No person may engage in the business of brokering activities described in subclause (I) without a license, issued in accordance with this Act, except that no license shall be required for such activities undertaken by or for an agency of the United States Government—
"(aa) for use by an agency of the United States Government; or
"(bb) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.
"(IV) For purposes of this clause, the term 'foreign defense article or defense service' includes any non-United States defense article or defense service of a nature described on the United States Munitions List regardless of whether such article or service is of United States origin or whether such article or service contains United States origin components."

* * * *

The brokering amendment was implemented through the ITAR, 22 C.F.R. pt. 129. The regulations required persons meeting the definitions of the act to register with the Office of Defense Trade Controls. Section 129.2(b) explained the application of the term "brokering" in the statute and regulations as follows:

> For example, this includes, but is not limited to, activities by U.S. persons who are located inside or outside of the United States or foreign persons subject to U.S. jurisdiction involving defense articles or defense services of U.S. or foreign origin which are located inside or outside of the United States. But, this does not include activities by U.S. persons that are limited exclusively to U.S. domestic sales or transfers (e.g., not for export or re-transfer in the United States or a foreign person).

22 C.F.R. § 129.2(b).

Section 129.3(b) listed persons exempt from the registration requirements, namely employees of the United States Government acting in an official capacity, 129.3(b)(1), employees of foreign governments or international organizations acting in an official capacity, 129.3(b)(2), and persons "exclusively in the business of financing, transporting, or freight forwarding, whose business activities do not also include brokering defense articles or defense services. For example, air carriers and freight forwarders who merely transport or arrange transportation for licensed United States Munitions List items are not required to register, nor are banks or credit companies who merely provide commercially available lines or letters of credit to persons registered in accordance with Part 122 of this subchapter required to register." 22 C.F.R. § 129.3(b)(3).

Under the regulations, no person could engage in brokering activities without obtaining approval (i.e., a license); however licenses were not required for brokering activities "undertaken by or for an agency of the United States Government, for use by the United States Government or for "carrying out any foreign assistance or sales program authorized by

law and subject to the control of the President . . ." 22 C.F.R. § 129.6(b)(1). A license was also not required for the brokering of certain military equipment arranged within and destined for NATO member states, Australia, Japan and New Zealand. *See* 22 C.F.R. § 129.6(b)(2).

C. NUCLEAR NONPROLIFERATION AND NUCLEAR COOPERATION

1. Comprehensive Test Ban Treaty

In April 1993 President Clinton announced at a summit in Vancouver, among other things, that "we will be starting a consultative process within the next 2 months with Russia, our allies, and other states, aimed at commencing negotiations toward a multilateral nuclear test ban." *See* Statement on Advancing U.S. Relations With Russia and Other New Independent States, 29 WEEKLY COMP. PRES. DOC. 660 (Apr. 26, 1993).

In July 1993 President Clinton stated his intention to negotiate a Comprehensive Test Ban Treaty ("CTBT"), and extend the U.S. testing moratorium. He called on other nations to observe the moratorium in an effort to further non-proliferation goals. *See* President's Radio Address, 1 Pub. Papers 993–95 (July 3, 1993). In October 1993 China conducted its first nuclear test since President Clinton's appeal for a global moratorium. The White House issued a statement regretting China's decision to resume nuclear testing and urged China to join other nuclear powers in the moratorium. *See* Statement by the Press Secretary on Nuclear Testing by China, 2 Pub. Papers 1694 (Oct. 5, 1993).

In May 1995 the Treaty on the Non-Proliferation of Nuclear Weapons ("Non-Proliferation Treaty" or "NPT") Review and Extension Conference agreed to extend the NPT indefinitely and without condition, as discussed in C.2.a., below. The Conference also adopted the "Principles and Objectives for Nuclear Non-Proliferation and Disarmament"

calling for the conclusion of negotiations on a CTBT in 1996. Then in June 1995 President Chirac announced the resumption of French nuclear testing in the South Pacific as part of a final series of tests to ensure the reliability and modernization of France's nuclear arsenal prior to the signing of a CTBT. The tests ended a moratorium that had been in place since 1992 when President Mitterrand halted nuclear testing. The White House issued a statement regretting France's decision to resume nuclear testing. *See www.clintonpresidentialcenter.org/legacy/090595-statement-by-press-secretary-on-french-nuclear-testing.htm*.

The CTBT was negotiated at the Geneva Conference on Disarmament from January 1994 to August 1996. The United Nations General Assembly adopted the CTBT via Resolution 50/245 on September 10, 1996. U.N. Doc. A/RES/50/245 (1996), *reprinted in* 35 I.L.M. 1439 (1996).

Article I of the CTBT sets forth its basic obligations as follows:

> 1. Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control.
> 2. Each State Party undertakes, furthermore, to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion.

On September 24, President Clinton became the first world leader to sign the CTBT. The President transmitted the treaty to the Senate for advice and consent to ratification on September 23, 1997. S. Treaty Doc. No. 105–28 (1997). *See also* 92 Am. J. Int'l L. 44, 59–65 (1998). Excerpts below from the President's letter of transmittal describe the provisions of the treaty and its importance.

I transmit herewith, for the advice and consent of the Senate to ratification, the Comprehensive Nuclear Test-Ban Treaty (the

"Treaty" or "CTBT"), opened for signature and signed by the United States at New York on September 24, 1996. The Treaty includes two Annexes, a Protocol, and two Annexes to the Protocol, all of which form integral parts of the Treaty. I transmit also, for the information of the Senate, the report of the Department of State on the Treaty, including an Article-by-Article analysis of the Treaty.

Also included in the Department of State's report is a document relevant to but not part of the Treaty: the Text on the Establishment of a Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization, adopted by the Signatory States to the Treaty on November 19, 1996. The Text provides the basis for the work of the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization in preparing detailed procedures for implementing the Treaty and making arrangements for the first session of the Conference of the States Parties to the Treaty. In particular, by the terms of the Treaty, the Preparatory Commission will be responsible for ensuring that the verification regime established by the Treaty will be effectively in operation at such time as the Treaty enters into force. My Administration has completed and will submit separately to the Senate an analysis of the verifiability of the Treaty, consistent with section 37 of the Arms Control and Disarmament Act, as amended. Such legislation as may be necessary to implement the Treaty also will be submitted separately to the Senate for appropriate action.

The conclusion of the Comprehensive Nuclear Test-Ban Treaty is a signal event in the history of arms control. The subject of the Treaty is one that has been under consideration by the international community for nearly 40 years, and the significance of the conclusion of negotiations and the signature to date of more than 140 states cannot be overestimated. The Treaty creates an absolute prohibition against the conduct of nuclear weapon test explosions or any other nuclear explosion anywhere. Specifically, each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion; to prohibit and prevent any nuclear explosions at any place under its jurisdiction or control; and to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion.

The Treaty establishes a far reaching verification regime, based on the provision of seismic, hydroaucoustic, radionuclide, and infrasound data by a global network (the "International Monitoring System") consisting of the facilities listed in Annex 1 to the Protocol. Data provided by the International Monitoring System will be stored, analyzed, and disseminated, in accordance with Treaty-mandated operational manuals, by an International Data Center that will be part of the Technical Secretariat of the Comprehensive Nuclear Test-Ban Treaty Organization. The verification regime includes rules for the conduct of on-site inspections, provisions for consultation and clarification, and voluntary confidence-building measures designed to contribute to the timely resolution of any compliance concerns arising from possible misinterpretation of monitoring data related to chemical explosions that a State Party intends to or has carried out. Equally important to the U.S. ability to verify the Treaty, the text specifically provides for the right of States Parties to use information obtained by national technical means in a manner consistent with generally recognized principles of international law for purposes of verification generally, and in particular, as the basis for an on-site inspection request. The verification regime provides each State Party the right to protect sensitive installations, activities, or locations not related to the Treaty. Determinations of compliance with the Treaty rest with each individual State Party to the Treaty.

Negotiations for a nuclear test-ban treaty date back to the Eisenhower Administration. During the period 1978–1980, negotiations among the United States, the United Kingdom, and the USSR (the Depositary Governments of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)) made progress, but ended without agreement. Thereafter, as the nonnuclear weapon states called for test-ban negotiations, the United States urged the Conference on Disarmament (the "CD") to devote its attention to the difficult aspects of monitoring compliance with such a ban and developing elements of an international monitoring regime. After the United States, joined by other key states, declared its support for comprehensive test-ban negotiations with a view toward prompt conclusion of a treaty, negotiations on a

comprehensive test-ban were initiated in the CD, in January 1994. Increased impetus for the conclusion of a comprehensive nuclear test-ban treaty by the end of 1996 resulted from the adoption, by the Parties to the NPT in conjunction with the indefinite and unconditional extension of that Treaty, of "Principles and Objectives for Nuclear Non-Proliferation and Disarmament" that listed the conclusion of a CTBT as the highest measure of its program of action.

On August 11, 1995, when I announced U.S. support for a "zero yield" CTBT, I stated that:

> . . . As part of our national security strategy, the United States must and will retain strategic nuclear forces sufficient to deter any future hostile foreign leadership with access to strategic nuclear forces from acting against our vital interests and to convince it that seeking a nuclear advantage would be futile. In this regard, I consider the maintenance of a safe and reliable nuclear stockpile to be a supreme national interest of the United States. I am assured by the Secretary of Energy and the Directors of our nuclear weapons labs that we can meet the challenge of maintaining our nuclear deterrent under a CTBT through a Science Based Stockpile Stewardship program without nuclear testing. I directed the implementation of such a program almost 2 years ago, and it is being developed with the support of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. This program will now be tied to a new certification procedure. In order for this program to succeed, both the Administration and the Congress must provide sustained bipartisan support for the stockpile stewardship program over the next decade and beyond. I am committed to working with the Congress to ensure this support.
>
> While I am optimistic that the stockpile stewardship program will be successful, as President I cannot dismiss the possibility, however unlikely, that the program will fall short of its objectives. Therefore, in addition to the

> new annual certification procedure for our nuclear weapons stockpile, I am also establishing concrete, specific safeguards that define the conditions under which the United States can enter into a CTBT . . .

The safeguards that were established are as follows:

The conduct of a Science Based Stockpile Stewardship program to ensure a high level of confidence in the safety and reliability of nuclear weapons in the active stockpile, including the conduct of a broad range of effective and continuing experimental programs.

The maintenance of modern nuclear laboratory facilities and programs in theoretical and exploratory nuclear technology that will attract, retain, and ensure the continued application of our human scientific resources to those programs on which continued progress in nuclear technology depends.

The maintenance of the basic capability to resume nuclear test activities prohibited by the CTBT should the United States cease to be bound to adhere to this Treaty.

The continuation of a comprehensive research and development program to improve our treaty monitoring capabilities and operations.

The continuing development of a broad range of intelligence gathering and analytical capabilities and operations to ensure accurate and comprehensive information on worldwide nuclear arsenals, nuclear weapons development programs, and related nuclear programs.

The understanding that if the President of the United States is informed by the Secretary of Defense and the Secretary of Energy (DOE)—advised by the Nuclear Weapons Council, the Directors of DOE's nuclear weapons laboratories, and the Commander of the U.S. Strategic Command—that a high level of confidence in the safety or reliability of a nuclear weapon type that the two Secretaries consider to be critical to our nuclear deterrent could no longer be certified, the President, in consultation with the Congress, would be prepared to withdraw from the CTBT under the standard "supreme national interests" clause in order to conduct whatever testing might be required.

With regard to the last safeguard:

The U.S. regards continued high confidence in the safety and reliability of its nuclear weapons stockpile as a matter affecting the supreme interests of the country and will regard any events calling that confidence into question as "extraordinary events related to the subject matter of the treaty." It will exercise its rights under the "supreme national interests" clause if it judges that the safety or reliability of its nuclear weapons stockpile cannot be assured with the necessary high degree of confidence without nuclear testing.

To implement that commitment, the Secretaries of Defense and Energy—advised by the Nuclear Weapons Council or "NWC" (comprising representatives of DOD, JCS, and DOE), the Directors of DOE's nuclear weapons laboratories and the commander of the U.S. Strategic Command—will report to the President annually, whether they can certify that the Nation's nuclear weapons stockpile and all critical elements thereof are, to a high degree of confidence, safe and reliable, and, if they cannot do so, whether, in their opinion and that of the NWC, testing is necessary to assure, with a high degree of confidence, the adequacy of corrective measures to assure the safety and reliability of the stockpile, or elements thereof. The Secretaries will state the reasons for their conclusions, and the views of the NWC, reporting any minority views.

After receiving the Secretaries' certification and accompanying report, including NWC and minority views, the President will provide them to the appropriate committees of the Congress, together with a report on the actions he has taken in light of them.

If the President is advised, by the above procedure, that a high level of confidence in the safety or reliability of a nuclear weapon type critical to the Nation's nuclear deterrent could no longer be certified without nuclear testing, or that nuclear testing is necessary to assure the adequacy of corrective measures, the President will be prepared to exercise our "supreme national interests" rights under the Treaty, in order to conduct such testing.

The procedure for such annual certification by the Secretaries, and for advice to them by the NWC, U.S. Strategic Command,

and the DOE nuclear weapons laboratories will be embodied in domestic law.

* * * *

The Comprehensive Nuclear Test-Ban Treaty is of singular significance to the continuing efforts to stem nuclear proliferation and strengthen regional and global stability. Its conclusion marks the achievement of the highest priority item on the international arms control and nonproliferation agenda. Its effective implementation will provide a foundation on which further efforts to control and limit nuclear weapons can be soundly based. By responding to the call for a CTBT by the end of 1996, the Signatory States, and most importantly the nuclear weapon states, have demonstrated the bona fides of their commitment to meaningful arms control measures.

The monitoring challenges presented by the wide scope of the CTBT exceed those imposed by any previous nuclear test-related treaty. Our current capability to monitor nuclear explosions will undergo significant improvement over the next several years to meet these challenges. Even with these enhancements, though, several conceivable CTBT evasion scenarios have been identified. Nonetheless, our National Intelligence Means (NIM), together with the Treaty's verification regime and our diplomatic efforts, provide the United States with the means to make the CTBT effectively verifiable. By this, I mean that the United States:

> will have a wide range of resources (NIM, the totality of information available in public and private channels, and the mechanisms established by the Treaty) for addressing compliance concerns and imposing sanctions in cases of noncompliance; and will thereby have the means to: (a) assess whether the Treaty is deterring the conduct of nuclear explosions (in terms of yields and number of tests) that could damage U.S. security interests and constraining the proliferation of nuclear weapons, and (b) take prompt and effective counteraction.

My judgment that the CTBT is effectively verifiable also reflects the belief that U.S. nuclear deterrence would not be undermined by possible nuclear testing that the United States might fail to detect under the Treaty, bearing in mind that the United States will derive substantial confidence from other factors—the CTBT's "supreme national interests" clause, the annual certification procedure for the U.S. nuclear stockpile, and the U.S. Safeguards program.

I believe that the Comprehensive Nuclear Test-Ban Treaty is in the best interests of the United States. Its provisions will significantly further our nuclear nonproliferation and arms control objectives and strengthen international security. Therefore, I urge the Senate to give early and favorable consideration to the Treaty and its advice and consent to ratification as soon as possible.

On October 13, 1999, the Senate refused to grant advice and consent to ratification of the CTBT. *See* 145 CONG. REC. S12,505–550 (daily ed. Oct. 13, 1999). In a press conference following the Senate's action, President Clinton promised that the United States would not test nuclear weapons during the remainder of his term in office. President Clinton called the CTBT "critical to protecting the American people from the dangers of nuclear war," and pledged to continue "the policy we have observed since 1992 of not conducting nuclear tests." 35 WEEKLY COMP. PRES. DOC. 2026 (Oct. 18, 1999).

2. Non-Proliferation Treaty Extension (1995) and Security Assurances

a. Treaty on the Non-Proliferation of Nuclear Weapons: Extension decision, joint principles and Middle East resolution

The NPT, signed in triplicate at Washington, London, and Moscow on July 1, 1968, entered into force on March 5, 1970, TIAS 6839, 729 U.N.T.S. 161, provides for periodic review conferences at five-year intervals. A conference held in 1995 was specifically provided for in Article X of the Treaty: "Twenty-five years after the entry into force of the Treaty, a

conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty."

The Review and Extension Conference of the Parties to the NPT was convened in New York from April 17 to May 12, 1995. The conference was attended by 175 of the Treaty's 178 States Parties. On May 11, 1995, the conference decided to extend the Treaty indefinitely, and agreed to greater accountability in future review conferences concerning the NPT's implementation. Extension of the Treaty on the Non-proliferation of Nuclear Weapons, NPT/CONF.1995/32/DEC.3. The conference also adopted a set of Principles and Objectives for Nuclear Non-Proliferation and Disarmament, addressing issues of nuclear disarmament, nuclear weapon-free zones, security assurances, safeguards under the authority of the IAEA, and peaceful uses of nuclear energy; and a resolution calling for a nuclear-free zone in the Middle East. Excerpts from the Principles and Objectives follow. The full texts of these documents are available at *www.state.gov/www/global/arms/bureau_np/decision.html*.

---

* * * *

Nuclear disarmament

3. . . .The undertakings with regard to nuclear disarmament as set out in the Treaty on the Non-Proliferation of Nuclear Weapons should . . . be fulfilled with determination. In this regard, the nuclear-weapon States reaffirm their commitment, as stated in article VI, to pursue in good faith negotiations on effective measures relating to nuclear disarmament.

4. The achievement of the following measures is important in the full realization and effective implementation of article VI, including the programme of action as reflected below:

(a) The completion by the Conference on Disarmament of the negotiations on a universal and internationally and effectively verifiable Comprehensive Nuclear-Test-Ban Treaty no later than 1996. Pending the entry into force of a Comprehensive Test-Ban

Treaty, the nuclear-weapon States should exercise utmost restraint;
(b) The immediate commencement and early conclusion of negotiations on a non-discriminatory and universally applicable convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices, in accordance with the statement of the Special Coordinator of the Conference on Disarmament and the mandate contained therein;
(c) The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control.

* * * *

Security assurances
8. Noting United Nations Security Council resolution 984 (1995), which was adopted unanimously on 11 April 1995, as well as the declarations by the nuclear-weapon Sates concerning both negative and positive security assurances, further steps should be considered to assure non-nuclear-weapon States party to the Treaty against the use or threat of use of nuclear weapons. These steps could take the form of an internationally legally binding instrument.

* * * *

b. UN Resolution 984

On April 11, 1995, the U.N. Security Council adopted Resolution 984 on Security Assurances in preparation for and corresponding with the NPT meeting to extend the treaty discussed above. U.N. Doc. S/RES/984 (1995). Security Assurances were seen as an incentive for non-nuclear weapon states to join the NPT regime, and for non-nuclear weapons States already parties to the NPT to continue their policies against the proliferation of nuclear weapons. Key provisions of the Resolution follow.

The Security Council,

* * * *

1. Takes note with appreciation of the statements made by each of the nuclear-weapon States (S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265), in which they give security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons;

2. Recognizes the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive assurances that the Security Council, and above all its nuclear-weapon State permanent members, will act immediately in accordance with the relevant provisions of the Charter of the United Nations, in the event that such States are the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used;

3. Recognizes further that, in case of aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, any State may bring the matter immediately to the attention of the Security Council to enable the Council to take urgent action to provide assistance, in accordance with the Charter, to the State victim of an act of, or object of a threat of, such aggression; and recognizes also that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim;

* * * *

6. Expresses its intention to recommend appropriate procedures, in response to any request from a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is the victim of such an act of aggression, regarding compensation under international law from the aggressor for loss, damage or injury sustained as a result of the aggression;

* * * *

9. Reaffirms the inherent right, recognized under Article 51 of the Charter, of individual and collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security;
10. Underlines that the issues raised in this resolution remain of continuing concern to the Council.

c. Security assurances by the United States

The security assurance provided by the United States, referred to in the 1995 Principles and Objectives and in Resolution 984, *supra*, was conveyed on April 6, 1995, in a letter to the Secretary General from Edward W. Gnehm, Chargé d'Affaires a.i. of the U.S. Mission to the United Nations. U.N. Doc. A/50/153 (1995), S/1995/263. The letter forwarded a "statement by the Secretary of State [of April 5, 1995] announcing a declaration by President Clinton." The statement

> reaffirm[ed] that [the United States] will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.

Further excerpts below from the letter explain the U.S. position and its view of the role of the United Nations in the event of aggression against a non-nuclear-weapon state.

---

* * * *

The United States of America believes that universal adherence to and compliance with international conventions and treaties seeking

to prevent the proliferation of weapons of mass destruction is a cornerstone of global security. The Treaty on the Non-Proliferation of Nuclear Weapons is a central element of this regime. . . . The United States considers the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons without conditions as a matter of the highest national priority and will continue to pursue all appropriate efforts to achieve that outcome.

* * * *

Aggression with nuclear weapons, or the threat of such aggression, against a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons would create a qualitatively new situation in which the nuclear-weapon-State permanent members of the United Nations Security Council would have to act immediately through the Security Council, in accordance with the Charter of the United Nations, to take the measures necessary to counter such aggression or to remove the threat of aggression. Any State which commits aggression accompanied by the use of nuclear weapons or which threatens such aggression must be aware that its actions are to be countered effectively by measures to be taken in accordance with the Charter to suppress the aggression or remove the threat of aggression.

Non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons have a legitimate desire for assurances that the United Nations Security Council, and above all its nuclear-weapon-State permanent members, would act immediately in accordance with the Charter, in the event such non-nuclear-weapon States are the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used.

The United States affirms its intention to provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used.

Among the means available to the Security Council for assisting such a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons would be an investigation into

the situation and appropriate measures to settle the dispute and to restore international peace and security.

United Nations Member States should take appropriate measures in response to a request for technical, medical, scientific or humanitarian assistance from a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of aggression with nuclear weapons, and the Security Council should consider what measures are needed in this regard in the event of such an act of aggression.

The Security Council should recommend appropriate procedures, in response to any request from a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is the victim of such an act of aggression, regarding compensation under international law from the aggressor for loss, damage or injury sustained as a result of the aggression.

The United States reaffirms the inherent right, recognized under Article 51 of the Charter, of individual and collective self-defence if an armed attack, including a nuclear attack, occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

A U.S. Department of State fact sheet dated April 5, 1995, excerpted below, explained the President's declaration. *See www.state.gov/www/global/arms/factsheets/wmd/nuclear/npt/nonucwp.html.*

---

* * * *

Background

Beginning with the negotiations on the NPT in the 1960s, many non-nuclear-weapon states made clear that in exchange for commitments not to acquire nuclear weapons they expected certain assurances from nuclear-weapon states. It was not possible to include such a provision in the NPT, but in 1968 the United States, United Kingdom and Soviet Union each announced that they would seek immediate Security Council action to provide assistance in accordance with the United Nations Charter to any NPT

non-nuclear-weapon state threatened with aggression involving nuclear weapons, or which is the victim of such aggression. These so-called positive security assurances were "welcomed" in U.N. Security Council resolution 255 which was adopted on June 19, 1968.

To further address concerns in this area, the United States, United Kingdom, and the Soviet Union each declared in 1978 a policy against the use of nuclear weapons toward NPT non-nuclear-weapon states. Russia adopted a new negative security assurance in 1993 which was closer in substance to the policies of the United Kingdom and United States.

France and China joined the NPT in 1992 and about a year ago all five NPT nuclear-weapon states began to address the security assurance issue during consultations on the margins of the Conference on Disarmament in Geneva. One outcome of that effort was an agreement that each would issue a national statement with their release planned for this week.

Presidential Declaration

* * * *

The President declares that the United States will not use nuclear weapons against non-nuclear-weapon States Parties to the NPT except under certain circumstances. This declaration reaffirms long-standing U.S. policy in this area and is fully compatible with U.S. alliance obligations. Notably, the language of this negative security assurance is virtually identical to that which is scheduled to be released today by the United Kingdom, France, and Russia. Many NPT non-nuclear-weapon states have long urged the nuclear-weapon states to achieve a common formula on negative security assurances. The fact that four of the five have done so is an important achievement. China will issue its own statement.

The President also declares that the United States intends to provide or support immediate assistance, in accordance with the United Nations Charter, to any NPT non-nuclear-weapon state threatened with aggression involving nuclear weapons or which is the victim of such aggression. This declaration reaffirms and makes more explicit the U.S. commitment first made in 1968. This revised

U.S. positive security assurance underscores the 1968 pledge by elaborating on the type of assistance the U.N. Security Council could consider in these circumstances. Some NPT non-nuclear-weapon states have long urged such an elaboration as a way to make these assurances more credible. . . .

* * * *

3. Nuclear Suppliers Group

The Nuclear Suppliers Group ("NSG") was formed in 1974, following the nuclear detonation by India in the same year. At the end of the 1990s, the NSG consisted of forty member nations. The primary purpose of the NSG is to ensure that suppliers uniformly apply a comprehensive set of guidelines to ensure that nuclear cooperation does not contribute to proliferation. The NSG develops guidelines and control lists to prevent proliferation. Such guidelines, which are developed by consensus and voluntarily adopted by NSG members, were first published in 1978. The NSG met in The Hague in March 1991 and thereafter held annual plenary meetings during the 1990s to strengthen NSG controls. The following text is extracted from two U.S. Department of State fact sheets on the NSG. *See www.state.gov/t/np/rls/fs/3053.htm* and *www.state.gov/www/global/arms/factsheets/exptcon/nuexpcnt.html*.

---

* * * *

The first set of NSG Guidelines (Part 1) governs exports of nuclear materials and equipment which require the application of International Atomic Energy Agency (IAEA) safeguards at the recipient facility. The Part 1 nuclear control list is called the "Trigger List" because the export of such items "triggers" the requirement for IAEA safeguards.

The second set of NSG Guidelines (Part 2) governs exports of nuclear-related dual-use equipment and materials. The NSG Guidelines also control technology related to both nuclear and

nuclear-related dual-use exports. Both Parts 1 and 2 of the NSG Guidelines aim to ensure that nuclear trade for peaceful purposes does not contribute to the proliferation of nuclear weapons or explosive devices while not hindering such trade.

* * * *

The NSG Guidelines include a number of important conditions that help promote nuclear cooperation under sound nonproliferation arrangements. For Trigger List exports, the NSG Guidelines currently require, for example, (1) an agreement between the International Atomic Energy Agency and the recipient state requiring the application of safeguards on all fissionable materials in its nuclear activities (also known as "full-scope IAEA safeguards")—not just on the exported items, (2) physical protection against unauthorized use of transferred materials and facilities, and (3) restraint in the transfer of sensitive facilities, technology, and weapons-usable materials, i.e., exports that could contribute to the acquisition of plutonium or highly enriched uranium.

In 1992, spurred on by revelations about Iraq's illicit nuclear weapons program, the NSG adopted controls on nuclear-related dual-use goods, for example those with both nuclear and non-nuclear applications, that could make a major contribution to unsafeguarded nuclear activities or to nuclear explosive activities. The NSG Dual-Use Guidelines prohibit the transfer of controlled items for use in a non-nuclear weapon state in a nuclear explosive activity or an unsafeguarded nuclear fuel-cycle activity, or when there is an unacceptable risk of diversion to such an activity. To reduce the risk of diversion, the Guidelines require recipients to provide assurances 1) specifying how transferred items will be used, 2) stating that they will not be used for proscribed activities, and 3) stating that the suppliers' consent will be obtained before any retransfers of the items.

The NSG also agreed to control technology related to both Trigger List and controlled dual-use goods. By controlling technical information and assistance for the development, production, and use of controlled goods, NSG members limit the ability of

proliferant states to use technical expertise or blueprints as part of a nuclear weapons program.

* * * *

4. Nuclear Nonproliferation Sanctions

a. Enforcement of nonproliferation treaties

During the 1990s, the threat of nuclear proliferation from countries such as North Korea, India, and Pakistan led the United States to adopt policies and sanctions regimes, in an effort to enforce States Parties' compliance with their obligations under the NPT and other non-proliferation agreements. Section 530 of the Foreign Relations Authorization Act, Fiscal Years 1994–95, Pub. L. No. 103–236, 108 Stat. 479 (1994), 22 U.S.C. § 2429a-2, as set forth below, prohibited assistance to countries not complying with IAEA or bilateral agreements with the United States.

---

* * * *

(b) PROHIBITION.—Notwithstanding any other provision of law, no United States assistance under the Foreign Assistance Act of 1961 shall be provided to any non-nuclear weapon state that is found by the President to have terminated, abrogated, or materially violated an IAEA full-scope safeguard agreement or materially violated a bilateral United States nuclear cooperation agreement entered into after the date of enactment of the Nuclear Non-Proliferation Act of 1978.

(c) WAIVER.—The President may waive the application of subsection (b) if—

(1) the President determines that the termination of such assistance would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security; and

(2) the President reports such determination to the Congress at least 15 days in advance of any resumption of assistance to that state.

* * * *

b. Nuclear Proliferation Prevention Act of 1994

In 1994, as part of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Congress passed the Nuclear Proliferation Prevention Act ("NPPA"). Pub. L. No. 103–236, tit. VIII, 108 Stat. 507 (1994). This legislation was designed to sanction entities that contributed to the proliferation of nuclear material and weapons-related technology and to expand existing sanctions against any non-nuclear state that detonated a nuclear explosive device.

Section 821 of the NPPA required the President to impose sanctions, with certain exceptions, "if the President determines . . . that . . . a foreign person or a United States person has materially and with requisite knowledge contributed, through the export from the United States or any other country of any goods or technology (as defined in section 830(2)), to the efforts by any individual, group, or non-nuclear-weapon state to acquire unsafeguarded special nuclear material or to use, develop, produce, stockpile, or otherwise acquire any nuclear explosive device." The sanctions were required to be imposed on

> (A) the foreign person or United States person with respect to which the President makes the determination described in that paragraph;
> (B) any successor entity to that foreign person or United States person;
> (C) any foreign person or United States person that is a parent or subsidiary of that person if that parent or subsidiary materially and with requisite knowledge assisted in the activities which were the basis of that determination; and

> (D) any foreign person or United States person that is an affiliate of that person if that affiliate materially and with requisite knowledge assisted in the activities which were the basis of that determination and if that affiliate is controlled in fact by that person.

The sanction to be imposed, with certain exceptions, was that "the United States Government shall not procure, or enter into any contract for the procurement of, any goods or services" from such persons. The President was authorized to waive the application of the sanction twelve months after sanctions were imposed "if the President determines and certifies in writing to the Congress that the continued imposition of the sanction would have a serious adverse effect on vital United States interests."

Section 822 of the act amended § 3 of the Arms Export Control Act ("AECA"), 22 U.S.C. § 2753, to prohibit "sales or leases . . . to any country that the President has determined is in material breach of its binding commitments to the United States under international treaties or agreements concerning the nonproliferation of nuclear explosive devices (as defined in section 830(4) of the Nuclear Proliferation Prevention Act of 1994) and unsafeguarded special nuclear material (as defined in section 830(8) of that Act)."

Section 826 amended the AECA by adding a new Chapter 10, "Nuclear Nonproliferation Controls." 22 U.S.C. §§ 2799aa and 2799aa-1. This new chapter consisted of new versions of the "Symington Amendment" and the "Glenn Amendment," formerly §§ 669 and 670 of the Foreign Assistance Act of 1961, as amended. New § 101 (the Symington Amendment) prohibited specified assistance, in subsection (a)

> to any country which the President determines delivers nuclear enrichment equipment, materials, or technology to any other country on or after August 4, 1977, or receives such equipment, materials, or technology from any other country on or after August 4, 1977, unless before such delivery—

> (1) the supplying country and receiving country have reached agreement to place all such equipment, materials, or technology, upon delivery, under multilateral auspices and management when available; and
> (2) the recipient country has entered into an agreement with the International Atomic Energy Agency to place all such equipment, materials, technology, and all nuclear fuel and facilities in such country under the safeguards system of such Agency.

Section 101(b) authorized the President to provide otherwise prohibited assistance if he determined and certified to Congress that "(A) the termination of such assistance would have a serious adverse effect on vital United States interests; and (B) he has received reliable assurances that the country in question will not acquire or develop nuclear weapons or assist other nations in doing so." Such a certification ceases to be effective, however, if the Congress enacts a resolution disapproving the furnishing of assistance pursuant to the certification within thirty calendar days after receiving the certification. 108 Stat. 515 (1994).

New § 102 (the Glenn Amendment) in § (a) prohibited specified assistance to

> any country which the President determines—
> (A) delivers nuclear reprocessing equipment, materials, or technology to any other country on or after August 4, 1977, or receives such equipment, materials, or technology from any other country on or after August 4, 1977 (except for the transfer of reprocessing technology associated with the investigation, under international evaluation programs in which the United States participates, of technologies which are alternatives to pure plutonium reprocessing), or
> (B) is a non-nuclear-weapon state which, on or after August 8, 1985, exports illegally (or attempts to export illegally) from the United States any material, equipment, or technology which would contribute significantly to the ability of such country to manufacture a

> nuclear explosive device, if the President determines that the material, equipment, or technology was to be used by such country in the manufacture of a nuclear explosive device.

Assistance may be provided if the President determines and certifies in writing to Congress "that the termination of such assistance would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security."

New § 102(b) expanded the list of applicable sanctions for transferring, receiving or detonating a nuclear device and, in addition, provided for sanctions for transferring or receiving nuclear weapons design information or components. Specifically, this provision required a broad range of sanctions (including terminating specified U.S. assistance, defense trade, U.S. Government credit or financial assistance, U.S. bank loans, and dual-use exports) against a country:

> (1) . . . in the event that the President determines that [the] country, after the effective date of part B of the Nuclear Proliferation Prevention Act of 1994—
> (A) transfers to a non-nuclear-weapon state a nuclear explosive device,
> (B) is a non-nuclear-weapon state and either—
> (i) receives a nuclear explosive device, or
> (ii) detonates a nuclear explosive device,
> (C) transfers to a non-nuclear-weapon state any design information or component which is determined by the President to be important to, and known by the transferring country to be intended by the recipient state for use in, the development or manufacture of any nuclear explosive device, or
> (D) is a non-nuclear-weapon state and seeks and receives any design information or component which is determined by the President to be important to, and intended by the recipient state for use in, the development or manufacture of any nuclear explosive device, then the President shall forthwith report in writing

his determination to the Congress and shall forthwith impose the sanctions described in paragraph (2) against that country.

The President may delay imposition of sanctions under paragraphs (1)(A) and (1)(B) for thirty days of continuous session of Congress upon a certification that he has "determined that an immediate imposition of sanctions on that country would be detrimental to the national security of the United States." The sanctions under (1)(A) and (1)(B) cannot be waived without legislation from Congress. Sanctions under (1)(C) or (1)(D) "shall not apply" if the President determines and certifies in writing to Congress "that the application of such sanctions against such country would have a serious adverse effect on vital United States interests."

Further amendments were made to this section in 1999 following imposition of sanctions on India and Pakistan, discussed below.

5. India-Pakistan Nuclear Tests (1998)

As noted above, in 1998 the governments of India and Pakistan conducted nuclear tests. The five permanent members of the UN Security Council issued a joint communiqué expressing concern over the tests and the Security Council adopted Resolution 1172. The United States and China issued a joint statement expressing the countries' concern over the tests and the potential destabilization of South Asia. The United States also imposed sanctions, consistent with provisions of, *inter alia*, the AECA discussed above, on both governments.

a. Joint communiqué

On June 4, 1998, in Geneva, the five permanent members of the UN Security Council ("P-5") issued a joint

communiqué, excerpted below, condemning the tests, enumerating steps that India and Pakistan should take, and affirming their readiness to assist the two countries to resolve the disputes between them. UN Doc. No. S/1998/473 (1998).

---

* * * *

1. Bearing in mind the responsibility of their countries for the maintenance of international peace and security, the Foreign Ministers of China, France, Russia, the United Kingdom and the United States met in Geneva on June 4, 1998 to coordinate their response to the grave situation created by the nuclear tests carried out in May 1998 by India and then by Pakistan. The Ministers condemned these tests, expressed their deep concern about the danger to peace and stability in the region, and pledged to cooperate closely in urgent efforts to prevent a nuclear and missile arms race in the Subcontinent, to bolster the non-proliferation regime, and to encourage reconciliation and peaceful resolution of differences between India and Pakistan.
2. The Ministers agreed that quick action is needed to arrest the further escalation of regional tensions stimulated by the recent nuclear tests. India and Pakistan should therefore stop all further such tests. They should refrain from the weaponization or deployment of nuclear weapons, from the testing or deployment of missiles capable of delivering nuclear weapons, and from any further production of fissile material for nuclear weapons. They should also halt provocative statements, refrain from any military movements that could be construed as threatening and increase transparency in their actions. Direct communications between the parties could help to build confidence.
3. To reinforce security and stability in the region and more widely, the Five strongly believe that India and Pakistan should adhere to the Comprehensive Nuclear Test Ban Treaty immediately and unconditionally, thereby facilitating its early

entry into force. The Five also call upon India and Pakistan to participate, in a positive spirit and on the basis of the agreed mandate, in negotiations with other states in the Conference on Disarmament for a Fissile Material Cut-off Convention with a view to reaching early agreement. The Five will seek firm commitments by India and Pakistan not to weaponize or deploy nuclear weapons or missiles. India and Pakistan should also confirm their policies not to export equipment, materials or technology that could contribute to weapons of mass destruction or missiles capable of delivering them, and should undertake appropriate commitments in that regard.

4. The Ministers agreed that the international non-proliferation regime must remain strong and effective despite the recent nuclear tests in South Asia. Their goal continues to be adherence by all countries, including India and Pakistan, to the Nuclear Non-Proliferation Treaty (NPT) as it stands, without any modification. This Treaty is the cornerstone of the non-proliferation regime and the essential foundation for the pursuit of nuclear disarmament. Notwithstanding their recent nuclear tests, India and Pakistan do not have the status of nuclear weapons states in accordance with the NPT.
5. The Ministers concluded that efforts to resolve disputes between India and Pakistan must be pursued with determination. The Ministers affirm their readiness to assist India and Pakistan, in a manner acceptable to both sides, in promoting reconciliation and cooperation. The Ministers pledged that they will actively encourage India and Pakistan to find mutually acceptable solutions, through direct dialogue, that address the root causes of the tension, including Kashmir, and to try to build confidence rather than seek confrontation. In that connection, the Ministers urged both parties to avoid threatening military movements, cross-border violations, or other provocative acts.

* * * *

b. Security Council Resolution 1172

On June 6, 1998, the U.N. Security Council adopted Resolution 1172 that, *inter alia*, condemned the nuclear tests conducted by India and Pakistan and endorsed the joint communiqué. U.N. Doc. S/RES/1172 (1998). The resolution provided further as excerpted below.

The Security Council,

* * * *

3. Demands that India and Pakistan refrain from further nuclear tests and in this context calls upon all States not to carry out any nuclear weapon test explosion or any other nuclear explosion in accordance with the provisions of the Comprehensive Nuclear Test Ban Treaty;

* * * *

7. Calls upon India and Pakistan immediately to stop their nuclear weapon development programmes, to refrain from weaponization or from the deployment of nuclear weapons, to cease development of ballistic missiles capable of delivering nuclear weapons and any further production of fissile material for nuclear weapons, to confirm their policies not to export equipment, materials or technology that could contribute to weapons of mass destruction or missiles capable of delivering them and to undertake appropriate commitments in that regard;

8. Encourages all States to prevent the export of equipment, materials or technology that could in any way assist programmes in India or Pakistan for nuclear weapons or for ballistic missiles capable of delivering such weapons, and welcomes national policies adopted and declared in this respect;

9. Expresses its grave concern at the negative effect of the nuclear tests conducted by India and Pakistan on peace and stability in South Asia and beyond;

* * * *

c. U.S.-China joint statement

On June 27, 1998, Presidents William J. Clinton and Jiang Zemin released a joint statement, reaffirming their respective policies intended to prevent the export of materials, equipment, or technology that could assist programs in India or Pakistan relating to nuclear weapons or for ballistic missiles capable of delivering such weapons. The full text of the joint statement is available at: *www.china-embassy.org/eng/zmgx/zysj/kldfh/t36228.htm*. Among other things the joint statement called for "the prompt initiation and conclusion of negotiations in the Conference on Disarmament, on the basis of the 1995 agreed mandate, for a multilateral treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices. We urge India and Pakistan to participate, in a positive spirit, in such negotiations with other states in the Conference on Disarmament with a view to reaching early agreement."

d. Imposition of sanctions

In May 1998 President Clinton issued two determinations in accordance with § 102(b)(1) of the Arms Export Control Act. In Presidential Determination No. 98–22, 63 Fed. Reg. 27,665 (May 20, 1998), the President determined that "India, a non-nuclear-weapon state, detonated a nuclear explosive device on May 11, 1998. The relevant agencies and instrumentalities of the United States Government are hereby directed to take the necessary actions to impose the sanctions described in section 102(b)(2) of that Act." Presidential Determination No. 98–25, 63 Fed. Reg. 31,881 (June 10, 1998), made the same determination as to Pakistan.

A fact sheet released in September 2000 by the U.S. Department of State Bureau of South Asian Affairs described the application of the sanctions under § 102(b)(2) of the AECA (the "Glenn Amendment" 4.b. *supra*), as excerpted below. *See www.state.gov/www/regions/sa/0009_glenna.html*.

See discussion of relevant AECA amendments in 4.b. *supra*. In 2001 the President waived the nuclear-related sanctions imposed on India and Pakistan. 66 Fed. Reg. 50,095 (Oct. 2, 2001). *See Digest 2001* at 808–10.

. . . Under the Glenn Amendment, if the President determines that a non-nuclear weapon state [as defined by the Nuclear Non-Proliferation Treaty (NPT)] detonates a nuclear explosive device, certain sanctions apply. The sanctions impose broad-ranging restrictions on various types of assistance, loans, and trade. The DOD Appropriations Act of 2000, signed into law on October 25, 1999, provides authority for the President to waive Glenn Amendment sanctions.

Glenn Amendment—India

Glenn Amendment sanctions were applied to India in the wake of its 1998 nuclear test. Certain sanctions were waived in October 1999. These included sanctions on some environmental programs as well as other activities. However, sanctions remain on programs which are affected by the following:

Prohibition of Foreign Assistance Act (FAA)-funded activities, U.S. government credit, credit guarantees or "other financial assistance" by departments, agencies, or instrumentalities of the U.S. government where no exemption (e.g., for humanitarian assistance or food or other agricultural commodities), "notwithstanding" authority, or existing waiver applies.

Prohibition of Foreign Military Sales (FMS), Foreign Military Financing (FMF).

Prohibition of licenses for export of items on the U.S. Munitions List (USML), certain dual-use exports, and for certain end-users.

The Glenn Amendment states that the United States must oppose (vote no or abstain) any IFI loan or financial or technical assistance that does not directly support basic human needs (BHN).

Glenn Amendment and Related Nuclear Provisions—Pakistan

At the time of its nuclear tests in May 1998, several restrictions on assistance to Pakistan were already in place in connection with

the Pressler Amendment (triggered by Pakistan's possession of a nuclear explosive device) and the Symington Amendment (triggered by Pakistan's receipt of uranium enrichment equipment). The May 1998 nuclear tests subjected Pakistan to a broader range of economic and military sanctions under the Glenn Amendment.

Since most assistance had already been terminated, the Glenn sanctions had limited additional consequences for bilateral assistance to Pakistan. However, they placed new restrictions on U.S. credit and credit guarantees, including by EXIM and OPIC; all Foreign Military Sales; licenses for commercial exports of munitions and certain dual-use items; and commercial bank lending to the government of Pakistan, except for loans or credits for purchasing food or other agricultural commodities. The most significant new restriction for Pakistan under Glenn was a congressional directive that the U.S. shall not support non-Basic Human Needs lending by international financial institutions.

In December 1998, the President authorized U.S. representatives to allow for approval of a particular IMF package, but that authorization has since lapsed and has not been renewed.

Consistent with UN Security Council Resolution 1172, the United States denied the licensing of exports of certain articles and technologies to both countries. The Bureau of Export Administration, U.S. Department of Commerce ("BXA"), issued an interim rule, effective November 1998, outlining the nature of the sanctions against India and Pakistan. 63 Fed. Reg. 64,322 (Nov. 19, 1998) (codified at 15 C.F.R. pt. 742 and 744). The rule was amended in 1998 and thereafter, adding or deleting facilities from the list. *See, e.g.*, 63 Fed. Reg. 65,552 (Nov. 27, 1998). An explanation of the implementation of the relevant regulations was included in the Federal Register, excerpts from which follow.

---

* * * *

In accordance with section 102(b) of the Arms Export Control Act, President Clinton reported to the Congress on May 13th with regard to India and May 30th with regard to Pakistan his

determinations that those non-nuclear weapon states had each detonated a nuclear explosive device. The President directed in the determination reported to the Congress that the relevant agencies and instrumentalities of the United States take the necessary actions to impose the sanctions described in section 102(b)(2) of that Act.

Consistent with the President's directive, the Bureau of Export Administration (BXA) is imposing certain sanctions, as well as certain supplementary measures to enhance the sanctions. Consistent with the provisions of section 102(b)(2)(G) of the Arms Export Control Act, BXA is amending the Export Administration Regulations (EAR) by adding new § 742.16, India and Pakistan sanctions. This section codifies a license review policy of denial for the export and reexport of items controlled for nuclear proliferation (NP) reasons to all end-users in India and Pakistan, except for computers (see § 742.12(b)(3)(iii), High Performance Computers, for license review policy for computers). This licensing policy was adopted in practice in existing regulations in June 1998. . . . Items controlled on the Commerce Control List for nuclear and missile technology reasons have been made subject to this sanction policy because of their significance for nuclear explosive purposes and for delivery of nuclear devices.

To supplement the sanctions of § 742.16, this rule adds certain Indian and Pakistani government, parastatal, and private entities determined to be involved in nuclear or missile activities to the Entity List in Supplement No. 4 to part 744. License requirements for these entities are set forth in the newly added § 744.11. Exports and reexports of all items subject to the EAR to listed government, parastatal, and private entities require a license. A license is also required if you know that the ultimate consignee or end-user is a listed government, parastatal, or private Indian or Pakistani entity, and the item is subject to the EAR. . . . All applications to export or reexport items subject to the EAR will be reviewed with a presumption of denial to these entities, except items for the preservation of safety of civil aircraft will be reviewed on a case-by-case basis. Except for items controlled for NP or MT reasons, exports or reexports to listed parastatals and private entities with whom you have a preexisting business arrangement will be considered on a case-by-case basis, with a presumption of approval

in cases where neither the arrangement nor the specific transaction involves nuclear or missile activities and the exports or reexports are pursuant to that arrangement. The term "business arrangement" covers the full range of business agreements, including general contracts, general terms agreements (e.g., agreements whereby the seller delivers products under purchase orders to be issued by the buyer), general business agreements, offset agreements, letter agreements that are stand-alone contracts, and letter agreements that are amendments to existing contracts or other agreements. The terms of the preexisting business arrangement policy may also apply to the longstanding continued supply of a particular item or items from the exporter to the entity even when there is no current agreement between the firms. BXA, in conjunction with other agencies, will determine eligibility under the preexisting business arrangement policy. In order to be eligible under the policy, you must provide documentation to establish such an arrangement. The documentation should be provided at the time you submit a license application to export or reexport items to any listed parastatal or private entity.

To further supplement the sanctions of § 742.16, this rule adds certain Indian and Pakistani military entities to the Entity List in Supplement No. 4 to part 744. License requirements for these entities are set forth in the newly added § 744.12. . . . The addition of entities to the Entity List does not relieve exporters or reexporters of their obligations under General Prohibition 5 in § 736.2(b)(5) of the EAR, "You may not, without a license, knowingly export or reexport any item subject to the EAR to an end-user or end-use that is prohibited by part 744 of the EAR." BXA strongly urges the use of Supplement No. 3 to part 732 of the EAR, "BXA's 'Know Your Customer' Guidance and Red Flags" when exporting or reexporting to India and Pakistan.

* * * *

e. Presidential waiver

In 1999 Congress enacted authority for the President to waive certain sanctions against India and Pakistan. Section 9001

of the Department of Defense Appropriations Act, FY 2000, Pub. L. No. 106–79 (1999), 22 U.S.C. 2799aa-1 note. Section 9001(d) stated that it was the sense of the Congress that "the broad application of export controls to nearly 300 Indian and Pakistani entities is inconsistent with the specific national security interests of the United States" and that "export controls should be applied only to those Indian and Pakistani entities that make direct and material contributions to weapons of mass destruction and missile programs and only to those items that can contribute to such programs."

Section 9001(a) provided for a Presidential waiver "with respect to India and Pakistan, [of] the application of any sanction contained in section 101 or 102 of the Arms Export Control Act (22 U.S.C. 2799aa or 22 U.S.C. 2799aa-1), section 2(b)(4) of the Export Import Bank Act of 1945 (12 U.S.C. 635(b)(4)), or section 620(e) of the Foreign Assistance Act of 1961, as amended, (22 U.S.C. 2375(e))." Section 9001(b) limited the waiver authority, making it inapplicable "with respect to a sanction or prohibition contained in subparagraph (B), (C), or (G) of section 102(b)(2) of the Arms Export Control Act, unless the President determines, and so certifies to the Congress, that the application of the restriction would not be in the national security interests of the United States." The President exercised this waiver authority on September 22, 2001. 66 Fed. Reg. 50,095 (Oct. 2, 2001). *See Digest 2001* at 808–11.

6. Agreements and Cooperative Programs with Russia and Former Soviet States

a. Highly enriched uranium

The United States and Russia concluded the Agreement Concerning the Disposition of Highly Enriched Uranium ("HEU") Extracted from Nuclear Weapons in Washington on February 18, 1993. The 1993 agreement and related contracts and agreements are referred to as the "HEU Agreements." *See* 31 C.F.R. § 540.305 (2001) (definition of

"HEU Agreements"). As described in a U.S. State Department press release, available at *www.state.gov/r/pa/prs/ps/2002/11255.htm*, "[t]he 1993 HEU Agreement calls for Russia to convert 500 tons of highly-enriched uranium from dismantled nuclear weapons into reactor fuel for use in commercial nuclear reactors in the United States. Shipments began in 1995 and will continue through 2013." *See also* discussion of these issues in 88 Am. J. Int'l L. 753, 760 (1994).

Article I of the 1993 agreement (Purpose), provided for the parties to cooperate in order to achieve the following objectives:

> (1) The conversion as soon as practicable of highly enriched uranium extracted from nuclear weapons resulting from the reduction of nuclear weapons pursuant to arms control agreements and other commitments of the Parties which is currently estimated at approximately 500 metric tons in the Russian Federation, having an average assay of 90 percent or greater of the uranium isotope 235 into low enriched uranium (LEU) for use as fuel in commercial nuclear reactors. For purposes of this Agreement, LEU shall mean uranium enriched to less than 20 percent in the isotope 235; and (2) The technology developed in the Russian Federation for conversion of HEU resulting from the reduction of nuclear weapons in the Russian Federation may be used for conversion of United States HEU in the United States of America; and (3) The establishment of appropriate measures to fulfill the non-proliferation, physical protection, nuclear material accounting and control, and environmental requirements of the Parties with respect to HEU and LEU subject to this Agreement.

Article II required the parties to seek to enter into an initial implementing contract to accomplish the objectives of the HEU Agreement. The contract was to provide for, *inter alia*, the purchase and sale of LEU (converted from HEU at facilities in the Russian Federation) by the U.S.

executive agent, initial delivery to the United States of low enriched uranium ("LEU") and minimum conversion amounts, participation of the U.S. private sector and of Russian enterprises, as well as use by the Russian side of a portion of proceeds from the sale of LEU for the conversion of defense enterprises, enhancement of the safety of nuclear power plants, environmental clean-up, and the construction and operation of facilities in the Russian Federation for the conversion of HEU to LEU. Article V provided in paragraph 3 that the parties, to the extent practicable, were to seek to arrange for more rapid conversion of HEU to LEU than provided for in Article II.

Paragraph 10 of Article V read:

> Prior to the conclusion of any implementing contract, the Parties shall establish transparency measures to ensure that the objectives of this Agreement are met, including provisions for nuclear material accounting and control and access, from the time that HEU is made available for conversion until it is converted into LEU. Specific transparency measures shall be established in the same time frame as the negotiation of the initial implementing contract, and shall be executed by a separate agreement.

The two instruments that established the required transparency were (1) the Memorandum of Understanding between the Government of the United States of America and the Government of the Russian Federation Relating to Transparency and Additional Arrangements Concerning 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 ("MOU"), concluded at Washington on September 1, 1993, and (2) the Protocol on HEU Transparency Arrangements in Furtherance of the Memorandum of Understanding of September 1, 1993, ("Protocol") signed in March 1994. Under the MOU, Article I, Purpose and Scope, the Russian side is to ensure, *inter alia*, that the

HEU extracted from nuclear weapons pursuant to the HEU Agreement is oxidized, fluorinated and subsequently blended with natural uranium or LEU blended stock to yield LEU end product enriched to less than 5 percent U-235. The U.S. side is to ensure that LEU received by the United States pursuant to the agreement is fabricated into fuel for commercial nuclear reactors. The Protocol details transparency and access requirements, including observation by monitors of either party in the territory of the other.

On January 14, 1994, the White House Office of the Press Secretary released a statement noting that "an important non-proliferation objective of the United States is to ensure that the highly enriched uranium (HEU) removed from nuclear weapons is converted to low-enriched uranium (LEU), which cannot be used for nuclear weapons purposes." 5 Dep't St. Dispatch Supp. 1 at 25 (Jan. 1994) available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*. The statement, excerpted below, described the terms of the "HEU Contract" under which the United States (through the U.S. Enrichment Corporation or "USEC") agreed to purchase LEU from Russia.

Large numbers of nuclear warheads of the arsenal of the former Soviet Union are being withdrawn from service as a result of arms control agreements such as INF and START and unilateral initiatives to reduce tactical nuclear forces. As these warheads are dismantled, valuable nuclear material is removed. . . .

LEU has economic value as fuel for nuclear power stations. . . .

Under the terms of the HEU contract signed in Moscow [on January 14, 1994, by USEC], Russia will convert 500 tons of HEU to LEU and sell the LEU to the . . . USEC, a U.S. Government corporation. USEC will use the LEU it purchases from Russia to fulfill contracts to supply fuel for nuclear power stations in the United States and throughout the world. Over the 20-year life of the HEU contract, Russia will earn approximately $12 billion from sales of enriched uranium to commercial nuclear power stations. There will be no net cost to the U.S. Government.

In addition, Ukraine, Kazakhstan, and Belarus will receive compensation for the value of the HEU in warheads transferred to Russia. In the case of Ukraine, as warheads are transferred to Russia for dismantling, Ukraine will receive in compensation fuel assemblies for its nuclear power stations. . . .

* * * *

b. 1998 Joint Statement of Principles for Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes

On September 2, 1998, at a summit between President Clinton and President Yeltsin held in Moscow, the Presidents of the two countries signed the Joint Statement of Principles for Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes. The purpose of the Joint Statement was to commit both countries to remove and convert significant amounts of plutonium from their nuclear weapons programs so that this material could not be used for future weapons. The Joint Statement led to the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Management and Disposition of Plutonium Designated as no Longer Required for Defense Purposes and Related Cooperation (2000), also known as the "Plutonium Disposition Agreement," available at *www.nnsa.doe.gov/na-20/docs/2000_Agreement.pdf*.

The text of the Joint Statement is excerpted below. A fact sheet issued by the White House Office of the Press Secretary on the same date is available at *http://clinton6.nara.gov/1998/09/1998-09-01-fact-sheet-on-;plutonium-disposition-statement.html*.

---

* * * *

We have agreed on the following principles:—The U.S. and Russia will each convert approximately 50 tons of plutonium withdrawn

in stages from nuclear military program into forms unusable for nuclear weapons. We recognize that interim storage will be required for this material;—The two governments will cooperate to pursue this goal through consumption of plutonium fuel in existing nuclear reactors (or reactors which may enter into service during the duration of our cooperation) or the immobilization of plutonium in glass or ceramic form mixed with high-level radioactive waste;—The U.S. and Russia expect that the comprehensive effort for the management and disposition of this plutonium will be a broad-based multilateral one, and welcome close cooperation and coordination with other countries, including those of the G-8. They further intend to encourage partnership with private industry;—In cooperation with others, the U.S. and Russia will, as soon as practically feasible and according to a time frame to be negotiated by the two governments, develop and operate an initial set of industrial-scale facilities for the conversion of plutonium to fuel for the above-mentioned existing reactors;—Conditions on cooperative projects for plutonium management and disposition will be determined by mutual consent of the parties participating in those projects;—In the plutonium management and disposition effort, the U.S. and Russia will seek to develop acceptable methods and technology for transparency measures, including appropriate international verification measures and stringent standards of physical protection, control, and accounting for the management of plutonium;—We also recognize that in order for this effort to be carried out, it will be necessary to agree upon appropriate financing arrangements.

* * * *

c. The Gore-Chernomyrdin Commission

In April 1993 during a summit held in Vancouver, British Columbia, Presidents Clinton and Yeltsin created the U.S.-Russia Joint Commission on Economic and Technological Cooperation, which became known as the Gore-Chernomyrdin Commission ("GCC"), after its co-chairmen, U.S. Vice President Al Gore and Russian Prime Minister Viktor

Chernomyrdin. The Commission was designed to support cooperation between the United States and Russia in the areas of space, energy, and technology. *See* 4 Dep't St. Dispatch No. 15 at 225 (Apr. 12, 1993) at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

By July 1996 the scope of work had expanded to include eight committees on Space, Business Development, Energy Policy, Defense Conversion, Science and Technology, Environment, Health, and Agribusiness. The nonproliferation initiatives were addressed by both the Energy Policy and Defense Conversion committees. The following discussion highlights some of the key developments in the nonproliferation area. Unless indicated otherwise, quotations are from a fact sheet released by the Department of State July 8, 1996, which includes fact sheets for sessions of the GCC from the first session held September 1993 in Washington, D.C. through the sixth session, held in Washington in January 1996, available at *www.state.gov/www/regions/nis/gore_chernomyrdin.html*. Fact sheets for earlier sessions are also available at 5 Dep't St. Dispatch No. 1 at 2 (Jan. 3, 1994) and No. 52 at 843 (Dec. 26, 1994), *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

On December 16, 1993, in Moscow, Vice President Gore and Prime Minister Chernomyrdin signed the Joint Principles for Nuclear Reactor Safety, done at Moscow, Dec. 16, 1993, described in the December 1993 fact sheet as "a milestone statement of principles for nuclear safety cooperation, with both governments committed to support and expand bilateral and multilateral efforts to promote nuclear safety." They also agreed on "principles guiding U.S. and Russian cooperation in the conversion and diversification of defense industries." On the same date, U.S. Secretary of Energy Hazel O'Leary and Russian Minister of Atomic Energy Viktor Mikhailov signed the Agreement Concerning Operational Safety Enhancements, Risk Reduction Measures and Nuclear Safety Regulation for Civil Nuclear Facilities in the Russian Federation to improve the safety of Russian nuclear reactors.

In June 1994 Vice President Gore and Prime Minister Chernomyrdin signed an agreement "obligating the U.S. and the Russian Federation to end the operation of plutonium production reactors by the year 2000. The agreement also prohibits the restarting of any reactors already closed and bars both countries from using in nuclear weapons any plutonium produced by the production reactors after the agreement enters into force." Agreement Concerning the Shutdown of Plutonium Production Reactors and the Cessation of Use of Newly Produced Plutonium for Nuclear Weapons, done at Washington, June 23, 1994. Both countries also agreed to expedite the construction of a fissile material storage facility at Mayak.

In December 1994, among other things, the two sides agreed that they "will exchange unclassified technical information to enhance safety and security in the dismantlement of nuclear warheads in both countries." Warhead Safety and Security Agreement, done at Moscow, Dec. 16, 1994.

In the June 1995 session two instruments were signed "showing marked progress in the area of nuclear accountability. The first covers the cooperation in the area of nuclear materials protection, control, and accounting [MCP&A]. [Joint Statement on Protection, Control and Accounting of Nuclear Materials, done at Moscow June 30, 1995.] The second covers cooperation on safety issues related to fuel cycle facilities and research reactors. [Agreement Between the U.S. Department of Energy and the Federal Nuclear and Radiation Safety Authority of the Russian Federation for Cooperation on Enhancing the Safety of Russian Nuclear Fuel Cycle Facilities and Research Reactors, done at Moscow, June 30, 1995] Statements were also signed on nuclear materials protection, transparency measures on purchases of highly enriched uranium, and plutonium production reactors. . . . [e.g., Joint Statement on HEU Purchase Agreement Transparency Measures.]"

On January 30, 1996, Secretary O'Leary and Minister Mikhailov signed a joint statement on "guiding principles in the area of nuclear materials accountability." Joint Statement

on Guiding Principles in the Area of Control, Accountability, and Physical Protection of Nuclear Materials.

In July 1996 in Moscow, Secretary O'Leary and Minister Mikhailov signed joint statements addressing MCP&A cooperation. Joint Statement on Control, Accounting, and Physical Protection of Nuclear Materials and Joint Statement on Nuclear Material Protection, Control, and Accounting During Transportation.

On September 23, 1997, at its ninth session, Vice President Gore and Prime Minster Chernomyrdin signed the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning Cooperation Regarding Plutonium Production Reactors, done at Moscow, Sept. 23, 1997. A statement released on that date by the White House Office of the Vice President described the agreement as "represent[ing] an additional, significant step away from the nuclear legacy of the Cold War by placing a cap on U.S. and Russian stockpiles of nuclear weapon-grade plutonium. It also prohibits Russian use in nuclear weapons of recently produced plutonium. It marks the first time that the U.S. and Russia have placed limits on the materials for nuclear warheads themselves rather than on their delivery vehicles such as missiles and bombers, as in the START and INF treaties." The agreement specifically required Russia to covert three plutonium-producing reactors in active use "so that they no longer produce weapon-grade plutonium. . . . Similarly, U.S. plutonium-producing reactors, all of which have been closed down since 1989, must remain closed." The full text of the statement is available at *www.state.gov/s/l/c8183.htm*.

Subsequent to the tenth session of the GCC, U.S. Secretary of Energy Bill Richardson and Russian Minister of Atomic Energy Yevgeniy Adamov signed the Agreement between the Government of the United States of America and the Government of the Russian Federation on the Nuclear Cities Initiative on September 22, 1998 at Vienna. As provided in Article 1, the purpose of the agreement "is to create a framework for cooperation in facilitating civilian

production that will provide new jobs for workers displaced from enterprises of the nuclear complex in the 'Nuclear Cities' controlled by the Ministry of the Russian Federation for Atomic Energy."

d. Cooperative threat reduction program

Responding to a request from then Soviet President Mikhail Gorbachev for assistance in dismantling Soviet nuclear weapons, President George H.W. Bush proposed that the United States would assist in the disposition, dismantlement, and destruction of nuclear weapons in the Soviet Union. Congress enacted the Soviet Nuclear Threat Reduction Act of 1991 in response, commonly referred to as "Nunn-Lugar" after Senators Nunn and Lugar. Pub. L. No. 102–228, 105 Stat. 1691 (1991), Title II, 22 U.S.C. § 2551 note. The Act authorized provision of assistance to address the threat of nuclear weapons proliferation resulting from the poor protection, control, and accounting of nuclear weapons and materials in the former Soviet Union and successor states and the concurrent potential for smuggling or transfer of materials, weapons, or weapons-related knowledge. Excerpts from the 1991 act, describing its objectives and requirement for Presidential certification in order to provide the assistance, follow.

---

* * * *

SEC. 211. NATIONAL DEFENSE AND SOVIET WEAPONS DESTRUCTION.

(a) FINDINGS.—The Congress finds—

(1) that Soviet President Gorbachev has requested Western help in dismantling nuclear weapons, and President Bush has proposed United States cooperation on the storage, transportation, dismantling, and destruction of Soviet nuclear weapons;

(2) that the profound changes underway in the Soviet Union pose three types of danger to nuclear safety and stability, as follows:

(A) ultimate disposition of nuclear weapons among the Soviet

Union, its republics, and any successor entities that is not conducive to weapons safety or to international stability; (B) seizure, theft, sale, or use of nuclear weapons or components; and (C) transfers of weapons, weapons components, or weapons know-how outside of the territory of the Soviet Union, its republics, and any successor entities, that contribute to world-wide proliferation; and
(3) that it is in the national security interests of the United States (A) to facilitate on a priority basis the transportation, storage, safeguarding, and destruction of nuclear and other weapons in the Soviet Union, its republics, and any successor entities, and (B) to assist in the prevention of weapons proliferation.
(b) EXCLUSIONS.—United States assistance in destroying nuclear and other weapons under this title may not be provided to the Soviet Union, any of its republics, or any successor entity unless the President certifies to the Congress that the proposed recipient is committed to—
(1) making a substantial investment of its resources for dismantling or destroying such weapons;
(2) forgoing any military modernization program that exceeds legitimate defense requirements and forgoing the replacement of destroyed weapons of mass destruction;
(3) forgoing any use of fissionable and other components of destroyed nuclear weapons in new nuclear weapons;
(4) facilitating United States verification of weapons destruction carried out under section 212;
(5) complying with all relevant arms control agreements; and
(6) observing internationally recognized human rights, including the protection of minorities.

On November 30, 1993, the Soviet Nuclear Threat Reduction Act was incorporated into the "Cooperative Threat Reduction Act of 1993," as part of the Fiscal Year 1994 National Defense Authorization Act. Pub. L. No. 103–160, Title XII, § 1203, 107 Stat. 1778 (1993) (codified at 22 U.S.C. § 5952). The new act authorized the President, notwithstanding any other provision of law, to "conduct programs . . . to assist the independent states of the former Soviet Union in the demilitarization of the former Soviet Union.

Any such program may be carried out only to the extent that the President determines that the program will directly contribute to the national security interests of the United States." 22 U.S.C. § 5952(a).

In addition to programs authorized in 1991, the new act also specified programs, *inter alia*, to "facilitate the elimination, and the safe and secure transportation and storage, of nuclear, chemical, and other weapons and their delivery vehicles," *id.* at (b)(1) "to prevent the proliferation of weapons, weapons components, and weapons-related technology and expertise," *id.* at (b)(3) "to facilitate the demilitarization of defense industries and the conversion of military technologies and capabilities into civilian activities," *id*. at (b)(5) and "to assist in the environmental restoration of former military sites and installations when such restoration is necessary to the demilitarization or conversion programs," *id.* at (b)(6).

Through the work of these programs, Kazakhstan became free of nuclear weapons in 1995, and both Ukraine and Belarus became free of nuclear weapons in 1996.

Between 1995 and 1997, the United States Government provided the Republic of Belarus approximately $75 million in Cooperative Threat Reduction ("CTR") funding. Additional CTR assistance to Belarus was suspended in 1997 as a result of the Government of Belarus' worsening human rights record and anti-democratic behavior. For more information on the CTR Program in Belarus, *see http://minsk.usembassy.gov/html/ctr.html*. CTR programs continued throughout the 1990s in Ukraine, Kazakhstan, Uzbekistan, and Russia.

7. Nuclear Weapons Free Zones: The African Nuclear-Weapon-Free Zone Treaty and the South Pacific Nuclear Free Zone Treaty

In 1996 the countries of Africa, including the territory of the continent of Africa, islands States members of the Organization of African Unity ("OAU") and all islands considered by the OAU in its resolutions to be part of Africa,

entered into the African Nuclear-Weapon-Free Zone Treaty ("Treaty of Pelindaba"). This treaty complements other regional treaty regimes declaring nuclear weapons free zones ("NWFZs"), and commits the States Parties, *inter alia*, not to conduct, or seek or receive assistance in conducting, research on nuclear weapons, or to develop, manufacture, stockpile or otherwise acquire, possess or have control over any nuclear explosive device (or to seek or receive assistance in any such actions), and to prohibit the stationing of non-peaceful nuclear devices within their territories. The full text of the Treaty is available at *www.state.gov/t/ac/trt/4699.htm; see also* U.N. Doc. A/RES/51/53 (1996).

On April 4, 1996 the United States signed Protocols I and II of the treaty. At the time of writing, the treaty had not yet entered into force and the United States had not ratified the protocols. In Protocols I and II the five nuclear-weapon states (China, France, the Russian Federation, the United Kingdom, and the United States) agreed not to use or threaten to use nuclear devices against any party to the treaty, not to contribute to actions that would violate the treaty, and not to test, assist in, or encourage the testing of nuclear weapons in the Zone. The full text of the two protocols is available at *www.state.gov/t/ac/trt/4699.htm*. The United States included a declaration that it reserved the right to respond with all options, implying possible use of nuclear weapons, to a chemical or biological weapons attack by a member of the zone.

Also in 1996 the United States signed three protocols to the South Pacific Nuclear Free Zone Treaty ("Treaty of Rarotonga"), *reprinted in* 24 I.L.M. 1442 (1985). The Treaty of Rarotonga established a nuclear weapons free zone in the South Pacific. The Treaty opened for signature on August 6, 1985 and entered into force December 11, 1986. The three protocols were opened for signature on August 8, 1986, in Suva, Fiji. All five nuclear weapon states have signed the protocols for which they are eligible, as explained below. The United States, along with the United Kingdom and France, signed the three protocols to the treaty on March 25, 1996,

at a ceremony in Suva, Fiji. The full texts of the Treaty and the Protocols are available online at *www.state.gov/t/ac/trt/5189.htm*.

Under Protocol I, the United States, France, and the United Kingdom are required to apply the basic provisions of the treaty to their respective territories in the Zone. This includes the U.S. territories of American Samoa and Jarvis Island. Neither Russia nor China has any territory in the Zone so they are not eligible to become parties to Protocol I. Under Protocol II, the United States, France, the United Kingdom, the Russian Federation and China agreed not to use or threaten to use nuclear explosive devices against any party to the treaty or against each other's territories located within the zone. Under Protocol III, the United States, France, the United Kingdom, the Russian Federation and China agreed not to test nuclear explosive devices within the zone established by the Treaty. As of the end of 2004, the United States had not ratified the Protocols.

8. U.S.-China Relations on Nuclear Issues

a. Agreement for nuclear cooperation

On July 23, 1985, the United States and China signed the Agreement for Cooperation Between the Government of the United States of America and the Government of the People's Republic of China Concerning Peaceful Uses of Nuclear Energy (known as the U.S.-China Nuclear Cooperation Agreement or "NCA"). TIAS No. 12027. The agreement was intended to meet the requirements of the Atomic Energy Act of 1954, as amended, to establish a regime for nuclear cooperation as a condition for potential U.S. nuclear exports. *See III Cumulative Digest 1981–1988* at 2863–84.

In approving the NCA in 1985, Congress enacted a joint resolution that conditioned implementation and nuclear cooperation on presidential certification of certain conditions including, *inter alia*, that verification measures were designed to be effective in ensuring that nuclear exports under the

agreement are used solely for intended peaceful purposes, and that China was not assisting non-nuclear-weapons states to acquire nuclear weapons capabilities in violation of Section 129 of the AEA. The President was also required to submit a report on Chinese nonproliferation policies and practices. Pub. L. No. 99–183 (1985). Additional conditions were imposed for the NCA's implementation in 1990 following the incident at Tienanmen Square. Foreign Relations Authorization Act, FY 1990–91, Pub. L. No. 101–246 (the "Tienanmen Square Legislation").

In 1995, with the 1985 agreement still not implemented, Washington and Beijing began intense negotiations aimed at meeting China's certification requirements under the NCA. In 1996 and 1997, China pledged not to provide assistance to unsafeguarded nuclear facilities, promulgated new nuclear export control regulations, and joined the Zangger Committee. In addition, China announced it would formulate nuclear-related dual-use export control regulations by mid-1998 and offered a confidential written assurance to Washington that it would halt all new nuclear cooperation with Iran. In response to these steps, in October 1997, President William J. Clinton announced his intention to implement the NCA, stating that

> the United States and China share a strong interest in stopping the spread of weapons of mass destruction and other sophisticated weaponry in unstable regions and rogue states—notably Iran. I welcome the steps China has taken and the clear assurances it has given today to help prevent the proliferation of nuclear weapons and related technology. On the basis of these steps and assurances, I agreed to move ahead with the US-China agreement for cooperation concerning the peaceful uses of nuclear energy. It will allow our companies to apply for licenses to sell equipment to Chinese nuclear power plants, subject to US monitoring. This agreement is win-win-win. It serves America's national security, environmental and economic interests.

The White House, Office of the Press Secretary, "Press Conference by President Clinton and President Jiang Zemin," October 29, 1997, available at *www.clintonpresidentialcenter.org/legacy/102997-joint-press-conference-with-jiang-zemin.htm*.

On January 12, 1998, President Clinton made the formal certification and report required by U.S. law for implementation. In his Presidential Determination, the President certified "that the People's Republic of China has provided clear and unequivocal assurances to the United States that it is not assisting and will not assist any nonnuclear-weapon state, either directly or indirectly, in acquiring nuclear explosive devices or the material and components for such devices." Presidential Determination No. 98–10, 63 Fed. Reg. 3447 (Jan. 23, 1998).

On February 4, 1998, while the issue was before Congress, Robert J. Einhorn, Deputy Assistant Secretary of State for Nonproliferation, testified before the House Committee on International Relations on the rationale behind the Administration's policy on nuclear cooperation with China, and about Chinese steps regarding nonproliferation.

The full text of the testimony, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

U.S. goals in the nuclear nonproliferation talks were carefully chosen to satisfy—and in some cases exceed—the requirements of U.S. law to implement the 1985 Agreement. Our goals were: (1) to terminate Chinese assistance to Pakistan's unsafeguarded nuclear facilities and nuclear explosive program, (2) to curtail Chinese cooperation with Iran's safeguarded nuclear program, (3) to establish an effective Chinese nuclear and nuclear-related dual-use export control system, and (4) to obtain Chinese participation in multilateral nuclear export control efforts. We achieved important results in each of these areas.

• China made a commitment in May 1996 not to provide assistance to unsafeguarded nuclear facilities, in Pakistan or anywhere else. . . .

• China has agreed to phase out its nuclear cooperation with Iran. . . .

• China is putting in place for the first time a comprehensive, nationwide system of nuclear and nuclear-related dual-use export controls. . . .

China became a member of the NPT Exporters Committee (Zangger Committee) in October 1997, the first time China has joined a multilateral nonproliferation export control regime. Committee membership will both enhance China's export control expertise and strengthen its commitment to nonproliferation norms and practices. . . .

The recent steps the Chinese have taken and the new assurances they have provided meet our negotiating goals and, more importantly, satisfy the standards set by the Congress for implementing the 1985 Agreement. . . .

But the progress we have seen involves more than words, more than commitments on paper. We have already begun to see concrete actions—in terms of sales to third countries rejected or canceled, detailed regulations and control lists adopted and publicized, and active participation in international regimes initiated.

* * * *

Taken together, these various steps and developments constitute a marked, positive shift in China's nuclear nonproliferation policies and practices. On the basis of this record, and taking carefully into account the specific requirements of U.S. law, the President announced on October 29, 1997 that he would submit to Congress the certifications and report necessary to implement the 1985 Agreement. He signed the certification package on January 12 of this year. It is now sitting before the Congress for the 30 continuous legislative days required before the Agreement can be implemented.

Implementation of the 1985 Agreement will bring important benefits for the United States.

It will provide an effective means of encouraging China to live up to the nuclear nonproliferation commitments it has recently made. It is necessary to point out, in this connection, that the 1985 U.S.-PRC Agreement will make China eligible to receive

U.S. nuclear exports; it does not guarantee that China will receive them. Under our nuclear licensing procedures, individual transactions will have to be approved on a case-by-case basis and each license is subject to a thorough interagency review process. If the Chinese do not abide by their assurances, we can withhold approval of new licenses and even revoke previously-approved licenses.

Implementation will therefore give China continuing incentives to fulfill its obligations. We will be monitoring Chinese behavior closely. Given the close historical ties between China and Pakistan and the challenge Beijing faces in implementing its new export control system, it is certainly conceivable that cases will arise that raise questions. If and when we encounter problems or uncertainties, we will not hesitate to raise them with Beijing. With the 1985 Agreement in effect—and prospects for continued cooperation potentially at risk—the Chinese will have a strong stake in being responsive to our inquiries and in taking prompt, corrective steps to prevent or stop any activities inconsistent with China's policies and commitments. Failure to proceed with implementation, on the other hand, would deprive us of the best vehicle we have for promoting cooperative and conscientious follow-up on China's undertakings.

* * * *

Congress did not reject the certifications within the ninety-day period provided by law and the NCA was finally implemented on March 19, 1998. The Agreement on Cooperation Concerning Peaceful Uses of Nuclear Technologies, with annex, was signed at Beijing on June 29, 1998, and entered into force the same day. Thereafter the parties also signed a Protocol on Cooperation in Nuclear Safety Matters in Vienna on September 24, 1998, which entered into force on that day.

b. Cox Report

In 1999 the House Select Committee on U.S. National Security and Military/Commercial Concerns with the People's

Republic of China released the Cox Report, a declassified version of a comprehensive report detailing China's espionage and intelligence gathering activities, including in the area of thermonuclear reactor technology and missile and space-launch technology. H.R. Rep. No. 105–851 (1999).

The report detailed both China's espionage activities and the Committee's analysis of China's ability to exploit the illegally obtained intelligence. The report also assessed certain aspects of United States export control laws, and found that certain U.S. companies had unlawfully transferred missile design information to the PRC. Additionally, the report noted legislative measures designed to increase safeguards, and the need for additional measures. The declassified report is available online at *www.gpo.gov/congress/house/hr105851-html/index.html*.

Excerpts from the Overview of the report are set forth below.

---

* * * *

A. The People's Republic of China (PRC) has stolen design information on the United States' most advanced thermonuclear weapons. . . . These thefts of nuclear secrets from our national weapons laboratories enabled the PRC to design, develop, and successfully test modern strategic nuclear weapons sooner than would otherwise have been possible. The stolen U.S. nuclear secrets give the PRC design information on thermonuclear weapons on a par with our own.

The PRC thefts from our National Laboratories began at least as early as the late 1970s. Significant secrets are known to have been stolen, from the laboratories or elsewhere, as recently as the mid-1990s. Such thefts almost certainly continue to the present.

• The stolen information includes classified information on seven U.S. thermonuclear warheads, including every currently deployed thermonuclear warhead in the U.S. ballistic missile arsenal.

• The stolen information also includes classified design information for an enhanced radiation weapon (commonly known

as the "neutron bomb"), which neither the United States, nor any other nation, has yet deployed.

* * * *

D. In the aftermath of three failed satellite launches since 1992, U.S. satellite manufacturers transferred missile design information and know-how to the PRC without obtaining the legally required licenses. This information has improved the reliability of PRC rockets useful for civilian and military purposes. The illegally transmitted information is useful for the design and improved reliability of future PRC ballistic missiles, as well.

U.S. satellite manufacturers analyzed the causes of three PRC launch failures and recommended improvements to the reliability of the PRC rockets. These launch failure reviews were conducted without required Department of State export licenses, and communicated technical information to the PRC in violation of the International Traffic in Arms Regulations.

* * * *

G. The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. No. 105–261 (Oct. 17, 1998), 112 Stat. 1920)) took important steps to correct deficiencies in the administration of U.S. export controls on commercial space launches in the PRC. But the aggressive implementation of this law is vital, and other problems with launches in the PRC that the Act does not address require immediate attention.

The Fiscal 1999 Department of Defense Authorization Act sought to increase safeguards on technology transfer during foreign launches of U.S. satellites.

The measures set forth in the Act include transferring licensing jurisdiction to the Department of State, and increased support for the Defense Department's efforts to prevent technology loss.

However, additional measures—including better training for Defense Department monitors and improved procedures for hiring professional security personnel—will be needed.

* * * *

9. Democratic People's Republic of Korea

a. The Agreed Framework: Background and implementation

In March 1993 the Democratic People's Republic of Korea ("DPRK" or "North Korea") gave notice to the UN Security Council that it intended to withdraw from the NPT. This action followed the discovery of discrepancies in the DPRK's declaration of nuclear material, which it was required to account for under the NPT. The United States undertook negotiations to persuade the DPRK not to withdraw from the NPT and to freeze and ultimately dismantle its nuclear weapons.

In testimony before the Senate Foreign Relations Committee on January 24, 1995, Secretary of State Warren Christopher explained the impetus for the U.S. efforts to halt the DPRK's nuclear weapons program. The full text of Secretary Christopher's testimony is available at *http://dosfan.lib.uic.edu/ERC/briefing/dossec/1995/9501/950124dossec.html*. *See also* 89 Am. J. Int'l L. 372 (1995).

---

* * * *

Over the last decade, successive administrations watched with concern as North Korea pursued its nuclear program, its development of ballistic missiles, and its build-up of forces. In 1987, during the Reagan Administration, North Korea's 5 megawatt reactor became operational. And in 1989, during the Bush Administration, North Korea unloaded an unknown amount of spent fuel that may have been reprocessed into plutonium.

When North Korea sought to remove its nuclear program from the constraint of international safeguards, President Clinton moved quickly to meet the potential global threat posed by its nuclear ambitions. Left unchecked, North Korea would soon have been in a position to produce hundreds of kilograms of plutonium for nuclear weapons—and to provoke a destabilizing nuclear arms race in Northeast Asia. It would also have been able to sell nuclear material or nuclear weapons to rogue states in the Middle East—just as it has sold them ballistic missiles in recent years.

* * * *

In June 1993 the two countries agreed on a Joint Statement of Principles in order to achieve peace and security on a nuclear-free Korean peninsula, 4 Dep't St. Dispatch No. 24 at 440 (June 14, 1993), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*, followed by an Agreed Statement in August of 1994. On October 21, 1994, after sixteen months of negotiations, the United States and North Korea signed an Agreed Framework with the objective of ending the threat of nuclear proliferation on the Korean Peninsula, *reprinted in* 34 I.L.M. 603 (1995).

Secretary of State Christopher outlined the terms of the Agreed Framework and its effects in his January 1995 testimony, supra, as set forth below.

First, the Agreed Framework immediately froze the North Korean nuclear program. The North agreed not to restart its 5 megawatt reactor. It agreed to seal its reprocessing facility and eventually dismantle it. It agreed to cooperate with the United States to store safely the spent fuel from the 5 megawatt reactor—rather than reprocess it—and eventually ship it out of the country. In short, North Korea's capacity to separate or produce plutonium was ended. All these steps are now taking place under the careful scrutiny of the IAEA.

Second, the North agreed to freeze construction of its 50 and 200 megawatt reactors and ultimately dismantle them. Absent this agreement, the two reactors would have been capable of producing enough plutonium for dozens of bombs each year.

Third, under the Agreed Framework, North Korea will remain a party to the NPT. As such, it must fully disclose its past nuclear activities. North Korea is obligated to cooperate with whatever measures the IAEA deems necessary—including special inspections—to resolve questions about its nuclear program.

Let me stress that as a result of the Framework, North Korea must fulfill additional obligations beyond its NPT requirements. These include no more reprocessing of spent fuel, the shipment of the spent fuel containing plutonium out of the country, and dismantlement of the gas graphite reactor system.

In return for these steps, North Korea will receive some benefits. We will lead an international effort to provide North Korea with proliferation-resistant, light-water reactors. It will also receive heavy fuel oil shipments as an interim energy source until the light-water reactors come on line early in the next century. Almost all financing for the LWRs will come from others, primarily South Korea and Japan. We expect the heavy fuel oil to be provided by the United States and other concerned countries.

Under the Agreed Framework, initial work on the LWR project will begin, but there will be no delivery of any significant nuclear components for the reactors until North Korea complies fully with its safeguards obligations. Put another way, the North Koreans will not receive critical equipment or technology for LWRs [light water reactors] until the IAEA is satisfied that questions about past North Korean nuclear activity are resolved.

Also under the terms of the Agreed Framework, the North has agreed to resume its dialogue with the Republic of Korea. This was a critical provision for South Korea and the United States if the Framework was to stand the test of time. Finally, under the Framework, the United States will move carefully toward more normal relations with North Korea. To ensure smooth implementation of the Framework, we will open a liaison office in Pyongyang, and North Korea will open a liaison office here. I would stress, though, that full normalization is explicitly linked to the North's willingness to resolve many issues of concern to us. We have made clear to the North Koreans that our agenda begins with their ballistic missile development and export activities, and their destabilizing conventional force deployment.

We designed the structure of the Agreed Framework to maximize the benefits and minimize the risks to the United States, South Korea and Japan. Let me explain how:

First, the burden of up-front performance falls on North Korea, not the United States. The North had to freeze immediately all construction of its 50 and 200 megawatt reactors. It had to refrain from refueling and restarting the 5 megawatt reactor and from taking any steps to reprocess existing spent fuel and to separate plutonium.

The steps we are taking in response are carefully calibrated. Last week, we provided 50,000 tons of heavy oil to North Korea, equivalent to less than one-half of one percent of its annual electrical energy production capability, and worth less than $5 million at current market prices. We are helping it safely store spent fuel until it is shipped out of the North. As an alternative to reprocessing, this is profoundly in our interest. We also have moved very selectively to ease commercial sanctions on North Korea. And we are moving ahead with the North Koreans to resolve issues related to establishing liaison offices.

The most significant benefits for North Korea will come several years later, after we have had time to judge North Korean performance and intentions. As I noted earlier, the most important benefit that the North will receive under the Agreed Framework, the sensitive nuclear components for LWRs, will not be provided until the North fully complies with its safeguards obligations, which includes accounting for its past activities.

Second, the structure of the Framework enables us to monitor closely North Korean compliance. This is not an arrangement that relies on trust. The IAEA is in North Korea monitoring the freeze and has received excellent cooperation. Beyond this, we have our own national technical means to verify the North's compliance.

Third, the Framework is also structured so that we are not disadvantaged in any significant way if the DPRK reneges on its commitments—at any time. The path to full implementation has defined checkpoints. If at any checkpoint, North Korea fails to fulfill its obligations, it will lose the benefits of compliance that it so clearly desires. If the North backs out of the deal in the next several years, for example, it will have gained little except modest amounts of heavy oil and some technical help in ensuring the safe storage of spent fuel. Should the North renege when it is required to submit to IAEA special inspections, Pyongyang will still be left with only the empty shells of two LWRs. Even if that happens, we will still have benefitted greatly. Why? Because the North's entire nuclear program will have been frozen for years.

Fourth, the Framework places highest priority on the elements of the North's program that most acutely threaten U.S. security. That means the accumulation of plutonium. For example, we

insisted that the Agreed Framework provide for the removal of spent fuel from North Korea without being reprocessed. That fuel (enough to build about five bombs) was a direct threat to our allies if it were ever reprocessed.

* * * *

We are cautious but hopeful about the continued smooth implementation of the Framework's terms. The North has frozen its nuclear program and is moving forward in discussions with the IAEA to enact additional verification measures. It is cooperating with American experts to ensure safe storage of the spent fuel at its Yongbyon nuclear plant—cooperation which has included the first visit by American technicians to Yongbyon.

At the same time, we have made important progress toward establishing the Korean Energy Development Organization (KEDO), the international consortium that will have a key role in implementing the Agreed Framework. It is KEDO that will ensure the provision of light-water reactors to North Korea, the heavy oil shipments, the safe storage of the spent fuel and its eventual shipment out of North Korea. South Korea will play a central role, and Japan will play a significant role, in the financing and construction of the LWR project. Both countries strongly support the Framework as in their national interest, and have demonstrated that support with their significant commitment to finance its implementation.

After several productive meetings with the Republic of Korea and Japan on KEDO, we have also begun to approach other potential members of KEDO in Asia and Europe. We hope to hold the first KEDO meeting next month in the United States.

* * * *

Regional security, ultimately, is what the Agreed Framework is designed to protect. The North's efforts to develop nuclear weapons and the means to deliver them have been a clear and immediate threat to our allies South Korea and Japan. Continuing tensions on the Korean peninsula in turn have been a threat to security and prosperity throughout Asia, the world's most dynamic economic region.

The Agreed Framework not only stops North Korea's nuclear program in its tracks. It provides a basis for reducing tensions in the region by opening the way for the establishment of more normal political and economic relationships between the United States and North Korea, and prospectively between North and South Korea. As part of the Framework, North Korea has pledged to resume dialogue with South Korea on matters affecting peace and security on the peninsula. We have made clear that resuming North-South dialogue is essential to the success of the Framework —so important that we were prepared to walk away from the Framework if North Korea had not been willing to meet that condition.

* * * *

The benefits of the Framework also extend well beyond our interests in Asia. The Framework supports our overarching goal of a strong global nonproliferation regime. It maintains the integrity of the Nuclear Non-Proliferation Treaty. It prevents future North Korean sales of nuclear weapons or materials to the Middle East. And it gives us an opportunity to curb North Korean sales of missile technology to those same countries.

* * * *

Under the Agreed Framework, the United States also undertook to provide "formal assurances to the DPRK, against the threat or use of nuclear weapons by the U.S." Such assurances were to be effective when the DPRK came into compliance with the NPT.

b. Korean Energy Development Organization

As noted in Secretary Christopher's testimony, the Korean Energy Development Organization ("KEDO") was established in 1995 to fulfill the objectives of the Agreed Framework. The Agreement on the Establishment of the Korean Peninsula Energy Development Organization ("KEDO Charter") was signed on March 9, 1995, in New York, *reprinted in* 34 I.L.M.

608 (1995). The purposes of KEDO, as set forth in Article II of the KEDO Charter, follow. For the full text of the KEDO Charter as amended, *see www.kedo.org*.

---

* * * *

ARTICLE II

(a) The purposes of the Organization shall be to:

(1) provide for the financing and supply of a light-water reactor (hereinafter referred to as "LWR") project in North Korea (hereinafter referred to as "the DPRK"), consisting of two reactors of the Korean standard nuclear plant model with a capacity of approximately 1,000 MW(e) each, pursuant to a supply agreement to be concluded between the Organization and the DPRK;

(2) provide for the supply of interim energy alternatives in lieu of the energy from the DPRK's graphite-moderated reactors pending construction of the first light-water reactor unit; and

(3) provide for the implementation of any other measures deemed necessary to accomplish the foregoing or otherwise to carry out the objectives of the Agreed Framework.

(b) The Organization shall fulfill its purposes with a view toward ensuring the full implementation by the DPRK of its undertakings as described in the Agreed Framework.

* * * *

A protocol signed in Washington by the Governments of the Republic of Korea, Japan and the United States on September 19, 1997, amended Articles V(b), VI(b) and (e), VIII(d) and (f) and XIV(b), (c) and (d) of the Agreement. *See* 2035 U.N.T.S. 280. The amendments to Articles V(b), VI(b) and Article XIV(b) make international organizations, including regional integration organizations, as well as states, eligible for membership in KEDO and provide for representation on the Executive Board on the basis of substantial and sustained support for the Organization. These amendments led to the European Union becoming a member of KEDO, with representation on the Executive Board.

10. Nonproliferation and Disarmament Fund

On October 24, 1992, President George H.W. Bush signed into law the Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992 ("FREEDOM Support Act"), Pub. L. No. 102–511, 106 Stat. 3320. Section 504 of the act established the Nonproliferation and Disarmament Fund and authorized the President "to promote bilateral and multilateral nonproliferation and disarmament activities"

> (1) by supporting the dismantlement and destruction of nuclear, biological, and chemical weapons, their delivery systems, and conventional weapons;
> (2) by supporting bilateral and multilateral efforts to halt the proliferation of nuclear, biological, and chemical weapons, their delivery systems, related technologies, and other weapons, including activities such as—
> (A) the storage, transportation, and safeguarding of such weapons, and
> (B) the purchase, barter, or other acquisition of such weapons or materials derived from such weapons;
> (3) by establishing programs for safeguarding against the proliferation of nuclear, biological, chemical, and other weapons of the independent states of the former Soviet Union;
> (4) by establishing programs for preventing diversion of weapons-related scientific and technical expertise of the independent states to terrorist groups or to third countries;
> (5) by establishing science and technology centers in the independent states for the purpose of engaging weapons scientists and engineers of the independent states (in particular those who were previously involved in the design and production of nuclear, biological, and chemical weapons) in productive, nonmilitary undertakings; and
> (6) by establishing programs for facilitating the conversion of military technologies and capabilities and

defense industries of the former Soviet Union into civilian activities.

Funds appropriated in annual appropriations acts to carry out § 504 are made available "notwithstanding any other provision of law, to promote bilateral and multilateral activities relating to nonproliferation and disarmament," and may be used "for such countries other than the Independent States of the former Soviet Union and international organizations when it is in the national security interest of the United States to do so." *See, e.g.,* Foreign Operations, Export Financing, and Related Programs Appropriation Act, FY 2000, Pub. L. No. 106–113, 113 Stat. 1501 (1999), under the heading "Nonproliferation, Anti-Terrorism, Demining and Related Programs."

11. IAEA and Other Multilateral Undertakings

a. International Atomic Energy Agency

During the 1990s, the International Atomic Energy Agency ("IAEA"), an organization of the United Nations, developed and implemented several multilateral agreements and conventions relating to, *inter alia*, the safe disposal of nuclear material, and non-proliferation of nuclear weapons. The United States became party to several such multilateral agreements during this time, as well as other instruments discussed below.

(1) Convention on Nuclear Safety

The Convention on Nuclear Safety was adopted in Vienna on June 17, 1994, by a diplomatic conference convened by the IAEA at its headquarters from June 14–17, 1994. The convention was opened for signature on September 20, 1994, and signed by the United States on that date.

On May 11, 1995, President William J. Clinton transmitted the convention to the Senate for its advice and consent to ratification. S. Treaty Doc. No. 104–6 (1995). The President's

letter of transmittal, set forth below, explains the importance of the convention to the United States, which entered into force for the United States on July 10, 1999. The full text of the convention is also available at *www.iaea.org/Publications/Documents/Infcircs/Others/inf449.shtml* and at *www.state.gov/t/np/trty/5940.htm*.

I transmit herewith, for Senate advice and consent to ratification, the Convention on Nuclear Safety done at Vienna on September 20, 1994. . . .

At the September 1991 General Conference of the IAEA, a Resolution was adopted, with U.S. Support, calling for the IAEA secretariat to develop elements for a possible International Convention of Nuclear Safety. From 1992 to 1994, the IAEA convened seven expert working group meetings, in which the United States participated. The IAEA Board of Governors approved a draft text at its meeting in February 1994, after which the IAEA Convened a Diplomatic Conference attended by representatives of more than 80 countries in June 1994. The final text of the Convention resulted in the Conference.

The Convention establishes a legal obligation on the part of the Parties to apply certain general safety principles to the construction, operation, and regulation of land-based civilian nuclear power plants under their jurisdiction. Parties to the Convention also agree to submit periodic reports on the steps they are taking to implement the obligations of the Convention. These reports will be reviewed and discussed at review meetings of the Parties at which each Party will have an opportunity to discuss and seek clarification of reports submitted by other Parties.

The United States has initiated many steps to deal with nuclear safety, and has supported the effort to develop this Convention. With its obligatory reporting and review procedures, requiring Parties to demonstrate in international meeting how they are complying with safety principles, the Convention should encourage countries to improve nuclear safety domestically and thus result in an increase in nuclear safety worldwide. I urge the Senate to act expeditiously in giving its advice and consent to ratification.

(2) Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management

On September 5, 1997, the United States signed the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management ("Joint Convention"). In transmitting the Joint Convention to the Senate for advice and consent to ratification on September 13, 2000, President Clinton described the significance of the instrument as set forth below. S. Treaty Doc. No. 106–48 (2000). The convention entered into force for the United States on July 14, 2003.

I transmit herewith, for Senate advice and consent to ratification, the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, done at Vienna on September 5, 1997. Also transmitted for the information of the Senate is the report of the Department of State concerning the Convention.

This Convention was adopted by a Diplomatic Conference convened by the International Atomic Energy Agency (IAEA) in September 1997 and was opened for signature in Vienna on September 5, 1997, during the IAEA General Conference, on which date Secretary of Energy Federico Pena signed the Convention for the United States.

The Convention is an important part of the effort to raise the level of nuclear safety around the world. It is companion to and structured similarly to the Convention on Nuclear Safety (CNS), to which the Senate gave its advice and consent on March 25, 1999, and which entered into force for the United States on July 10, 1999. The Convention establishes a series of broad commitments with respect to the safe management of spent fuel and radioactive waste. The Convention does not delineate detailed mandatory standards the Parties must meet, but instead Parties are to take appropriate steps to bring their activities into compliance with the general obligations of the Convention.

The Convention includes safety requirements for spent fuel management when the spent fuel results from the operation of civilian nuclear reactors and radioactive waste management for wastes resulting from civilian applications.

The Convention does not apply to a Party's military radioactive waste or spent nuclear fuel unless the Party declares it as spent nuclear fuel or radioactive waste for the purposes of the Convention, or if and when such waste material is permanently transferred to and managed within exclusively civilian programs. The Convention contains provisions to ensure that national security is not compromised and that Parties have absolute discretion as to what information is reported on material from military sources.

The United States has initiated many steps to improve nuclear safety worldwide in accordance with its long-standing policy to make safety an absolute priority in the use of nuclear energy, and has supported the effort to develop both the CNS and this Convention. The Convention should encourage countries to improve the management of spent fuel and radioactive waste domestically and thus result in an increase in nuclear safety worldwide.

(3) Taiwan retransfer agreements

Following the 1971 recognition by the United Nations and the IAEA of the People's Republic of China as the sole representative of China, Taiwan was no longer recognized as a Party to the Nuclear Non-Proliferation Treaty. It was also unable to sign safeguards agreements with the IAEA as a sovereign state. To address this situation, Taiwan, the United States and the IAEA completed a trilateral Safeguards Transfer Agreement, signed December 6, 1971, 22 U.S.T. 1837; TIAS No. 7228.

The United States entered into an agreement via an exchange of notes with Canada in 1993 to govern the retransfer of Canadian nuclear material by the United States to Taiwan for peaceful purposes. The United States agreed, *inter alia*, to ensure that Canadian uranium and special nuclear material, while on Taiwan, are subject to both the

Agreement for Cooperation Concerning Civil Uses of Atomic Energy, signed April 4, 1972 (reproduced at TIAS No. 7364; 23 U.S.T. 945), as amended, and the above-mentioned Safeguards Transfer Agreement. *See* Agreement Between the United States and Canada Concerning Cooperation On the Application of Non-Proliferation Assurances to Canadian Uranium to be Transferred From Canada to the United States for Enrichment and Fabrication Into Fuel and Retransferred to Taiwan for Use in Nuclear Reactors, TIAS No. 12490 (1993). The U.S. and Australia also commenced negotiations in 1993 for retransfers to Taiwan. These negotiations resulted in an exchange of notes in 2001, modeled closely on the Canadian agreement. The U.S.-Australia agreement entered into force on May 17, 2002. 2001 U.S.T. Lexis 102.

(4) Additional Protocol to the U.S.-IAEA Safeguards Agreement

On September 22, 1998, the United States signed an Additional Protocol with the IAEA. The Additional Protocol supplements the U.S. undertakings in the Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States ("Safeguards Agreement and Protocol Thereto"), signed at Vienna November 18, 1977, entered into force on December 9, 1980, 32 U.S.T. 3317, TIAS No. 9900.

The Additional Protocol was based on the provisions of a "Model Protocol," approved by the Agency's Board of Governors in 1997. One of the key goals of the Model Protocol was to require non-nuclear-weapon states to provide more information and greater access to the IAEA on their nuclear programs and nuclear-related activities. The United States accepted the provisions of the Model Protocol on a voluntary basis. See fact sheet at *www.state.gov/t/np/rls/fs/2002/10316.htm*.

President George W. Bush transmitted the Protocol to the Senate for advice and consent to ratification on May 9, 2002. S. Treaty Doc. No. 107–7. *See Digest 2002* at 1057–62. On March 31, 2004, the protocol received Senate advice and

consent to ratification, but at year end it had not yet entered into force.

b. European Atomic Energy Community

During the 1990s the United States negotiated a number of instruments relating to nuclear cooperation with the European Atomic Energy Community ("EURATOM"). In order to replace and update an agreement expiring December 31, 1995, representatives of the United States and the European Commission signed the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States and the European Atomic Energy Community in Brussels, Belgium, November 7, 1995. As explained in a statement from the U.S. Department of State on that date:

> President Clinton approved the new agreement and authorized its execution by Presidential Determination No. 96–4, dated November 1, 1995. [60 Fed. Reg. 56,931 (Nov. 13, 1995).]
>
> Now that the agreement has been signed, the President, as required by Section 123 of the U.S. Atomic Energy Act, will submit it to Congress for a review period of 90 continuous session days. The new agreement may be brought into force at the conclusion of this statutory congressional review period unless a joint resolution of disapproval is enacted.
>
> * * * *

6 Dep't St. Dispatch No. 47 at 862 (Nov. 20, 1995), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

President Clinton transmitted the new agreement to Congress on November 29, 1995. 31 WEEKLY COMP. PRES. DOC. 2077 (Dec. 4, 1995). Congress allowed the agreement to enter into force, which occurred as of April 12, 1996. Excerpts from President Clinton's November 1995 letter follow.

---

* * * *

I am pleased to transmit to the Congress, pursuant to sections 123 b. and 123 d. of the Atomic Energy Act of 1954, as amended 42 U.S.C. 2153(b), (d), the text of a proposed Agreement for Cooperation in the Peaceful Uses of Nuclear Energy Between the United States of America and the European Atomic Energy Community (EURATOM) with accompanying agreed minutes, annexes, and other attachments. . . .

The proposed new agreement with EURATOM has been negotiated in accordance with the Atomic Energy Act of 1954, as amended by the Nuclear Non-Proliferation Act of 1978 (NNPA) and as otherwise amended. It replaces two existing agreements for peaceful nuclear cooperation with EURATOM, including the 1960 agreement that has served as our primary legal framework for cooperation in recent years and that will expire by its terms on December 31 of this year. [11 U.S.T. 2589; 402 U.N.T.S. 325 (1960)]. The proposed new agreement will provide an updated, comprehensive framework for peaceful nuclear cooperation between the United States and EURATOM, will facilitate such cooperation, and will establish strengthened nonproliferation conditions and controls including all those required by the NNPA. The new agreement provides for the transfer of nonnuclear material, nuclear material, and equipment for both nuclear research and nuclear power purposes. It does not provide for transfers under the agreement of any sensitive nuclear technology (SNT).

The proposed agreement has an initial term of 30 years, and will continue in force indefinitely thereafter in increments of 5 years each until terminated in accordance with its provisions. In the event of termination, key nonproliferation conditions and controls, including guarantees of safeguards, peaceful use and adequate physical protection, and the U.S. right to approve retransfers to third parties, will remain effective with respect to transferred nonnuclear material, nuclear material, and equipment, as well nuclear material produced through their use. Procedures are also established for determining the survival of additional controls.

* * * *

The proposed new agreement provides for very stringent controls over certain fuel cycle activities, including enrichment, reprocessing, and alteration in form or content and storage of plutonium and other sensitive nuclear materials. The United States and EURATOM have accepted these controls on a reciprocal basis, not as a sign of either Party's distrust of the other, and not for the purpose of interfering with each other's fuel cycle choices, which are for each Party to determine for itself, but rather as a reflection of their common conviction that the provisions in question represent an important norm for peaceful nuclear commerce.

In view of the strong commitment of EURATOM and its member states to the international nonproliferation regime, the comprehensive nonproliferation commitments they have made, the advanced technological character of the EURATOM civil nuclear program, the long history of extensive transatlantic cooperation in the peaceful uses of nuclear energy without any risk of proliferation, and the fact that all member states are close allies or close friends of the United States, the proposed new agreement provides to EURATOM (and on a reciprocal basis, to the United States) advance, long-term approval for specified enrichment, retransfers, reprocessing, alteration in form or content, and storage of specified nuclear material and for retransfers of nonnuclear material and equipment. The approval for reprocessing and alteration in form or content may be suspended if either activity ceases to meet the criteria set out in U.S. law, including criteria relating to safeguards and physical protection.

In providing advance, long-term approval for certain nuclear fuel cycle activities, the proposed agreement has features similar to those in several other agreements for cooperation that the United States has entered into subsequent to enactment of the NNPA. These include bilateral U.S. agreements with Japan, Finland, Norway and Sweden. (The U.S. agreements with Finland and Sweden will be automatically terminated upon entry into force of the new U.S.-EURATOM agreement, as Finland and Sweden joined the European Union on January 1, 1995.) Among the documents I am transmitting herewith to the Congress is an analysis by the Secretary of Energy of the advance, long-term approvals contained in the proposed U.S. agreement with EURATOM. The

analysis concludes that the approvals meet all requirements of the Atomic Energy Act.

* * * *

Also in 1995, the U.S.-EURATOM Agreement in the Field of Nuclear Material Safeguards Research and Development was signed in Brussels and Washington, January 6, 1995, and entered into force the same day. TIAS No. 12596 (1995). The Agreement's objective is to provide a means for cooperation between the United States and the European Community regarding research and development on the topic of nuclear safeguards. Article 2 sets forth the areas of cooperation as follows:

> 1. Safeguards systems analysis for part or the complete fuel cycle;
> 2. Measurement and accountancy control technology for nuclear materials;
> 3. Containment and surveillance technology for nuclear materials and nuclear facilities;
> 4. Nuclear safeguards training courses for inspectors and specialists;
> 5. Scientific coordination of both Parties' efforts to transfer nuclear safeguards technologies to other countries, upon their request, in order to improve the effectiveness of their national safeguards systems;
> Other areas of cooperation may be added by mutual agreement.

c. Trilateral Initiative

The United States, Russia, and the IAEA launched a voluntary program known as the Trilateral Initiative in September 1996. The IAEA described the basis for the initiative as follows:

> The Trilateral Initiative was launched in 1996 following independent statements by the President of the United States beginning in 1993, and by the President of the

> Russian Federation in 1996. It is an Initiative between the IAEA, the Russian Federation and the United States that is in the context of Article VI of the NPT. The intention is to examine the technical, legal and financial issues associated with IAEA verification of weapon origin and other fissile material released from defense programmes in those two countries.

IAEA Bulletin, Apr. 4, 2001 at 49–53, available at *www.iaea.or.at/Publications/Magazines/Bulletin/Bull434/article9.pdf*.

D. CHEMICAL AND BIOLOGICAL WEAPONS NONPROLIFERATION

1. Chemical Weapons Convention (CWC)

a. Negotiation and transmittal

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ("CWC"), with annexes, was opened for signature at Paris on January 13, 1993, and signed by the United States on that date. The annexes, which are integral parts of the Convention, include the Annex on Chemicals, the Annex on Implementation and Verification, and the Annex on the Protection of Confidential Information. The Treaty and Annexes are also available at *www.cwc.gov*.

On November 23, 1993, President William J. Clinton transmitted the CWC and accompanying instruments to the Senate for its advice and consent to ratification. S. Treaty Doc. No. 103–21 (1993). Excerpts from the President's letter of transmittal follow.

---

* * * *

I transmit herewith, for the advice and consent of the Senate to ratification, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on

Their Destruction (the "Chemical Weapons Convention" or CWC). The Convention includes the following documents, which are integral parts thereof: the Annex on Chemicals, the Annex on Implementation and Verification, and the Annex on the Protection of Confidential Information. The Convention was opened for signature and was signed by the United States at Paris on January 13, 1993. I transmit also, for the information of the Senate, the Report of the Department of State on the Convention.

In addition, I transmit herewith, for the information of the Senate, two documents relevant to, but not part of, the Convention: the Resolution Establishing the Preparatory Commission for the Organization for the Prohibition of Chemical Weapons and the Text on the Establishment of a Preparatory Commission (with three Annexes), adopted by acclamation by Signatory States at Paris on January 13, 1993. These documents provide the basis for the Preparatory Commission for the Organization for the Prohibition of Chemical Weapons (Preparatory Commission), which is responsible for preparing detailed procedures for implementing the Convention and for laying the foundation for the international organization created by the Convention. In addition, the recommended legislation necessary to implement the Chemical Weapons Convention, environmental documentation related to the Convention, and an analysis of the verifiability of the Convention consistent with Section 37 of the Arms Control and Disarmament Act, as amended, will be submitted separately to the Senate for its information.

The Chemical Weapons Convention is unprecedented in its scope. The Convention will require States Parties to destroy their chemical weapons and chemical weapons production facilities under the observation of international inspectors; subject States Parties' citizens and businesses and other nongovernmental entities to its obligations; subject States Parties' chemical industry to declarations and routine inspection; and subject any facility or location in the territory or any other place under the jurisdiction or control of a State Party to international inspection to address other States Parties' compliance concerns.

The Chemical Weapons Convention is also unique in the number of countries involved in its development and committed

from the outset to its non-proliferation objectives. This major arms control treaty was negotiated by the 39 countries in the Geneva-based Conference on Disarmament, with contributions from an equal number of observer countries, representing all areas of the world. . . .

The complexities of negotiating a universally applicable treaty were immense. Difficult issues such as the need to balance an adequate degree of intrusiveness, to address compliance concerns, with the need to protect sensitive nonchemical weapons related information and constitutional rights, were painstakingly negotiated. The international chemical industry, and U.S. chemical industry representatives, in particular, played a crucial role in the elaboration of landmark provisions for the protection of sensitive commercial and national security information.

* * * *

The Convention is designed to exclude the possibility of the use or threat of use of chemical weapons, thus reflecting a significant step forward in reducing the threat of chemical warfare. To this end, the Convention prohibits the development, production, acquisition, stockpiling, retention, and, direct or indirect, transfer to anyone of chemical weapons; the use of chemical weapons against anyone, including retaliatory use; the engagement in any military preparations to use chemical weapons; and the assistance, encouragement, or inducement of anyone to engage in activities prohibited to States Parties. The convention also requires all chemical weapons to be declared, declarations to be internationally confirmed, and all chemical weapons to be completely eliminated within 10 years after its entry into force (15 years in extraordinary cases), with storage and destruction monitored through on-site international inspection. The Convention further requires all chemical weapons production to cease within 30 days of the entry into force of the Convention for a State Party and all chemical weapons production facilities to be eliminated (or in exceptional cases of compelling need, and with the permission of the Conference of the States Parties, converted to peaceful purposes). Cessation of production, and destruction within 10 years after the entry into force of the Convention (or conversion and peaceful

production), will be internationally monitored through on-site inspection.

In addition, the Convention prohibits use of riot control agents as a method of warfare, reaffirms the prohibition in international law on the use of herbicides as a method of warfare, and provides for the possibility for protection against and assistance in the event of use or threat of use of chemical weapons against a State Party. The Administration is reviewing the impact of the Convention's prohibition on the use of riot control agents as a method of warfare on Executive Order No. 11850, which specifies the current policy of the United States with regard to the use of riot control agents in war. The results of the review will be submitted separately to the Senate [*see* 1.b. and c. below].

The Convention contains a number of provisions that make a major contribution to our nonproliferation objectives. In addition to verification of the destruction of chemical weapons, the Convention provides a regime for monitoring relevant civilian chemical industry facilities through declaration and inspection requirements. States Parties are also prohibited from providing any assistance to anyone to engage in activities, such as the acquisition of chemical weapons, prohibited by the Convention. Exports to non-States Parties of chemicals listed in the Convention are prohibited in some instances and subject to end-user assurances in others. Imports of some chemicals from non-States Parties are also banned. These restrictions will also serve to provide an incentive for countries to become parties as soon as possible. Finally, each State Party is required to pass penal legislation prohibiting individuals and businesses and other nongovernmental entities from engaging in activities on its territory or any other place under its jurisdiction that are prohibited to States Parties. Such penal legislation must also apply to the activities of each State Party's citizens, wherever the activities occur. Through these provisions, the Convention furthers the important goal of preventing the proliferation of chemical weapons, while holding out the promise of their eventual worldwide elimination.

The Convention contains two verification regimes to enhance the security of States Parties to the Convention and limit the possibility of clandestine chemical weapons production, storage,

and use. The first regime provides for a routine monitoring regime involving declarations, initial visits, systematic inspections of declared chemical weapons storage, production and destruction facilities, and routine inspections of the relevant civilian chemical industry facilities. The second regime, challenge inspections, allows a State Party to have an international inspection conducted of any facility or location in the territory or any other place under the jurisdiction or control of another State Party in order to clarify and resolve questions of possible noncompliance. The Convention obligates the challenged State Party to accept the inspection and to make every reasonable effort to satisfy the compliance concern. At the same time, the Convention provides a system for the inspected State Party to manage access to a challenged site in a manner that allows for protection of its national security, proprietary, and constitutional concerns. In addition, the Convention contains requirements for the protection of confidential information obtained by the OPCW.

The Convention prohibits reservations to the Articles. However, the CWC allows reservations to the Annexes so long as they are compatible with the object and purpose of the Convention. This structure prevents States Parties from modifying their fundamental obligations, as some countries, including the United States, did with regard to the Geneva Protocol of 1925 when they attached reservations preserving the right to retaliate with chemical weapons. At the same time, it allows States Parties some flexibility with regard to the specifics of their implementation of the Convention.

Beyond the elimination of chemical weapons, the Chemical Weapons Convention is of major importance in providing a foundation for enhancing regional and global stability, a forum for promoting international cooperation and responsibility, and a system for resolution of national concerns.

I believe that the Chemical Weapons Convention is in the best interests of the United States. Its provisions will significantly strengthen United States, allied and international security, and enhance global and regional stability. Therefore, I urge the Senate to give early and favorable consideration to the Convention, and to give advice and consent to its ratification as soon as possible in 1994.

b. Entry into force

The U.S. Senate gave its advice and consent to ratification of the CWC on April 24, 1997, subject to certain conditions. 143 CONG. REC. S3689 (daily ed. Apr. 24, 1997). Conditions included, *inter alia*, limitations with regard to cost-sharing, intelligence sharing and assessments, expectations on the primacy of constitutional guarantees, as well as the continuing vitality of the Australia Group (*see* D.3.a. below) and national export controls, and provisions to ensure chemical and biological defense capabilities. Condition 26 required the President to certify that U.S. use of riot control agents in certain circumstances was not restricted by the Convention, and provided that the President "shall take no measure and prescribe no rule or regulation, which would alter or eliminate Executive Order 11850 of April 8, 1975," discussed in c. below. The full text of the resolution of ratification is also available at *www.cwc.gov/ratification_conditions. See also* Chapter 4.B.4.a. President Clinton submitted a report to the Senate dated April 28, 1997, addressing the conditions of ratification. 143 CONG. REC. S3749 (Apr. 28, 1997). The CWC entered into force on April 29, 1997.

c. Riot control agents

On June 23, 1994, President William J. Clinton reported by letter to the Senate on the administration's review of the impact of the CWC on Executive Order No. 11850, which states U.S. policy with regard to the use of riot control agents ("RCAs") in war. 140 CONG. REC. S7635 (daily ed. June 24, 1994). The President's letter is excerpted below.

---

* * * *

Article I(5) of the CWC prohibits Parties from using RCAs as a "method of warfare." That phrase is not defined in the CWC. The United States interprets this provision to mean that:

— The CWC applies only to the use of RCAs in international or internal armed conflict. Other peacetime uses of RCAs, such as normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and noncombatant rescue operations conducted outside such conflicts are unaffected by the Convention.
— The CWC does not apply to all uses of RCAs in time of armed conflict. Use of RCAs solely against noncombatants for law enforcement, riot control, or other noncombat purposes would not be considered as a "method of warfare" and therefore would not be prohibited. Accordingly, the CWC does not prohibit the use of RCAs in riot control situations in areas under direct U.S. military control, including against rioting prisoners of war, and to protect convoys from civil disturbances, terrorists, and paramilitary organizations in rear areas outside the zone of immediate combat.
— The CWC does prohibit the use of RCAs solely against combatants. In addition, according to the current international understanding, the CWC's prohibition on the use of RCAs as a "method of warfare" also precludes the use of RCAs even for humanitarian purposes in situations where combatants and noncombatants are intermingled, such as the rescue of downed air crews, passengers, and escaping prisoners and situations where civilians are being used to mask or screen attacks. However, were the international understanding of this issue to change, the United States would not consider itself bound by this position.

Upon receiving the advice and consent of the Senate to ratification of the Chemical Weapons Convention, a new Executive order outlining U.S. policy on the use of RCAs under the Convention will be issued. I will also direct the Office of the Secretary of Defense to accelerate efforts to field non-chemical, non-lethal alternatives to RCAs for use in situations where combatants and noncombatants are intermingled.

* * * *

In response to Condition 26 in the Senate resolution of advice and consent to ratification of the CCW, *supra*, on April 28, 1997, the President certified as follows:

> In connection with Condition (26), Riot Control Agents, the United States is not restricted by the Convention in its use of riot control agents, including the use against combatants who are parties to a conflict, in any of the following cases: (i) the conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict (such as recent use of the United States Armed Forces in Somalia, Bosnia, and Rwanda); (ii) consensual peacekeeping operations when the use of force is authorized by the receiving state, including operations pursuant to Chapter VI of the United Nations Charter; and (iii) peacekeeping operations when force is authorized by the Security Council under Chapter VII of the United Nations Charter.

143 CONG. REC. S3749 (Apr. 28, 1997).

d. U.S. implementation

The Chemical Weapons Convention Implementation Act of 1998 was enacted on October 21, 1998. Pub. L. No. 105–277, Div. I, 112 Stat. 2681–856 (1998) (codified in scattered sections of 22 U.S.C.). The CWC Implementation Act designated the Department of State as the National Administrative Authority required by the convention to serve as liaison between the Organization for the Prohibition of Chemical Weapons ("OCPW"), established to implement the Convention, and other States Parties; authorized and provided for procedures for inspections while containing provisions to protect national security and constitutional rights; and provided for criminal and civil penalties for certain unlawful activities.

The act provided significant protections for U.S. private and industry interests. Section 102 provided that no one can be required to "waive any right under the Constitution for any purpose related to the Act or the Convention" as a condition for entering into a contract or receiving any benefit from the United States. Section 103(a), subsection (1)

provided jurisdiction in the Court of Federal Claims for claims against the United States for "any taking of property without just compensation that occurs by reason of the action of any officer or employee of the Organization for the Prohibition of Chemical Weapons, including any member of an inspection team of the Technical Secretariat, or by reason of the action of any officer or employee of the United States pursuant to this Act or the Convention." Subsections (2) and (3) required the imposition of sanctions on certain foreign persons and foreign governments involved in disclosure of U.S. confidential business information.

Section 103(f) required denial of visas and exclusion from the United States of any alien who:

> (1) is, or previously served as, an officer or employee of the Organization and who has willfully published, divulged, disclosed, or made known in any manner or to any extent not authorized by the Convention any United States confidential business information coming to him in the course of his employment or official duties, or by reason of any examination or investigation of any return, report, or record made to or filed with the Organization, or any officer or employee thereof, such practice or disclosure having resulted in financial loses or damages to a United States person and for which actions or omissions the United States has been found liable of a tort or taking pursuant to this Act; [or]
> (2) traffics in United States confidential business information, a proven claim to which is owned by a United States national; . . .

Section 201, among other things, amended Title 18 of the U.S. Code to add § 229, which provided criminal penalties for any person, with exceptions including members of the U.S. Armed Forces, who would knowingly "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or . . . assist or induce, in any way, any person to violate [the above provision], or to attempt

or conspire to violate [the above provision]." Under section 211 of the act, the President was authorized to suspend or revoke export authority for any person who is a national of the United States or any person within the United States who violated 18 U.S.C. § 229.

Sections 302–304 provided authority and procedures for inspections of facilities in the United States under the Convention. Section 305 required that such inspections be conducted with the consent of the person in charge of the premises or, if consent is withheld, pursuant to a search warrant as prescribed under § 305. Section 307 provided that the President may deny a request to inspect a facility in the United States on the ground that the inspection may pose a threat to the national security interests of the United States.

On May 18, 1999, the Bureau of Export Administration of the U.S. Department of Commerce enacted an interim rule to implement the CWC Act. 64 Fed. Reg. 27,138 (May 18, 1999), as corrected, 64 Fed. Reg. 28,908 (May 28, 1999). On June 25, 1999, President Clinton signed Executive Order 13128, entitled "Implementation of the Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act," allocating responsibility for implementation. 64 Fed. Reg. 34,703 (June 28, 1999). Subsequently, the Department of Commerce issued interim rules establishing Parts II and III of the Chemical Weapons Convention Regulations, 64 Fed. Reg. 39,194 (July 21, 1999) and 64 Fed. Reg. 73, 744 (Dec. 30, 1999).

The text of U.S. legislation, regulations, executive orders and related materials are available at *www.cwc.gov*.

e. Constitutionality of inspections under the Chemical Weapons Convention

On September 10, 1996, Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, testified before the Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Committee on the Judiciary. Mr. Shiffrin concluded that the

inspection provisions of the CWC Act discussed above are consistent with the Fourth Amendment to the Constitution.

The full text of the statement, excerpted below, is available at w*ww.usdoj.gov/olc/cwc_tes.htm*.

---

* * * *

This inspection scheme is fully consistent with Fourth Amendment principles. The Fourth Amendment requires that "subject only to a few specifically established and well-delineated exceptions," *Katz v. United States*, 390 U.S. 347, 357 (1967), searches and seizures conducted in the absence of "a judicial warrant issued upon probable cause and particularly describing the items to be seized" are per se unreasonable. *United States v. Place*, 462 U.S. 696, 701 (1983). The Fourth Amendment's warrant and probable cause requirements do not apply to a particular search, however, when the party to be searched provides consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). I thus would emphasize that the warrant provisions under the CWC and its implementing legislation would apply only to the small minority of inspections as to which consent might be withheld.

* * * *

In certain instances, insufficient evidence may exist to establish criminal probable cause within the meaning of the Fourth Amendment. Thus, a search warrant would be unobtainable. The CWC anticipates this possibility and would not force a choice between compliance with its terms, and adherence to our constitutional principles. Rather, the Convention specifically allows the U.S. Government, in granting access to facilities identified for challenge inspections, to "tak[e] into account any constitutional obligations it may have with regard to proprietary rights or searches and seizures." *See* Verification Annex of the CWC, pt. X, para. C.41. Hence, in the rare event that the Fourth Amendment would pose a bar to a search of premises identified for a challenge inspection and the inspection could not go forward, the United States would remain in full compliance with its obligations under the CWC.

* * * *

2. The Australia Group

The Australia Group ("AG"), of which the United States is a member, was founded in 1984 in the aftermath of the use of chemical weapons during the Iran-Iraq War. The principal impetus for the AG was to ensure that industries of the participating countries did not assist, either purposefully or inadvertently, states seeking to acquire a chemical or biological weapons ("CBW") capability. Participation in the AG is dependent on consensus. Participating countries must have established effective national export controls and demonstrate compliance with multinational treaties banning certain CBW activities. The AG's activities are designed to complement and serve the objectives of the 1925 Geneva Protocol, the 1972 Biological Weapons Convention ("BWC"), and the 1993 Chemical Weapons Convention ("CWC").

In 1993, the AG implemented a "no-undercut" policy in order to enhance cooperation in enforcing export controls. Under this policy, AG members agreed to notify the AG of any export licenses that were denied for nonproliferation reasons, and provided that other participants would consult with the government that denied a specific license before they would approve identical transactions. *See www.state.gov/www/global/arms/bureau_np/000401_ag.html.*

Also in the 1990s, the AG adopted a common approach on export controls and issued the Control List of Dual Use Chemicals: Commercial and Military Application. This list of controlled materials is available at *www.state.gov/www/global/arms/factsheets/wmd/cw/auslist.html.*

3. Chemical and Biological Weapons Control and Warfare Elimination Act of 1991

a. Enactment

On October 28, 1991, President George H.W. Bush signed into law the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, Pub. L. No. 102–138, 105 Stat. 722, 22 U.S.C. §§ 501–06 ("CBW Act").

Section 502 of the CBW Act set forth its purposes, including "to mandate United States sanctions, and to encourage international sanctions, against countries that use chemical or biological weapons in violation of international law or use lethal chemical or biological weapons against their own nationals, and to impose sanctions against companies that aid in the proliferation of chemical and biological weapons" and "to support multilaterally coordinated efforts to control the proliferation of chemical and biological weapons."

Section 504 required, *inter alia*, the creation of a list of "goods and technology that would directly and substantially assist a foreign government or group in acquiring the capability to develop, produce, stockpile, or deliver chemical or biological weapons, the licensing of which would be effective in barring acquisition or enhancement of such capability." The provision required a validated license for export of such goods or technology to any "country of concern." That term was defined to include any country that did not have a bilateral or multilateral arrangement with the United States for control of such goods or technology or was otherwise designated by the Secretary of State.

Sections 505 and 507 of the act established new sanctions to be imposed against foreign persons and countries, respectively. Section 505 amended the Export Administration Act of 1979 and the Arms Export Control Act to prohibit U.S. government procurement from certain foreign persons, with specified exceptions,

> if the President determines that a foreign person . . . has knowingly and materially contributed through the export . . . of U.S. goods or technology that are subject to U.S. jurisdiction . . . to the efforts by any foreign country, project or entity [meeting criteria related to use of lethal chemical or biological weapons or its status as a state sponsor of terrorism] . . . to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons.

Section 505 provided for a Presidential waiver of sanctions twelve months after imposition based on a determination that "such waiver is important to the national security interests of the United States."

Section 507 required the imposition of broad sanctions against a country when the President determined under § 506 that its government "has used chemical or biological weapons in violation of international law or has used lethal chemical or biological weapons against its own nationals." Initial sanctions provided in § 507 included termination of foreign assistance, arms sales, and arms sales financing. Additional sanctions were to be imposed unless, within three months after making the determination under § 506, the President certified to Congress that the government was no longer using such weapons in such manner, had provided reliable assurances that it would not do so in the future, and was willing to allow on-site inspections. The statute provided for termination of sanctions after twelve months if certain criteria were met and provided a Presidential waiver if the President determined that such waiver was "essential to the national security interests of the United States" or that "there has been a fundamental change in the leadership and policies of [the] government of the country." *Id.* at § 507(d). It also provided certain exceptions related to contract sanctity.

The United States imposed sanctions on a number of foreign entities under the 1991 Act for their knowing contribution to CBW programs in countries of concern. *See, e.g.*, 62 Fed. Reg. 28, 304 (May 22, 1997), 62 Fed. Reg. 51,926 (Oct. 3, 1997), and 63 Fed. Reg. 9039 (Feb. 23, 1998).

b. Presidential discretion under the CBW Act

As noted above, section 505 of the CBW Act requires the President to make a determination, upon the presentation of sufficient evidence, that would trigger sanctions. A November 16, 1995, memorandum opinion prepared by Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Department of Justice, addressed the issue of

whether the President has discretion, under certain circumstances, to delay making such a determination.

The opinion concluded that the "Act permits the President to delay making determinations that would trigger sanctions under [§ 505 of the Act, 50 U.S.C. app. § 2410c], when the delay is necessary to protect intelligence sources or methods used for acquiring intelligence relating to [chemical or biological weapons] proliferation." The opinion likewise concluded that the President can delay a determination "when no reasonable alternative means exists to protect the life of an intelligence source."

The full text of the memorandum opinion, excerpted below, is available at *www.usdoj.gov/olc/cbw_b10.htm*.

---

* * * *

We believe that the President has the right, and indeed the duty, to protect the life of an intelligence source in such circumstances. This responsibility is rooted both in statutory law and in the President's constitutional authority to protect national security. (footnote omitted) The President's obligations towards any intelligence source whose life would be at risk in this case if a determination were made are thus in direct conflict with the President's obligations under the CBW Act not to delay making a determination indefinitely, once the evidence establishes that a violation has taken place. Faced with such unavoidably conflicting obligations, we believe that the President may reasonably and lawfully conclude that the obligation to preserve the life of the source should prevail.

* * * *

In reaching its conclusions, the opinion relied on the following language included in the signing statement issued by President George H.W. Bush on signing the Act into law on October 28, 1991. The full text of the signing statement is available at *http://bushlibrary.tamu.edu/research/papers/1991/91102809.html*.

---

* * * *

Title V, Chemical and Biological Weapons (CBW), raises concerns with respect to both the President's control over negotiations with foreign governments and the possible disclosure of sensitive information. Title V's provisions establish sanctions against foreign companies and countries involved in the spread or use of chemical and biological weapons. Title V demonstrates that the Congress endorses my goal of stemming dangerous CBW proliferation. In signing this Act, it is my understanding, as reflected in the legislative history, that title V gives me the flexibility to protect intelligence sources and methods essential to the acquisition of intelligence about CBW proliferation. In part, such flexibility is available because title V does not dictate the timing of determinations that would lead to sanctions against foreign persons.

* * * *

E. MISSILE DEFENSE & MISSILE PROLIFERATION

1. The ABM Treaty

Issues concerning succession of successor states of the former Soviet Union to the ABM Treaty are discussed in Chapter 4.B.6.a.(3).

2. Joint Statement of the Presidents of the United States of America and the Russian Federation on the Exchange of Information on Missile Launches and Early Warning of September 2, 1998

On September 2, 1998, U.S. President Clinton and Russian President Yeltsin signed the Joint Statement on the Exchange of Information on Missile Launches and Early Warning in Moscow. 34 WEEKLY COMP. PRES. DOC. 1694 (Sept. 7, 1998). The text of the statement follows.

Taking into account the continuing worldwide proliferation of ballistic missiles and of missile technologies, the need to minimize

even further the consequences of a false missile attack warning and above all, to prevent the possibility of a missile launch caused by such false warning, the President of the United States and the President of the Russian Federation have reached agreement on a cooperative initiative between the United States and Russia regarding the exchange of information on missile launches and early warning.

The objective of the initiative is the continuous exchange of information on the launches of ballistic missiles and space launch vehicles derived from each side's missile launch warning system, including the possible establishment of a center for the exchange of missile launch data operated by the United States and Russia and separate from their respective national centers. As part of this initiative, the United States and Russia will also examine the possibility of establishing a multilateral ballistic missile and space launch vehicle pre-launch notification regime in which other states could voluntarily participate.

The Presidents have directed their experts to develop as quickly as possible for approval in their respective countries a plan for advancing this initiative toward implementation as soon as practicable.

Russia, proceeding from its international obligations relating to information derived from missile attack warning systems, will reach agreement regarding necessary issues relating to the implementation of this initiative.

3. Missile Technology Control Regime Guidelines

Excerpts below from a U.S. State Department fact sheet, issued December 23, 2003, by the Bureau of Nonproliferation, describe the origins and work of the Missile Technology Control Regime ("MTCR"). The fact sheet is available at *www.state.gov/t/np/rls/fs/27514.htm*.

In 1987, seven concerned countries created the Missile Technology Control Regime (MTCR) to restrict the proliferation of

nuclear-capable missiles and related technology. The original participants in the Regime were Canada, France, West Germany, Italy, Japan, the United Kingdom, and the United States. . . .

The MTCR is not a treaty, but a voluntary arrangement among member countries sharing a common interest in controlling missile proliferation. The Regime's mandate was expanded in 2003 to include preventing terrorists from acquiring missiles and missile technology.

The MTCR Partners have committed to apply a common export policy (MTCR Guidelines) to a common list (MTCR Annex) of controlled items, including virtually all key equipment and technology needed for missile development, production, and operation. The Guidelines and Annex are implemented by each Partner in accordance with its national legislation.

The MTCR Guidelines restrict transfers of "missiles" . . . capable of delivering weapons of mass destruction (WMD). . . .

* * * *

On January 7, 1993, the Bureau of Nonproliferation, U.S. Department of State, released a statement that "[t]he United States Government has, after careful consideration and subject to its international treaty obligations, decided that, when considering the transfer of equipment and technology related to missiles, it will act in accordance with the attached Guidelines beginning on January 7, 1993. These Guidelines replace those adopted on April 16, 1987." *See* 4 Dep't St. Dispatch No. 3 at 41 (Jan. 18, 1993), available at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html.*

In June 1996 the United States adopted the Equipment and Technology Annex for the MTCR Guidelines. The 1993 U.S. statement, containing the text of the guidelines (excerpted below), as well as the 1996 annex, are available at *www.state.gov/t/ac/trt/5073.htm.*

---

1. The purpose of these Guidelines is to limit the risks of proliferation of weapons of mass destruction (i.e. nuclear, chemical and biological weapons), by controlling transfers

that could make a contribution to delivery systems (other than manned aircraft) for such weapons. The Guidelines are not designed to impede national space programs or international cooperation in such programs as long as such programs could not contribute to delivery systems for weapons of mass destruction. These Guidelines, including the attached Annex, form the basis for controlling transfers to any destination beyond the Government's jurisdiction or control of all delivery systems (other than manned aircraft) capable of delivering weapons of mass destruction, and of equipment and technology relevant to missiles whose performance in terms of payload and range exceeds stated parameters. Restraint will be exercised in the consideration of all transfers of items contained within the Annex and all such transfers will be considered on a case-by-case basis. The Government will implement the Guidelines in accordance with national legislation.

2. The Annex consists of two categories of items, which term includes equipment and technology. Category I items, all of which are in Annex Items 1 and 2, are those items of greatest sensitivity. If a Category I item is included in a system, that system will also be considered as Category I, except when the incorporated item cannot be separated, removed or duplicated. Particular restraint will be exercised in the consideration of Category I transfers regardless of their purpose, and there will be a strong presumption to deny such transfers. Particular restraint will also be exercised in the consideration of transfers of any items in the Annex, or of any missiles (whether or not in the Annex), if the Government judges, on the basis of all available, persuasive information, evaluated according to factors including those in paragraph 3, that they are intended to be used for the delivery of weapons of mass destruction, and there will be a strong presumption to deny such transfers. Until further notice, the transfer of Category I production facilities will not be authorized. The transfer of other Category I items will be authorized only on rare occasions and where the Government (A) obtains binding government-to-government

undertakings embodying the assurances from the recipient government called for in paragraph 5 of these Guidelines and (B) assumes responsibility for taking all steps necessary to ensure that the item is put only to its stated end-use. It is understood that the decision to transfer remains the sole and sovereign judgment of the United States Government.

3. In the evaluation of transfer applications for Annex items, the following factors will be taken into account:
   A. Concerns about the proliferation of weapons of mass destruction;
   B. The capabilities and objectives of the missile and space programs of the recipient state;
   C. The significance of the transfer in terms of the potential development of delivery systems (other than manned aircraft) for weapons of mass destruction;
   D. The assessment of the end-use of the transfers, including the relevant assurances of the recipient states referred to in sub-paragraphs 5.A and 5.B below;
   E. The applicability of relevant multilateral agreements.

* * * *

4. Chinese Missile Transfers

During the 1990s the United States became increasingly concerned about China's transfers of missiles and missile-related technology as a result of such transfers to states like Iran and Pakistan. In 1991 and 1993, the U.S. imposed sanctions on Chinese entities pursuant to the Missile Technology Control Act, which amended the Arms Export Control Act and the Export Administration Act of 1979. *See* Pub. L. No. 101–501, 104 Stat. 1738, (Nov. 5, 1990).

On June 25, 1991, the Secretary of State made a determination that Chinese entities had "engaged in missile technology proliferation activities that required 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))." 56 Fed. Reg. 32,601 (July 17, 1991). These sanctions were waived in the interests of national security on February 26, 1992. *See* 57 Fed. Reg. 11,768 (Apr. 7, 1992).

On August 24, 1993, sanctions were again imposed on the Chinese Ministry of Aerospace Industry, including the China Precision Machinery Import/Export Corporation ("CPMIEC"), as well as Pakistan's Ministry of Defense for missile proliferation activities. *See* 58 Fed. Reg. 45,408 (Aug. 27, 1993). The following sanctions were imposed on the named entities and their subsidiaries:

> (A) licenses for export to the sanctioned entities of Missile Technology Control Regime (MTCR) equipment or technology controlled pursuant to the Export Administration Act of 1979 or the Arms Export Control Act will be denied for two years; and
> (B) no U.S. government contracts relating to MTCR equipment or technology and involving the sanctioned entities will be entered into for two years.

Imposition of sanctions led to negotiations between the U.S. and China, resulting in the Joint Statement on Missile Proliferation signed on October 4, 1994. The Joint Statement provided:

> The United States of America and the People's Republic of China, in furtherance of their shared nonproliferation interests, have agreed to take the following steps as of today's date: (1) the United States will take the measures necessary to lift the sanctions imposed in August 1993, and (2) once the United States lifts the sanctions, China will not export ground-to-ground missiles featuring the primary parameters of the Missile Technology Control Regime (MTCR)—that is, inherently capable of reaching a range of at least 300 km with a payload of at least 500 kg.

> Both sides also reaffirm their respective commitments to the Guidelines and parameters of the MTCR, and have agreed to hold in-depth discussions on the MTCR.

On the same date, a Joint Statement on Stopping the Production of Fissile Materials For Nuclear Weapons was issued, stating:

> The United States of America and the People's Republic of China, in support of their shared interest in preventing the proliferation of nuclear weapons, have agreed to work together to promote the earliest possible achievement of a multilateral, non-discriminatory, and effectively verifiable convention banning the production of fissile materials for nuclear weapons or other nuclear explosive devices.

The Joint Statements and statements by Secretary of State Warren Christopher and Vice Premier and Foreign Minister Qian, are available at 5 Dep't St. Dispatch No. 42 at 701 (Oct. 17, 1994) at *http://dosfan.lib.uic.edu/ERC/briefing/dispatch/index.html*.

On November 1, 1994, Lynn E. Davis, Under Secretary for Arms Control and International Security Affairs, determined that it was "essential to the national security of the United States to waive" the sanctions that had previously been imposed. 59 Fed. Reg. 55,522 (Nov. 7, 1994). As a result of this waiver, "the U.S. government will no longer be required to deny licenses for exports to the entities described above or to activities of the Chinese government relating to missile development or production or affecting the development or production of electronics, space systems, or equipment, and military aircraft of Missile Technology Control Regime (MTCR) Annex equipment or technology. In addition, U.S. government contracts related to MTCR Annex items no longer are prohibited with these entities." *Id.* at 55,523. The missile sanctions on the Pakistani entities remained in place until they expired in August 1995. *See id.*

F. WEAPONS OF MASS DESTRUCTION ("WMD"): GENERAL MEASURES

1. Iran-Iraq Arms Non-Proliferation Act of 1992

The Iran-Iraq Arms Non-Proliferation Act requires the imposition of sanctions on countries that transfer to Iran or Iraq any goods or technology (including dual-use items and training or information) so as to contribute knowingly and materially to those countries' efforts to acquire WMD or "destabilizing numbers and types of advanced conventional weapons." Pub. L. No. 102–484, Div. A, Title XVI, §§ 1601–08, 106 Stat. 2571 (1992), as amended Pub. L. No. 104–106, Div. A, Title XIV, § 1408(a)–(c), 110 Stat. 494 (1996); Pub. L. No. 107–228, Div. B, Title XIII, § 1308(g)(1)(C), 116 Stat. 1441 (2002).

Section 1604 of the Act sets forth mandatory procurement and export sanctions against any "person" engaged in such activities. Section 1605 sets forth both mandatory and discretionary sanctions applicable to any "country" engaged in such activities. Mandatory sanctions include: suspension of U.S. assistance, opposition to multilateral development bank assistance, suspension of co-development or co-production agreements, suspension of military and dual-use technical exchange agreements, and a prohibition of exports to the sanctioned country of any item on the U.S. Munitions List (established pursuant to § 38 of the AECA, 22 U.S.C. § 2778). In addition, the act authorized the President to exercise the authorities of the International Emergency Economic Powers Act, except with respect to urgent humanitarian assistance.

Finally, § 1606 provided the President with authority to waive any sanction under §§ 1603, 1604 or 1605 if he determined and reported to Congress that the exercise of such authority "is essential to the national interest of the United States."

2. Executive Order Sanctions

a. Executive Order 12938

On November 14, 1994, President William J. Clinton issued Executive Order 12938, "Proliferation of Weapons of Mass Destruction." 59 Fed. Reg. 59,099 (Nov. 16, 1994). Key provisions of the executive order, declaring a national emergency and providing for sanctions in addition to those mandated by statute, are set forth below.

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.), the Arms Export Control Act, as amended (22 U.S.C. 2751 et seq.), Executive Orders Nos. 12851 and 12924, and section 301 of title 3, United States Code,

I, WILLIAM J. CLINTON, President of the United States of America, find that the proliferation of nuclear, biological, and chemical weapons ("weapons of mass destruction") and of the means of delivering such weapons, constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.

Accordingly, I hereby order:

* * * *

Sec. 4. Sanctions Against Foreign Persons. (a) In addition to the sanctions imposed on foreign persons as provided in the National Defense Authorization Act for Fiscal Year 1991 and the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, sanctions also shall be imposed on a foreign person with respect to chemical and biological weapons proliferation if the Secretary of State determines that the foreign person on or after the effective date of this order or its predecessor, Executive Order No. 12735 of November 16, 1990, knowingly and materially contributed to the efforts of any foreign country, project, or entity

to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons.

* * * *

Sec. 5. Sanctions Against Foreign Countries. (a) In addition to the sanctions imposed on foreign countries as provided in the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, sanctions also shall be imposed on a foreign country as specified in subsection (b) of this section, if the Secretary of State determines that the foreign country has, on or after the effective date of this order or its predecessor, Executive Order No. 12735 of November 16, 1990, (1) used chemical or biological weapons in violation of international law; (2) made substantial preparations to use chemical or biological weapons in violation of international law; or (3) developed, produced, stockpiled, or otherwise acquired chemical or biological weapons in violation of international law.
(b) The following sanctions shall be imposed on any foreign country identified in subsection (a)(1) of this section unless the Secretary of State determines, on grounds of significant foreign policy or national security, that any individual sanction should not be applied. The sanctions specified in this section may be made applicable to the countries identified in subsections (a)(2) or (a)(3) when the Secretary of State determines that such action will further the objectives of this order pertaining to proliferation. The sanctions specified in subsection (b)(2) below shall be imposed with the concurrence of the Secretary of the Treasury.
(1) Foreign Assistance. No assistance shall be provided to that country under the Foreign Assistance Act of 1961, or any successor act, or the Arms Export Control Act, other than assistance that is intended to benefit the people of that country directly and that is not channeled through governmental agencies or entities of that country.

* * * *

b. Executive Order 13094

On July 28, 1998, President Clinton issued Executive Order 13094, amending Executive Order 12938, effective July 29,

1998. 63 Fed. Reg. 40,803 (July 30, 1998). Executive Order 13094, excerpted below, significantly expanded the authority under Executive Order 12938 to impose sanctions against foreign entities determined to have materially contributed (or attempted to materially contribute) to efforts of a foreign country to acquire WMD (as already stated in 12938), or (additionally) the means of delivering them (i.e., missile systems or technology).

---

* * * *

(a) Section 4 of Executive Order 12938 of November 14, 1994, is revised to read as follows:

"Sec. 4. Measures Against Foreign Persons.

(a) Determination by Secretary of State; Imposition of Measures. Except to the extent provided in section 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)), where applicable, if the Secretary of State determines that a foreign person, on or after November 16, 1990, the effective date of Executive Order 12735, the predecessor order to Executive Order 12938, has materially contributed or attempted to contribute materially to the efforts of any foreign country, project, or entity of proliferation concern to use, acquire, design, develop, produce, or stockpile weapons of mass destruction or missiles capable of delivering such weapons, the measures set forth in subsections (b), (c), and (d) of this section shall be imposed on that foreign person to the extent determined by the Secretary of State in consultation with the implementing agency and other relevant agencies. Nothing in this section is intended to preclude the imposition on that foreign person of other measures or sanctions available under this order or under other authorities.

(b) Procurement Ban. 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 any foreign person described in subsection (a) of this section.

(c) Assistance Ban. No department or agency of the United States Government may provide any assistance to any foreign person described in subsection (a) of this section, and no such foreign

person shall be eligible to participate in any assistance program of the United States Government.
(d) Import Ban. The Secretary of the Treasury shall prohibit the importation into the United States of goods, technology, or services produced or provided by any foreign person described in subsection (a) of this section, other than information or informational materials within the meaning of section 203(b)(3) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)).
(e) Termination. Measures pursuant to this section may be terminated against a foreign person if the Secretary of State determines that there is reliable evidence that such foreign person has ceased all activities referred to in subsection (a) of this section.
(f) Exceptions. Departments and agencies of the United States Government, acting in consultation with the Secretary of State, may, by license, regulation, order, directive, exception, or otherwise, provide for:
(I) Procurement contracts necessary to meet U.S. operational military requirements or requirements under defense production agreements; intelligence requirements; sole source suppliers, spare parts, components, routine servicing and maintenance of products for the United States Government; and medical and humanitarian items; and (II) Performance pursuant to contracts in force on the effective date of this order under appropriate circumstances."

* * * *

Sanctions have been imposed under these executive orders in numerous cases since the expansion of the entity sanctions in 1998. *See, e.g.*, 60 Fed. Reg. 42,089 (Aug. 6, 1998) and 64 Fed. Reg. 2935 (Jan. 19, 1999). On February 23, 1999, the Office of Foreign Assets Control, Department of the Treasury, issued a final rule implementing Executive Order 13094. 64 Fed. Reg. 8715 (Feb. 23, 1999).

Cross-references

War crimes, crimes against humanity and genocide, **Chapter 3.B.2.**
Attacks on civil aircraft in counternarcotics, **Chapter 3.B.3.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.*

B

P

Subject Index