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20 April 1999

TO: L/T – Robert Dalton

FROM: L/PIL – Harold Burman

Re: Question concerning standards for rejection of PIL projects

Bob, in response to the question raised, the following may be helpful as to the reasons for our positions that the U.S. would not support certain PIL projects proposed in the 1990's. Projects rejected by the U.S. were in all but one case not approved by the IO's 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 IO's 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.

Please let us know if additional information on any of these developments would be of assistance.