# DIGEST OF
# UNITED STATES PRACTICE
# IN INTERNATIONAL LAW

## 1989–1990

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**Office of the Legal Adviser**
**United States Department of State**


**INTERNATIONAL LAW INSTITUTE**

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# Preface

With this volume covering the years 1989-1990, we have taken the first step in filling the gap between 1988, when the publication of the *Digest* ceased, and 2000, when annual publication of the *Digest* was renewed. We will complete the task with a set of consolidated volumes for 1991–1999, which we hope to publish in 2004.

At the same time, the editors will continue to prepare current-year volumes. The Institute is very pleased to work with the Office of the Legal Adviser to make these volumes available for the use of the international legal community.

Don Wallace, Jr.
*Chairman*
*International Law Institute*

# Introduction

This volume of the now-revived *Digest of U.S. Practice in International Law* is a kind of "legal prequel." As many users of the *Digest* know, the previous series of volumes covered the years 1973 though 1988, after which publication was suspended for over a decade. The first volume of the current series was issued just a year and half ago, covering calendar year 2000. The 2001 *Digest* followed quickly. The editors have now turned their efforts to filling in the "gap" between 1988 and 2000, while maintaining their commitment to produce current annual volumes in a timely fashion (the 2002 *Digest* is already in production). This volume, for 1989–90, represents the first step in that "catch up" process.

The material included herein remains topical and, in many instances, still timely. The year 1989–90 was a transitional period in international relations, as the world community continued to deal with implications of the end of the Cold War and the unsteady emergence of a new era. Many of the tensions and ambiguities of the time are reflected in the documents excerpted in this volume. For example, the Immigration Act of 1990 was adopted against the background of domestic U.S. concerns about terrorism, admission of refugees and exclusion of aliens—issues that continue to be important today. Other significant domestic law issues involved reservations to treaties (in this case, the 1948 Genocide Convention), the application of doctrines of foreign sovereign immunity (the *Wallenberg* Case), the interplay between sanctions and foreign assistance (e.g., Hungary, Poland, Czechoslovakia and the German Democratic Republic), and the allocation of foreign affairs authority in our federal system.

At the same time, the volume records U.S. efforts to deal effectively with the legal dimensions of very diverse issues on the international plane, including the Iraqi attack on the U.S.S. *Stark*, the

downing of Iran Air Flight 655, the deployment of U.S. armed forces in Panama, maritime interdiction incidents, irregular rendition of criminal suspects, and the Treaty on Conventional Forces in Europe. Concerns about human rights, terrorism, and the war on drugs are indicated by the adoption of domestic legislation implementing, or relating to the implementation of, the UN Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Montreal Protocol on Suppression of Unlawful Acts of Violence at Airports, and the IMO Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (negotiated in the aftermath of the *Achille Lauro* incident) and its related Protocol on Fixed Platforms.

The aim of the Office of the Legal Adviser in renewing publication of the *Digest*, and particularly in reaching back in time to fill in the missing years, remains to provide practitioners, scholars and the public, as well as governmental officials, with ready access to documents and other information regarding U.S. views and actions in the most important areas of international law. As readers will appreciate, this effort requires a substantial amount of time and resources. We consider it worthwhile and continue to solicit comments and suggestions from those who use the *Digest*, to make it more useful and more usable.

Once again, I want to express my thanks to the editors of and contributors to the *Digest*, in particular this year to Meg Pickering, to whom fell the initial task of drafting this volume, and Jami Borek, whose support and assistance made that undertaking possible. The co-editors of this series, Sally Cummins and David Stewart, were able to complete the effort, with the exceptionally able assistance of Joan Sherer, one of the librarians in the Office of the Legal Adviser.

Even as work progresses on the *Digest* for the current (2002) annual volume, efforts are well underway to compile the material for the period 1991–1999, which we and the International Law Institute hope to publish in 2004.

William H. Taft, IV
The Legal Adviser
U.S. Department of State
April 2003

# Note from the Editors

With this volume we begin the process of filling in what we have come to refer to as "the gap years": the period from 1989 to 1999 during which the *Digest of U.S. Practice in International Law* was not published. As always, we want to thank our colleagues here in the Office of the Legal Adviser as well as Professor Don Wallace, Jr. and Peter B. Whitten, both of the International Law Institute, without whom this volume would not exist.

The *Digest 1989–90* is unique in a variety of ways. The volume was initially drafted by Meg Pickering nearly a dozen years ago. The advantage in that fact is that she was well-positioned to collect documents relevant to the period. Unfortunately, due to resource limitations, the volume was not published at that time. In preparing to publish it now, we have reorganized the contents to follow the subject matter structure introduced in *Digest 2000*. At the same time, the drafting of individual entries remains closer to the style of the older *Digest* volumes.

As readers familiar with the *Cumulative Digest 1981–1988* are aware, the three volumes of that series were not published until 1994 and 1995. In the final preparations, a number of issues were updated through the publication date. Where that updating was comprehensive, entries in *Digest 1989–90* are briefer than their importance might otherwise warrant, with a cross-reference back to the *Cumulative Digest*.

As with *Digest 2000* and *Digest 2001*, the initial current-year volumes in the revived series, we have endeavored in this volume to provide citations to publicly available sources for the full text of documents excerpted here. Not surprisingly, far fewer of these documents are available on the internet. In addition, due to the evolution of the computer systems in the Department of State, electronic versions of most of the documents do not exist.

Nevertheless, for documents where there is no readily available public source in print or on the internet, we are again making as many as possible available on the State Department website at *www.state.gov/s/l*. Some documents, such as telegrams, proved to be too costly to prepare in compliance with regulations on government internet postings. We believe, however, that the excerpts in the book are sufficiently extensive so that this omission will not present any real problems for the reader.

As in previous volumes, selections in this volume reflect our 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.

Margaret S. Pickering
Sally J. Cummins
David P. Stewart
April 2003

# CHAPTER 1

# Nationality, Citizenship and Immigration

## A. NATIONALITY AND CITIZENSHIP

### 1. Parentage Blood Testing in Filiation Claims

#### *a. Citizenship by birth*

In October 1989 the State Department provided guidance to the U.S. Embassy in Athens, Greece, concerning possible use of blood tests to establish whether a child is the blood issue of U.S. parents and therefore has a claim to U.S. citizenship by birth abroad to a U.S. citizen parent. The telegram included the following information:

> Parentage blood testing provides the claimant with an additional means of attempting to establish such a claim. Parentage tests involve laboratory procedures performed on blood samples obtained from the child and the putative mother and father. Conclusions in parentage blood testing are based upon the principle that the child inherits genetic markers in his or her blood from each of his or her natural parents. Parentage blood tests cannot prove with 100 percent certainty that an individual is a child's parent, but can provide a statistical likelihood of parentage based on the identification of genetic markers in the general population. Parentage blood tests can establish definitively that an individual is not a child's parent as a result of the absolute exclusion of the putative parent due to the absence of genetic markers present in the child's blood from the samples of either putative parent. At the

> present time, the cumulative exclusion rate of the entire gamut of parentage blood tests is 99.98 percent. Therefore, it is possible that if an individual is not excluded after all testing is conducted there is only a .02 percent probability that another individual is the child's parent.
>
> When the Department of State agrees to consider parentage blood tests as evidence in a citizenship case, the testing must be conducted in accordance with the joint American Medical Association—American Bar Association guidelines on parentage blood testing, the standards for parentage testing laboratories of the American Association of Blood Banks and the Department of Health and Human Services Guidelines of 1981. Moreover, the testing must be conducted at a laboratory accredited by [the] American Association of Blood Banks for parentage testing or included in the list of blood testing laboratories prepared by the Department of Health and Human Services.

Dept. of State Telegram to U.S. Embassy Athens, Greece, October 2, 1989.

### *b. Immigrant visas*

During 1989 and 1990, issues regarding parentage blood testing also arose in the area of immigrant visa issuance. In response to one U.S. consulate's inquiry regarding the use of blood tests to verify relationships relied on by applicants to qualify for immigrant visas, the Department of State noted that blood tests would normally only be explored, where appropriate, by the INS in the course of petition adjudication, as discussed in 9 FAM 42.41 PN 4. The telegram also explained that approval by INS of a petition is itself considered to establish a valid relationship between the petitioner and alien beneficiary. Therefore, the consulate "should not question approved petitions unless information becomes available that was not available to INS at the time of petition adjudication. In those cases the petition should be returned to INS for reconsideration" under 9 FAM 42.41 N1. Telegram from the Department of State to U.S. Consulate Guangzhou, May 11, 1989.

The use of blood tests to combat immigrant visa fraud was raised by several posts during this period. The U.S. Embassy in Manila reported:

> The immigrant visa section uses HLA genetic testing as a means of confirming filiation in cases where the parentage of applicants is in doubt, when there is no independent documentary evidence to substantiate the alleged relationship, and when circumstances of the case suggest that the claimed blood relationship may in fact not exist. . . .

Telegram from U.S. Embassy, Manila, to the Department of State, June 7, 1990.

On October 9, 1990, the State Department authorized the use of DNA "profiling" (genetic fingerprinting) in a specific case as a means of establishing definitively the relationship between a petitioner and beneficiary. The Department provided the following guidance regarding the use of such blood tests:

> Neither the Department nor the INS has as yet established guidelines for DNA profiling although INS has such guidelines under consideration. . . .
>
> * * * *
>
> Notwithstanding the lack of established guidelines, Department authorizes post in this case repeat in this case to suggest genetic profiling to the applicant as a voluntary means of establishing identity and entitlement to status. . . . Applicant should be advised that, if he wishes to pursue his application in view of the documentary anomalies to date, conclusive establishment of his identity is crucial. To that end genetic fingerprinting at the expense of the petitioner and beneficiary might be one means of establishing entitlement to status. He should also be advised that, if he declines to take the test at this time, the petition will be returned to INS with a memorandum explaining the documentary discrepancies.

Telegram from the Department of State to U.S. Consulate, Karachi, October 9, 1990.

### 2. Standards for Determining Expatriation

On April 16, 1990, after years of litigation in which the courts increasingly failed to uphold loss-of-nationality determinations by the Department of State, the Department adopted new administrative standards for determining a U.S. national's intent, in connection with the Department's adjudication of cases involving potential loss of U.S. nationality based on the national's performance of a statutorily established expatriating act. Such acts result in loss of nationality when performed voluntarily and with the intention of relinquishing U.S. nationality. Section 349 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1481. As explained in a State Department telegram to all overseas posts:

> Changes in interpretation of citizenship law have made [loss of citizenship] cases progressively more difficult to manage. In a given case, the facts may yield a number of different interpretations, or leave conscientious officers in the field and at the Department unsure of whether the facts fall just short of or just beyond the applicable standards. The officer reviewing the case, however, is left with a simple and uncompromising choice: loss or retention of American citizenship.

Telegram from the Department of State, April 16, 1990.

The new standards were set out in a public information statement that provided, in pertinent part:

> The Department has a uniform administrative standard of evidence based on the premise that U.S. citizens intend to retain United States citizenship when they obtain naturalization in a foreign state, subscribe to routine declarations of allegiance to a foreign state, or accept non-policy level employment with a foreign government.
>
> *Disposition Of Cases When Administrative Premise Is Applicable*
>
> In light of the administrative premise discussed above, a person who:

(1) is naturalized in a foreign country;
(2) takes a routine oath of allegiance; or
(3) accepts non-policy level employment with a foreign government

and in so doing wishes to retain U.S. citizenship, need not submit prior to the commission of the potentially expatriating act a statement or evidence of his or her intent to retain U.S. citizenship since such intent will be presumed.

When such cases come to the attention of a U.S. consular officer, the person concerned will be asked to complete a questionnaire to ascertain his or her intent toward U.S. citizenship. Unless the person affirmatively asserts in the questionnaire that it was his or her intent to relinquish U.S. citizenship, the consular officer will certify that it was *not* the person's intent to relinquish U.S. citizenship and, consequently, find that the person has retained U.S. citizenship.

*Disposition Of Cases When Administrative Premise Is Inapplicable*

The premise that a person intends to retain U.S. citizenship is *not* applicable when the individual:

(1) formally renounces U.S. citizenship before a consular officer;
(2) takes a policy level position in a foreign state;
(3) is convicted of treason; or
(4) performs an act made potentially expatriating by statute accompanied by conduct which is so inconsistent with retention of U.S. citizenship that it compels a conclusion that the individual intended to relinquish U.S. citizenship. (Such cases are very rare.)

Cases in categories 2, 3, and 4 will be developed carefully by U.S. consular officers to ascertain the individual's intent toward U.S. citizenship.

*Applicability Of Administrative Premise To Past Cases*

> The premise established by the administrative standard of evidence is applicable to cases adjudicated previously. Persons who previously lost U.S. citizenship may wish to have their cases reconsidered in light of this policy. . . . Each case will be reviewed on its own merits taking into consideration, for example, statements made by the person at the time of the potentially expatriating act.

*Dual Nationality*

> When a person is naturalized in a foreign state (or otherwise possesses another nationality) and is thereafter found not to have lost U.S. citizenship, the individual consequently may possess dual nationality. It is prudent, however, to check with authorities of the other country to see if dual nationality is permissible under local law. The United States does not favor dual nationality as a matter of policy, but does recognize its existence in individual cases.

"Advice about Possible Loss of U.S. Citizenship and Dual Nationality," Bureau of Consular Affairs, U.S. Department of State; *reprinted in* Interpreter Releases, pp. 1092–94 (October 1, 1990).

### 3. Retention of Citizenship

In a telegram to all diplomatic and consular posts of February 1, 1989, the Department established simplified procedures for adjudication of cases involving former section 301(b) of the Immigration and Nationality Act, 8 U.S.C. § 1401(b). Former section 301(b) established requirements for physical presence in the United States for the retention of U.S. citizenship by certain citizens who acquired citizenship by birth outside the U.S. and who had only one U.S. citizen parent. Due to changes in U.S. citizenship statutes, which determine citizenship as of the time of birth, the provision was applicable to persons born between May 24, 1934 and October 10, 1952. The telegram addressed the affirmative defenses that would excuse noncompliance with the physical presence and other retention requirements.

First, the telegram addressed the affirmative defense of "unawareness," where the person had not been aware of a possible claim to U.S. citizenship:

> [U]nless there is evidence of an applicant's awareness of his claim to U.S. citizenship, we will accept the applicant's credible and convincing statements of unawareness.
>
> * * * *
>
> In some cases direct evidence of knowledge of a claim could be imputed to the applicant if an applicant's sibling previously inquired or applied for documentation as an American citizen. However, the use of such evidence to counter a claim of unawareness would require not only a statement from the sibling, but a thorough development of the sibling's awareness case as well. In this regard, there is no requirement . . . to query each sibling and parent of the applicant. Post should attempt to develop only that evidence which would appear to refute the applicant's statements. In any case, it should not be necessary to require a personal appearance by any sibling.
>
> Posts may consider evidence which is circumstantial but nevertheless probative in assessing a claim of unawareness. For example, there has been a substantial American presence in the Philippines since late in the last century. An unawareness claim from an applicant from the Philippines with an English surname might, therefore, raise questions that a similar claim in the United Kingdom would not raise. Thus, there may be, in any case, historical or cultural factors which should be taken into consideration.

Next, the telegram addressed the affirmative defense of impossibility of performance:

> This excuse is most likely to be substantiated in totalitarian states where government permission was required to depart the country. (This is not to be confused with an instance in which a person considered the possibility of his or her relocation to the United States to be merely difficult, inconvenient, or financially disadvantageous.)

* * * *

> Since claims of inability often require evidence of positive action on the part of the applicant, they have generally been easier to prove than unawareness claims (which require proving a negative). However, it is not sufficient to merely assert that compliance was attempted.
>
> While cases may not be adjudicated solely under a blanket acceptance of inability for periods during which compliance is known to have been impossible, posts may acknowledge that, during certain periods, persons would not have been permitted to leave a country, and that it was common knowledge during those periods that efforts to leave the country would entail substantial risk. For example, we know that emigration from most Eastern European countries was extremely difficult after the second World War. Requests to emigrate still carry substantial political risk in some bloc countries, even in this period of "openness." Thus, [in such countries] should a former American citizen present an application based on a credible claim that he would have traveled to the U.S. to comply with retention requirements but found such travel forbidden, directly or indirectly, the consular officer should accept that claim as an effective defense to the retention requirements.

Finally, the telegram reviewed the defense of official misinformation:

> Noncompliance with the retention requirements will also be excused in those cases in which the applicant can affirmatively demonstrate that he was misinformed by an agent of the federal government regarding the retention requirements or, in rare cases, the underlying claim to citizenship. (In this context, an agent is an employee of the federal government who might reasonably be expected to have knowledge of citizenship matters.) Such cases arise very infrequently. It is incumbent upon the applicant to provide convincing evidence of misinformation beyond a simple self-serving statement.
>
> One example of a possible misinformation defense is a case where the applicant was issued a full validity pass-

port when, in fact, the passport should have been limited for purposes of compliance with the retention of citizenship provisions.

Conversely, an incorrect denial of a legitimate claim to citizenship could lead to a failure to comply with retention requirements. The denial of passport services, for example, could result in a citizen's inability to meet retention requirements. That denial would anchor a strong affirmative defense on retention in the event of a correct adjudication of the underlying claim at some later date.

On occasion, applicants may present official correspondence which appears to have inadvertently misrepresented retention requirements or other laws, policies or procedures, resulting in a failure to comply.

### 4. Status of Residents of Commonwealth of the Northern Mariana Islands

In 1975 the United States and the Northern Mariana Islands, then part of the Trust Territory of the Pacific Islands ("TTPI"), which had been administered by the United States since 1947, concluded the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, approved by Congress in 1976, Act of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (1976). On November 3, 1986, President Ronald Reagan formally terminated the TTPI and, among other things, declared effective parts of the covenant with the Northern Mariana Islands, creating the Commonwealth of the Northern Mariana Islands ("CNMI"). Presidential Proclamation 5564, 51 Fed. Reg. 40,399 (Nov. 3, 1986). *See* discussion of developments following this action in Chapter 5.B.below and in *Cumulative Digest 1981–1988* at 442–455, 503–507.

Under section 301 of the covenant, persons meeting requirements of birth or residence in the Mariana Islands were determined to be U.S. citizens as of November 3, 1986. On May 31, 1989, in order to address certain problems that had arisen in the application of section 301's criteria, the INS issued a memorandum attaching a list, agreed to by the Department of State and the INS, of documentary requirements and procedures for adju-

dicating applications for citizen identification cards. (*Reprinted in* Interpreter Releases, pp. 756–61 (July 10, 1989).) The memorandum noted that certain additional, unresolved questions had been referred to the general counsel of the INS for review.

On June 9, 1989, the general counsel of the INS issued a memorandum addressing questions concerning the status of aliens who do not qualify as "immediate relatives under section 506(c) of the Covenant." Section 506(c) provided special procedures for immediate relatives of U.S. citizens residing permanently in the CNMI, as follows:

> With respect to aliens who are "immediate relatives" (as defined in Subsection 201(b) of [the Immigration and Nationality Act]) of United States citizens who are permanently residing in the Northern Mariana Islands all the provisions of the said Act will apply, commencing when a claim is made to entitlement to "immediate relative" status. A person who is certified by the Government of the Northern Mariana Islands both to have been a lawful permanent resident of the Northern Mariana Islands and to have had the "immediate relative" relationship denoted herein on the effective date of this Section will be presumed to have been admitted to the United States for lawful permanent residence as of that date without the requirement of any of the usual procedures set forth in the said Act. For the purposes of the requirements of judicial naturalization, the Northern Mariana islands will be deemed to constitute a State as defined in Subsection 101(a) paragraph (36) of the said Act. The Courts of record of the Northern Mariana islands and the District Court for the Northern Mariana Islands will be included among the courts specified in Subsection 310(a) of the said Act and will have jurisdiction to naturalize persons who become eligible under this Section and who reside within their respective jurisdictions.

The memorandum concluded that aliens not covered by 506(c) do not enjoy comparable advantages. In pertinent part, the memorandum stated:

The CNMI is a self-governing political entity "in political union with and under the sovereignty of the United States." CNMI Covenant, art. I, section 101. The CNMI Covenant grants a considerable degree of protection to the CNMI's right to self-government. For example, Federal legislation that "cannot . . . be made applicable to the several States" does not apply to the CNMI unless Congress expressly makes the legislation apply to the CNMI. Id., art. I, section 105. . . .

Immigration is a matter subject to the control of the CNMI Government. With three narrow exceptions, the immigration and naturalization laws of the United States do not apply in the CNMI. Id., art. V, section 503(a).* The Covenant's drafting history reveals that the drafters intended section 503(a) to give the CNMI the authority to enact its own immigration laws. Section-By-Section Analysis, reprinted in Hearing on H.J. Res. 549, H.J. Res. 550 and H.J. Res. 547 Before the Subcommittee on Territorial and Insular Affairs of the Committee on Interior and Insular Affairs, House of Representatives, 94th Cong., lst Sess., at 626, 642 (Volume XI of Hearings Before the House Committee on Interior and Insular Affiars, 94th Cong., lst Sess.). Congress knew that its approval of the language of section 503(a) would permit the CNMI to enact its own immigration law. H.R.Rep. 364, 94th Cong., 1st Sess. at 9.

One exception to section 503(a) is relevant to the questions . . . presented. This exception concerns aliens who are the section 201(b) [of the Immigration and Nationality Act ("INA")] immediate relatives of United States citizens who reside permanently in the CNMI. CNMI Covenant, art. V, section 506(c). All of the provisions of the INA

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* [Editors' Note: Section 503 provides, in pertinent part:
The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Marianaa Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:

(a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States. . . .]

> apply to these immediate relatives. Id. For the purposes of this exception, the CNMI is deemed to be included in the INA's definition of the "United States." Id., section 506(a). The CNMI is also deemed to be a "State" for the purposes of the residence requirements for the naturalization of these immediate relatives. Id., section 506(c). The INA does not apply, however, to aliens who do not qualify as section 201(b) immediate relatives, nor to aliens who are the section 201(b) immediate relatives of United States citizens who do not reside permanently in the CNMI. Id.

Legal Opinion, Office of the General Counsel to Assistant INS Commissioner James A. Puleo, June 19, 1989, *reprinted in* Interpreter Releases, pp. 894–98 (August 7, 1989).

Accordingly, the Office of the General Counsel concluded that aliens who do not qualify as covenant section 506(c) immediate relatives could not satisfy the resident requirement for naturalization as U.S. citizens through residence in the CNMI and could lose their lawful permanent resident status by residing in the CNMI.

Because an alien "must have been 'inspected and admitted or paroled into the United States' in order to qualify for adjustment of status," the opinion also concluded that "aliens who are in the CNMI but who do not qualify as section 506(c) immediate relatives do not qualify for adjustment of status under Section 245 of the Immigration and Nationality Act," and may not obtain adjustment of status under section 245 of the INA if they resided in the CNMI.

Finally, since Congress "conferred jurisdiction to naturalize on the CNMI courts of record . . . [only for] aliens who are section 506(c) immediate relatives," CNMI courts did not have jurisdiction to grant naturalization as U.S. citizens to these aliens. *Id.*

### 5. Other Developments

#### *a. Philippine war veterans*

Section 405 of the Immigration Act of 1990, Pub. L. No. 101–649, 8 U.S.C. § 1440 note, granted special naturalization benefits to

natives of the Philippines who served honorably under U.S. command or within the Philippine army, Scouts or recognized guerilla units during World War II. The law included a waiver of certain residency requirements for those veterans who apply for naturalization within two years of the law's enactment. Information about the Philippine war veterans' circumstances and efforts to obtain naturalization are discussed in *INS v. Hibi*, 414 U.S. 5 (1973); *Matter of Naturalization of 68 Filipino War Vets*, 406 F. Supp. 931 (N.D.Cal.1975); *United States v. Mendoza*, 464 U.S. 154 (1984); and *INS v. Pangilinan*, 486 U.S. 875 (1988).

#### *b. Surrogate parentage*

In June 1990 the Department of State responded to a request for guidance from an overseas post in a case concerning the citizenship at birth of a child born overseas through artificial insemination to a U.S. father and a surrogate mother who was not a U.S. citizen. The guidance indicated that, as in all cases of children born abroad to an American citizen parent, a blood relationship between the parent and child must be proved. In the case of artificial insemination by the citizen parent, evidence such as certification by appropriate medical authorities as to all facts and circumstances surrounding the entire insemination procedure would be required. In addition, the citizen parent would have to prove sufficient physical presence in the United States to transmit citizenship and, because the child would be considered to have been born out of wedlock to a U.S. citizen father, the child would have to be legitimated prior to age 18. Telegram from the Department of State to Embassy Vientiane, June 1, 1990.

## B. PASSPORTS

### 1. Reinstatement of Revoked Passport

On January 21, 1987, Philip Agee applied for a passport at the United States Embassy in Madrid. Agee's U.S. passport had been revoked in 1979 on the basis that his "activities abroad were causing or likely to cause serious damage to the national security or the foreign policy of the United States," 22 C.F.R. §§ 51.70(b)(4)

and 51.71(a)(2002). Agee, a former CIA employee, had engaged in a campaign to expose the identity of CIA agents, and was allegedly involved with the Iranian captors of U.S. Embassy employees in Iran. The passport revocation was upheld by the U.S. Supreme Court. *Haig v. Agee*, 453 U.S. 280 (1981). *See Digest 1979*, pp. 293–97; *Digest 1980* at 125–32.

On June 29, 1987, Agee received a letter from the Department of State denying his request for a passport on the basis of 22 C.F.R. § 51.70(b)(5) (2002), which permits the Secretary to deny a passport where "[t]he applicant has been the subject of a prior adverse action . . . under [22 C.F.R. § 51.70 or 51.71 (2002)] and has not shown that a change in circumstances since the adverse action warrants issuance of a passport."

The decision took into account submissions made by Agee in April 1987 through counsel addressing the changed circumstances requirement and requesting a hearing if his application were denied. The decision also relied on a letter of June 20, 1987, from William H. Webster, Director of Central Intelligence, asserting that Agee had assisted various hostile intelligence services and had violated an injunction to observe a secrecy agreement with the CIA. The Webster letter set forth twelve specific charges against Agee.

On October 15, 1987, the State Department held a hearing at which Agee appeared with counsel. The hearing officer recommended affirmation of the passport denial. This recommendation was accepted by Assistant Secretary for Consular Affairs Joan M. Clark on February 10, 1988.

Agee appealed to the Department of State's Board of Appellate Review, which remanded the case because the administrative record was incomplete. The board noted its concern that Agee had requested and been denied the opportunity to cross-examine Director Webster concerning the twelve charges included in his letter. Accordingly, in May 1989 the Department provided Agee with two declarations from the CIA, affirming that the information upon which its assertions were based was obtained in the normal course of CIA business, and that the sources were genuine and the translations accurate. The Department refused a request for a hearing, on the ground that it had fully met the requirements of the remand. The Department offered to entertain written interrogatories, but Agee submitted none.

On June 8, 1990, Agee filed suit in the U.S. District Court for the District of Columbia against the Department of State seeking a passport and asserting that the procedures followed by the Department in denying his passport application violated the Constitution, federal statutes and regulations. *Agee v. Baker*, No. 90-1350 (D.D.C. 1990) (GAG).

Both parties moved for summary judgment. The U.S. brief in the case emphasized that, "[u]nder applicable law, it is [Agee], already adjudged as a threat to national security and not entitled to an American passport, who bears the burden of showing that those circumstances have changed." Defendant's Opposition to Plaintiff's Cross-Motion for Summary Judgment, *Agee v. Baker*, No. 90-1350 (D.D.C. 1990) (GAG), p. 2 (Oct. 10, 1990), available at *www.state.gov/s/l*.

The brief then stated that plaintiff had failed to meet his burden of proof, noting that Agee, in fact, had not even challenged the adverse material placed in the record by the Department. Addressing the constitutional issue of the right to travel, the U.S. brief stated:

> Plaintiff has no constitutional right to travel on an American passport. . . . Contrary to plaintiff's arguments . . . there is no "proposed deprivation" of plaintiff's rights, only a question of whether an existing, and lawful, deprivation should continue.

*Id*. at p. 5.

The brief pointed out that, under the Administrative Procedure Act, 5 U.S.C. § 706, the Department of State's decision had to be upheld as long as it was not arbitrary and capricious, and was rationally based on the record. The record in the case was summarized as follows:

> Here, the evidence before the Secretary showed that, while plaintiff had submitted some materials for prepublication review by the CIA, there was also reason to believe that plaintiff had made public statements concerning the CIA's activities without approval, that he repeated his previously-voiced intention to engage in a campaign against the CIA, and that he enjoyed the favor of governments

> hostile to the United States. In these circumstances, it was entirely rational for the Department to conclude that plaintiff's circumstances had not changed and consequently, that he was not entitled to a reissued passport.

*Id.* at 13.

As to Agee's procedural assertions, the U.S. government took the view that the Department's regulations were properly applied, and that Agee was not denied any constitutional right to cross-examination because he refused to submit written interrogatories when given the opportunity.

On October 30, 1990, the district court granted the U.S. motion for summary judgment and dismissed Agee's complaint. *Agee v. Baker*, 753 F. Supp. 373 (D.D.C. 1990). The court addressed in detail what it viewed as Agee's central claims, "that the Department deprived him of a passport without due process of law by acting on the basis of unreliable evidence and denying him adequate information and confrontation regarding the sources of that evidence." *Id.* at 385. With regard to Agee's procedural claim, the court stated:

> Undoubtedly, the Court would normally have an obligation to test the government's passport procedures provided to ensure consistency with the Fifth Amendment's Due Process Clause. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). International travel, while not an unqualified right, is a liberty interest which the Fifth Amendment forbids the government from taking away from a citizen without procedural due process. *Kent v. Dulles*, 357 U.S. 116, 125 (1958); *Haig v. Agee*, 453 U.S. at 306–07.
>
> In Agee's situation, possession of a United States passport is a matter of more than casual *desire* to travel. The Department states that Agee, who resides with his wife in Madrid, is free to come home without a passport. But Agee says he needs a passport to maintain his married life in Europe while continuing his world travel to earn a living by making speeches in the United States and elsewhere.

> The Department's passport regulatory authority can no longer be exercised by fiat, as it appears to have been in the past. The Department must have meaningful procedures adequate to resolve both passport issuance and passport revocation promptly and fairly. This role is of particular consequence today given the increasing necessity of foreign travel on the one hand and ever-present national security concerns on the other.
>
> Had Agee and his counsel fairly tested the existing procedures, the Court could by review of the administrative record consider whether or not Agee received the process due under the circumstances and act to correct any perceived deficiency. . . .
>
> * * * *
>
> A "clear and convincing evidence" burden imposed on the government, although often appropriate where a protected liberty interest is at stake, may be unwarranted in the case of a person who has been the subject of a prior adverse passport determination. However, if the applicant makes a credible showing of changed circumstances, the Due Process Clause would clearly require the government to present some reliable, verifiable evidence rebutting the applicant's showing. On the other hand, if the government makes such a showing, and new, serious charges are raised, the applicant cannot simply remain silent and prevail.
>
> * * * *
>
> In the last analysis, this is an instance where the Court must accept the sufficiency of the administrative decision because there was no attempt to exhaust the processes provided and, accordingly, the issues tendered by Agee are not ripe. There is nothing on the face of the passport regulations that denies due process, and one who claims more process is due has the burden of fairly testing the adequacy of what is provided.

*Id.* at 386–88 (footnotes omitted).

## C. IMMIGRATION AND VISAS

### 1. Exclusion of Aliens with AIDS

In 1987, consistent with the requirement of section 518 of the Supplemental Appropriations Act, 1987, Pub.L. No. 100-71, 101 Stat. 391, 475 (1987), the U.S. Department of Health and Human Services added AIDS and infection with the human immunodeficiency virus ("HIV") to the list of dangerous contagious diseases that make an alien inadmissible to the U.S. under § 212(a)(6) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(6), now codified as 1182(a) (1)(A) (2002). The current list is found at § 42 C.F.R. § 34.2(b) (2001). In a telegram of March 2, 1988, to all INS field offices, James A. Puleo, INS assistant commissioner for examinations, explained that there was no statutory authority to waive this ineligibility for immigrant and fiancé visa cases, but that in refugee, legalization and nonimmigrant visa cases the ineligibility could be waived under discretionary authority of the Attorney General. Section 212(d)(3) of the INA, 8 U.S.C. § 1182(d)(3)(2002). The telegram went on to state that this waiver authority would not be used as a matter of policy except where the applicant could establish that (1) the danger to the public health of the United States created by the alien's admission to the United States was minimal, (2) the possibility of the spread of the infection created by the alien's admission to the United States was minimal, and (3) there would be no cost incurred by any level of government agency of the United States without prior consent of that agency. *See* 65 Interpreter Releases, p. 239 (March 14, 1988).

In April 1989 an immigration judge for the first time granted such a waiver for a nonimmigrant alien, overriding a decision by the INS. The alien had come to the United States to attend a health conference on AIDS issues. The INS district director had approved the waiver request, finding that the applicant had met the guidelines for a waiver. The INS associate commissioner for examinations had denied it, however, stating that "[a]lthough the Service is sensitive to the needs of people who want to exchange ideas, the Service has also, in these circumstances, a legal obligation to protect the health and safety of United States residents. The risk of harm by an AIDS-infected alien in the absence of humanitar-

ian reasons for the temporary admission of aliens far outweighs the privilege of an alien to enter the United States to participate in a conference." In overriding the INS denial, the immigration judge found that "the applicant has shown there is a minimal risk to the United States if he is admitted on a temporary basis." The applicant was required to post a $10,000 bond. The Board of Immigration Appeals refused to consider an INS request for a stay. 66 Interpreter Releases, pp. 427–28 (April 17, 1989).

Subsequently, the Department of Justice implemented a new policy permitting waivers to enable otherwise admissible nonimmigrant aliens with AIDS to enter the United States for up to 30 days to attend meetings, visit relatives or seek medical treatment. As explained in a May 25, 1989 telegram from Richard E. Norton, INS associate commissioner for examinations, to all INS field offices:

> . . . waivers and temporary admissions should be provided to those applicants who establish that their entry into the United States would confer a public benefit which outweighs any risk to the public health. A sufficient public benefit can include a showing that the short term nonimmigrant will be attending academic or health related activities (including seeking medical treatment), or conducting temporary business in the U.S. A sufficient public benefit can also include the applicant establishing that he or she will visit close family members in the United States. . . .

Briefly transiting the United States to engage in similar activities in a third country could also constitute a sufficient public benefit. *Id*. at 624–27 (June 6, 1989).

In early 1990, in response to information concerning several large scientific educational conferences in the United States that aliens infected with AIDS were expected to attend, the U.S. government modified visa application and waiver procedures to expedite processing and ensure confidentiality of information concerning HIV-infected individuals. 67 Interpreter Releases, pp. 190–91 (February 12, 1990); *id*. at 262–64 (March 5, 1990); 320–21 (March 19, 1990).

In April 1990 the attorney general exercised his discretionary authority under section 212(d)(3) to grant temporary 10-day visas

for persons attending certain scientific and academic conferences in the United States designated by the Department of Health and Human Services to be in the public interest. Under the attorney general's directive these persons did not have to identify whether they are HIV positive. 67 Interpreter Releases, pp. 467–68 (April 23, 1990); *Id.* at 535–36; 562 (May 14, 1990); 666–67 (June 18, 1990).

Section 601(a) of The Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990), amended subsection (a) of § 212 of the INA, 8 U.S.C. § 1182(a), to revise the grounds for excluding aliens, as discussed in section C.4. below. As to health-related grounds, it created a new subsection (a)(1), replacing the language that, among other things, required AIDS and HIV infection be included on a list of "dangerous contagious diseases" making an alien inadmissible absent waiver. The new subsection made excludable an alien "who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance," without specifying the inclusion of any specific disease. 8 U.S.C. § 1182(a)(l)(A)(i)(1990). The Congressional Conference Report on the Act commented as follows on the revised provision on health-related exclusions:

> The term in this section has been changed from "dangerous contagious diseases" to "communicable diseases of public health significance." By substituting the words "public health significance" for "dangerous," Congress intends to insure that this exclusion will apply only to those diseases for which admission of aliens with such disease would pose a public health risk to the United States.
>
> The Secretary of Health and Human Services shall determine the content of regulations regarding the list of communicable diseases of public health significance, notwithstanding previous amendments to the law or previous regulations setting forth the list of "dangerous, contagious diseases" under section 212(a)(6). . . .

H.R. Conf. Rep. No. 101-955, 101st Cong., 2d Sess. (1990), p. 128.

### 2. Visa Denial for Terrorist Activity: Consular Non-reviewability

In January 1988 Gerry Adams applied for a nonimmigrant visa to enter the United States to conduct a speaking tour. Adams was the president of Sinn Fein, an organization that the United States views to be the political arm of the Provisional Irish Republican Army. The U.S. consulate in Belfast denied the application on the basis of § 212(a)(28)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(28)(F) (1990),** because of Adams' alleged advocacy of and personal involvement with terrorist violence. Following this action several U.S. entities brought suit in federal court seeking to have the visa denial set aside, on the basis that they desired to exchange views with Adams on U.S. soil in accordance with their constitutional rights to free association and communication. In July 1989, the district court entered summary judgment for the State Department. The court first addressed the Department's argument that courts cannot review consular determinations of ineligibility:

> The government attempts to distinguish this action from those in which a visa denial has been found reviewable, because it involves a determination of ineligibility by a consular official, rather than the Attorney General's failure to grant a waiver of such ineligibility, as was the case in *Kleindienst v. Mandel* (408 U.S. 753, 770 (1972). The same rights are involved in this case as in those previously held justiciable. *See e.g., Kleindienst v. Mandel, supra; Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1985). I see no principled basis to hold justiciable decisions expressly committed to the Attorney General's discretion, while insulating from review determinations made by State Department officials based on clear statutory standards. In this case, the determination to deny Adams entry was not made solely by a consular officer, but was the decision of a senior State Department official. See, e.g., *Allende*

** This provision was eliminated in the extensive revisions to section 212(a) under § 601(a) of The Immigration Act of 1990, which introduced a new terrorism provision as 212(a)(3)(B), 8 U.S.C. 1182(a)(3)(B). *See* discussion in section C.5. below.

> *v. Shultz*, 845 F.2d 1111 (lst Cir. 1985), reviewing a visa denial initially based on subsection 28, but as to which the Secretary set aside the question of waiver, and instead based ineligibility on subsection 27, for which waiver is unavailable.

*Adams v. Baker*, Civil Action No. 88-1701-S, slip op. at 5–6 (D.Mass. July 10, 1989).

The court then rejected the plaintiffs' arguments that Adams was entitled to a visa on the basis of a waiver under the so-called McGovern amendment, 22 U.S.C. § 2691 (1979), and § 901 of P.L. 100-204 (1987), 8 U.S.C. § 1182 note (both repealed by Pub. L. No. 101-649 (1990).

> The basis for the determination of ineligibility in Adams' case was the State Department's conclusion that Adams has been personally involved with terrorist activities in the past, and is a current advocate of terrorist violence. Waiver was not recommended because of the potentially adverse impact on United States foreign policy of his admission. These constitute facially legitimate and bona fide reasons for the decision to deny Adams entry.
>
> * * * *
>
> As Adams was denied entry because of his personal involvement with terrorism, rather than protected association or ideas, neither the McGovern amendment nor section 901 were applicable.

*Adams v. Baker*, slip op. at 9–10. The court also rejected the plaintiffs' constitutional attack on 8 U.S.C. § 1182(a)(28)(F)(1990), holding the statute to be within Congress' power to regulate alien traffic across U.S. borders. The plaintiffs appealed the district court decision.

The U.S. brief on appeal to the U.S. Court of Appeals for the First Circuit emphasized its view that "the law is . . . clear that the courts have no authority to review consular determinations on visa applications," and that the standard of review for those immigration matters found appropriate for judicial scrutiny is

very narrow, limited in exclusion matters to a review of whether a "facially legitimate and bona fide reason" was provided, citing *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

As for the plaintiffs' argument attacking both the consular officer's judgment and the reliability of the information considered by the officer, the brief made the following points:

> First, while Adams denies "each and every one of the [Deputy Secretary's] accusations," the alien does not state that he had no personal involvement in any aspect of the violence that has wracked Northern Ireland, and nowhere disavows advocacy of acts of violence directed against government officers and property. Adams acknowledges if not expressly endorses the carnage, characterizing the IRA as a "military organization engaged in an armed insurrection against the British occupation," and he neither condemns nor criticizes the terrorism waged by that organization. Adams' declaration neither refutes nor conflicts with the consular judgment.
>
> Second and more important, it would not matter even if Adams had denied any advocacy of or involvement in the violence in Northern Ireland, or if he could prove that there were errors in the information underlying the visa determination. Factual determinations by the consular officers cannot be reviewed by the Secretary of State (8 U.S.C. § 1104(a)(1)), and cannot be reviewed by the courts. *See, e.g., Ventura-Escamill*, 647 F.2d [28], 31 [9th Cir. 1981], citing *Loza-Bedoya v. M*, 410 F.2d 343, 347 9th Cir. 1969). *See also Rivera de Gomez v. Kissinger*, 534 F.2d 518 (2d Cir.), *cert. denied*, 429 U.S. 897 (1976) (consular judgment on validity of marriage); *Burrafato*, 523 F.2d (554], 556 [2d Cir. 1975](failure of consular officer to specify visa denial grounds). The law entrusts the consular officers with the first and final judgment on questions of fact, and if Adams believed that the information considered by the government is inaccurate or incomplete, his (only) recourse would be to present his evidence to the consular officer. 22 C.F.R. 40.6 (1989).
>
> Similarly misdirected is appellants' attack on the evidentiary quality of the information underlying the visa

determination. Without conceding any of the criticisms, it does not matter whether the articles, books, and other materials referenced by the Deputy Secretary would be inadmissible at trial, or that the information concerning Adams' involvement in terrorism might be less than fully complete or reliable. Rules of civil procedure or evidence do not apply to the consular processing of visa applications; rather, to protect the United States against the various harms and evils embodied in the admission criteria, consular officers properly may consider all available information. *See*, *e.g.*, 22 C.F.R. 41.102(b), 41.103(b), and 41.105(a).

Finally, appellants are wrong in their suggestion that the statutory standard of "reason to believe" should be viewed as equivalent to probable cause. *See McMullen v.INS*, 788 F.2d 591, 598–99 & n.2 9th Cir. 1986). While the evidence linking Adams to terrorist violence satisfies such higher standards, all that is required is information sufficient to permit a "reasonable person" to believe that the alien falls within the statutory proscriptions. 22 C.F.R. 40.6 (1989); *see also Hamid v. INS*, 538 F.2d 1389, 1391 9th Cir. 1976). It is absurd to suppose that the consular officers would have the resources or authority to pursue factual issues in foreign countries with the precision and reliability of our domestic criminal justice system, or to suggest that alien admission be governed by evidentiary standards that deprive us of the protection afforded by the sound judgment of the officers who actually examine the visa applicants. See *Langhammer v. Hamilton*, 295 F.2d [642], 647 [lst Cir. 1961]. *Cf, Amanullah [v. Nelson]*, 811 F.2d [1,] 16–17 [lst Cir. 1987] (rejecting evidentiary hearings to test exclusion of aliens denied parole). Equally important, evidentiary arguments cannot obscure the *alien's* responsibility for the pertinent factual proof, for under our law it is the visa applicant who must prove himself eligible for admission to the United States. 8 U.S.C. §§ 1201(g), 1361.

Brief for Appellees, *Adams v. Baker*, No. 89-1903 at 23–26 (Dec. 20, 1989)(footnotes omitted). The brief is available at *www.state.gov/s/l*.

The brief then argued that Adams' personal advocacy of and support for terrorism meant that he did not qualify for waiver under the McGovern amendment or section 901, and rejected the plaintiffs' view that the First Amendment of the Constitution restrains the government's authority to make the political judgment of which aliens should be permitted to enter the U.S., noting: "[a] constitutional interest in ideas held by an alien simply does not translate into a constitutional right to 'import' that alien into the United States." *Id*. at 44.

The court of appeals affirmed the district court's decision. *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990). In its decision the court addressed the reviewability of consular visa determinations and whether there was a "facially legitimate and bona fide reason" to exclude Adams:

> The consular judgment regarding Adams' relationship to terrorist violence and the reliability of the information used by the consular officer in reaching that judgment is subject only to very narrow review. We note, first, that in the absence of statutory authorization or mandate from Congress, factual determinations made by consular officers in the visa issuance process are not subject to review by the Secretary of State, 8 U.S.C. § 1104(a)(1), and are similarly not reviewable by courts. E.g., *Wan Shih Hsie v. Kiley*, 569 F.2d 1179, 1182 (2d Cir.), *cert. denied, Wan Shih Hsie v. I.N.S.*, 439 U.S. 828 (1978); *Rivera de Gomez v. Kissinger*, 534 F.2d 518 (2d Cir.), *cert. denied*, 429 U.S. 897, (1976). Thus, while Section 901 does authorize judicial review over the question of whether there was a "facially legitimate and bona fide reason" for an alien's exclusion, that review is limited to the determination of whether there was sufficient evidence to form a "reasonable ground to believe" that the alien had engaged in terrorist activity.
>
> The decision to prohibit an alien from entering the United States under Section 901 *does* require that the government "know[] or ha[ve] reasonable ground to believe" that the alien has "engaged in a terrorist activity." But the Rules of Civil Procedure and Evidence are not applicable to the consular processing of visa applications. Instead, consular officers are permitted to consider all available

> information in making their determinations. See 22 C.F.R. 41.102(b), 41.103(b) and 41.105(a). The evidence so used need not have qualified for admission in a court of law. Thus, "reasonable belief" may be formed if the evidence linking the alien to terrorist violence is sufficient to justify a reasonable belief that the alien falls within the proscribed category. 22 C.F.R. 40.6; See also *Hamid v. I.N.S.*, 538 F.2d 1389, 1391 (9th Cir. 1976); *Kasravi v. I.N.S.*, 400 F2d 675, 677 (9th Cir. 1968) (superseded by statute on other grounds as stated in *McMullen v. I.N.S.*, 658 F.2d 1312 (9th Cir. 1981)).
>
> The question of whether the evidence is sufficient, however, to support a finding of "reasonable belief" is a question of law which courts must resolve. Upon review, we think that there is sufficient evidence to support such a finding, and hence that there was a "legitimate and bona fide reason" underlying the government's decision to exclude Adams from the United States. The fact that the information relied upon by the government came from printed sources does not render that belief intrinsically suspect, and the district court did not err in so concluding. The evidence of Adams' involvement in the violent activities of the IRA, both as a policy maker and as a field commander, provides a "facially legitimate and bona fide reason" for his exclusion. In making this determination, it is important to note that there need only have been a reasonable belief that Adams was involved in terrorist activity: it is not necessary to have proven his involvement in the activity beyond a reasonable doubt.

*Adams v. Baker*, 909 F.2d at 649.

### 3. Nonimmigrant Visa Waiver Pilot Program

Section 217 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1187, as added by section 313(a) of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3435 (1986), established a visa waiver pilot program for certain nonimmigrant visitors applying for admission to the United States

for a period not exceeding 90 days. The provision authorized the Attorney General and the Secretary of State to establish a pilot program under which, acting jointly, they could waive the nonimmigrant visa requirement set out in section 212(a)(26)(B) of the Immigration and Nationality Act (8 U.S.C. § 1182(a)(26)(B)), codified in its current form as 8 U.S.C. § 1182(a)(7)(B), in the case of certain aliens. Among other conditions, the alien had to be a national of a country that extended (or agreed to extend) reciprocal privileges to U.S. citizens and nationals and that was designated as a pilot program country pursuant to section 217(c) of the Act (8 U.S.C. § 1187(c)). Under that section, up to eight countries could be designated as pilot program countries. For the initial period of the pilot program, a country could be so designated only if two conditions were next: (1) the average number of refusals of U.S. nonimmigrant visitor visas for its nationals during the two preceding full fiscal years was less than two percent of the total number of nonimmigrant visitor visas granted or refused for such nationals; and (2) the average number of nonimmigrant visitor visa refusals during either of the two preceding full fiscal years was less than 2.5 percent of the total number of such visas for such nationals granted or refused during that year.

The Visa Waiver Pilot Program was implemented on July 1, 1988, for the United Kingdom, and on December 15, 1988, for Japan. 53 Fed. Reg. 24,898 and 50,160 (1988). A final rule issued on June 20, 1989, as an amendment to 8 C.F.R. § 217.5(a) by Richard E. Norton, Associate Commissioner, Examinations, Immigration and Naturalization Service, designated six additional countries for the program, with effective dates of implementation as follows: France and Switzerland, July 1,1989; the Federal Republic of Germany and Sweden, July 15, 1989; and Italy and the Netherlands, July 29, 1989. 54 Fed. Reg. 27,120 (1989). Consistent with the statutory intent to promote and facilitate international travel, the volume of travel to the United States had also been used in the designation process. The rule noted that the eight countries together accounted for over 50 percent of the 12.4 million nonimmigrants who entered the United States in fiscal year 1987 and of the 14.6 million in fiscal year 1988. Id. At the same time the State Department issued a corresponding final rule amending 22 C.F.R. 41.2(e). *Id*. *See also* 83 Am. J. Int'l 905 (1989).

### 4. Status of A and G Visa Holders

The Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1255a(a)(2)(B), provided that certain aliens in the United States illegally before January 1, 1982, could be legalized under certain conditions. An alien applying for legalization under this authority was required to establish that he or she had violated his or her non-immigrant visa prior to January 1, 1982, and that the unlawful status was known to the government. In *Ayuda, Inc. v. Thornburgh*, 1989 U.S. Dist. LEXIS 7497 (D.D.C. 1989) plaintiffs contended that any A or G visa holder (foreign diplomats or international organization employees, and their families) who had engaged in unauthorized employment was in "unlawful status" and therefore eligible for legalization under this provision. They urged the court to find that denial by the Immigration and Nationality Service of legalization of such visa holders who had admittedly violated the terms and/or conditions of their visas by engaging in unauthorized employment was contrary to the IRCA.

The government took the view that the plaintiffs were not in unlawful status because only the State Department could make that determination for A and G visa holders, and that the Department had not done so in these cases. As explained in a letter to the court from the Assistant Legal Adviser for Consular Affairs James G. Hergen in response to the court's request for the State Department's views:

> The Department of State decides the lawfulness or unlawfulness of an A/G visa holder's status. An A/G visa holder is lawfully admitted to the United States and has lawful status for only so long as the Secretary of State recognizes the A/G visa holder as being entitled to such status. Termination of recognition of an A/G visa holder's status is committed to the discretion of the Department of State. See, e.g., 22 C.F.R. 41.22(f). In addition, in order for an A-1 or G-1-visa holder to be deported, the INS must first obtain the approval of the Secretary of State (except in certain limited cases). 8 U.S.C. § 1251(e).
>
> No statute makes unauthorized employment a violation of the terms and conditions of, or failure to maintain,

> A/G status. Nor do Department of State or INS regulations make unauthorized employment a violation of the terms and conditions of, or failure to maintain, A/G status. The INS regulations explicitly recognize, however, that an A/G visa holder is to be admitted for so long as the Department of State recognizes the alien as entitled to that status. 8 C.F.R. 214.2(a)(1),(9)(1). The Department of State interprets this regulation to mean the A/G visa holders remain in lawful status and are not in violation of the terms and conditions of status for so long as the Department of State continues to recognize them as entitled to that status.
>
> Although the Department of State considers unauthorized employment by A/G visa holders to be inconsistent with their A/G status, the Department of State does not consider such unauthorized employment in and of itself as rendering the A/G visa holder's status unlawful. Despite unauthorized employment by an A/G visa holder, the Department of State nevertheless has the discretion to consider such A/G visa holder entitled to that status and not in violation of the terms and conditions of status.

Letter from Assistant Legal Adviser for Consular Affairs James G. Hergen to Judge Stanley Sporkin, United States District Court for the District of Columbia, April 7, 1989, available at *www.state.gov/s/l*.

The court found that plaintiffs were not in unlawful status, based upon the Department's letter and the laws and regulations it cited. The court concluded:

> To put it succinctly, an "A" or "G" visa holder who violates the terms or conditions of his or her visa cannot be deemed to have unlawful status unless and until action is taken by the Department of State.[3] Thus, it is clear that so long as the Department of State has not withdrawn recognition of "A" or "G" status, the "A" or "G" visa holder's status cannot be deemed to be illegal.

[3] Affording special treatment to foreign diplomats, ministers and representatives is neither inappropriate nor unusual. *See, e.g.*,

> U.S. Const. art. III, sec. 2, cl.2 ("[i]n all cases affecting Ambassadors, other public Ministers and Consuls, the Supreme Court shall have original Jurisdiction"); 8 U.S.C. § 1103(a) ("[t1he Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers. . . ."). Rather, such treatment reflects the role of international comity in domestic policy as well as the importance of diplomatic relations.

*Ayuda, Inc. v. Thornburgh*, 1989 U.S.Dist LEXIS 7497 at *6 (D.D.C. June 27, 1989).

### 5. Immigration Act of 1990: Exclusion of Aliens

On November 29, 1990, President George H. W. Bush signed the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, into law. In doing so, he made the following comments:

> Today I am pleased to sign S. 358, the "Immigration Act of 1990"—the most comprehensive reform of our immigration laws in 66 years. This Act recognizes the fundamental importance and historic contributions of immigrants to our country. S. 358 accomplishes what this Administration sought from the outset of the immigration reform process: a complementary blending of our tradition of family reunification with increased immigration of skilled individuals to meet our economic needs.
>
> The legislation meets several objectives of this Administration's domestic policy agenda—cultivation of a more competitive economy, support for the family as the essential unit of society, and swift and effective punishment for drug-related and other violent crime.
>
> S. 358 provides for a significant increase in the overall number of immigrants permitted to enter the United States each year. The Act maintains our Nation's historic commitment to family reunification visas allocated on the basis of family ties. At the same time, S. 358 dramatically increases the number of immigrants who may be admit-

ted to the United States because of the skills they have and the needs of our economy. This legislation will encourage the immigration of exceptionally talented people, such as scientists, engineers, and educators. Other provisions of S. 358 will promote the initiation of new business in rural areas and the investment of foreign capital in our economy.

I am also pleased to note that this Act facilitates immigration not just in numerical terms, but also in terms of basic entry rights of those beyond our borders. S. 358 revises the politically related "exclusion grounds" for the first time since their enactment in 1952. These revised grounds lift unnecessary restrictions on those who may enter the United States. At the same time, they retain important administrative checks in the interest of national security as well as the health and welfare of U.S. citizens.

Immigration reform began in 1986 with an effort to close the "back door" on illegal immigration through enactment of the 1986 Immigration Reform and Control Act (IRCA). Now, as we open the "Front door" to increased legal immigration, I am pleased that this Act also provides needed enforcement authority.

S. 358 meets several objectives of my Administration's war on drugs and violent crime. Specifically, it provides for the expeditious deportation of aliens who, by their violent criminal acts, forfeit their right to remain in this country. These offenders, comprising nearly a quarter of our Federal prison population, jeopardize the safety and well-being of every American resident. In addition, S. 358 improves this Administration's ability to secure the U.S. border—the front lines of the war on drugs—by clarifying the authority of Immigration and Naturalization Service enforcement officers to make arrests and carry firearms.

S. 358 also improves the antidiscrimination provisions of the IRCA. These amendments will help deter discrimination that might be related to the implementation of "employer sanctions" under the 1986 law. In this regard, S. 358 helps to remedy unfortunate side effects of this important deterrent to illegal immigration.

> In signing this legislation, I am concerned with the provision of S. 358 that creates a new form of relief known as "temporary protected status." The power to grant temporary protected status would be, except as specifically provided, the "exclusive authority" by which the Attorney General could allow otherwise deportable aliens to remain here temporarily because of their nationality or their region of origin. I do not interpret this provision as detracting from any authority of their region of origin. I do not interpret this provision as detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases. Any attempt to do so would raise serious constitutional questions.

26 WEEKLY COMP. PRES. DOC. 1946 (Nov. 29, 1990).

Section 601 of the Act extensively revised section 212 of the Immigration and Nationality Act, 8 U.S.C. § 1182 (1990), which lists grounds for exclusion of aliens from the United States. Overall, the exclusion provisions of the 1990 Act, as noted in the Congressional Conference Report:

> [P]rovide for a comprehensive revision of all the existing grounds for exclusion and deportation, including the repeal of outmoded grounds, the expansion of waivers for certain grounds, the substantial revision of security and foreign policy grounds, and the consolidation of related grounds in order to make the law more rational and easy to understand.

H.R. Conf. Rep. No. 101-955, 101st Cong., 2d Sess. (1990), p. 128.

Important new or revised provisions included those in the areas of technology transfer, terrorism, foreign policy, membership in a totalitarian party, and international child abduction, and review of the exclusion lists used for screening aliens applying for visas or admission to the United States, discussed below. Health-related issues are discussed *supra*, section C.1.

### *a. Technology transfer*

Subsection 212(a)(3)(A)(i) of the INA was aimed at excluding aliens entering the United States "to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information." The Conference Report commented that:

> In addition to permitting the exclusion or imposition of restrictions on aliens who may engage in activity which would violate any laws relating to export of sensitive material, this provision also permits the exclusion or imposition of restrictions on aliens who engage in activity to evade such laws. While this standard is clearly less strict than actual violation of such laws, the conferees intend that it be employed only in cases where such evasion would harm the national security. An example might include a case in which nationals of a hostile foreign country seek access to a university facility which conducts research which is vital to national security, including, for example, aerospace research.

H.R. Cong. Rep. No. 101-955, 101st Cong., 2d Sess. (1990), pp. 131–32.

### *b. Terrorism*

Subsection 212(a)(3)(B) provided that an alien who has engaged in a terrorist activity, or who a consular officer or the Attorney General knew or had reason to believe was likely to engage in a terrorist activity, was excludable. 8 U.S.C. § 1182(a)(3)(B)(1990). The statute also stated that "[a]n alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity." The law then defined "terrorist activity," 212(a)(3)(B)(ii), and "engage in terrorist activity," 212(a)(3)(B)(iii). As Congress noted in the Conference Report on the Act:

> For the purposes of this legislation, the conferees consider terrorist activity to include, but not be limited to, conduct

which is prohibited by international conventions relating to terrorism, such as the Convention for the Unlawful Seizure of Aircraft (the Hague, 1970), the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1971), the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents (New York, 1973), The Convention Against the Taking of Hostages (New York, 1979), the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

Also illustrative of the acts which should be considered terrorist acts for the purpose of this legislation are those which are encompassed within the definition of terrorism contained in Title 22 United States Code, Section 2656f(d). That statute defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational or clandestine agents."

For the purposes of this legislation, the conferees consider "terrorist organization" to be one whose leadership, or whose members, with the knowledge, approval or acquiescence of the leadership, have taken part in terrorist activities. In making determinations for the purpose of establishing excludability, the Department of State (or the Immigration Service when appropriate) should take into account the best available information from the intelligence community. A group may be considered a terrorist organization even if it has not conducted terrorist operations in the past several years, but there is reason to believe it still has the capability and inclination to conduct such operations.

H.R. Conf. Rep. No. 101-955, 101st Cong., 2d Sess. (1990), p. 131.

### *c. Foreign policy*

Subsection 212(a)(3)(C) provided that "[a]n 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 excludable." 8 U.S.C. § 1182(a)(3)(C)(1990). It provided exceptions, however, in certain circumstances relying on "the alien's past, current or expected beliefs, statements or associations which would be lawful in the United States." Section 212(a)(3)(C)(ii) and (iii); 8 U.S.C. § 1182(a) (3)(C)(ii) and (iii)(1990). The conference report provided extensive comments on this foreign policy ground for exclusion:

> Under current law there is some ambiguity as to the authority of the Executive Branch to exclude aliens on foreign policy grounds (this ambiguity is a result of the overlapping nature of the basic grounds for exclusion as set out in Section 212(a) of the Immigration and Nationality Act (INA), Section 901 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, as amended, and the "McGovern Amendment"). The foreign policy provision in this title would establish a single clear standard for foreign policy exclusions. The conferees believe that granting an alien admission to the United States is not a sign of approval or agreement and the conferees therefore expect that, with enactment of this provision, aliens will be excluded not merely because of the potential signal that might be sent because of their admission, but when there would be a clear negative foreign policy impact associated with their admission.
>
> This provision would authorize the executive branch to exclude aliens for foreign policy reasons in certain circumstances. Specifically, under this provision, an alien could be excluded only if the Secretary of State has reasonable ground to believe an alien's entry or proposed activities within the United States would have potentially serious adverse foreign policy consequences. However, there are two exceptions to this general standard.
>
> First, an alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office (and who is seeking entry into the United States during the period immediately prior to the election) would not be excludable under this provision solely because of any past, current or expected

beliefs, statements or associations which would be lawful in the United States. The word "solely" is used in this provision to indicate that, in cases involving government officials, the committee intends that exclusions not be based merely on, for example, the possible content of an alien's speech in this country, but that there be some clear foreign policy impact beyond the mere fact of the speech or its content, that would permit exclusion.

* * * *

The second exception, which applies to all other aliens, would prevent exclusion on the basis of an alien's past, current or expected beliefs, statements or associations which would be lawful within the United States unless the Secretary of State personally determines that the alien's admission to the United States would compromise a compelling United States foreign policy interest, and so certifies to the relevant Congressional Committees. It is the intent of the conference committee that this authority would be used sparingly and not merely because there is a likelihood that an alien will make critical remarks about the United States or its policies.

Furthermore, the conferees intend that the "compelling foreign policy interest" standard be interpreted as a significantly higher standard than the general "potentially serious adverse foreign policy consequences standard." In particular, the conferees note that the general exclusion standard in this provision refers only to the "potential" for serious adverse foreign policy consequences, whereas exclusion under the second exception (under which an alien can be excluded because of his beliefs, statements or associations) must be linked to a "compelling" foreign policy interest. The fact that the Secretary of State personally must inform the relevant Congressional Committees when a determination of excludability is made under this provision is a further indication that the conferees intend that this provision be used only in unusual circumstances.

With regard to the second exception, the following include some of the circumstances in which exclusion

> might be appropriate: when an alien's mere entry into the United States could result in imminent harm to the lives or property of United States persons abroad or to property of the United States government abroad (as occurred with the former Shah of Iran), or when an alien's entry would violate a treaty or international agreement to which the United States is a party.
>
> Finally, the conferees intend that, since this legislation repeals both Section 901 and the McGovern Amendment [22 U.S.C. § 2691 and 8 U.S.C. 1182 note]and removes membership in or affiliation with the communist party as a ground for exclusion of nonimmigrants, the current practice under which certain nonimmigrants who are excludable under provisions of the INA, but who benefit from the reforms of section 901, have been required to go through an "automatic" waiver process, would be discontinued. Instead, aliens who are no longer excludable would simply be able to enter the U.S. (unless any provision of this legislation specifically requires a waiver process).

H.R. Conf. Rep.No. 101-955, 101st Cong., 2d Sess. (1990) at 128–30.

### *d. Membership in a totalitarian party*

Subsection 212(a)(3)(D) excluded immigrants who were or had been members of the Communist or any other totalitarian party. 8 U.S.C. § 1182(a)(3)(D)(1990). Several important exceptions to the exclusion were also provided. First, subsection 12(a)(3)(D)(ii) exempted aliens who could establish that the membership was involuntary, occurred solely while under 16 years of age or by operation of law, or was necessary to obtain employment, food rations or other essentials of living. Subsection 212(a)(3)(D)(iii) exempted aliens who were not a threat to the security of the U.S. and who could establish that the membership terminated at least two years before the visa application, or at least five years before the application "in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date." A third

exception, set forth in subsection 212(a)(3)(D)(iv) granted the Attorney General the discretion to waive this exclusion in the case of a close family member of a U.S. citizen or permanent resident when it was in the public interest and the alien was not a threat to the security of the U.S.

As noted in the Conference Report:

> This legislation includes a provision . . . designed to modernize the provision in existing law relating to the exclusion of aliens who are members of or affiliated with the Communist Party or other totalitarian parties. This provision eliminates membership in or affiliation with such parties as a ground for exclusion of nonimmigrants (though any nonimmigrant who is a spy or terrorist, or who seeks the overthrow of the U.S., would remain excludable under other provisions in this legislation). With regard to immigrants, this provision retains the existing language exempting immigrants whose membership was involuntary, but it amends the "defector" provision under which an alien is required to demonstrate opposition to the doctrines of the party for at least five years, removes the language requiring that the admission of aliens in either category (involuntary membership or defector) be in the public interest, and establishes several new exemptions.
>
> Specifically, under this provision an alien who has terminated his membership in or affiliation with a totalitarian party for at least two years at the time he applies for a visa or to enter the U.S. would not be excludable if such alien is determined not to be a threat to the security of the United States. This provision could apply to aliens from countries like the countries in Eastern Europe which were formerly Soviet Satellite states, but which are no longer controlled by the Communist Party.
>
> In the case of an alien whose involvement was with a totalitarian party which still controls the government of a foreign state at the time of the application for a visa or entry, the exemption would not be available until five years had passed since the termination of membership or affiliation. This second provision could apply to aliens from countries like Cuba, Albania or the People's Republic of

> China, and, again, would only apply if the alien was determined not to be a security threat.
>
> Finally, there is an exemption for current party members who are seeking to immigrate to the United States and who have certain specified close family relatives in the U.S. Under this exemption, the general ground for exclusion for totalitarian party involvement would be waived, if the required family ties were present, at the discretion of the Attorney General for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, provided that the alien is not a security threat.
>
> It is the intent of the conferees that aliens who would previously have been excludable under section 212(a)(28) because of membership in or affiliation with the Communist party, but who are no longer excludable for that reason because of the changes made in this provision, would not be excludable under the new foreign policy grounds established by this legislation merely because of such membership or affiliation.

H.R. Conf. Rep. No. 101-955, 101st Cong., 2d Sess. (1990) at 130, 131.

### *e. Review of exclusion lists*

Subsection 212(c), 8 U.S.C. § 1182 note (1990), required the Attorney General and the Secretary of State to "develop protocols and guidelines for updating lookout books and the automated visa lookout system and similar mechanisms for the screening of aliens. In particular, the protocols and guidelines were required to ensure that there was a procedure to remove the name of an alien who is no longer excludable because of the amendments to the exclusion provisions.

### *f. Temporary protected status*

New section 244A, 8 U.S.C. § 1254a (1990), created a new "temporary protected status" for aliens who would face certain

dangers should they return to their country of nationality, where that country has been designated by the Attorney General. Section 244A(b)(1)(A) authorized the Attorney General, after proper consultation with other appropriate agencies, to designate a foreign state if he finds, among other things, "that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state would pose a serious threat to their personal safety." Section 244A(b)(1) also provided, among other things, for designation by the Attorney General on the basis of temporary disruption caused by natural disasters, an official request by the foreign state, or if the Attorney General finds the existence of "extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety." This last basis, however, is only available "unless the attorney general finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States." During the period of temporary protected status, the alien cannot be deported and receives employment authorization. Section 303 of the Immigration Act of 1990 specifically designated El Salvador as meeting the requirements of section 244A(b)(1)(A). 8 U.S.C. § 1254a note (1990).

### 6. Visa Lottery Rule

The final visa lottery rule implementing section 3 of the Immigration Amendments of 1988, Pub. L. No. 100-658, 8 U.S.C. § 1153 note, was published on February 16, 1989, 54 Fed. Reg. 7,166 (Feb. 16, 1989)(to be codified at 22 C.F.R. § 44). The visa lottery granted 20,000 immigrant visas to persons selected at random from applicants who were nationals of "under-represented countries."

## D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES

### 1. Salvadoran and Guatemalan Asylum Applicants

The case of *American Baptist Churches v. Thornburgh* was filed in 1985 by several U.S. protestant churches challenging prosecu-

tion by the U.S. government of persons assisting and shielding from deportation or exclusion illegal aliens from Guatemala and El Salvador, the so-called "sanctuary movement." The case also alleged discrimination against asylum applicants from those countries. During the course of the case, all of the allegations relating to sanctuary were dismissed by the court. The remaining charge that the Immigration and Naturalization Service, the immigration courts and the State Department were discriminating against Salvadorans and Guatemalans in the adjudication of asylum applications and in failing to grant extended voluntary departure was dismissed after the parties reached a settlement on December 14, 1990. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991)(attaching stipulated settlement agreement). The settlement agreement noted that several recent changes in United States laws and regulations affected the case. First, as discussed in C.5., *supra*, section 302 of the Immigration Act of 1990 had created a new "temporary protected status" for aliens who were nationals of countries who would face certain dangers should they return to their country of nationality and specifically designated El Salvador as a country covered by the provision. Temporary protected status, like extended voluntary departure, effectively allowed the alien in question to remain in the United States.

Second, new asylum regulations, effective October 1, 1990, significantly changed the methods under which asylum applications are considered and decided. 8 CFR § 208 (2002); 55 Fed. Reg. 30,674 (July 27, 1990). *See* discussion below in section D.2.

The settlement agreement provided that the class members would be afforded a *de novo*, unappealable asylum adjudication before an asylum officer under the new regulations. 760 F. Supp. at 799. Following notice, which was required to be provided in a number of specified ways, class members were to respond and to submit new applications for asylum within agreed time limits. Those class members who requested new interviews were to be provided by the INS with a list of legal or accredited organizations willing to assist them. *Id*. at 800–803.

In addition, the settlement agreement provided for certain procedures to be applied in the course of the *de novo* review by an asylum officer. *Id*. at 803–804. First, after an initial interview, the asylum officer was required to make a preliminary assessment of whether the applicant appeared to have established a prima

facie case of either past persecution or a well-founded fear of persecution. This preliminary assessment was to be made before any prior administrative file was reviewed or the application sent to the State Department's Bureau of Human Rights and Humanitarian Affairs ("BHRHA") for comment. The asylum officer was required to follow an interview instruction sheet (Exhibit 10 to the settlement agreement, *Id.* at 822–823), which specified that "the fact that an applicant's claim may have been denied previously is not relevant to [the] present determination and such previous denial does not indicate in any way that the present claim is not meritorious." After the initial decision by the asylum officer who interviewed the applicant, the case was to be reviewed *de novo* by a supervisory asylum officer and in certain cases, by the Justice Department's Central Office for Refugee and Asylum Policy.

Any transmittal of the application to BHRHA was required to contain the specific recommendation by the asylum officer to grant or deny asylum. *Id.* at 804. Any BHRHA recommendations to deny asylum were required to contain reasons for that determination and state that the recommendation was advisory only. *Id.* at 807. Grounds for detention of class members were strictly limited. Class members entitled to *de novo* interviews were to receive employment authorization pending a decision on their asylum application. *Id.* at 804–805.

Finally, the settlement agreement contained several provisions ensuring that certain information and training would be provided to government personnel involved in asylum determinations. For example, the agreement provided that certain groups could make reference information available to the INS to include in its centralized information center on asylum. In addition, it required a specific training manual to be distributed to asylum officers, immigration judges, and BHRHA personnel commenting on asylum applications. The settlement agreement gave plaintiffs' representatives an opportunity to address training sessions for these officials and provided for monitoring of procedures. *Id.* at 807–809.

### 2. New Asylum Regulations

On July 27, 1990, the Immigration and Naturalization Service published as a final rule extensive regulations on procedures to

be used in determining asylum under section 201(b) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 109, 8 U.S.C. § 1158. (A discussion of the Refugee Act of 1980 may be found at *Digest 1980*, pp. 179–85.) The new regulations, effective October 1, 1990, were published at 55 Fed. Reg. 30,674–88 (July 27, 1990); 8 C.F.R. §§ 3, 103, 208, 236, 242, and 253 (2002).

One major change made by the regulations was the establishment of a professional corps in the Immigration and Naturalization Service of "asylum officers." The Federal Register summary explained that originally all asylum and withholding of deportation claims were to be adjudicated in a nonadversarial setting by these asylum officers. The final rule, however, "provides for continued adversarial adjudications of asylum and withholding of deportation applications by Immigration Judges for those applicants who are in exclusion or deportation proceedings. At the same time, it preserves an opportunity, prior to the institution of proceedings, for adjudication of initial applications in a nonadversarial setting by a specially-trained corps of Asylum Officers." 55 Fed. Reg. 30,675 (July 27, 1990). Section 208.2(b) of the regulations also provided that: "the Immigration Judge shall make a determination on such claims *de novo* regardless of whether or not a previous application was filed and adjudicated by an Asylum Officer prior to the initiation of exclusion or deportation proceedings." *Id*. at 30,681.

These new asylum officers:

> are to receive special training in international relations and international law under the direction of the [INS and Justice Department]. [These agencies], in coordination with the Department of State, and in cooperation with other appropriate sources, [will] compile and disseminate to Asylum Officers information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion, as well as other information relevant to asylum determinations, and shall maintain a documentation center with information on human rights conditions.

8 C.F.R. § 208.1(b), (c)(2002); 55 Fed. Reg. 30,680 (July 27,1990). As stated in the background comments in the final rule, "it was felt that [the creation of a documentation center] would be a very positive development in aiding Asylum Officers to maintain current knowledge of country conditions around the world. It also reflects recent developments in the methods used to aid in the adjudication of asylum cases in other countries, such as Canada." 55 Fed. Reg. 30,676 (July 27, 1990).

The procedures for asylum officer interviews was established by 8 C.F.R. § 208.9 (2002):

> (b) The Asylum Officer shall conduct the interview in a nonadversarial manner and, at the request of the applicant, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for the form of relief sought. The applicant may have counsel or a representative present and may submit affidavits of witnesses.
>
> * * * *
>
> (d) Upon completion of the interview, the applicant or his representative shall have an opportunity to make a statement or comment on the evidence presented.
>
> (e) Following the interview the applicant may be given a period not to exceed 30 days to submit evidence in support of his application, unless, in the discretion of the Asylum Officer, a longer period is required.

8 C.F.R. § 208.9 (2002); 55 Fed. Reg. 30,682 (July 27, 1990).

The regulations also spelled out what information may be relied upon by the asylum officer in reaching a decision:

> (a) . . . [T]he Asylum Officer may rely on material provided by the Department of State, the Asylum Policy and Review Unit, the Office of Refugees, Asylum, and Parole, the District Director having jurisdiction over the place of the applicant's residence or the port of entry from which the applicant seeks admission to the United States, or other

> credible sources, such as international organizations, private voluntary agencies, or academic institutions. Prior to the issuance of an adverse decision made in reliance upon such material, the material must be identified and the applicant must be provided with an opportunity to inspect, explain and rebut the material, unless the material is classified under E.O. 12356.

8 C.F.R. § 208.12(a)(2002); 55 Fed. Reg. 30,683 (July 27, 1990).

Section 208.11 of the regulations allowed the BHRHA, at its option, to comment on applications forwarded to it as, for instance, asylum officers are required to do under § 208.4(a). The scope of BHRHA's comments was set forth in 208.11(a) as follows:

> (1) An assessment of the accuracy of the applicant's assertions about conditions in his country of nationality or habitual residence and his own experiences;
>
> (2) An assessment of his likely treatment were he to return to his country of nationality or habitual residence;
>
> (3) Information about whether persons who are similarly situated to the applicant are persecuted in his country of nationality or habitual residence and the frequency of such persecutions;
>
> (4) Information about whether one of the grounds for denial specified in section 208.14 may apply; or
>
> (5) Such other information or views as it deems relevant to deciding whether to grant or deny the application.

55 Fed. Reg. 30,682 (July 27, 1990). This section of the regulations also limited the amount of time BHRHA could take to comment on the application, and provided that these comments were part of the asylum record unless they were classified. The applicant had the opportunity to respond to unclassified BHRHA comments before any adverse decision could be made. 8 C.F.R. § 208.11(b)(c) (2002), 55 Fed. Reg. 30,682–83 (July 27, 1990).

The regulations for determining the establishment of refugee status and entitlement to withholding of deportation were largely the same as the April 6, 1988, revised proposed rule. 53 Fed. Reg. 11,300-10 (1988). In order to receive asylum, the applicant

had to prove that he or she had either suffered actual past persecution or had a well-founded fear of future persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion. Applicants who participated in persecution of others could not qualify. 8 C.F.R. § 208.13 (2002); 55 Fed. Reg. 30,683 (July 27, 1990). Denial was mandatory if the applicant had been convicted of a particularly serious crime in the United States and thus constituted a danger to the community, had been firmly resettled in another country (as defined by § 208.15), or was a danger to U.S. national security. 8 C.F.R. § 208.14(c)(2002); 55 Fed. Reg. 30,683 (July 27, 1990).

Entitlement to withholding of deportation was granted where the applicant established that his or her life or freedom would be threatened in the proposed country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. Denial was required if the applicant participated in persecution of another person or had been convicted of a particularly serious crime and constituted a danger to the community of the United States; or if there were serious reasons for considering that the alien had committed a serious nonpolitical crime outside the United States or for regarding the alien as a danger to U.S. national security. 8 C.F.R. § 208.16(b)(c) (2002); 55 Fed. Reg. 30,684 (July 27, 1990).

Grounds for revocation of asylum or withholding of deportation were provided in 8 C.F.R. § 208.24 (2002); 55 Fed. Reg. 30,865–66 (July 27, 1990).

Section 208.6 of the regulations limited disclosure to third parties of an application for asylum or withholding of deportation without the alien's written consent, except as permitted by the section or at the discretion of the Attorney General. 8 C.F.R. § 208.6 (2002); 55 Fed. Reg. 30,681 (July 27, 1990). Exceptions to the prohibition on disclosure included U.S. Government officials or contractors with a need to examine the information in connection with certain legal proceedings and investigations, and courts considering certain legal actions related to the asylum or withholding of deportation proceedings. The background comments specifically addressed concerns that the failure to specifically include the United Nations High Commissioner for Refugees

("UNHCR") in the list of exceptions would limit that agency's access to information, stating: "This is not meant to limit disclosure to the UNHCR, or to increase the discretion of the Attorney General in revealing information. Rather it was felt that it is inappropriate to specify a non-governmental agency to which the Attorney General, after consultation with the Secretary of State, may reveal information." 55 Fed. Reg. 30,676 (July 27, 1990).

Section 208.7 of the regulations required a grant of employment authorization for up to one year for those applicants who are not in detention and whose asylum applications are not frivolous. The term "frivolous" was defined as "manifestly unfounded or abusive." 8 C.F.R. § 208.7(a) (2002); 55 Fed. Reg. 30,681-82 (July 27, 1990). The employment authorization could be renewed by the applicant showing that he or she was pursuing the asylum claim through appropriate administrative or judicial review. 8 C.F.R. § 208.7(c) (2002); 55 Fed. Reg. 30,682 (July 27, 1990).

Finally, the regulations set a new and less difficult standard for overcoming the presumption that an applicant for asylum who returns to the country of claimed persecution has abandoned the application. Where previously the alien had to show "extraordinary and urgent reasons" for the return, the new regulations required the alien to establish "compelling reasons" for assuming the risk of persecution in so returning. 8 CFR § 208.8 (2002); 55 Fed. Reg. 30,682.

### 3. Haitian Refugees

Alan J. Kreczko, Deputy Legal Adviser of the Department of State, testified before the Subcommittee on Immigration, Refugees and International Law of the House Committee on the Judiciary on June 8, 1989, concerning the ongoing Haitian Migration Interdiction Program. Mr. Kreczko's testimony addressed the compatibility of this program with international law, including the law of the sea and refugee law:

> The Haitian Migration Agreement and the INS guidelines for implementing the agreement are entirely consistent with international law, including the law of the sea and refugee law. I will touch on both aspects, with emphasis

on refugee law, because that is the area in which some legal commentators have faulted the interdiction program.

The Haitian Migration Interdiction Program was initiated on the basis of an executive agreement between the United States and Haiti concluded on September 23, 1981 [Agreement Relating to Establishment of a Cooperative Program of Interdiction and Selective Return of Persons Coming from Haiti, TIAS No. 10,241 reprinted in 20 I.L.M. 1198 (1981) (entered into force Sept. 23, 1981)]. Under the agreement, Haiti permits the U.S. Coast Guard to board any Haitian flag vessel on the high seas or in Haitian territorial waters which the Coast Guard has reason to believe may be involved in the irregular carriage of passengers outbound from Haiti, to make inquiries concerning the status of those on board, to detain the vessel if it appears that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, and to return the vessel and the persons on board to Haiti. The assent of Haiti to U.S. enforcement actions against Haitian vessels on the high seas and in Haitian territorial waters was necessary because otherwise such actions would violate customary international law codified in Article 6(1) of the Geneva Convention on the High Seas, April 29, 1958 (13 U.S.T. 2312; T.I.A.S. No. 5200) and article 92(1) of the 1982 U.N. Convention on the Law of the Sea, which provide for exclusive flag-state jurisdiction over vessels on the high seas, as well as violate Haitian sovereignty over its territorial sea.

The agreement also states that "[h]aving regard to the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January 1967,"the United States Government "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." To implement this provision, guidelines were developed directing INS officers on board the Coast Guard interdiction vessels to monitor Coast Guard interviews of interdicted Haitians, and, in cases where indications of a claim to refugee status might arise, to conduct further

interviews themselves. The guidelines further provide that if the INS interview suggests that a bona fide claim to refugee status may exist, the individual shall be brought to the United States so that he or she may apply for political asylum.

Finally, it is worth noting that, in the context of the agreement, Haiti provided assurances that it would not prosecute for illegal departure Haitians returned to Haiti who are not traffickers.

The provisions of the agreement and the INS implementing guidelines go well beyond what the United States is obligated to do under the U.N. Refugee Protocol.*** The obligation of non-refoulement set forth in Article 33 of the U.N. Convention Relating to the Status of Refugees (which is incorporated in the Protocol) extends only to persons who have gained entry into the territory of a Contracting state.

Article 33 provides:

> "1. No 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 his race, religion, nationality, membership of a social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country."

*** Editors' note: The international law of refugees is embodied in the 1951 UN Convention Relating to the Status of Refugees, and the 1967 Protocol thereto. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, TIAS No. 6577, 606 UNTS 267. The United States is a party to the Protocol but not to the Convention, July 28, 1951, 189 UNTS 1509. The Protocol broadened the coverage of the Convention to include persons who became refugees after January 1, 1951 and it incorporated by reference the substantive provisions of the Convention.

While it might be tempting to read the words "expel" and "return" as applying to different categories of refugees—"expel" to refugees in the contracting country, and "return" to refugees outside—this reading is not tenable. The second paragraph of Article 33 makes clear that paragraph 1 applies only to persons actually in the territory of a State party when it makes an exception for an individual who is a "danger to the security of *the country in which he is*" or "a danger to the community of that country." Moreover, the negotiating history of the Convention demonstrates that the drafters of the Convention took deliberate measures to ensure that Article 33 of the Convention would not be interpreted to apply to person outside their territory,

During the final negotiating session for the Convention, in July 1951 the delegates 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 11, the Swiss representative expressed concern the Article 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 thought it essential that the negotiating States make clear that the word "return," like the word "expel," in fact "applied solely to refugees who had already entered a country, but were not yet resident there." This was consistent with the use of the French word "*refouler*," which the Swiss representative noted "could not . . . be applied to a refugee who had not yet entered the territory of a country." He made clear that his country's assent depended on being assured 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; no one disagreed. U.N. Doc. A/CONF.2/SR.16, p. 6 (July 11, 1951). The limited meaning of the word "return" in Article 33—that it did not cover "the possibility of mass migrations across frontiers or of attempted mass migrations"—was reaffirmed at the second and final reading of the draft Convention,

on July 25, 1952, when the President of the Conference *ruled* that the interpretation should be placed on record since no objection had been expressed. U.N. Doc. A/CONF.2/ SR.35, pp. 21–22.

In short, the delegates who negotiated the Convention expressly precluded the application of Article 33 to the very situation involved in the Haitian Migration Interdiction Program—the mass illegal migration of Haitians into the United States. Indeed, it is clear from the negotiating record that at least some countries would never have agreed to Article 33 had it been intended to impose obligations with respect to refugees outside their territory who were seeking entry. Numerous commentators have acknowledged that Article 33 applies only to refugees who have gained entry, not to those who are seeking entry; *e.g.*, Robinson, *Convention Relating to the Status of Refugees. A Commentary*, p. 163 (1953); Grahl-Madsen, *The Status of Refugees in International Law, Vol. 11*, p. 94 (1972); Weis, *The United Nations Declaration an Territorial Asylum*, 7 Can. Y. B. Int'l L., pp. 92, 123–24 (1969).

The interpretation of Article 33 was also briefed extensively for the U.S. Court of Appeals for the D.C. Circuit in litigation challenging the interdiction program. Only one judge, Judge Harry Edwards, felt it necessary to reach this issue, but he ruled squarely that Article 33 did not apply:

> . . . it seems clear that the Haitian interdictees are not protected by the Protocol. The negotiating history of the Convention it incorporates leads inescapably to the conclusion that certain compromises were essential to agreement and that the ideal of unconditional asylum was diluted by the need for other practical guarantees.

*Haitian Refugee Center v. Gracey*, 809 F.2d 794, 841 (D.C.Cir. 1987).

That Article 33 addresses only those refugees who have already entered a state's territory is confirmed by subsequent, unsuccessful, efforts to broaden the requirement

not to expel or return refugees in one's territory to include a prohibition against rejection of refugees at the frontier: The international community in the United Nation's Declaration on Territorial Asylum endorsed this more inclusive obligation as a goal to be sought, but not as an existing international obligation. It also made clear that cases of mass migration might provide an exception. G.A. Res. 2312, 22 U.N. GAOR,Supp. (No. 16), p.8l, U.N.Doc A/6716 (1967). Article 3 of the Declaration provides in part:

> 1. No person referred to in Article 1, para. 1 [a refugee], 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.

The debate preceding adoption of the resolution made clear that the declaration was not intended to propound legal norms, but to lay down broad humanitarian and moral principles. Nor was the declaration meant to give rise to legal obligations or to affect existing international undertakings or national legislation. *See Official Records of the General Assembly*, Twenty-second Session, Annexes, agenda item 89, document A/6912. It was clearly understood that the Declaration's reference to rejection at the frontier, even as limited, went beyond the Convention's Article 33 obligation. *See* Weis, *The United Nations Declaration an Territorial Asylum*, 7 Can. Y. B. Int'l L., pp. 92, 123–124, 142 (1969).

In the mid-1970s, the international community considered whether to go beyond the Declaration to draft a binding instrument incorporating under the precept of *non-refoulement* protection against rejection at the frontier. Significantly, the Conference of Plenipotentiaries Draft Convention on Territorial Asylum failed to adopt the

Convention, and the various versions of the Draft Convention's provision on *non-refoulement* continued to treat separately the concepts of rejection at the frontier" and "return" or "expulsion." *See Elaboratation of a Draft Convention on Territorial Asylum, Report of the Secretary-Genera*, August 29, 1975, Doc. A/10177. In fact, at the insistence of the States, an initial draft of the Convention distinguished between mandatory obligation not to return or expel refugees who were in the territory of a contracting state and the considerably weaker requirement to use "best endeavors to ensure" refugees were not rejected at the frontier. *See ibid*.; 1975 *Digest of United States Practice in International Law*, pp. 156–158. These distinctions obviously would not have been drawn had it not been understood that the words "expel or return" in Article 53 of the Convention did not apply to refugees at the frontier.

Despite the evidence that countries have refused to accept a legal obligation of non-refoulement with respect to persons outside their territory or not to reject refugees at the frontier, some legal commentators assert that such an obligation has crystallized, under customary international law. Often this alleged obligation is described as "temporary refuge," an obligation to accept asylum-seekers into one's territory. For a norm of customary international law to exist, however, there must be general and consistent practice of states followed by them from a sense of legal obligation. 1 *Restatement (Third),of Foreign Relations* § 102(2). Those who put forth this view do not seriously attempt to establish general and consistent state practice, let alone one followed out of a sense of legal obligation. Rather, they summon forth numerous non-legally binding resolutions, recommendations, and self-referring statements of legal scholars as alleged proof of the illusory norm. In the world of international law, saying that a principle is or should be customary international law does not make it so. Only States' practice and statements can make it so, and they are far from uniform in this area. In fact, the unsuccessful effort to conclude a multilateral convention on territorial asylum demonstrates definitively that States are not willing to take on this obligation.

> I do not want to suggest by the above legal analysis that the Executive Branch ignored humanitarian concerns in designing the interdiction program. That is demonstrably not the case. Although the U.S. Government was not legally obligated to do so, it decided to give Haitians interdicted by the Coast Guard on the high seas or in Haitian territorial waters an opportunity to express any fears they might have of returning to Haiti, and to afford persons with credible claims to refugee status opportunity to apply for asylum in the United States. It also sought and received Haitian assurances that returned Haitians would not be prosecuted for their attempts to leave Haiti illegally.

*Haitian Detention and Interdiction: Hearing before the House Comm. On the Judiciary*. 101st Cong. 20–79 (1989). *See also* 83 Am. J. Int'l L. 906 (1989); *Cumulative Digest 1981–1988* at 631–635.

### 4. Deferred Departure: Nationals of People's Republic of China

In a letter of June 6, 1989, Attorney General Dick Thornburgh directed Immigration and Naturalization Service Commissioner Alan C. Nelson to defer the enforced departure of virtually all nationals of the People's Republic of China (PRC) until June 5, 1990, in light of the uncertainty of conditions in China at that time:

> The President has requested that the Department of Justice ensure that nationals of the People's Republic of China and their dependents whose visas have or will expire within the coming year will not be deported to the PRC against their wishes.
>
> In implementation of this foreign policy decision of the United States, I hereby direct you, as Commissioner, Immigration and Naturalization Service, to take all steps necessary to defer enforcing the departure, until further notice, of all nationals of the PRC and their dependents who were in the United States on June 6, 1989.
>
> This directive shall not apply to:

(1) those PRC nationals who have not evidenced an unwillingness to return to the PRC;
(2) those PRC nationals who are residents of a third country;
(3) those PRC nationals who have been convicted of any criminal act in the United States; or
(4) those PRC nationals arriving in the United States after June 6, 1989.

Letter from Attorney General Dick Thornburgh to Commissioner Alan C. Nelson, June 6, 1989. Interpreter Releases, June 19, 1989, p. 664.

On April 11, 1990, President George Bush issued Executive Order, No. 12,711, Policy Implementation with Respect to Nationals of the People's Republic of China, 55 Fed.Reg. 18,897 (Apr.13, 1990), elaborating on a memorandum for the Secretary of State and Attorney General dated November 30, 1989. The executive order directed the Attorney General to defer until January 1, 1994, the enforced departure of all nationals of the People's Republic of China and their dependents "who were in the United States on or after June 5, 1989, up to and including the date of the executive order." In the order the President further directed the Attorney General and the Secretary of State to "take all steps necessary with respect to such PRC nationals (a) to waive through January 1, 1994, the requirement of a valid passport, and (b) to process and provide necessary documents, both within the United States and at U.S. consulates overseas, to facilitate their travel across the borders of other nations and reentry into the United States in the same status that such PRC nationals had upon departure."

Section 3 of Executive Order No. 12,711 directed the Secretary of State and the Attorney General to provide the following protections:

(a) irrevocable waiver of the 2-year home country residence requirement [applicable to exchange visitors, § 212(e) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(e) (1988)] that may be exercised until January 1, 1994, for such PRC nationals

(b) maintenance of lawful status for purposes of adjustment of status or change of nonimmigrant status for such PRC nationals who were in lawful status at any time on or after June 5, 1989, up to and including [April 11, 1990];

(c) authorization for employment of such PRC nationals through January 1, 1994; and

(d) notice of expiration of nonimmigrant status (if applicable) rather than the institution of deportation proceedings, and explanation of options available for such PRC nationals eligible for deferral of enforced departure whose nonimmigrant status has expired.

Section 4 of the executive order directed the Secretary of State and the Attorney General to provide for "enhanced consideration, under the immigration laws for individuals from any country who express a fear of persecution upon returning to their country related to its policy of forced abortion or coerced sterilization, as implemented by the Attorney General's regulation effective January 29, 1990."

Section 5 directed the Attorney General "to ensure that the Immigration and Naturalization Service finalizes and makes public its position on training for individuals in F-I [student] visa status and on the reinstatement into lawful nonimmigrant status of such PRC nationals who have withdrawn their applications for asylum."

Finally, Section 6 directed the Departments of State and Justice to "consider other steps to assist such PRC nationals in their efforts to utilize the protections" extended by the President pursuant to the executive order. 55 Fed. Reg. 13,897–98 (Apr. 13, 1990).

On May 9, 1990, the INS provided instructions to its offices on implementation of the executive order. Telegram from the Department of State, May 25, 1990. Among other things, the instructions made clear that the class of PRC nationals and dependents (including non-PRC dependents) eligible for deferred departure also included those who would have been present in the United States from June 5, 1989 to April 11, 1990, but for a brief, casual, and innocent departure from the United States. The instructions provided that the term "brief, casual and innocent departure":

> shall be interpreted liberally to include temporary absences from the United States for foreign visits by students during school vacations, family emergencies, international conferences, and other academically related activities. A temporary absence of this nature should not exceed the length of a normal summer vacation for students. Prolonged absences that are longer than five months are not necessarily deemed brief or casual. However, circumstances requiring longer absences will be given special consideration.

On June 1, 1990, the Department of State sent a diplomatic note to the chiefs of mission in Washington, D.C., addressing the circumstances of PRC nationals falling under the order who wish to travel but who may not have a valid passport. Referring to section 2 of the executive order concerning travel documents, the note requested other governments "to give due consideration to the circumstances of such PRC nationals who, in some instances, may be unable to obtain valid PRC passports or other travel documents, and to permit such PRC nationals to enter their territories temporarily on the basis of the Form 1-512 [authorization for advance parole, annotated to indicate that the holder would be readmitted to the United States], provided such PRC nationals are otherwise admissible." The note is available at *www.state.gov/s/l*. *See also* 84 Am. J. Int'l L. 724 (1990).

## E. DEPARTURE CONTROLS

### 1. Federal Aviation Restrictions

On May 20, 1989, the Government of the Republic of the Philippines requested the cooperation of the United States government in preventing the return of the remains of former Philippine President Ferdinand Marcos, should he die. On June 3, 1989, Under Secretary for Political Affairs Robert M. Kimmitt sent a letter to Acting Administrator for the Federal Aviation Administration Robert E. Whittington, requesting FAA assistance:

> On May 20, 1989, the Government of the Philippines, by diplomatic note to our Embassy in Manila, restated its policy of opposition to the return of former President Ferdinand Marcos to the Philippines, adding that the position also applied in the event of Mr. Marcos' death. President Corazan Aquino has recently reiterated this policy publicly. This position is based on concerns for the stability of the Philippines. The Philippine Department of Transportation has informed us that it has instructed appropriate authorities to deny entry into the Philippines of any vessel or aircraft carrying the body of Mr. Marcos.
>
> The United States has an important strategic interest in democracy and stability in the Philippines, a long-time ally of the United States. The U.S. Government has previously implemented measures to prevent the departure of Mr. Marcos while alive. We also believe that measures should be taken to prevent the return of his body in the event of his death. We believe that the concerns of the Government of the Philippines are well-founded and that the return of Mr. Marcos' body to the Philippines in contravention of Philippine policy and law would be contrary to U.S. foreign policy interests. We also believe that such a return, or the attempt to do so, would create a danger to the safety of the aircraft and persons involved, as well as other persons who might be present at the actual or anticipated destination.

Letter from Under Secretary of State for Political Affairs Robert M. Kimmitt to Acting Administrator of the Federal Aviation Administration Robert E. Whittington, June 3, 1989, available at *www.state.gov/s/l*.

On September 28, 1989, the date of Marcos' death, the FAA issued an emergency rule, Special Federal Aviation Regulation No. 57, prohibiting any person from operating an aircraft from the United States to the Philippines with Marcos' remains. As explained in the Federal Register notice containing the rule, the FAA is "responsible for the safety of . . . U.S.-registered aircraft throughout the world. Under section 103 of the Federal Aviation Act of 1958, as amended, the FAA is charged with the regulation

of air commerce in a manner to best promote safety and fulfill the requirements of the national security." The necessity for the emergency prohibition was based on the information provided by the Department of State and the FAA's assessment of the jeopardy to the safety of the aircraft as a result of a reaction to carriage of the remains, either because the arrival of the aircraft could create civil unrest, or because the aircraft could be prevented from landing in the Philippines. Restriction on Certain Flights From the United States to the Republic of the Philippines, 54 Fed. Reg. 40,624 (Oct. 2, 1989). The rule was valid until October 1, 1990.

On August 29, 1990, the Philippine government sent a diplomatic note to the U.S. Embassy in Manila restating its opposition to the return of Marcos' remains. On September 24, 1990, Under Secretary Kimmitt wrote a letter to FAA Administrator Admiral James B. Busey IV requesting an extension of the FAA order:

> The Department has been recently informed by the Government of the Philippines that its current policy on the return of Mr. Marcos' body, and regulations implementing it, remain in effect. After careful review of the current situation in the Philippines, the Department has concluded that our concerns expressed last year regarding the consequences for both U.S. foreign policy interests and aviation safety of a return of Mr. Marcos' body remain valid, and therefore that continued measures should be taken to prevent its return to the Philippines. We thus wish to request the continued cooperation of the FAA in this important matter after October 1, 1990.

Letter from Under Secretary of State for Political Affairs Robert M. Kimmitt to Adminstrator of the Federal Aviation Administration Admiral James B. Busey, IV, September 24, 1989, available at *www.state.gov/s/l*.

On September 27, 1990, the FAA extended the expiration date of the Special Federal Aviation Regulation to October 1, 1991, on the ground that the circumstances warranting the order continued to exist in the Philippines. Restriction on Certain Flights From the United States to the Republic of the Philippines, 55 Fed. Reg. 40,360 (Oct. 2, 1990).

### 2. Departure Control Orders

On June 16, 1989, the Immigration and Naturalization Service issued a temporary departure control order to Mrs. Imelda Marcos, pursuant to 8 U.S.C. § 1185(a)(1). This statute makes it unlawful for any alien to leave the United States unless the alien's departure conforms with the rules and regulations issued under the statute. According to the order, the INS had reason to believe that Mrs. Marcos "intend[ed] to depart from the United States in a manner which would be prejudicial to the interests of the United States." The INS also had reason to believe that Mrs. Marcos' departure would fall within 8 C.F.R. § 215.3(g), (h), (c), and (k) (2002), providing specific grounds for prohibiting departure of an alien, and was therefore prohibited. Mrs. Marcos was ordered not to leave the United States until the order was revoked. Departure Control Order, Mrs. Imelda Marcos, A27 259 946, June 16, 1989, available at *www.state.gov/s/l*.

On June 19, 1989, Mrs. Marcos exercised her right to a hearing to contest the order. After a hearing in August, the chief immigration judge issued a recommended decision on August 31, 1990. First, the judge found that Mrs. Marcos should be prevented from leaving the United States under 8 C.F.R. § 215.3(h) (2002) which prohibits the departure of any alien who is needed for an investigation or proceeding conducted by an official agency or governmental entity in the United States. The U.S. government indicated that Mrs. Marcos had information potentially material to pending criminal investigations in the Western District of Pennsylvania and the Eastern District of Virginia.

The chief immigration judge next examined whether Mrs. Marcos' departure would fall within the terms of 8 C.F.R. § 215.3(c) (2002), which prohibits the departure of:

> Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities which would obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or action taken by any country cooperating with the United States in measures adopted to promote the peace, defense, or safey of the United States or such other country.

The INS alleged that Mrs. Marcos' departure would be prejudicial to the interests of the United States because of serious adverse consequences for the peace, defense and safety of the Philippines. In his decision, the chief immigration judge reviewed a number of factors relevant to these potential serious and adverse consequences:

> Mrs. Marcos argues that the government has relied solely on "guilt through association" with Ferdinand Marcos to allege that she poses a threat to the peace, stability and national security of the Philippines. Respondent [Mrs. Marcos] claims that the government has relied solely upon the testimony of Mr. Salmon [Charles B. Salmon, Jr., Director of the Office of Philippine Affairs, Department of State] on this charge but that Mr. Salmon's testimony referred solely to the involvement of Ferdinand Marcos (not Mrs. Marcos) regarding the coup attempts and other loyalist activities.
>
> The government, however, is not attempting to prove an insurrection case against Imelda Marcos. The government offered no evidence of Imelda Marcos' direct involvement in any of the destabilization efforts or coup attempts. The government does not have to prove that Imelda Marcos has been, or will be, involved in any such subversive activities.
>
> The government has demonstrated that the return of Mrs. Marcos to the Philippines would pose a threat to the stability of the Aquino government. Mrs. Marcos is a well-connected political figure and is seen by loyalists as a natural heir to the leadership of the Philippines. Mrs. Marcos held a cabinet position in the Marcos government, was an officer in the ruling political party, was Governor of Metro Manila, and acted as Philippine emissary on trips throughout the world. . . . Mrs. Marcos claims to have some continuing political control over loyalists.
>
> * * * *
>
> In addition, Mrs. Marcos has not accepted the legitimacy of the Aquino government as evidenced by her referring to Mrs. Aquino and her supporters as "usurpers" and referring to her husband as the rightful president. . . .

> The most telling evidence of the Philippine government's position on the return of Ferdinand and Imelda Marcos is contained in repeated correspondence with the United States. The first diplomatic note, dated May 20, 1989, informed the United States of the position of the Government of the Philippines not to allow the entry into the Philippines of former President Ferdinand Marcos, even stating "this position remains the same in the event of the death of Mr. Marcos." . . . The Philippine Government expressed its strong hope that the United States Government would cooperate in this matter. In the second diplomatic note, dated July 4, 1989, the Government of the Philippines further affirmed its position not to allow the return to the Philippines of Mrs. Marcos for national security reasons.
>
> On September 14, 1987 the Philippine Ministry of Justice issued a Certification stating that the Government of the Philippines considered the presence of Ferdinand Marcos and Imelda Marcos in the Philippines to be contrary to the interests of the Philippines. . . .
>
> In addition, the Government of the Philippines informed the United States Embassy on May 22, 1989, that all Philippine ports and aeronautical authorities had been instructed not to give entry or landing clearance to vessels or aircraft carrying the remains of Ferdinand Marcos. . . . The Philippine Department of Transportation issued a memorandum circular on May 26, 1989, informing all commercial airlines and operators of private aircraft of the prohibitions against the return of Mrs. Marcos. . . .
>
> It would obviously strain relations with the Philippines if the United States were to allow Imelda Marcos to depart from the United States. I find that it has been established that Imelda Marcos should be prevented from departing the United States under the provisions of 8 C.F.R. s. 215.3(c)[sic].

*In the Matter of Imelda Marcos, Respondent*, File A27 259 946, August 31, 1989, pp. 17–20 (Recommended Decision of the Chief Immigration Judge).

# CHAPTER 2

# Consular and Judicial Assistance and Related Issues

## A. CONSULAR NOTIFICATION, ACCESS AND ASSISTANCE

### 1. Consular Agents

On July 5, 1990, in response to a request for information regarding the U.S. consular agent in Palma de Mallorca and his functions, Assistant Legal Adviser for Consular Affairs James G. Hergen provided the following background information:

> The consular establishment in Palma de Mallorca is a consular agency, not a U.S. consulate. Consular agents are usually local business or professional persons, preferably American citizens, who serve part-time in isolated areas where a substantial number of Americans reside or visit, and where there is no Foreign Service post. They are appointed in accordance with title 22, U.S. Code, section 951 and Volume 3, Foreign Affairs Manual, sections 990–999. The U.S. consular agent in Palma de Mallorca, who is not a U.S. citizen, has held that position for twenty-five years.
>
> Consular agents perform limited consular services and act as points of contact between citizens and the principal consular officer. Consular agents operate under the supervision of the principal consular officer in the consular district in which they are located. The Consulate General in Barcelona has supervisory responsibility for the consular agency in Palma de Mallorca. Title 22, U.S. Code, sections 4215 and 4221, and title 22, Code of

> Federal Regulations, section 92.4(e) provide that consular agents have authority to perform notarial services. Consular officers and consular agents are prohibited by federal regulation (22 C.F.R. 10.735-206(a)(7), 71.5, 72.41, and 92.81) from acting as agents, attorneys, or in a fiduciary duty on behalf of U.S. citizens in private legal disputes.

Letter from Assistant Legal Adviser for Consular Affairs James G. Hergen to Mr. David Grabill, July 5, 1990, p. 2, available at *www.state.gov/s/l*.

### 2. Consular Functions: Disaster Assistance

In the aftermath of the bombing of Pan Am Flight 103 on December 21, 1988, over Lockerbie, Scotland, resulting in the deaths of 189 Americans, several laws were enacted to clarify the role of the State Department's Bureau of Consular Affairs and U.S. consular officers in providing warnings and assistance to U.S. citizens in future disasters.

On February 16, 1990, the State Department Basic Authorities Act was amended to add a new section 43, requiring the Secretary of State to "provide prompt and thorough notification of all appropriate information concerning such disaster or incident and its effect on United States citizens to the next-of-kin of such individuals." Section 115(c), Foreign Relations Authorization Act, Fiscal Years 1990–91, Pub. L. No. 101-246, 104 Stat.15. The notification must be through the most expeditious means possible, and include written notice. In addition, the Department of State was required to act as a clearinghouse for information and to provide other services and assistance, including liaison with foreign governments and persons and with U.S. air carriers, 22 U.S.C. § 2715. Section 115(d) required the Secretary of State to "enter into discussions with international air carriers and other appropriate entities to develop standardized procedures" to assist the Secretary in carrying out the provisions of new section 43.

On August 5, 1989, the Department of State sent a telegram to all posts on its policy that there be no double standard regarding warnings provided to official Americans and to the American traveling public about situations of serious risk, including terrorism:

> Official Americans cannot benefit from receipt of information which might equally apply to the travelling public but is not available to them. Warnings which posts plan to distribute to official personnel and dependents should be referred, unless immediate notice is critical, in advance to the Department for a determination about dissemination to a broader e.g., non-U.S. Government audience. The guidance contained in this cable does not supersede the Department of State's travel advisory system (which is the primary vehicle for publicly disseminating risk information such as that concerning not only terrorism but civil disorder, natural disaster, etc.); or the U.S. intelligence community's national terrorist warning alert/advisory system. This telegram which discusses the public dissemination of such information is issued under the Department's designation as the lead foreign affairs agency of the U.S. Government, and in cognizance of the Secretary of State's responsibilities for the safety and well-being of U.S. citizens abroad.

Telegram from the Department of State, August 5, 1989.

On May 15, 1990, the President's Commission on Aviation Security and Terrorism, established pursuant to Executive Order 12686 of August 4, 1989 (54 Fed. Reg. 32,629 (Aug. 9, 1989)) in order to review the Pan Am 103 bombing, issued its report, which included a number of recommendations on ways to improve airline security and provide better support for victims of terrorism. Recommendations addressing State Department practices and policies in the areas of consular assistance may be found at Chapter 7, "Treatment of the Families of Victims of Terrorism," Report of the President's Commission on Aviation Security and Terrorism, May 15, 1990, U.S. Gov't Printing Office 1990.

On October 23, 1990, many of the commission's recommendations were adopted into law in the Aviation Security Improvement Act of 1990, P.L. 101-604, 104 Stat. 3066 of Nov. 16, 1990. Provisions relating to the role of the State Department in providing assistance to U.S. citizens include:

— Section 203, requiring U.S. carriers to provide a passenger manifest to Department of State representatives within 1 hour of notification of an aviation disaster, 49 U.S.C. § 44909.

— Section 204, recognizing Department of State policy under section 43 of the Basic Authorities Act, discussed above, to provide notification, and requiring the Secretary of State to ensure that Department of State notification is carried out notwithstanding notification by any other person, 22 U.S.C. § 5503.

— Section 205, requiring the State Department to appoint specific personnel as liaison with the family of each U.S. victim of an aviation disaster, 22 U.S.C. § 5504.

—Section 206, requiring disaster management training for all consular officers, and specialized training for a team of "disaster specialists" to be sent immediately in the event of a disaster, 22 U.S.C. § 5505.

— Section 207, requiring the State Department to send a senior officer from the Bureau of Consular Affairs to the scene of a disaster site, the dispatch of a State Department employee as ombudsman specifically to assist family members at the scene of a disaster site, and to establish procedures for deployment of crisis teams to disaster sites, 22 U.S.C. § 5506.

— Section 212, requiring the establishment of an electronic bulletin board available to the public containing information on overseas crime and security, 22 U.S.C. § 5511.

## B. CHILDREN

### International Adoption

During 1990 the Office of Overseas Citizens Consular Services of the Bureau of Consular Affairs of the Department of State issued a general informational flyer entitled "International Adoption." The flyer reviewed U.S. policy and practice with regard to U.S. citizens adopting children abroad:

> The subject of international adoptions has become an issue of considerable concern to the Department of State and its embassies and consulates abroad in recent years. There has been an increasing incidence of illicit activities in the area of international adoptions by intermediaries and adoption agencies both in the foreign countries involved and in the United States.

The Department considers adoptions to be private legal matters within the judicial sovereignty of the nation where the child resides. U.S. authorities, therefore, have no right to intervene on behalf of an individual American citizen with the courts in the country where the adoption takes place. However, while we cannot become directly involved in the adoption process, we do receive requests for assistance and information from American citizens who wish to adopt in foreign countries. Requests cover a broad range of subjects from the legal procedures involved to the expeditious issuance of immigrant visas to adopted children, or children being brought to the United States for the purpose of adoption.

The Department of State can . . . provide information on the details of the adoption process in the foreign country; make inquiries on behalf of adoptive parents regarding the status of their cases before foreign tribunals; assist in the clarification of documentary requirements; provide information on the U.S. visa application and issuance process; and endeavor to ensure that Americans are not discriminated against by foreign authorities and courts.

* * * *

One crucial fact which must be understood at the outset of any adoption is that the child is a national of the country of its origin (and remains so even after the adoption process is completed) and is subject to the jurisdiction of the foreign courts. Consequently, parents should be certain that the procedures they follow in arranging for such an adoption strictly comply with local (foreign) law. This is usually accomplished by dealing with a reputable, licensed international adoption agency which has experience in arranging adoptions in the particular foreign country, or, in the case of a private adoption, with a local attorney who has routinely handled successful adoptions.

* * * *

In addition to the foreign adoption requirements, prospective adoptive parents must comply with U.S. immigration procedures. It is not possible, for example, to simply

locate a child in a foreign country, then go to the U.S. embassy and obtain a visa for the child. Visa procedures in this area are complex, and designed with many safeguards to ensure that children adopted abroad or brought to this country for adoption are truly orphans and will go to healthy homes in the U.S.

* * * *

In most cases the formal adoption of a child in a foreign court is accepted as lawful in the United States. In some instances, it will be necessary to re-adopt the child in the United States. For example, if the adoptive parent(s) did not see the child abroad prior to or during the full adoption proceedings abroad, the child must be brought to the U.S. to be adopted here. In the case of a married couple, *both* parents *must* see the child before the U.S. visa can be issued if the child is to be considered "adopted abroad." Otherwise, the parent(s) must be able to meet the pre-adoption requirements of their state of residence in order for the child to qualify for a U.S. visa to come to the U.S. to be adopted here.

* * * *

The Department of State refers to INS for investigation all petitions for children whose adoptions have been arranged through private or organizational "facilitators" motivated by undue personal gain or improper profit, or other irregular practices. This policy flows from our general obligation to respect host country laws and is based on a strong desire on the part of the United States not to promote abuse of adoption procedures ("baby-selling", kidnapping, etc.), and not to permit its officials to engage in conduct that might cause a host country to prohibit altogether further adoptions of host country children by U.S. citizens. To this end, the Department of State has consistently expressed its support for measures taken by foreign states to reduce adoption abuse.

"International Adoptions," Bureau of Consular Affairs, Department of State, pp. 1, 2, 3, 6–7, available at *www.state. gov/s/l.*

The flyer is accompanied by a disclaimer noting that "the information in this circular relating to the legal requirements of specific foreign countries is provided for general information only and may not be totally accurate in a particular case. Questions involving the interpretation of specific foreign laws should be addressed to foreign attorneys or foreign government officials." *Id*. at 1.

On June 29, 1989, the Department of State sent a telegram reviewing the processing of immigrant visa cases of adopted children who are orphans as defined in section 101(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F).

First, the telegram discussed the situation in which an I-600 petition had been fully approved by the Immigration and Naturalization Service. An 1-600 petition is sought where the adoptive parents have already identified a child to adopt when immigration processing is begun. In such cases:

> The consular officer must verify that the facts alleged about the child are correct and that the child does not have a medical condition which has not been identified in the petition. . . . In this respect, the consular officer's responsibility is unlike that in the case of any other approved immigrant or nonimmigrant visa petition. Generally, the approval of a petition is prima facie evidence of the entitlement of the beneficiary to the status accorded by the petition. Consular officers are not normally authorized or required to readjudicate approved visa petitions. In an I-600 case, the consular officer is under an affirmative duty to make an independent investigation of the facts. Information casting doubt upon the child's eligibility as an orphan or disclosing a medical condition not identified in the approved petition requires return of the petition to the approving [U.S. Immigration and Naturalization] Service office for reconsideration and possible revocation.

Telegram from the Department of State to all diplomatic and consular posts, June 29, 1989.

The other situation arises when the adoptive parents begin immigration processing before going abroad to locate a child, by

filing an application on Form I-600A for advance determination of suitability as adoptive parents. The telegram explained that:

> The adjudication of an 1-600 petition when accompanied by an approved I-600A application presents perhaps the most difficult situation in that the Service has not reviewed, or even seen, the documentation regarding the child in such cases. It is, therefore, especially important that the consular officer understand, and adhere precisely to, the terms of the delegation of authority from the Service in such cases. The Service has delegated only the authority to approve the I-600 petition, not to deny it. Moreover, the authority to approve is confined to those cases which are "clearly approvable." If any doubt exists as to whether the petition may be approved, the consular officer must refer the petition to the appropriate overseas office of the Service for adjudication.

*Id.*

The telegram then provided detailed guidance on the definition of "clearly approvable":

> A petition is "clearly approvable" only where primary documentation is presented which establishes the elements of eligibility. In orphan cases, there are certain possible circumstances which inherently cannot be documented by "primary evidence," as that term is generally understood. There follows a discussion of "primary evidence" as it relates to such cases—
>
> (a) Identity of Child—Primary evidence would consist of a birth certificate and a national identity card or passport with a photograph of the child. (The two are necessary since a birth record, even though genuine, may or may not be the birth record of the child in question and the passport or identity card connects the child for whom orphan status is sought with the birth record. In addition, the birth record serves to identify the parent or parents of the child.)
>
> (b) Death of Parent or Parents—Primary evidence of the claimed death of the child's parent or parents would

be death certificates in the name of the parent or parents.

(c) Abandonment by Parent or Parents—Primary evidence would be a document signed by the parent or parents unconditionally divesting the parent or parents of parental rights over the child. (All other evidence of claimed abandonment, regardless of the circumstances of the case, is secondary in character.)

(d) Disappearance or Loss of, or Separation from Parent or Parents—All evidence of disappearance or loss of, or separation from parent or parents is secondary.

(e) Unconditional Release by Sole or Surviving Parent—Primary evidence would be a document so stating, written in a language which the parent is capable of reading and signed by the parent. (If the parent is illiterate, the document shall be treated as secondary.)

*Id.*

Finally, the telegram reviewed INS standards on several important issues involved in approval of I-600 petitions, by reference to recent administrative appeals of I-600 petition denials, in order to assist consular officers adjudicating these petitions:

(a) Unable to Provide Proper Care—It is the position of the Service that a child whose sole or surviving parent has unconditionally released the child for emigration and adoption may not repeat not be classified as an orphan unless it is shown that the sole or surviving parent cannot provide the child the nourishment and shelter necessary for subsistence consistent with the local standards of the child's place of residence. It is important to note in this regard that the fact that the adoptive parent(s) would be able to provide the child a much higher level of care in the United States is not relevant. The issue is whether the sole or surviving parent can provide care consistent with local standards, however high or low local standards may be.

(b) Abandonment. Most AAU [Administrative Appeals Unit] decisions on abandonment involve cases in which the beneficiary child has two living parents. The decisions define abandonment strictly. Specifically, [it has been] held

> in several cases that a release for adoption does not constitute abandonment. Citing *Matter of Del Conte*, 10 I&N Dec. 761 (1964), the AAU has held that "[t]he severance of ties between parent and child must be total, with no communication between parent and child, no financial contributions by the parents towards the child's sustenance, and no arrangements made by the parents for [his or her] support. In short, no continuing interest in the child, whatever. Short of such a complete termination of all ties, the condition of abandonment does not exist."

*Id.*

## C. PRISONER TRANSFER AND RELATED ISSUES

### Council of Europe Prisoner Transfer Convention: Italian Request for Terrorist

In 1990 the Government of Italy requested the transfer of Silvia Baraldini, a convicted terrorist serving a sentence in a U.S. federal prison, to serve her sentence in Italy, under the terms of the Council of Europe Convention on the Transfer of Sentenced Persons. Mar. 21, 1983, T.I.A.S. No. 10,824 (entered into force July 1, 1985). The United States and Italy are both parties to the Convention, which provides for the transfer, under certain circumstances, of prisoners held in one country to serve their sentences in prisons of their country of nationality. All transfers require the consent of both countries involved as well as the prisoner. Baraldini was an Italian citizen by birth although she had lived in the United States for nearly thirty years and was a U.S. permanent resident alien.

After a review of the background, court records and prison conditions under which Baraldini was being held, the United States concluded that it could not at that time approve the Italian government's request for transfer of the prisoner. The reasons for the conclusion were set forth in a letter of December 19, 1990, from Robert S. Mueller III, Assistant Attorney General, Criminal Division, U.S. Department of Justice, to Director General Piero Calla, Directorate General of Penal Affairs, Italian Ministry of Pardons and Justice, as follows:

Ms. Baraldini was a member of a criminal organization known as the "Family" which had as a goal the support of a terrorist organization called the Republic of New Africa. . . .

In 1983 Ms. Baraldini together with several of her criminal associates, was convicted by a jury in the United States District Court for the Southern District of New York of conspiracy to violate the Racketeer Influenced and Corrupt Organization Act (RICO) and of substantive racketeering offenses. The RICO Act provides especially severe penalties for those who commit serious crimes through organized criminal groups. Ms. Baraldini was convicted for her ongoing and active participation in the "Family" criminal enterprise responsible for the commission of numerous serious crimes, including: armed robberies of armored trucks in New York and Connecticut; several attempted armed robberies of Brinks armored trucks; the successful prison break-out of terrorist Joanne Chesimard who was in prison for the muder of a New Jersey State trooper; the kidnapping of a prison guard and a prison matron in the course of the Chesimard escape; the 1981 robbery of an armored Brinks truck in Nanuet, New York; the murder of a Brinks guard and the critical wounding of a second guard; and the murder of two police officers. Public outrage over the "Family's" violent acts is particularly acute because two of the victims were police officers who left young families. One of the officers, Sgt. Edward O'Grady, was a father of three, a Marine Corps Vietnam veteran and an 11-year veteran in the police force. The other, Officer Waverly Brown, was 45 years old, had two daughters, was an Air Force veteran of the Korean War and a 13-year veteran of the police force.

Ms. Baraldini's substantive RICO convictions were based upon two of the many crimes she and other "Family" members perpetrated: the 1980 attempted armed robbery of an armored truck and the 1979 kidnapping of a prison guard and matron in the Chesimard escape. For her crimes, Ms. Baraldini was sentenced to forty years in prison with a recommendation by the judge that she "not be considered for parole until the maximum period." She also received a fine of $50,000.

At the time of her conviction, Ms. Baraldini was not only a member of the "Family", but also was involved with other terrorist organizations. She was the National Secretary of the May 19th Organization, a domestic terrorist enterprise committed to the use of violence against the United States. Several members of the Organization also participated in violent crimes and are currently fugitives. Ms. Baraldini is believed to be currently communicating with several of these individuals, may have information regarding terrorist activities committed by them and, we believe, would assist them if released.

Evidence also exists indicating that Ms. Baraldini has knowledge of, and may have participated in, activities of another terrorist group, the FALN (Fuerzas Armadas de Liberacion Nacional Puertorriquena), an organization responsible for hundreds of bombings in New York and Chicago resulting in at least five deaths, scores of injuries and millions of dollars in property damage. For instance, the FALN was responsible for the 1975 bombing of the Fraunces Tavern in New York City, resulting in the deaths of four people. The FALN also caused four bombs to explode in the Wall Street area of Manhattan. . . .

Following her conviction, grand jury testimony was sought from Ms. Baraldini in 1983 and 1984 regarding her knowledge of FALN activities. She repeatedly refused to testify before the Grand jury and was ultimately convicted of criminal contempt in 1984 in the United States District Court for the Eastern District of New York. For her contempt, she was sentenced to an additional three years to be served consecutively to the original 40-year sentence she received for the conspiracy and RICO convictions.

Since her convictions, Ms. Baraldini has exhibited no remorse whatsoever for her crimes and has refused to cooperate in any way with the United States Government in its ongoing investigations of domestic terrorist activities. As noted above, we believe that Ms. Baraldini is still in communication with her former criminal associates. As late as 1985, her fingerprints were found on a letter discovered in a May 19th Organization safe house.

In addition to the serious nature of Ms. Baraldini's offenses, her refusal to cooperate and her suspected ongoing involvement with fugitive criminals, we are concerned that, if transferred to Italy, Ms. Baraldini will serve a considerably shorter sentence than that imposed in the United States. We understand that if she were to be transferred, an Italian Court of Appeals must recompute the sentence she would receive and that under Italian law this sentence would necessarily be shorter than that which she currently is serving in the United States. Further, under Italian law the criminal contempt offense is not transferable and therefore would be excluded entirely from her Italian sentence.

We must also express our concern about the current parole practice in Italy which, we understand, has in the recent past allowed convicted terrorists and organized crime figures to be furloughed or placed on work release after only relatively short periods of incarceration. The serious and violent nature of the crimes committed by Ms. Baraldini, in our view, demands a sentence commensurate with those imposed by the courts in the United States. The term and conditions of her incarceration are of particular importance to us because we believe that, if released, Ms. Baraldini would continue in criminal activities detrimental to the United States.

We understand that there is some concern over the conditions of Ms. Baraldini's incarceration in the United States. This concern is unfounded. Ms. Baraldini is presently housed in the Marianna Federal Correctional Institution in Marianna, Florida, which opened in 1988. She resides in a self-contained unit that provides the same high quality services afforded to the general inmate population at Marianna, including medical, dental, religious, educational, recreational, and psychological services. . . .

In conclusion, we cannot at this time agree to a transfer of Ms. Baraldini to Italy. Were Ms. Baraldini to show remorse for her past crimes, cooperate with the Government of the United States in its current investigations and demonstrate in some convincing way that she has abandoned her criminal life style, we might reconsider this

decision. Alternatively, if we could be assured that Ms. Baraldini would serve a sentence in Italy equivalent to that imposed by the judges here, we would, of course, reconsider this decision. As is our practice, we would consider an application from Ms. Baraldini again in one year. Absent a dramatic change in Ms. Baraldini's attitude or assurances that she would serve a sentence in Italy commensurate with that imposed for her serious crimes in the United States we cannot guarantee that our decision would change.

Please be assured, however, of our efforts to cooperate with you wherever possible as we have on three other cases before you in which preliminary approval to transfer to Italy has been given by this Department.

*See also* 85 Am. J. Int'l Law 338 (1991).

# CHAPTER 3

# International Criminal Law

## A. EXTRADITION AND OTHER RENDITIONS, AND MUTUAL LEGAL ASSISTANCE

### 1. Extradition

#### *a. Extradition of Nicaraguan diplomat from Japan*

On July 16, 1990, the United States sent a diplomatic note to the Japanese government requesting the provisional detention of a counselor of the Nicaraguan embassy in Tokyo for extradition to the United States to stand trial for violations of U.S. federal law on which he had been indicted. The note addressed the issue of diplomatic immunity as follows:

> The Embassy is aware that [the person in question] is a diplomatic agent of the Government of Nicaragua, and enjoys in Japan, which is the receiving State, the privileges and immunities under the Vienna Convention on Diplomatic Relations. In this connection, the Government of the United States of America believes that if the Government of Japan as the receiving State obtains from the Government of Nicaragua as the sending State its prior consent, by waiver and/or withdrawal of any diplomatic privileges, immunities and inviolability that [the person in question] may enjoy, there will be no problem of incompatibility with Japan's obligation under international law with regard to diplomatic privileges and immunities.

Note from the U.S. Embassy to the Ministry of Foreign Affairs of Japan, July 16, 1990.

The next day, the Government of Nicaragua terminated the diplomat's appointment and expressly consented to the application by Japan of the U.S.-Japan Extradition Treaty to him. The diplomat was arrested in Tokyo on July 17, 1990. In October 1990 he was extradited to the United States, where he pleaded guilty to one count of the charges against him.

### *b. Waiver of the rule of speciality*

On July 11, 1989, Acting Secretary of State Lawrence Eagleburger signed a warrant authorizing the extradition of Gennaro Prete to Canada to stand trial for attempted murder and conspiracy to commit murder. Prete had contracted for the murder of his brother-in-law in Canada. The person he hired had shot Prete's brother-in-law but the victim did not die until January 1990, after Prete's extradition. In November 1990 the Government of Canada sought the consent of the Department of State to charge Prete with first degree murder, in accordance with article 12(l)(iii) of the U.S.-Canada Treaty on Extradition, as amended by exchange of notes of June 28 and July 9, 1974, 27 U.S.T. 983, T.I.A.S. 8237. This article prohibits the requesting state from prosecuting the person extradited for any offense other than that for which he was extradited unless the requested state consents, a requirement usually referred to as the "rule of speciality" or "specialty."

In deciding whether to grant the request, the Department of State applied the criteria established in the 1979 case of *Berenguer v. Vance*, 473 F.Supp. 1195 (D.D.C. 1979). In that case the U.S. District Court for the District of Columbia upheld the power of the executive branch to consent to an expansion of extradition without a judicial hearing if two criteria were met in making the determination: (1) that failure to include the offense in the original extradition request was excusable for legal or practical reasons, and (2) that the Departments of State and Justice were satisfied that the request and supporting documents contain "probable cause" evidence that would have withstood judicial scrutiny had the additional or new offense been included in the original extradition request.

In this case, the criterion of timeliness was found to be satisfied because, among other things, the new charge of first degree murder could not have been included in the original Canadian request of June 1, 1989, since the victim did not die until 1990. On the basis of a review of the Canadian documentation submitted in support of the waiver request, it was also determined that the indictment of Prete for first degree murder, as proposed by the attorney general of Ontario, was fully justified, thus satisfying the second criterion.

The Department of State informed the Government of Canada of its decision on December 13, 1990. Prete pleaded guilty to second-degree murder and was sentenced to life imprisonment.

### *c. The rule of non-inquiry*

On June 26, 1987, the Government of Israel submitted to the United States an extradition request for Mahmoud El Abed Ahmad, also known as Mahmoud Abed Atta, a naturalized U.S. citizen. Atta was charged with murder and various other offenses stemming from a 1986 bus attack on civilians in the West Bank of the Occupied Territories. The crimes all fell within the U.S.–Israel extradition treaty of December 10, 1962, 14 U.S.T. 1707, T.I.A.S. No. 5476. Atta had been located and detained in Venezuela in April 1987 and deported to the United States soon after. He was arrested by U.S. authorities on the plane to New York.

After an extradition hearing, the magistrate denied the extradition request on June 17, 1988. *In re Extradition of Atta*, 87-0551-M, 1988 U.S. Dist. LEXIS 6001 (E.D.N.Y. June 17, 1988). The magistrate found that the exception to extradition for political offenses in the treaty applied to this case, and also found that the court lacked jurisdiction because, in the magistrate's opinion, Atta had been brought into the U.S. illegally.

The U.S. Government then filed a second extradition request on behalf of Israel. On February 14, 1989, the district court granted the application for certification of Atta for extradition, finding that the conditions under which Atta was deported to the United States did not deprive the court of jurisdiction, and that the political offense exception did not apply. *Matter of Extradition of Atta*, 706 F.Supp. 1032 (E.D.N.Y. 1989). In particular, the

court cited testimony of a State Department representative regarding the potential effects of a denial of Atta's extradition:

> Extraditing individuals charged with the murder of a civilian target and refusing to evoke the political offense exception is one of the United States' most important law enforcement tools in terrorist matters. Extraditing the defendant in this case will help to ensure that the United States does not become a haven for violent criminals charged with or convicted of offenses committed in other countries, and that the United States becomes viewed as a reliable partner in the fight against terrorism.
>
> The United States recently criticized severely the Government of Mexico because the Mexican Foreign Ministry invoked the political offense exception to our '78 extradition treaty with Mexico in denying the extradition of William Morales to the United States. Morales is a United States citizen considered a Puerto Rican freedom fighter by the Government of Mexico who had been convicted of serious weapons possession charges in the United States federal and state courts and sentenced to over one hundred years. It's important to the Department of State that a similar miscarriage of justice in this case be avoided.

*Id.* at 1041–42.

On March 3, 1989, Atta filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of New York to prevent his extradition to Israel. The petition was the procedural avenue available to him because there is no appeal under U.S. law of an order granting extradition. In addition to the grounds discussed above, Atta also argued that he would face procedures and treatment that would violate due process and universally accepted principles of human rights should he be extradited to Israel. Atta requested an evidentiary hearing on this issue.

The U.S. Government strongly opposed the request, on the ground that such arguments may only properly be addressed by the Department of State, under the so-called "rule of non-inquiry." The government's brief argued:

As the Second Circuit stated in *Jhirad v. Ferrandina*, 536 F.2d 478 (2d Cir. 1976), *cert. denied*, 429 U.S. 833 (1976), "[I]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity upon which extradition is based." Id. at 484–485 (citing *Factor v. Laubenheimer*, 290 U.S. 276 (1933)). *Accord, Demjanjuk v. Petrovsk*, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1198 (1986); see also *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) ("we are bound by the existence of an extradition treaty to assume that the trial will be fair.")

If there is a reason to believe that a nation with which we have a valid extradition treaty does not intend to comply with "due process" in its most general sense, the responsibility for investigating and addressing that concern rests entirely with the State Department; the courts may not become involved. *Gallina v. Fraser*, 278 F.2d 77, 78–79 (2d Cir.), *cert. denied*, 364 U.S. 81 (1960); *accord, In re Ryan*, 360 F.Supp. 270, 274 (E.D.N.Y. 1973); *aff'd without op.*, 478 F.2d 1397 (2d Cir. 1973). To require Israel to establish the fairness of its judicial system negates the purpose of an extradition treaty, undermines the responsibility of the Secretary of State, and effectively eliminates the treaty making power of the Senate.

Furthermore, it is well established that:

> Regardless of what constitutional protections are given to persons held for trial in the courts of the United States or of the constituent states thereof, those protections cannot be claimed by an accused whose trial and conviction have been held or are to be held under the laws of another nation, acting according to its traditional processes and within the scope of its authority and jurisdiction.

*Gallina v. Fraser*, 177 F.Supp. 856, 866 (D.Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). *Accord, Holmes v. Laird*, 459 F.2d 1211 (D.C.Cir.), *cert. denied*, 409 U.S. 869 (1972). . . .

> In spite of that, Israel—while under no obligation to do so under the treaty, United States law or international law—has produced evidence that Atta will receive a fair trial.

United States Memorandum of Law in Opposition to the Petition for a Writ of Habeas Corpus, at 25–27, *Ahmad v. Wigen*, No. 89-CV-715 (E.D.N.Y. 1989).

Despite these arguments, on May 16, 1989, the district court agreed to consider the issue of the nature of the Israeli judicial system to which the defendant would be exposed were he extradited to Israel, and authorized an evidentiary hearing on this issue. The U.S. Government sought a writ of mandamus in the U.S. Court of Appeals for the Second Circuit ordering the district court not to engage in any further inquiry on Israel's internal judicial procedures. In its petition for writ of mandamus, the U.S. Government argued that the rule of non-inquiry bars any such evidentiary hearing, as follows:

> The practice of judicial non-inquiry into the processes of a foreign government finds its origins in *Neely v. Henkel*, 180 U.S.109 (1901). In that decision, a fugitive challenged the constitutionality of the federal extradition statute on the ground that it did not "secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges and immunities that are guaranteed by the Constitution * * *." Rejecting these claims, the Court stated (180 U.S. at 122–123):
>
> > Allusion is here made to the provisions of the Federal Constitution relating to the writ of *habeas corpus*[,] bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty and property embodied in that instrument. The answer to this question is that those provisions have no relation to the crimes committed without the jurisdiction of the United States against the laws of a foreign country.
> >
> > In connection with the above proposition we are reminded of the fact that appellant is a citizen of the United States. But such citizenship does not * * * entitle him to demand, of right, a trial in any other mode

> than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. By the [extradition statute] the appellant cannot be extradited except upon the order of a judge * * * and then only upon evidence establishing probable cause to believe him guilty of the offence charged; and when tried in the country to which he is sent, he is secured by the same act 'a fair and impartial trial'—not necessarily a trial according to the mode prescribed by this country for crimes committed against its laws, but a trial according to the modes established in the country where the crime was committed.

The Supreme Court in a later decision reiterated that the courts do not examine the foreign state's processes in an extradition proceeding. Though that case involved a challenge to the probable cause showing, the Court spoke more broadly: "if there is presented * * * such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. We are bound by the existence of an extradition treaty to assume that the trial will be fair." *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911).

The Court similarly recognizes that "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." *Jhirad v. Ferrandina*, 536 F.2d 478, 484–85 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976). See also *Sindona v. Grant*, 619 F.2d 167, 174–74 (2d Cir. 1980). In a lengthy and seminal discussion of the issue, this Court explained:

> [W]e have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition. There is nothing in [two Supreme Court decisions and two lower court cases] indicating that the foreign proceedings must conform to American conc epts of due process. * * * * The authority that does exist points clearly to the proposition that the

> conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the Government. The right of international extradition is solely the creature of treaty * * * *. We regard it as significant that the procedures which will occur in the demanding country subject to extradition were not listed as a matter of a federal court's consideration in [a number of Supreme Court decisions].

*Gallina v. Fraser*, 278 F.2d at 78–79, citations omitted.

The Second Circuit's approach is consistent not only with the Supreme Court's view, but also with the views of the other circuits that have addressed the issue. . . .

The Rule of Non-Inquiry is thus uniformly observed by the federal courts. It is also consistent with the very limited scope of habeas review of international extradition orders. As the Supreme Court stated, "[t]he alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty, and * * * whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); see also *Jhirad v. Ferrandina*, 536 F.2d at 482. Plainly, the narrow scope of habeas review in extradition cases—with its explicitly limited inquiry that does not include an examination of the judicial system of the requesting country—precludes the examination the district court proposes to undertake here.

* * * *

Relying on *dictum* in *Gallina v. Fraser*, 278 F.2d at 79, [Atta] urged the district court to disregard the Rule of Non-Inquiry on the ground that "extradition would expose him to procedures or punishment 'antipathetic to a federal court's sense of decency.' " *Ibid.*; see also *Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir. 1980). Presumably, the district court also relied on the *Gallina* statement in determining that it had the authority to inquire into Israel's judicial system. Contrary to the court's and

[Atta's] view, *Gallina* does not justify the kind of inquiry that the court has signaled here.

We question first whether the *dictum* in *Gallina* permits the sort of wholesale inquiry into the requesting country's procedures that the district court seemingly contemplates. Indeed, as Judge Friendly, writing for the Court, later explained, *Gallina* holds expressly that "the federal courts may not 'inquire into the procedures which await the relator upon extradition.' 278 F.2d at 78." Judge Friendly continued that "[t]he fact that *Gallina* also added the caveat that some situations were imaginable in which a federal court might wish to reexamine the principle of exclusive executive discretion, id. at 79, falls well short of a command to do so here." *Sindona v. Grant*, 619 F.2d at 175. In other words, *Gallina* did not create or endorse a new rule, but merely enunciated the possibility that such a change might be imposed in appropriate circumstances. Hence, that case does not stand for the proposition that the courts currently have the authority to ignore "the principle of exclusive executive discretion." Absent any indication from a higher court that the long-standing principle is no longer valid, *Gallina* provides no basis for the district court to depart from it.[3]

Additionally, assuming that *Gallina* provided some support for the district court to examine the requesting state's internal processes, the Court's explanation in *Sindona* and its emphasis in that case on *Gallina's* expression of the non-inquiry rule diminishes even further the minimal significance of that *dictum*. But, even assuming that a very limited exception to the Rule of Non-Inquiry might exist in extradition proceedings and that it could, in an appropriate case, support an inquiry into all aspects of the foreign government's judicial processes, the intrusion of such a judicial examination on our treaty obligations and the Executive Branch's discretion requires at least a threshold showing that the foreign system is suspect. In this case, [Atta's] challenge to the Israeli judicial process was entirely based on the alleged unfairness of the *military* judicial procedures followed on the West Bank. He made no showing, however, that the procedures observed

> in Israel's *civilian* courts—in which he has been charged and will be tried (according to the guarantee provided in a diplomatic note by Israel and submitted to the district court)—are in any way "antipathetic to a federal court's sense of decency." In short, nothing in the papers filed by [Atta] makes a threshold showing sufficient to trigger an evidentiary hearing on the "nature of the [Israeli] judicial system."
>
> [3] As the Ninth Circuit noted several years ago, Gallina's "exception has yet to be employed in an extradition case" (*Arnsbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983)), and nothing decided since 1983 has rendered invalid that observation. Moreover, *Gallina* did not involve an unrestricted examination into all aspects of the foreign state's system of justice; rather, it focused in a very limited manner on the singular practice of prosecuting *in absentia*.

U.S. Petition for a Writ of Mandamus and Prohibition to the United States District Court for the Eastern District of New York, at 8–13, *In Re United States of America*, No. 89-2503 (2d Cir., June 19, 1989), available at *www.state.gov/s/l*.

The court of appeals denied the writ of mandamus on June 20, 1989, without opinion. The district court then proceeded to consider the habeas petition, including the inquiry into Israel's internal judicial procedures.

On September 26, 1989, the district court denied Atta's petition for writ of habeas corpus. *Ahmad v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989). The court found that the political offense exception to extradition was inapplicable and that jurisdictional requirements were met. With regard to the rule of non-inquiry, the district court held that U.S. courts, as an independent branch of government, are charged with defending the due process rights of all those who appear before them, and must exercise their independent judgment to determine the propriety of an individual's judgment. *Id*. at 409–20. Accordingly, the court reviewed the facts regarding the Israeli judicial system and practices produced at the evidentiary hearing, and found that Atta would receive due process protections under Israeli law. *Id*.

On August 10, 1990, the Second Circuit Court of Appeals affirmed the district court's denial of Atta's petition for habeas

corpus. The appellate court disagreed, however, with the district court's decision to examine Atta's claims concerning his treatment on his return to Israel. On that issue, the appellate court concluded as follows:

> We have no problem with the district court's rejection of Ahmad's remaining argument to the effect that, if he is returned to Israel, he probably will be mistreated, denied a fair trial, and deprived of his constitutional and human rights. We do, however, question the district court's decision to explore the merits of this contention in the manner that it did. The Supreme Court . . . cases dealing with the scope of habeas corpus review carefully prescribe the limits of such review. Habeas corpus is not a writ of error, and it is not a means of rehearing what the certification judge or magistrate already has decided. A consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge. Indeed, there is substantial authority for the proposition that this is not a proper matter for consideration by the certifying judicial officer. In *Sindona v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980), we said that "the degree of risk to [appellant's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch." In *Jhirad v. Ferrandina*, 536 F.2d at 484–85, we said that "it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."
>
> Notwithstanding the above described judicial roadblocks, the district court proceeded to take testimony from both expert and fact witnesses and received extensive reports, affidavits, and other documentation concerning Israel's law enforcement procedures and its treatment of prisoners. This, we think, was improper. The interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced. It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds. So far as we know, the Secretary

> never has directed extradition in the face of proof that the extraditee would be subjected to procedures or punishment antipathetic to a federal court's sense of decency. Indeed, it is difficult to conceive of a situation in which a Secretary of State would do so.

*Ahmad v. Wigen*, 910 F.2d 1063, 1066–1067 (2nd Cir. 1990).

Atta was extradited and arrested in Israel on October 29, 1990. He was sentenced to life in prison in 1991.

### *d. Department of State extradition procedures*

On December 10, 1989, the Assistant Legal Adviser for Law Enforcement and Intelligence, Andre M. Surena, executed a declaration filed in the case of *Gill v. Imundi*, 88 Civ. 153(RWS) (S.D.N.Y. 1989), explaining the State Department's extradition procedures, in response to questions concerning consideration by the Secretary of State of allegations of inability to receive a fair trial and claims of persecution upon extradition in making extradition decisions. The declaration described the extradition process as follows:

* * * *

> 2. The process of extraditing a fugitive to a foreign country begins when a formal extradition request is presented to the Department by a diplomatic note from the requesting State's Embassy in Washington. Upon receiving the request with supporting documents properly certified by the U.S. Embassy in the requesting State, the office of the Assistant Legal Adviser for Law Enforcement and Intelligence conducts a preliminary review of the materials to determine: (a) whether an extradition treaty is in effect between the requesting State and the United States, (b) whether the request appears to come within the scope of the applicable extradition treaty, and (c) whether, on the face of the supporting documents, there is no clearly-evident defense to extradition (for example, that the offense is manifestly politically motivated). If the answers to these questions are yes, we transmit the request and

documents to the Department of Justice for further review and, if appropriate, the commencement of judicial extradition proceedings.

3. The Department of Justice review, conducted by the Office of International Affairs, is primarily intended to determine whether the supporting documents contain sufficient evidence to meet U.S. evidentiary requirements. If the Department of Justice considers that the documents are in order and the extradition request is well founded, it has the request and documents filed (generally, by a United States Attorney's Office) in the appropriate federal district court along with a complaint seeking a warrant for the fugitive's arrest. Upon issuance of the arrest warrant, the U.S. Marshals Service apprehends the person sought, if he can be found, and he is held pending the extradition hearing.

4. A hearing on the merits of the extradition request is then held before a United States magistrate or a United States district judge sitting as an extradition magistrate. The Department of Justice, through the Office of the U.S. Attorney, will represent the legal interests of the requesting State at the hearing when it is obliged to do so by treaty or when the requesting State agrees to provide reciprocal representation for U.S. requests presented before its courts. If the extradition judge or magistrate confirms the identity of the fugitive and finds that probable cause exists to believe that he committed the offense charged (or that he has been convicted in the requesting State of the offense) and that no defense to extradition under the applicable treaty has been made, he will issue a certificate of extraditability and order that the fugitive be held in custody pending a final determination on his extradition by the Secretary of State. The judicial record in the case is then certified to the Secretary, pursuant to 18 U.S.C. Section 3184, for a decision by the Secretary on whether to authorize the surrender of the fugitive to the agents of the requesting State. See 18 U.S.C. Section 3186. This authority has been delegated to the Deputy Secretary of State; consequently, either the Secretary or the Deputy Secretary may exercise this authority.

5. The fugitive may seek judicial review of the extradition magistrate's finding by petitioning for a writ of habeas corpus, generally in the district court in which the extradition hearing was held. The district court's decision on the petition for a writ of habeas corpus is appealable to the United States Court of Appeals. Either party may seek review of a Court of Appeals decision by petitioning the Supreme Court for a writ of certiorari. . . . .

6. Although the Department of Justice generally represents the interests of the requesting State during judicial extradition proceedings, this representation does not in any way constitute a decision by the United States, acting through the Secretary of State, to extradite the individual. The Secretary's decision on whether to extradite is made after final judicial action. However, if a court declines to issue a certificate of extraditability on grounds of lack of probable cause or a treaty-based defense, there will be no occasion for the Secretary to act.

7. Upon the issuance of a certificate of extraditability and completion of judicial proceedings, the Secretary may consider *de novo* all issues properly raised before the court, and any new arguments either in favor of or against surrender that are presented to him by any interested party or which have otherwise come to the Department's attention. He may also consider any arguments which, although not new, are relevant and could not have been considered by the court, *e.g.*, whether the extradition request was politically motivated, or whether the fugitive is likely to be denied a fair trail or otherwise persecuted upon his return.

8. The manner in which the Secretary may consider these issues will vary from case to case. Invariably, the Department of State will rely upon its knowledge and expertise of the judicial and penal conditions and practices of the requesting country. It may in some cases make specific inquiries relating to the individual fugitive or it may frame its judgment on the basis of its analysis of more general information.

9. Based on an analysis of such information by all relevant offices within the Department, 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 any conditions he deems reasonable or otherwise appropriate.
>
> 10. The allegations raised by petitioners during the course of these judicial proceedings relating to their inability to receive a fair trial and claims of persecution upon extradition have not yet been presented to the Secretary for consideration. The Department is aware of the seriousness of these allegations and will consider them prior to the Secretary's final determination. In fact, the Office of the Assistant Legal Adviser for Law Enforcement and Intelligence has already sought to obtain relevant information from the Department's Country Office for India and from its Bureau of Human Rights and Humanitarian Affairs. Either petitioner is also free to submit to the Secretary in writing any material that he believes is relevant generally to the question of his extradition. If, upon completion of judicial proceedings, the courts have sustained the finding of extraditability, the Department would present all relevant issues to the Secretary for his consideration and decision.

Declaration of Andre M. Surena, *Gill v. Imundi*, 747 F. Supp. 1028 (S.D.N.Y. 1990). The Declaration is available at *www.state.gov/s/l*.

### 2. Other Renditions

#### *Irregular apprehensions of criminal suspects*

The Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary held a hearing on November 8, 1989, concerning an opinion by the Office of the Legal Counsel of the Department of Justice that the Federal Bureau of Investigation was authorized as a matter of domestic law to conduct extraterritorial arrests of individuals for violations of U.S. law. William P. Barr, Assistant Attorney General, Office of Legal Counsel, provided testimony explaining the interpretation of U.S. law at issue and the importance of extraterritorial enforcement

of U.S. law. Legal Adviser of the Department of State Abraham D. Sofaer testified on the international and foreign policy implication of such arrests, issues that were not addressed by the Office of Legal Counsel's opinion. Portions of the Legal Adviser's prepared statement follow:

> The Office of Legal Counsel, as the office within the Department of Justice responsible for articulating the Executive Branch view of domestic law, recently issued an opinion concerning the FBI's domestic legal authority to conduct arrests abroad without host country consent. . . . The opinion did not change Administration or Department of Justice policy concerning such arrests. As the White House recently made clear, an interagency process exists to ensure that the President takes into account the full range of foreign policy and international law considerations before making any such decision.
>
> My role today is to address issues not discussed in the OLC opinion—the international law and foreign policy implications of a nonconsensual arrest in a foreign country. . . . [T]he Congress and President have the power under the Constitution in various circumstances to act inconsistently with international law. . . . In practice, despite their power to act otherwise, each of the branches of our government has shown a healthy respect for international law.
>
> The Federal courts have treated international law as part of United States law since our early days as a nation. The *Paquete Habana* is probably best known, and most frequently cited, for language in Justice Gray's opinion concerning the authority of the Executive Branch to violate international law by controlling act. In fact, however, the decision in that case found no controlling Executive Act, affirmed the relevance of international law to the conduct of Executive Branch officials, and disallowed an action by a lower official because it violated international law. . . .
>
> Presidents, and other Executive officers have recognized the importance and authority of international law. . . .
>
> Congress, similarly, has demonstrated substantial respect for international law. While the principle that

Congress can override international law for purposes of our domestic law is well-established, actual examples of such actions are few, and the record is overwhelmingly to the contrary. Even when dealing with issues of national urgency, the Congress has acted with respect for our international obligations. . . . Thus, in passing the Omnibus Diplomatic Security and AntiTerrorism Act of 1986, Congress declined to include a provision authorizing "self-help" measures.

Given this tradition of respect for international law, it is not surprising that our courts assume in all cases of doubt that our political branches have acted consistently with international law.

* * * *

"Territorial integrity" is a cornerstone of international law; control over territory is one of the most fundamental attributes of sovereignty. . . . Forcible abductions from a foreign State clearly violate this principle. In his important Survey of International Law in 1949, Sir Hersh Lauterpacht wrote of "the obligation of states to refrain from performing jurisdictional acts within the territory of other states except by virtue of general or special permission. Such acts include, for instance, the sending of agents for the purpose of apprehending within foreign territory persons accused of having committed a crime." Lauterpacht, E. (ed.), *International Law*, Vol. 1, 487–488 (1970). See also Section 433, *Restatement 3rd of the Foreign Relations Law of the United States*.

The United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity. . . .

* * * *

States have sought to overcome the limitations on international law enforcement activities arising from the principle of territorial integrity by cooperating in dealing with extraterritorial crime and in apprehending fugitives. An array of international agreements, institutions, and practices has developed to help nations deal with the

difficulties in pursuing criminals caused by our respect for each other's borders. States have voluntarily returned fugitives from justice through legal devices such as extradition, deportation, and expulsion for literally thousands of years. Where such cooperation is possible, no question of unilateral action even arises.

Further, certain forms of criminal activity have been subjected to universal jurisdiction. Multilateral conventions impose an obligation on parties to prosecute or extradite for hijacking, hostage-taking, aircraft sabotage, and other forms of terrorist behavior. Other agreements deal with international drug dealers, and create an obligation on parties to prosecute or extradite those criminals as well.

The adverse effects of the principle of territorial integrity on law enforcement are also mitigated by the willingness of states to consent to foreign law enforcement action on their territory. No particular formality or publicity is required for such consent to be legally effective. Even tacit consent is sufficient if given by appropriate officials. For political reasons a state may decide to deny after the fact that it had consented to an operation. This would not vitiate the legality of an action, if consent had in fact been given. In still other cases, a foreign state may cooperate by quietly placing an individual wanted by the United States on board a plane or vessel over which the United States has jurisdiction.

Despite its importance, however, the principle of territorial integrity is not entitled to absolute deference in international law. Every state retains the right of self-defense, recognized in Article 51 of the UN Charter. Thus, a state may take appropriate action in order to protect itself and its citizens against terrorist attacks. This includes the right to rescue American citizens and to take action in a foreign state where that state is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks upon U.S. citizens. Any use of force in self-defense must meet the standards of necessity and proportionality to be lawful. But if these conditions are met, the fact that the use of force breaches the territorial integrity of a state does not render it unlawful.

Thus, the United States defended Israel's rescue mission at Entebbe in 1976, notwithstanding the temporary breach of Uganda's territorial integrity. The U.S. representative to the United Nations stated that "given the attitude of the Ugandan authorities, cooperation with or reliance on them in rescuing the passengers and crew was impracticable." The United States was acting consistently with international law in taking forcible action against Libya in 1986 for its role in terrorist attacks against the United States. Even in the area of forcible abductions, the international community seems willing to take into account particular circumstances in assessing a violation of territorial integrity. While the international community criticized the forcible abduction of Adolf Eichmann from Argentina, it did not call for his return and even Argentina was satisfied by an Israeli expression of regret for any violation of Argentine law and sovereignty.

In considering the availability of the doctrine of self-defense to justify a breach of territorial integrity, it is essential to recognize that the President is not bound by the interpretations of international law taken by other states. The President should carefully consider those views, since the U.S. must be prepared to defend its interpretation of the law. But self-defense is a right deemed "inherent" in the Charter. Here, more than anywhere else in international law, a state must act in good faith, but must also be free to protect its nationals from all forms of aggression. State-sponsored terrorism has created new dangers for civilized peoples, and the responses of the United States in Libya and elsewhere have gained ever wider recognition as having been necessary and effective methods for defending Americans.

While the law must be given full respect even in matters of self-defense, we must not permit the law to be manipulated to render the free world ineffective in dealing with those who have no regard for law. We must not allow law to be so exploited, but rather must insist on the continued development of legal rules that enable states to deal effectively with new forms of aggression.

This brings me to the increasingly serious threat to the

domestic security of the United States and other nations by narcotics traffickers. In recent months evidence has accumulated that some of these traffickers have been trained in terrorist tactics. They have enormous resources and small armies at their command. Their modus operandi is to try to intimidate or disrupt the legal process in states. They have threatened violence against United States citizens, officials, and property. They have been provided safe-haven, or given approval to transit, by governments in complicity with the drug traffickers.

We are reaching the point . . . at which the activities and threats of some drug traffickers may be so serious and damaging as to give rise to the right to resort to self-defense. The evidence of imminent harm from traffickers' threats would have to be strong to sustain a self-defense argument. Arrests in foreign states without their consent have no legal justification under international law aside from self-defense. But where a criminal organization grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures in self-defense.

While international law therefore permits extraterritorial "arrests" in situations which permit a valid claim of self-defense, decisions about any extraterritorial arrest entail grave potential implications for U.S. personnel, for the United States, and for our relations with other states. These considerations must be carefully weighed by the Secretary of State, who is statutorily responsible for the management of foreign affairs and for the security of U.S. officials overseas (22 U.S.C. 2656 and 22 U.S.C. 3927), and by the Ambassador to the country in question who has statutory responsibility for the direction and supervision of U.S. government employees in the country to which he or she is assigned (22 U.S.C. 3927).

The actual implications of a nonconsensual arrest in foreign territory may vary with such factors as the seriousness of the offense for which the apprehended person is arrested; the citizenship of the offender; whether the foreign government itself had tried to bring the offenders to justice or would have consented to the apprehension

had it been asked; and the general tenor of bilateral relations with the United States. However, any proposal for unilateral action would need to be reviewed from the standpoint of a variety of potential policy implications.

First, such operations create substantial risks to the U.S. agents involved. Actions involving arrests by U.S. officials on foreign territory require plans to get those officials into the foreign state, to protect those officials while in the foreign state, to remove the officials with the person arrested from that state, and finally to bring them safely back, to United States territory. While the officials involved might include FBI agents seeking to make an arrest, such operations may also require the use of a wide range of U.S. assets and personnel.

Apart from being killed in action, U.S. agents involved in such operations risk apprehension and punishment for their actions. Our agents would not normally enjoy immunity from prosecution or civil suit in the foreign country involved for any violations of local law which occur. (In 1952, the Soviets abducted Dr. Walter Linse from the U.S. sector of Berlin to the Soviet sector, where he was tried and convicted by a Soviet Tribunal. Two of Linse's abductors were subsequently apprehended in West Berlin and sentenced for kidnapping.) Moreover, many states will not accord POW status to military personnel apprehended in support of an unconsented law enforcement action. The United States could also face requests from the foreign country for extradition of the agents. Obviously the United States would not extradite its agents for carrying out an authorized mission, but our failure to do so could lead the foreign country to cease extradition cooperation with us. Moreover, our agents would be vulnerable to extradition from third countries they visit.

Beyond the risks to our agents, the possibility also exists of suits against the United States in the foreign country's courts for the illegal actions taken in that country. For example, U.S. courts held that Chile was not immune from suit in the United States for its involvement in the assassination of a Chilean, Letelier, in the United States. The United States could also face challenges for such

actions in international fora, including the International Court of Justice.

An unconsented, extraterritorial arrest would inevitably have an adverse impact on our bilateral relations with the country in which we act. Less obviously, such arrests could also greatly reduce law enforcement cooperation with that or other countries. The United States has attached substantial importance over the past decade to improving bilateral and multilateral law enforcement cooperation. For many countries, these agreements reflect the commitment of the United States to confine itself to cooperative measures, rather than unilateral action, in the pursuit, of U.S. law enforcement objectives. If the United States disregards these agreed law enforcement norms and mechanisms, and acts unilaterally, we must be prepared for states to decline to cooperate under these arrangements or to denounce them. Foreign states have reacted adversely to extraterritorial U.S. laws, even when those laws involve enforcement action taken only in the United States. The breadth of our discovery practices and antitrust laws has led some states to pass blocking and secrecy statutes that preclude cooperation with the United States. Their reaction to unconsented extraterritorial arrests could be more extreme.

Finally, we need to consider the fact that our legal position may be seized upon by other nations to engage in irresponsible conduct against our interests. Reciprocity is at the heart of international law; all nations need to take into account the reactions of other nations to conduct which departs from accepted norms.

*Authority of the Federal Bureau of Investigation to Seize Suspects Abroad: Hearing Before the Sub-Comm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. (1989) at 22–25. *See also* 84 Am. J. Int'l L. 725 (1990).

## 3. Mutual Legal Assistance and Related Issues

### *a. U.S.-USSR memorandum of understanding on Nazi war criminals*

On October 19, 1989, the Attorney General of the United States, Richard Thornburgh, and the Procurator General of the Union of Soviet Socialist Republics, Alexander Sukharev, signed a memorandum of understanding reaffirming cooperation by way of judicial assistance in Nazi war crimes cases. Memorandum of Understanding Between the Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice Concerning Cooperation in the Pursuit of Nazi War Criminals, entered into force October 19, 1989. The memorandum, signed at Moscow, provided as follows in pertinent part:

> The Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice, in the spirit of reciprocity, cooperation, and mutual interest in the pursuit, investigation and prosecution of individuals who are suspected of having committed Nazi war crimes or of having assisted in the commission of such crimes during the years of the Second World War, have agreed to the following:
>
> 1. The Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice agree to provide legal assistance on a reciprocal basis in the investigation of individuals who are suspected of having committed Nazi war crimes or of having assisted in the commission of such crimes.
>
> 2. The Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice shall furnish one another on a confidential basis, through diplomatic channels, names, other data and archival documents relating to the foregoing category of individuals.
>
> 3. Inasmuch as the procedures for the gathering of evidence followed by the Office of Special Investigations (OSI) of the United States Department of Justice, which have

been worked out in the process of the evolving practice of cooperation by both sides, have been accepted by numerous courts and tribunals under appropriate laws, regulations, rules, and judicial precedents of the United States of America, and do not contradict Soviet legal norms, the Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice affirm their readiness to continue to provide mutual assistance in the gathering of appropriate evidence.

* * * *

5. The Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice, recognizing the legal and moral importance of the investigation of cases involving individuals who have committed Nazi crimes or assisted in them, hereby affirm their unfailing resolve and commitment to actively cooperate in the investigation of such cases.

* * * *

*See also* 84 Am. J. Int'l L. 536 (1990).

### *b. Admissibility of evidence obtained abroad*

On February 28, 1990, the U.S. Supreme Court held that "the Fourth Amendment [does not] appl[y] to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990).

The respondent in the case, Rene Martin Verdugo-Urquidez, a citizen of Mexico, was believed to be one of the leaders of a large and violent organization in Mexico smuggling narcotics into the United States. A warrant for his arrest on various federal narcotics-related charges had been issued in 1985. Mexican law enforcement personnel arrested Verdugo-Urquidez in Mexico in January 1986, drove him to the border, and turned him over to U.S. marshals on the U.S. side of the border. Following the arrest, a Drug Enforcement Administration agent arranged for searches of Verdugo-Urquidez's residences in Mexicali and San Felipe,

Mexico. The agent believed that respondent's residences would contain cash proceeds and documents reflecting his participation in narcotics trafficking, as well as evidence of respondent's involvement in the kidnapping and assassination of a DEA agent, for which he was later convicted in a separate prosecution. *United States v. Verdugo-Urquidez*, No. 87-422, slip. op. (C.D. Cal., Nov. 22, 1988). The Director General of the Mexican Federal Judicial Police ("MFJP") authorized the search and made MFJP officers available to assist in the operation. The U.S. and Mexican officials searched both residences on the same day, concluding at 3:30 a.m.

The U.S. District Court for the Southern District of California suppressed the evidence seized from both premises in an unreported memorandum decision and order. *U.S. v. Verdugo-Urquidez*, No. 86-107, slip op. (S.D.Cal., Feb. 18, 1987). It found at the outset that the [Drug Enforcement Administration] DEA agents had sufficiently participated in the searches to make those searches "a joint venture" between the American and Mexico agents. Because the agents had not secured a warrant from a United States district court, which the court found it would have had the "inherent power" to issue, the court held that the searches of respondent's residences were unconstitutional under the Fourth Amendment to the U.S. Constitution. *Id*.

On appeal, the Court of Appeals for the Ninth Circuit affirmed. 856 F.2d. 1214 (9th Cir. 1988). It held that a nonresident alien may invoke the Fourth Amendment to challenge the reasonableness of a foreign search and that the search was constitutionally unreasonable for want of a warrant. *Id*. at 1214. The court acknowledged that "a warrant issued by an American magistrate would be a dead letter in Mexico." It also noted that "[I]nternational law enforcement is a cooperative venture and it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant and suggested that it gave the American agents all the authority they needed to search a foreign residence." *Id*. at 1229–1230. Nevertheless, the court concluded that an American warrant would still "have substantial constitutional value in this country" because it would "reflect the magistrate's determination that probable cause to search existed" and would "define the scope of the search." *Id*. at 1230.

In reversing, the U.S. Supreme Court first distinguished the

scope of the Fourth Amendment from that of the Fifth and Sixth Amendments. It found significant the use of the term "the people"* in contrast to the use of "person" and "accused" in the Fifth and Sixth Amendments regulating procedure in criminal cases:

> The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.
>
> There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.

494 U.S. at 266–267.

The Court reviewed its own precedents in cases construing the applicability of various aspects of the Constitution outside the United States and to aliens generally. The decision in relevant part follows:

> The global view taken by the Court of Appeals of the application of the Constitution is also contrary to this Court's decisions in the *Insular Cases*, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power. [citations omitted to cases denying applicability of fifth and sixth amendment rights in Puerto Rico, the Philippines and Hawaii before it was a state]. In *Dorr* [ *v. United States*, 195 U.S. 138 (1904)], we declared the general rule that in an unincorporated territory—one not clearly destined for statehood—Congress was not required to adopt

* The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"a system of laws which shall include the right of trial by jury, and that *the Constitution does not, without legislation and of its own force, carry such right to territory so situated*." Only "fundamental" constitutional rights are guaranteed to inhabitants of those territories. [citations omitted] If that is true with respect to territories ultimately governed by Congress, respondent's claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker. And certainly, it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power. Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions. The *Eisentrager* opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry; "the alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society." But our rejection of extraterritorial application of the Fifth Amendment was emphatic:

> "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. [citations omitted] None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.
>
> If such is true of the Fifth Amendment, which speaks in the relatively universal term of 'person,' it would seem even more true with respect to the Fourth Amendment, which applies only to 'the people.' "

To support his all-encompassing view of the Fourth Amendment, respondent points to language from the plurality opinion in *Reid v. Covert*, 354 U.S. 1 (1957). *Reid* involved an attempt by Congress to subject the wives of American servicemen to trial by military tribunals without the protection of the Fifth and Sixth Amendments. The Court held that it was unconstitutional to apply the Uniform Code of Military Justice to the trials of the American women for capital crimes. Four Justices "rejected the idea that when the United States acts *against citizens* abroad it can do so free of the Bill of Rights." *Id.* At 5. The plurality went on to say:

> "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish *a citizen* who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." [citations omitted]

Respondent urges that we interpret this discussion to mean that federal officials are constrained by the Fourth Amendment wherever and against whomever they act. But the holding of *Reid* stands for no such sweeping proposition: it decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments. The concurring opinions by Justices Frankfurter and Harlan in *Reid* resolved the case on much narrower grounds than the plurality and declined even to hold that United States citizens were entitled to the full range of constitutional protections in all overseas criminal prosecutions. See *id.*, at 75 (Harlan, J., concurring in result) ("I agree with my brother Frankfurter that . . . we have before us a question analogous, ultimately, to issues of due process; one can say, in fact, that the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case").

Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding.

Verdugo-Urquidez also relies on a series of cases in which we have held that aliens enjoy certain constitutional rights. [citations omitted] These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country. [citations omitted] Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not.

Justice Stevens' concurrence in the judgment takes the view that even though the search took place in Mexico, it is nonetheless governed by the requirements of the Fourth Amendment because respondent was "lawfully present in the United States . . . even though he was brought and held here against his will." *Post*, at 279.† But this sort of presence—

† [Editors' note: The three dissenting Justices (Brennan, Marshall and Blackmun) would have found the Fourth Amendment applicable to this case because of the circumstances of Verdugo-Urquidez' presence in the United States. Justices Brennan and Marshall argued as follows in their joint dissent:

> What the majority ignores, however, is the most obvious connection between Verdugo-Urquidez and the United States: he was investigated and is being prosecuted for violations of United States law and may well spend the rest of his life in a United States prison. The "sufficient connection" is supplied not by Verdugo-Urquidez, but by the Government. Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed. Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose "societal obligations," *ante*, at 273, such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.
>
> By concluding that respondent is not one of "the people" protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.

*Id.* at 283–284.]

> lawful but involuntary—is not of the sort to indicate any substantial connection with our country. The extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example—we need not decide. When the search of his house in Mexico took place, he had been present in the United States for only a matter of days. We do not think the applicability of the Fourth Amendment to the search of premises in Mexico should turn on the fortuitous circumstance of whether the custodian of its nonresident alien owner had or had not transported him to the United States at the time the search was made.

*Id.* at 268–272.

After disposing of further objections raised by Verdugo-Urquidez, the Court concluded:

> Not only are history and case law against respondent, but as pointed out in *Johnson v. Eisentrager*, 393 U.S. 763 (1950), the result of accepting his claim [that the Fourth Amendment was applicable to his case] would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries. The rule adopted by the Court of Appeals would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in "searches or seizures." The United States frequently employs armed forces outside this country—over 200 times in our history—for the protection of American citizens or national security. Congressional Research Service, Instances of Use of United States Armed Forces Abroad, 1798–1989 (E. Collier ed. 1989). Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in

> international waters. . . . The Members of the Executive and Legislative Branches are sworn to uphold the Constitution, and they presumably desire to follow its commands. But the Court of Appeals' global view of its applicability would plunge them into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad. Indeed, the Court of Appeals held that absent exigent circumstances, United States agents could not effect a "search or seizure" for law enforcement purposes in a foreign country without first obtaining a warrant—which would be a dead letter outside the United States—from a magistrate in this country. Even if no warrant were required, American agents would have to articulate specific facts giving them probable cause to undertake a search or seizure if they wished to comply with the Fourth Amendment as conceived by the Court of Appeals.
>
> We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.
>
> For better or for worse, we live in a world of nation-states in which our Government must be able to "function effectively in the company of sovereign nations." [citations omitted] Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.

*Id.* at 273–275.

## B. INTERNATIONAL CRIMES

### 1. Terrorism

#### *a. U.S. legislation*

On December 12, 1989, President George H.W. Bush signed the Anti-Terrorism and Arms Export Amendments Act of 1989, Pub. L. No. 101-122, 103 Stat. 1892, 22 U.S.C. §§ 1732, 2364, 2371, 2753, 2776, 2778, 2780 and 50 § U.S.C. 2405. The Act included, among other things, anti-terrorism measures to accomplish the following:

— Clarify and strengthen the prohibitions on the export of military arms and equipment to countries which the Secretary of State has determined have "repeatedly supported acts of international terrorism." The Act imposes criminal and civil penalties for violations of the prohibitions.

— Establish uniform standards in the Arms Export Control Act, the Foreign Assistance Act of 1961, and the Export Administration Act of 1979 for the Secretary of State to employ in designating a terrorist country, and provides for Presidential authority to waive the statutory sanctions or to rescind the Secretary's designation under certain circumstances.

— Require a validated license and 30-day advance congressional notification for the export of any good or technology, irrespective of the dollar value, that the Secretary of State determines could significantly contribute to the military potential of a terrorist country or to its ability to support international terrorism.

— Prohibit bilateral U.S. foreign assistance to any country whose government has repeatedly provided support for acts of international terrorism, as determined by the Secretary of State.

— Prohibit U.S. and U.S.-controlled corporations and other persons from taking actions prohibited by the legislation outside of the United States.

— Require congressional notification before a country may be removed from the list of those designated as supporting international terrorism.

President Bush's statement at the time of signature asserted that "[c]urbing state support to terrorists is essential in reducing the menace of international terrorism." His statement also

addressed several concerns with the bill as enacted. First, he addressed the section providing for extraterritorial application to certain persons:

> I am aware that, insofar as the new section 40 of the Arms Export Control Act applies to activities by U.S. persons (including subsidiaries of U.S. firms) in foreign countries, it has thus raised concerns among our Allies regarding the extraterritorial application of U.S. law. Moreover, section 40 makes it clear that all of the prohibitions dealing with foreign subsidiaries and munitions items are applicable to the extent specified in implementing regulations of the Department of State. I consequently direct the Secretary of State to ensure that the appropriate implementing amendments to the International Traffic in Arms Regulations (ITAR) are consistent with applicable international law regarding the extraterritorial effect of U.S. law.

Statement by the President, Office of the Press Secretary, White House, 25 WEEKLY COMP. PRES. DOC. 1942 (Dec. 12, 1989).

The President also made clear that he would construe certain provisions of the act in order to avoid any limitation on his ability to conduct the foreign policy of the United States:

> Two provisions of the bill warrant careful construction in order to avoid constitutional difficulties. The new section 40(a)(5) prohibits the United States Government from "facilitating the acquisition of any munitions item" by a country designated by the Secretary of State under section 40(d). The new section 40(b)(1)(D) contains a parallel prohibition on actions by any U.S. person to facilitate such an acquisition. I shall interpret these provisions as placing no limit on our negotiations and communications with foreign governments. This interpretation is supported by the House Committee Report and the colloquy on the floor of the House clarifying that these provisions are not intended to circumscribe my constitutional authority to articulate foreign policy or to discuss with foreign countries arms transfers that they may wish to make.

*Id.* at 1942

### *b. International counter-terrorism agreements*

On November 17, 1989, Deputy Legal Adviser Elizabeth R. Rindskopf testified before the Senate Committee on Foreign Relations on the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, done at Montreal, 24 February 1988, 27 I.L.M. 627 (May 1988) and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its related Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome, 10 March 1988, 27 I.L.M. 668 (May 1988).

#### *(1) Protocol for the Suppression of Unlawful Acts of Violence at Airports*

The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation supplements the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the "Montreal Sabotage Convention," 24 U.S.T. 565, T.I.A.S. No. 7570. It extends the international prohibitions against acts of violence against aircraft, including the obligation on states to prosecute offenders themselves or extradite them for prosecution by other states, to certain acts of violence at airports serving international civil aviation. As explained by Ms. Rindskopf:

> This Protocol to the Montreal Sabotage Convention was stimulated by the Abu Nidal organization's December 1985 attacks on Rome and Vienna airports that killed twenty persons, including five Americans. Those brutal attacks, in which the terrorists shot at passengers in the airport building without even coming close to the aircraft, demonstrated that the airport facilities themselves, in addition to the aircraft, needed to be brought under the umbrella of international anti-terrorist conventions. . . .

Ms. Rindskopf then described the U.S. Government's strong support for the Protocol:

> . . . The instrument represents another important international step to prevent and punish terrorists. By including

> acts of violence committed in airports within the "prosecute or extradite" regime embodied in the Montreal convention, the Protocol closes a significant "loophole" in the international fight against aviation terrorism. While this Protocol cannot guarantee that similar tragedies at airports will not occur in the future, it does serve as a deterrent and increases the likelihood that those responsible, if apprehended, will be held accountable.
>
> The Protocol also represents a significant achievement in international cooperation to fight terrorism. The United States was a leader in the call for the negotiation of this instrument. Its successful conclusion under ICAO [International Civil Aviation Organization] auspices was a significant achievement that illustrates the ability of nations to work together to prevent and punish acts of violence against civil aviation. The unprecedented speed in which ICAO mechanisms adopted this instrument reflects its importance to the international community.

Testimony of Deputy Legal Adviser Elizabeth R. Rindskopf, Senate Exec. Rep. No. 101-18 (1989) at 6–7.

The documents transmitting the Airport Security Protocol to the Senate for advice and consent are available at S. Treaty Doc. No. 101-19 (1989). See discussion in *Cumulative Digest 1981–1988* at 2216–2218. (The Protocol entered into force for the United States November 18, 1994).

### *(2) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Related Protocol*

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the related Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf generally extend to the maritime community those protections afforded to civil aviation by conventions on aviation security. As explained by Ms. Rindskopf, these instruments were also in response to terrorist violence, "prompted by a tragic act of terrorist violence, in this case, the seizure of the Italian cruise ship *Achille Lauro* in October

1985 and the murder of an elderly American passenger, Leon Klinghoffer."

In describing the Convention and related Protocol, Ms. Rindskopf made the following comments on the offenses established under the Convention:

> The purpose of Article 3, which enumerates the acts that constitute offenses under the Convention, is to overcome concerns that were raised as to the adequacy of international law to enable States other than that of a ship's registry to apprehend and prosecute those who commit terrorist acts on the high seas. In the aftermath of the *Achille Lauro* incident, there existed considerable controversy about whether such terrorist acts fell within the international law of piracy. For example, the 1931 Harvard Draft Convention on Piracy, the 1958 Geneva Convention on the High Seas, and the 1982 United Nations Convention on the Law of the Seas, all define piracy as an act of violence for private ends by one ship against another. Because the seizure of the *Achille Lauro* was arguably not committed for private ends and was committed by the ship's own passengers rather than by members of another ship, the existing international law on piracy was seen by some as inadequate to deal with the situation.
>
> Article 3 solves the problem by enumerating the following acts deemed to be in violation of the Convention, without regard to the motive of the offender or whether the offender attacked from another ship: (1) hijacking a ship, (2) violence against a person on board a ship where such violence is likely to endanger the safe navigation of the ship, (3) sabotage of a ship or maritime navigation facilities, (4) communication of false information regarding navigation, and (5) injuring or killing any person in connection with other offenses.
>
> The Convention differs from most previous anti-terrorist conventions in that it specifically makes it an offense to injure or kill a person. This provision was specifically included in response to the murder of Leon Klinghoffer during the *Achille Lauro* hijacking. . . . .

Testimony of Deputy Legal Adviser Elizabeth R. Rindskopf, Senate Exec. Rep. No. 101-18, (1989) at 8–9.

The State Department also provided answers to a series of questions from the Committee on Foreign Relations concerning the agreements. In response to a question concerning the definition of terrorism in the instruments, the Department responded:

> The Airport Security Protocol, the Maritime Terrorism Convention, and the Fixed Platforms Protocol, like the other anti-terrorism conventions to which the United States is a party, do not attempt to define terrorism. Rather, these instruments proscribe, and create national jurisdiction over acts, which by their nature are a threat to civil aviation and maritime travel and are typically committed by terrorists. By agreeing that the offenses enumerated in these instruments are criminal regardless of motivation, the instruments avoid the controversy over who is a "terrorist" and who is a "freedom fighter."

*Id.* at 15.

In response to another question, the Department noted that state-sponsored terrorism was covered by the agreements:

> These instruments criminalize certain acts. The perpetrators of such acts are considered criminals whether they acted alone or with the assistance, or under the direction, of a State sponsor. Therefore, acts of state sponsored terrorism are covered to the same degree as other acts of terrorism.

*Id.*

The Department also addressed the process of extradition under the Maritime Terrorism Convention:

> The United States is unlikely to be the state of registry (the flag state) of a ship subject to a terrorist attack, but it has been, and will unfortunately likely continue to be, the state of nationality of victims as well as one of the states whose conduct terrorists seek to affect by their attacks. The United States therefore opposed a proposal to give priority to an extradition request by the flag state. As a compromise,

> we joined consensus in adopting the language contained in Article 11, paragraph 5, which provides that "a State Party which receives more than one request for extradition . . . shall, in selecting the State to which the offender or alleged offender is to be extradited, pay due regard to the interests and responsibilities of the State Party whose flag the ship was flying at the time of the commission of the offense.' This provision preserves the flexibility of the Requested State to consider all relevant interests and circumstances in deciding where to extradite the offender.

*Id.* at 16.

Finally, the Department responded to the question of whether it considered itself bound to submit to the compulsory jurisdiction of the International Court of Justice in respect to disputes arising under the Maritime Terrorism Convention:

> No. The following reservation should be included in the resolution of advice and consent to ratification: ". . . subject to a reservation being made by the United States pursuant to Article 16(2), declaring that it does not consider itself bound by Article 16(1) insofar as it relates to the referral of disputes to the International Court of Justice."

*Id.* at 17.

The documents transmitting the Convention and Protocol to the Senate for advice and consent are available at S. Treaty Doc. No. 101-1 (1989). For a discussion of the transmittal documents, Ms. Rindskopf's testimony, and further background on the *Achille Lauro* incident, see *Cumulative Digest 1981–1988* at 2157–2166. (The Convention and Protocol entered into force for the United States March 6, 1995).

### *c. U.S. civil cause of action for terrorist acts*

On July 25, 1990, Deputy Legal Adviser Alan J. Kreczko testified before the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee on S. 2465, a bill to provide a new civil cause of action in federal courts for terrorist

acts committed abroad against United States nationals. After reviewing the existing legal framework against terrorism, Mr. Kreczko noted that victims of terrorism usually remain uncompensated for their injuries. Thus, the Department of State generally supported the bill:

> We view this bill as a welcome addition to the growing web of law we are weaving against terrorists. It may be that, as a practical matter, there are not very many circumstances in which the law can be employed. Few terrorists travel to the United States and few terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment. The existence of such a cause of action, however, may deter terrorist groups from maintaining assets in the United States, from benefiting from investments in the U.S. and from soliciting funds within the U.S. In addition, other countries may follow our lead and implement complementary national measures, thereby increasing obstacles to terrorist operations.
>
> Moreover, the bill may be useful in situations in which the rules of evidence or standards of proof preclude the U.S. government from effectively prosecuting a criminal case in U.S. Courts. Because a different evidentiary standard is involved in a civil suit, the bill may provide another vehicle for ensuring that terrorists do not escape justice.

*Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. On Courts and Administrative Practice of the Senate Judiciary Comm.*, 101st Cong. 11–55 (1990) (Statement of Deputy Legal Adviser Alan J. Kreczko, Dept. of State).

Mr. Kreczko also addressed the State Department's concerns with the Legislation as drafted:

> . . . [W]e favor adding a new provision to the Bill. This provision would state that the Bill's other provisions shall not apply in suits against the United States, foreign states as defined in the Foreign Sovereign Immunities Act, or any officer or employee thereof. The effect of this provision

would be to maintain the status quo as regards sovereign states and their officials: no cause of action for "international terrorism" exists against them.

The Department opposes creating this civil cause of action against foreign states. Use of the U.S. judicial system to bring charges of terrorism against foreign states or officials has obvious potential to create serious frictions and tensions with other nations. Most if not all foreign states would view the assertion by U.S. courts of jurisdiction to review allegations against them of committing or aiding terrorist acts outside the United States as inconsistent with international law. We are concerned that unilateral extension of such jurisdiction by us would undercut our effort to build multilateral cooperation against terrorism. We also believe that the provisions of this Bill should not apply to suits against foreign officials. This is necessary to prevent plaintiffs from circumventing the immunity of foreign states by alleging terrorism against foreign government officials.

We would be concerned about the reciprocal implications of any bill that permitted U.S. courts to adjudicate allegations of terrorism against foreign states or their officials. Such legislation could lead courts in hostile states to entertain suits that legitimate U.S. military activities constitute "terrorism."

Moreover, if the Bill were to permit civil suits against states or their officials alleging terrorism, individuals—rather than the U.S. government—would determine the timing and manner of making allegations in official U.S. fora about the conduct of foreign countries and their officers. We believe that the United States can best manage a complex foreign policy with multiple objectives—among the most important of which is combating terrorism—if the timing and manner of such serious allegations against foreign countries in official fora are left in the hands of persons who are responsible for the conduct of our foreign policy.

Finally, we are concerned over the prospect of nuisance or harassment suits brought by political opponents or for publicity purposes, where allegations may be made

> against foreign governments or officials who are not terrorists but would nonetheless be required to defend against expensive and drawn-out legal proceedings. Many foreign states are unlikely to enter the courts of other countries to defend against charges of intentional wrongdoing. This would exacerbate the problem of default judgments that exists under current law.

*Id.* at 18–19.

Following Deputy Legal Adviser Kreczko's testimony, the Department of State responded to questions raised by the Committee. The questions and answers are available at *www.state.gov/s/l*. One question concerned the feasibility of an international convention on civil redress for criminal acts of terrorism. The Department responded that:

> . . . Such an international convention . . . would have to overcome several significant obstacles:
> — First, the world community has tried unsuccessfully in a number of different fora since 1972 to come up with an acceptable definition of terrorism. It is for this reason that international conventions have been adopted proscribing specific acts, which by their nature are typically committed by terrorists (*e.g.*, hostage-taking; aircraft hijacking and sabotage; acts of violence against maritime vessels and fixed platforms; and violence against diplomats).
> — Second, other states may not be willing to undertake such obligations to enforce the civil decrees of the United States since, unlike most other countries, the decision regarding appropriate compensation for a tortious injury is made by a jury in the United States rather than by a judge. American monetary awards have tended to be much larger than those rendered by foreign courts for similar torts. Foreign states may be reluctant to enter into an obligation to enforce these higher awards.
> — Third, we would need to be satisfied that the judgments of other countries would comport to our notions of fairness and due process before we could undertake to enforce them.

> We note that one recent international convention does contain a provision on civil redress. The Torture Convention, currently before the Senate for its advice and consent, requires States parties to create a cause of action for acts of torture committed in their country. (This Convention does not, however, contain a provision for mutual recognition of civil decrees related to such a cause of action.) We will consider whether it would be advisable to include a similar provision in future conventions related to terrorism.

Two questions asked for further clarification of the Department's view that the bill should specifically state that its provisions will not apply in suits against the United States, foreign states as defined in the Foreign Sovereign Immunities Act, or any officer or employee thereof. First, the committee asked if such a provision was consistent with traditional notions of immunity. The Department responded, in pertinent part:

> Existing theories of immunity are generally limited to 'official acts' immunity in order to hold an official potentially liable for purely private acts, such as contract or family law disputes, or torts. Our proposal does not extend immunity into any of these areas; indeed, we note that most if not all 'international terrorism' suits could be maintained as traditional tort actions (assault and battery), where a foreign government official would have only official acts immunity.
>
> Our proposal would, however, exempt foreign officials from this new cause of action. . . .
>
> * * * *
>
> We have indicated a concern that without an exception for foreign officials, the cause of action provided under S. 2465 could become a vehicle for court suits to harass foreign officials in the United States or to challenge the policies of foreign governments. Committee staff have been sympathetic to this concern. However, if the exemption is limited to "official acts" the litigation will still occur. To maintain the suit, the plaintiff would only need

> to allege that the defendant's terrorist actions were "non-official." Foreign officials will be subject to suit, and the litigation will revolve around whether the official's country has a policy of terrorism which made his support of terrorism "official" or "non-official."
>
> * * * *
>
> We do not see sufficient reason to risk this litigation. We have no reason to believe that acts of terrorism are being committed against Americans by foreign officials acting in a non-official capacity. Furthermore, there is no exemption in the bill, and we are seeking none, for members of terrorist organizations. Exempting officials, including their nonofficial acts, will not benefit such organizations.

The bill was enacted as § 132(b)(4) of Pub. L. No. 101-519, 104 Stat. 2251 (1990). *See* 18 U.S.C. § 2333.

### 2. Genocide, War Crimes and Crimes Against Humanity

On November 17, 1989, the Subcommittee on Asian and Pacific Affairs and the Subcommittee on International Economic Policy and Trade of the House Foreign Affairs Committee held a hearing on issues affecting the question of U.S. relations with Vietnam. *See* discussion in Chapter 17.A. below. At the hearing the Department of State was asked to respond to questions concerning the Khmer Rouge's activities in Cambodia. Several of the questions, set forth below with responses from the Department of State, related to the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1989).

> Q: What is the Department's opinion on whether the Khmer Rouge committed genocide as defined in the 1948 Genocide Convention?
>
> A: The issue whether genocide, as defined in the Genocide Convention, occurred in Cambodia while under Khmer Rouge rule requires a legal determination that all the elements of the crime, as defined by the Convention, have been established. As ratified by the United States, the

Convention defines genocide as an act taken with the specific intent of destroying a national, ethnic, racial, or religious group, as such, in whole or in substantial part. Based on currently available information, we believe that members of the Khmer Rouge committed genocide, as defined in the Convention, against some religious and ethnic groups. Specifically, evidence exists that members of the Khmer Rouge committed genocide against the Cham, Vietnamese, Thai, and Chinese ethnic minorities, as well as against Buddhist monks and possibly Christians. (The Cham would constitute a Moslem religious minority, as well as an ethnic group.) We note in this connection that the United Nations Special Rapporteur on genocide, Benjamin Whittaker, stated in his report of July 2, 1985, to the UN Economic and Social Council, that Pol Pot's Khmer Rouge government of Democratic Kampuchea was guilty of genocide "even under the most restricted definition . . . since the victims included target groups such as the Chams (an Islamic minority) and the Buddhist monks." (E/CN.4/SUB.2/1985/6, at 10 n.17.) We agree with that assessment.

The Convention's definition of genocide does not, however, address the full extent of the atrocities committed by members of the Khmer Rouge. Mass murder not intended to destroy any of these four specific types of groups is not genocide under the Convention, regardless of the numbers killed. Because much of the Khmer Rouge slaughter was random, politically motivated, or the result of harsh conditions imposed on society at large, many acts would probably not constitute genocide as defined in the Convention.

Q: What are the United States rights and responsibilities under the Genocide Convention regarding the Khmer Rouge, and do they require U.S. opposition to any role for the Khmer Rouge in a multipartite government?

A: With regard to the rights of the U.S. under the Convention, as a legal matter, the Genocide Convention generally reasserts existing rights of states under domestic and international law to prevent and punish genocide,

> rather than creating additional rights. The only new rights provided to states that they did not already have are the right to bring other states before the ICJ [International Court of Justice] for disputes relating to the interpretation, application, or fulfillment of the Convention (including those relating to the responsibility of a state for genocide), and the right to prosecute individuals in an international penal tribunal if such a tribunal were established. With respect to our obligations or responsibilities under the Convention . . . under the general obligation of Article I "to prevent and punish" genocide, the United States is required by Articles V and VI to enact domestic legislation against genocide committed in U.S. territory and try persons accused of genocide, and by Article VII to extradite persons accused of genocide in accordance with applicable laws and treaties, and not treat them as political offenders. The Convention does not apply to U.S. policy toward a political settlement in Cambodia.
>
> Nevertheless, in the context of the Cambodia conflict, a principal goal of U.S. policy is to ensure that perpetrators of genocide and other atrocities are prevented from returning to positions of power. Indeed, we continue to oppose any role for the Khmer Rouge in any future government of Cambodia, and especially any role for the clearly discredited leaders of the 1975–79 period.

*Issues Affecting the Question of U.S. Relations with Vietnam: Hearings Before the Subcommittees on Asian and Pacific Affairs and the Subcommittee on International Economic Policy and Trade of the House Foreign Affairs Committee*, 101st Cong. (1989) at 135–140.

In response to a question about options for bringing members of the Khmer Rouge who committed atrocities to justice, the Department stated the following with regard to the possibility of bringing a case under the Genocide Convention:

> The Genocide Convention provides, in Article IX, that:
>
> > Disputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention, including those relating to the respon-

> sibility of a State for genocide or for any other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Cambodia is a party to the Convention, and has been for almost forty years. Consequently, the International Court of Justice (ICJ) would have jurisdiction under this provision were an action properly initiated by another state that is a party, and such an action could address whether Cambodia was responsible for genocide under the Khmer Rouge regime. Compared to alternatives such as an international criminal court, the bringing of such an action is, from a legal point of view, relatively straightforward. It would not, however, provide a means of bringing Pol Pot to justice. Such a suit can only be against the country of Cambodia, and not against any particular individuals. In order to determine whether Cambodia was responsible for genocide, it may be necessary for the Court to engage in a detailed examination of the role and responsibility of government officials, although the Court would likely focus at a more general level on government policies and actions rather than on the identification of specific individual responsibility.

Although the ICJ affords a mechanism for the formal determination of whether genocide occurred, it is questionable whether the United States could or should initiate such an action. Two critical legal obstacles would appear to make a U.S. suit unlikely to succeed. First, the Convention was not in force between the United States and Cambodia until 1989 (when the United States became a party), and probably cannot be applied retroactively. Under customary international law, codified in Article 28 of the Vienna Convention on the Law of Treaties, treaties are presumed not to apply retroactively unless a contrary intention is stated in the treaty or is otherwise established. The Convention is silent on the issue of retroactivity, and the negotiating history does not indicate it was intended to apply retroactively.

Second, the United States is a party to the Convention subject to a reservation under which the United States may

only be sued in the ICJ under the Genocide Convention with its consent. Under general principles of international law, this reservation may be invoked reciprocally against the U.S. to bar a suit. This would mean that the United States could not bring an action against Cambodia without Cambodia's specific consent.

These obstacles would not be present were a suit brought by a third country that became a party to the Convention prior to the Khmer Rouge atrocities and without an ICJ reservation. We understand that such a suit—in which the United States would not be a party—has been explored by human rights attorneys in the private sector.

* * * *

From a legal point of view, we continue to believe that the trial of Pol Pot and others by a future government of Cambodia, formed after elections, would be the most effective procedure for imposing punishment. Pol Pot and others have committed numerous acts that we assume are crimes under domestic Cambodian law. Moreover, Cambodia has been a party to the Genocide Convention since 1950 without reservation. Because Cambodia is the place in which the acts were committed, Cambodia is the only country with an obligation to bring domestic prosecution under the Genocide Convention, as provided in Article VI.

The United States could assist Cambodia in such a prosecution if a perpetrator were apprehended here. . . . Genocide was made a crime under U.S. law in 1988; thus, the United States may extradite a person for the offense of genocide if that offense is covered by the applicable bilateral U.S. extradition treaty. The prospect of extradition for the offense of genocide in the case of Khmer Rouge perpetrators is limited, however, because they would have to be located in the United States, and because the acts underlying a charge of genocide occurred prior to the establishment of the crime of genocide in the United States. As a result, they might be extradited from the U.S. to face trial for e.g., murder or assault, instead of genocide.

*Id.* at 126–131

The Department reviewed several other options for bringing to justice the Khmer Rouge leaders responsible for atrocities in Cambodia from 1975 to 1979. The Department discussed the actions taken by the United Nations Commission on Human Rights and commented on its possible role:

> The U.N. Commission on Human Rights, established by the U.N. Economic and Social Council as the central policy organ in the field of human rights, may investigate allegations of human rights violations, handle communications relating to such violations, and prepare recommendations relating to human rights. The Commission's expert body, the Subcommission on Prevention of Discrimination and Protection of Minorities, assists the Commission in this work. Bringing violations of human rights before the Commission or the Subcommission may further the goals of exerting public pressure upon a country, calling a government's attention to alleged violations, and otherwise investigating a human rights situation.
>
> The human rights situation in Cambodia has been considered in some manner by the Commission every year since 1978, with annual resolutions since 1980 focusing mainly on the Vietnamese occupation and condemning the "persistent occurrence of gross and flagrant violations of human rights in Kampuchea." (*See, e.g.*, U.N.C.H.R. Resolutions 1989/20, 1988/6.) The Commission and Subcommission began formal consideration of the Khmer Rouge atrocities in 1978 when certain members, the United Kingdom and Canada in particular, presented evidence of the atrocities to the Commission.
>
> In 1979, at the Subcommission's direction, the Chairman of the Subcommission prepared an analysis of the evidence before the Commission. (Commission on Human Rights (35th Sess.), U.N. Doc. E/CN.4/1335(1979).) This analysis presented the various allegations of Khmer Rouge human rights violations without drawing conclusions as to their veracity. The Commission, however, postponed consideration of the Chairman's analysis and condemned the human rights situation in Cambodia only after the

> Vietnamese invasion. (U.N.C.H.R. Resolution 29 (XXXVI) (March 11, 1980). *See* 1978 U.N. Yearbook at p. 230.) Subsequent reports on the human rights situation in Cambodia tend to focus on the Vietnamese occupation and not on the Khmer Rouge atrocities. (*See, e.g.*, Subcommission on Prevention of Discrimination and Protection of Minorities (34th Sess.), U.N. Doc. E/CN.4/Sub.2/L.780 (1981).)
>
> The objectives that could be served by action before the Commission or Subcommission at this time would be: (1) to investigate further the Khmer Rouge atrocities and, if possible, identify the role of individuals in these human rights violations; and (2) to place international pressure on Cambodia or other relevant countries in order to ensure the prosecution of those responsible for the atrocities.
>
> A special Rapporteur, working group of experts, or other investigatory body could be directed to conduct an investigation into Khmer Rouge atrocities and report its results. In its investigation, the body could examine information submitted by governments, non-governmental organizations, experts and individuals. It would also be able to conduct an on-site investigation in Cambodia, with the cooperation of the appropriate Cambodian parties. Such an investigation would best succeed in widely disseminating the identity of those responsible for, and the extent of, Khmer Rouge atrocities if it were endorsed by resolutions of the Subcommission, the Commission, ECOSOC, or the General Assembly. Of course, any such action furthering these objectives is wholly dependent upon the political will of the states that are members of these bodies.

*Id.* at 132–134.

Next, the Department addressed the potential for prosecution of Khmer Rouge leaders in the United States:

> U.S. criminal jurisdiction normally does not extend to actions committed by foreign nationals in foreign countries, particularly if the victims are also foreign nationals. U.S. law implementing Articles II—VI of the Genocide

Convention and making genocide a crime under U.S. law provides the U.S. with jurisdiction only over defendants who are nationals of the United States or who committed genocidal acts on the territory of the United States. (The Genocide Convention requires states to enact statutes to punish only genocide occurring on their territory.) Moreover, because ex post facto laws are prohibited by the U.S. Constitution, this statute may not apply to acts committed prior to its enactment in 1988.

Indeed, only a few exceptional criminal statutes confer criminal jurisdiction in the United States over any person for acts committed abroad. (*See, e.g.*, 18 U.S.C. § 1116 (murder of internationally protected person); 18 U.S.C. ch. 113a (killings of U.S. national abroad); 18 U.S.C. § 1203 (hostage taking).) While the Khmer Rouge leaders may have taken some action at some time that would fall under such a statute, they do not cover the primary crimes of mass murder or genocide. Moreover, the last two of these were enacted in the mid-1980s, and, as noted above, may not be retroactively applicable.

Thus, the most fundamental difficulty with U.S. prosecution of Pol Pot and others for Khmer Rouge atrocities is that we are unaware as of this date of any Khmer Rouge actions that would constitute crimes under U.S. law. Until we can identify a U.S. legal basis to charge, arrest, or prosecute, the question of acquiring custody of Pol Pot or others cannot usefully be answered.

* * * *

The U.S. Government could initiate an investigation to determine more precisely the extent and nature of culpability of the Khmer Rouge leadership. For reasons noted above, we currently have no indication that such an investigation would lead to any U.S. prosecution, and certainly not to an indictment for genocide under U.S. law. It might, however, provide a basis for other actions, such as the exclusion of persons from the U.S. The Department of State would need to consult and coordinate with the Department of Justice in any action along these lines.

*Id.* at 129–130

The Department also reviewed the potential for creating an international criminal court to prosecute Khmer Rouge leaders for the Cambodian atrocities:

> Creation of an international criminal court able to try and punish those responsible for the atrocities of the Khmer Rouge period raises a wide variety of legal and practical concerns. Generally, although there is a long history of consideration of such a court, states have been reluctant to create one, in great part due to the enormous complexity of such an endeavor. Agreement would have to be reached on such contentious issues as the court's jurisdiction, including the definition of crimes under international law, as well as the rules of procedure and evidence, funding, gathering of evidence, identification of appropriate prosecutors, and incarceration of offenders.
>
> As a result of these difficulties, prior proposals to create such a court have been largely unsuccessful. For example, a 1937 convention to establish such a court, concluded under League of Nations auspices after years of study, never entered into force as only one state ratified it. After World War II, the victorious allies created the Nuremberg and Tokyo tribunals, the only international criminal tribunals ever established to try individuals for war crimes and crimes against humanity. The Nuremberg and Tokyo courts would not, however, serve as appropriate models in light of the unusual circumstances surrounding their creation. The 1948 Genocide Convention envisages the possible establishment of an international criminal court, but no state has every tried to create such a tribunal in connection with the Convention. (In fact, no enforcement procedure, including reference to the International Court of Justice, has been invoked under that treaty.) The UN Committee on International Criminal Jurisdiction studied the issue in the early 1950s, but in 1954 consideration of its proposals was put on hold. The International Law Commission (ILC) discussed it in 1974 in the context of its work on a draft code of offenses against the peace and security of mankind, but

because of the controversy surrounding the proposal chose to postpone work on it indefinitely.

Beyond these complications, we are concerned that an international criminal court could, like other ostensibly impartial international bodies, become politicized and, therefore, counterproductive. Were the courts to become politicized, we might find it acting contrary to U.S. interests on a whole range of issues or contrary to U.S. notions of governing international law and fundamental fairness.

* * * *

Finally, as a practical matter, the success of any prosecution will depend on the willingness of those states where offenders are located to capture them and hand them over to an international criminal court. This might be particularly true in the case of the Khmer Rouge, as no state has effective control over the perpetrators. Moreover, states are generally reluctant to submit their nationals to the jurisdiction of an international tribunal. Members of the Hun Sen regime, including Hun Sen himself, served in the Khmer Rouge in the 1970s and might be particularly reluctant to submit generally to the jurisdiction of such a court.

. . . Nevertheless, we believe this alternative requires further study along the lines indicated above. In this regard, we will be following developments in the International Law Commission, which was requested by the General Assembly this year to address the issue, and the General Assembly, which will consider the ILC's views as part of next year's agenda.

*Id.* at 123–126

### 3. Narcotrafficking: UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

On June 19, 1989, President George H.W. Bush submitted to the Senate for advice and consent to ratification the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic

Substances, adopted by consensus on December 20, 1988, at the conclusion of an international conference at Vienna. UN Doc. E/CONF.82/15 (1988), *reprinted in* 28 I.L.M. 493 (1989). The transmittal documents are available at S. Treaty Doc. No. 101-4 (1988). The United States and 43 other nations signed the Convention when it was opened for signature on December 21, 1988, and 16 others had also signed as of the date of its transmittal to the Senate. For discussion of the Convention, including transmittal to the Senate and Senate approval in 1989, *see Cumulative Digest 1981–1988* at 3108–3114; *see also id.* at 723–724, 1388–1389, 1393–1394.

On August 2, 1989, Attorney General Richard L. Thornburgh testified before the Senate Foreign Relations Committee in support of the Convention. His statement enumerated the most important terms of the agreement:

> First, it is important to recognize that it is a law enforcement convention providing new tools for police prosecutors and judges from the signatory nations to more effectively carry out their responsibilities across international borders while preserving each nation's sovereignty.
>
> The convention will lift the veil of bank secrecy, for example, as an impediment to gathering evidence against traffickers and as a method of hiding illicit profits. Governments are also given the tools to seize illicit drug profits and use them as we do in the United States, to enhance our law enforcement efforts.
>
> Second, all the nations signing the convention have agreed to exchange evidence of criminal conduct and to extradite accused traffickers so that safe havens are no longer so readily available. The pact, in effect, tells the cartels that they are not welcome within any of our borders.
>
> Third, the convention provides for the supervision of the manufacturing and sale of essential and precursor chemicals for the production of illegal drugs in terms similar to recently enacted United States legislation.
>
> Fourth, commercial carriers are brought into the drug war through requirements that they make certain that commercial consignments are free from drugs. Law enforcement officials are given the authority to board,

search and, if necessary, seize vessels used in the drug business with the consent of the flag state.

Finally, the convention reaffirms the need for aggressive efforts in crop eradication and demand reduction to complement its law enforcement officials.

Senate Exec. Rep. No. 101-15 (1989) at 119.

Attorney General Thornburgh's prepared testimony addressed in depth some of the most important specific provisions. As to the extradition and mutual legal assistance provisions, he stated:

(4) *Extradition*.—The Convention amends existing extradition treaties between parties to include drug and money laundering offenses as extraditable offenses and provides that they shall be extraditable offenses between states that do not make extradition conditional on an extradition treaty. While although almost all United States extradition treaties include within their scope drug trafficking offenses, many do not include drug-related money laundering offenses. This provision will, therefore, have an important impact on our bilateral extradition relations.

The United States had hoped to include a broad obligation to extradite one's own nationals in this article. Unfortunately, there was overwhelming opposition from the northern European countries that, for either political or legal reasons, would not accept any provision on the extradition of their nationals, even a hortatory provision. Thus, the article contains no provision on the extradition of nationals. The article does, however, obligate a party to submit the case to its competent authorities for the purpose of prosecution when it refuses to extradite an offender because the offender is one of its nationals or because the offense occurred on its territory or on its vessel or aircraft.

(5) *Mutual Legal Assistance*.—The Convention provides a treaty obligation, to provide mutual legal assistance to other parties in investigations, prosecutions or other judicial proceedings in relation to covered offenses. Such assistance includes, *inter alia*, the taking of evidence,

> service of documents, executing searches and seizures, examining objects and sites, providing bank, financial and business records, and identifying and tracing proceeds and instrumentalities of crime. Other forms of mutual legal assistance may be provided as allowed by the domestic law of the requested party.
>
> Significantly, the Convention also eliminates bank secrecy as a ground for refusing a request for mutual legal assistance.
>
> To the extent necessary, the Convention amends existing mutual legal assistance treaties to apply to offenses covered by the Convention, thereby including money laundering in the context of illegal drug trafficking. As between parties that are not parties to bilateral or multilateral treaties on mutual legal assistance, the Convention provides a basis for according such assistance, and specifies the procedures to be followed in making and executing requests. Requests may be refused only for limited specified reasons.

*Id*. at 127–128.

Attorney General Thornburgh and Senator Joseph Biden engaged in the following exchange regarding the Convention's safeguards where other States' requests for investigative information would jeopardize U.S. law enforcement efforts:

> Mr.Thornburgh. [I]n a specific case if we made a determination that the information requested was not part of a legitimate law enforcement undertaking in an investigation of criminal conduct, I would have no hesitation about refusing to furnish the information. That would largely be a matter between our State Department and the requesting country, but at the first instance, I have no desire or any willingness to compromise the rights of American citizens in an investigation that does not relate to legitimate law enforcement purposes. At the same time, it is important I think for us to recognize our obligation to furnish that information when it is in the course of a legitimate law enforcement undertaking.

Again, without looking at the facts of a particular case, where you draw the line is obviously going to be a judgmental matter.

Senator Biden. So, it is a judgmental matter that the Secretary of State or you, or whomever is asked by the President, can make as to whether or not the investigative body in country A seeking the report relating to criminal activity in country A is or is not necessarily required to be given [that report].

Mr. Thornburgh. It is a judgmental matter today. Those are the judgments we make in the normal course of our relationships with countries around the world, and it would remain a judgmental matter under the treaty.

* * * *

[The Convention] requires [that information be provided] but permits us to resist where we consider that the execution of the request would be prejudicial to our essential interests. . . . Article 7, paragraph 15, subpart B. "Mutual legal assistance may be refused if the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public, or other essential interests." And under the rubric of other essential interests I would certainly include our right to exercise our judgment that this was not a legitimate law enforcement investigation and the rights of American citizens should not be prejudiced by furnishing information of the type you suggest might be requested.

* * * *

Let me, if I might, just add one other provision because I anticipate a further objection in this regard that the furnishing of that information to a foreign country might, in fact, compromise an investigation that we were carrying on within our borders. And that is covered by paragraph 17 which says, "Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding."

I regard those as both sufficient safeguards to deal with the threat that you raise about our dealing in the future with countries whose bona fides we have some doubt.

*Id.* at 137–138.

On November 21, 1989, the Senate gave its advice and consent to ratification of the Convention. 135 Cong. Rec. at S16,616 (Nov. 21, 1989). The United States ratified the Convention on February 20, 1990, and it entered into force for the United States on November 11, 1990.

## C. INTERNATIONAL CRIMINAL TRIBUNALS

### International Criminal Court

On December 4, 1989, the U.N. General Assembly passed a resolution requesting that the International Law Commission "address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under a code, including persons engaged in illicit drug trafficking across national frontiers, and to devote particular attention to the latter question in its report on that session." UN Doc. No. A/RES/ 44/39. Accordingly, in 1990 the ILC submitted, as part of its report to the Sixth Committee, a consideration of the establishment of an international criminal court, including a review of previous U.N. efforts in this area, a discussion of the advantages and disadvantages, an overview of possible options, and a review of other possible international mechanisms for trying such crimes. *Report of the International Law Commission on the work of its Forty-Second Session*, 1 Y.B. Int'l L. Comm'n 36–61, UN Doc. A/CN.4/SER.A/1990.

On November 7, 1990, John Knox, U.S. representative to the Sixth Committee, made the following comments on the ILC's Report, available at *www.state.gov/s/l:*

> We appreciate the Commission's work on an International Criminal Court. Their outline of issues and options is a useful basis for more detailed analysis of such a court, and of the problems of enforcing international offenses, generally.
>
> It has been suggested that the Court could operate, at least at first, independently of the Draft Criminal Code, and adjudicate a narrower range of crimes, such as those defined in existing international conventions. This would

avoid our problems with the Code. A Code without a Court would seem unhelpful, but a Court could perhaps be of use without a Code.

We would point out, however, that there are effective national and international systems in place to respond to such crimes. Of course, we are always interested in possible means of improving the prosecution of international crimes. But it is still not clear to us that the Court would contribute to the existing system. There is in fact a danger, as the Commission notes in paragraph 18 of its Report, that the Court would disrupt satisfactory implementation of the existing system. This is a real danger, and one that we believe should be considered very carefully.

The fundamental question here is how the Court would work with existing national and international systems of criminal law enforcement. There are also a host of practical questions that must be addressed before States can decide whether the Court would complement, or interfere with, the existing system.

For example, what rules of evidence and procedure would the Court apply? How would evidence be obtained? Who would conduct the investigation and prosecution, and who would make the crucial decisions as to which individuals should be prosecuted? It would appear that the Court might require a large prosecution arm and a penal facility. What will these cost? How will they be administered? And, most important, how will the answers to these questions affect the current system of national and international enforcement?

These are not merely questions of implementation. They are fundamental, and must be answered before it is possible to decide whether the Court is worthwhile.

Mr. Chairman, given the fairly early stage of the Commission's consideration of these questions, the United States believes that the Commission should not be asked now to focus its analysis on a particular type of Court. Instead, we would suggest that the Commission be requested to continue its analysis in more detail, with particular emphasis on the practical questions attendant on the Court's relationship to the existing system of enforcement.

On November 28, 1990, the General Assembly adopted Resolution 45/41, which asked the ILC "to consider further and analyse the issues raised in its report . . . including the possibility of establishing an international criminal court or other international criminal trial mechanism."

On December 11, 1990, Assistant Secretary for Legislative Affairs Janet G. Mullins sent a letter to Rep. Dante B. Fascell, Chairman of the House Committee on Foreign Affairs, expressing the Department of State's view on a proposed congressional concurrent resolution urging the U.S. to pursue the establishment of an international criminal court. In pertinent part, the letter stated:

> [T]he proposal to create an International Criminal Court is an interesting idea. However, . . . there are substantive, definitional and procedural problems attendant to the proposal. Because of these problems, the idea of creating an International Criminal Court has had a long, and largely disappointing, history. While the Department will continue to examine specific proposals for such a court carefully, we believe it would be premature and unwise for the Congress to go on record in support of such a court or a diplomatic conference to create one, until there is greater indication that these problems can be addressed satisfactorily.
>
> For example, it is not clear that such a court would actually facilitate the prosecution of international criminals. The current approach of the international legal system is to require states either to prosecute or extradite alleged offenders. We are not convinced that states would be more willing to turn offenders over to an international court than they would be to prosecute offenders or extradite them to another state. We also need to consider the risk that an International Criminal Court could develop into a politicized body, in which case we might find the court interpreting crimes in unhelpful ways and releasing criminals who might no longer be prosecutable.
>
> In addition, given the general reluctance of states to submit themselves or their nationals to the jurisdiction of an international authority, it is highly questionable whether

> the creation of an International Criminal Court could at this point in time achieve acceptance by a sufficient number of states to be an effective and worthwhile endeavor. This concern is borne out by the lack of enthusiasm most governments have shown for past proposals to create international criminal tribunals.
>
> Furthermore, the creation of an International Criminal Court is an enormously complex matter, requiring consensus on numerous practical issues. . . . While all of these problems may be potentially surmountable, achieving consensus on them could well prove a difficult if not impossible task, especially in light of the divergence of opinion among the international community on various aspects of international criminal law. The Department has not to date encountered any proposal for the creation of an International Criminal Court which addresses these problems in a serious manner.

Letter from Assistant Secretary Mullins to Dante B. Fascell, Chairman, Committee of Foreign Affairs, House of Representatives, December 11, 1990, pp. 1–3, available at *www.state.gov/s/l*.

### Cross references

*Visa denial for Terrorist activity*, **Chapter 1.C.2.**
*Italian Request for transfer of terrorist under Council of Europe Prisoner Transfer Convention*, **Chapter 2.C.**
*Violations of criminal law by persons entitled to diplomatic immunity*, **Chapter 10.C.1.b.**

# CHAPTER 4

# Treaties and Other International Agreements

## A. CAPACITY TO MAKE

### 1. U.S. Signature: South Pacific Driftnet Convention

In 1990 the United States and New Zealand engaged in correspondence regarding signature by the United States of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific Region, adopted at Wellington on November 24, 1989 by the South Pacific states. 29 I.L.M. 1454 (1991); *see also* S. Treaty Doc. No. 102-7 (May 21, 1991). The Government of New Zealand is designated as the depositary by the Convention.

Article 10 of the Convention provides that it shall be open for signature by any member of the South Pacific Forum Fisheries Agency ("FFA"), any state in respect of any territory situated within the Convention area for which it is internationally responsible, and any territory situated within the Convention area which has been authorized to sign the Convention and assume rights and obligations under it by the government of the state which is internationally responsible for it. The Convention obligates parties to restrict their activities with respect to waters under their fisheries jurisdiction that are in the Convention area. For the United States, waters within the Convention area are the exclusive economic zones around American Samoa and the few U.S. unincorporated islands.

An August 2, 1990, letter to the Department of State from the ambassador of New Zealand to the United States, discussing protocols to the Convention, reflected his understanding that the United States would sign the Convention "in respect of . . . United

States territory (American Samoa)." In order to clarify that the Government of the United States signs treaties on behalf of the United States and not on behalf of territories or portions thereof, on September 26, 1990 Deputy Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs David A. Colson sent the following response to the ambassador of New Zealand:

> [T]he United States intends to sign 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. Upon becoming Party to this Convention, the United States will be obligated to prohibit driftnet fishing in all areas of its EEZ within the Convention Area, and to prohibit all U.S. nationals and vessels documented under U.S. laws from fishing with driftnets in the Convention Area.

The letter from the ambassador of New Zealand and Deputy Assistant Secretary Colson's response are available at *www.state.gov/s/l*. The United States signed the Convention on Nov. 14, 1990; it entered into force for the United States on Feb. 28, 1992.

### 2. Choice of Treaty Form: Treaty on the Final Settlement with Germany

On July 12, 1990, Deputy Legal Adviser Michael K. Young testified before the Senate Foreign Relations Committee on legal aspects of German unification. Among the issues discussed by Mr. Young was the form that a final settlement agreement with Germany should take, and the role of the U.S. Senate in German treaty matters. His testimony on these questions follows:

> [W]e are working out in the Two-plus-Four negotiations the terms of a final settlement that will resolve all outstanding four-power issues regarding Germany in a manner consistent with the goal of a Germany free from any vestiges of the occupation era.
>
> The United States has considerable flexibility regarding the form and contents of the settlement document.

Our approach reflects the fact that the central element in resolving the German question—the ending of Germany's tragic and artificial division—is coming about as a result of the sea change in Eastern European politics and through the actions and decisions of the Germans themselves. The settlement document is not the instrument that will end Germany's division. Instead, it is a coda, albeit an important one, to the central work being carried on peacefully and democratically by the Germans themselves. The settlement document is needed, in our view, solely to provide an uncontested basis for full German sovereignty.

Thus, we believe that the settlement document should be brief. It must make a few important but technical adjustments to make the legal situation in Germany correspond to the new political realities there. No more is needed. Moreover, the Final Settlement on Germany is not the appropriate document in which to address the many detailed technical policy issues between the various parties. These can and will be settled elsewhere, bilaterally and multilaterally, as sovereign acts of a United Germany.

Against this background, Mr. Chairman, let me briefly address some of the general issues regarding the Senate's role on German treaty matters and survey the criteria that we will look at—together with the views of this Committee and others in the Congress—in making the final judgment as to the appropriate domestic form for the Settlement.

The Senate has already played a significant role in the adoption of the individual pieces of the conclusion of peace with Germany, with the result that the few remaining matters are generally technical in nature:

— First, Congress and the President ended the state of war with Germany on October 24, 1951 when the President issued a proclamation pursuant to a joint resolution of Congress.
— Second, the Senate gave its advice and consent on July 13, 1953 to the Agreement on German External Debts, which resolved reparations and other key issues that would normally have been addressed in a peace treaty.

— Third, on July 1, 1952 and April 1, 1955 the Senate gave its advice and consent to the Convention on Relations between the Three Powers and the Federal Republic of Germany and its related Protocol on the Termination of the Occupation Regime in the FRG, which resolved other key issues necessary to normalizing our relationship with West Germany.

Unlike the case of Italy, Japan and the other axis powers, the business of regulating the peace with Germany was never addressed in a single document. But through a series of documents in the early 1950's, the Senate has already given its advice and consent to the elements of such a peace treaty with Germany.

The allied rights and other subjects which remain for negotiation, as part of the final settlement, are set forth and reconfirmed in executive agreements, not treaties. I am referring to such documents as the August 1, 1945 Potsdam Protocol, the June 5, 1945 Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority and the September 3, 1971 Quadripartite Agreement on Berlin.

The Department of State's regulations on international agreements, contained in the Foreign Affairs Manual (11 FAM 720), set forth the general criteria we review in resolving the question of submission to the Senate. The first criterion—and the most important—is the extent to which the settlement will involve commitments or risks affecting the nation as a whole. As I have noted, we do not intend to enter into new obligations in the Settlement document, but merely to solemnize our fulfillment of an old one—our obligation to promote the emergence of a democratic, sovereign, unified Germany within a community of democratic states. The Settlement will not create new rights.

The Department's second criterion is whether the settlement is intended to affect State laws. The settlement as we now see it would not.

Third is whether the agreement can be given effect without the enactment of subsequent legislation. No leg-

islation would be required to implement the settlement we foresee.

Fourth is past U.S. practice regarding similar agreements. As I have noted, the Settlement in all likelihood will address those issues that we have traditionally included in executive agreements not submitted to the Senate.

Fifth, the criteria highlight the preference of the Congress as to the particular type of agreement.

Sixth is the degree of formality of the settlement. It is simply too early to assess this criterion. I would note, however, that it has been Bonn's strong desire, and also our preference, not to present this Settlement as a Peace Treaty dividing victors and vanquished. This may affect the degree of formality desired.

Seventh, the criteria refer to the proposed duration of the agreement, the need for its prompt conclusion, and the desirability of concluding a routine or short-term agreement. The proposed settlement is intended to resolve permanently the comparatively narrow issues it will probably cover. Once the parties reach agreement, the sheer pace of events in Germany will make it desirable to bring the settlement into force expeditiously.

Finally, the criteria refer to the general international practice as to similar agreements. Some of the other parties may submit it to their parliaments. Others may not. However, this is a criterion we must treat with caution because the other states concerned have very different legal systems—as well as legal traditions that commend a different range of documents, with quite different legal form and criteria, to legislative consideration, while simultaneously sharply limiting the role of parliamentary review of these agreements.

*Legal Issues Relating to Future Status of Germany: Hearing Before the Senate Comm. On Foreign Relations*, 101st Cong. 2–15 (1990)(Statement of Michael K. Young, Deputy Legal Adviser, Department of State).

Ultimately the settlement was concluded in the form of a treaty to which the Senate gave its advice and consent to ratification on

October 10, 1990; it entered into force March 15, 1991. 29 I.L.M. 1186 (1990); S. Treaty Doc. 101-20 (Sept. 26, 1990). For a discussion of the treaty and related instruments, *see Cumulative Digest 1981–1988* at 3474–3493. For settlement of claims by the United States against the German Democratic Republic in the context of German unification, *see id.* at 2357–2360.

## B. CONCLUSION, ENTRY INTO FORCE, APPLICATION AND TERMINATION

### 1. Full Powers

A memorandum prepared by the Office of the Assistant Legal Adviser for Treaty Affairs on May 5, 1989, described the practice of the U.S. Government regarding full powers as follows:

> A "full power" is issued to the U.S. representative and presented at the time of signing of a treaty in order to assure the depositary or, in the case of a bilateral [treaty], the other government, that the U.S. representative possesses the necessary authority to sign. In international law the full power is formal evidence of a representative's authority to sign on behalf of his government. The 1969 Vienna Convention on the Law of Treaties defines a full power as "a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty."
>
> International law and practice recognize Heads of State, Heads of Government and Ministers of Foreign Affairs as having the authority to issue full powers. In U.S. practice full powers were issued by the President until October of 1968, at which time the President delegated authority to sign full powers to the Secretary, or in his absence, the Acting Secretary of State.
>
> In accordance with customary U.S. treaty practice, the full power names the representative, with title, and gives

> a clear indication of the particular instrument or agreement which the representative is to sign. The full power includes a statement to the effect that signature of the treaty is subject to advice and consent of the Senate or other approval by the President. Full powers for representatives of the United States are prepared by this office in accordance with a prescribed style and format.
>
> If authorization to sign a treaty or agreement given pursuant to Circular 175 procedure is subject to final approval of the text, or if the person named in the full power is under instructions to await further instructions before signing the treaty or agreement, these domestic qualifications are never to be contained in the text of the full power, which is of an international character, but rather may comprise an element of the instructions to the U.S. representative.

The memorandum is available at *www.state.gov/s/l*. Signature of full powers on behalf of the United States is also discussed in the Department of State's regulations at 11 Foreign Affairs Manual 732. The "Circular 175 procedure" referred to in the letter is the procedure on negotiation and signature of treaties and other international agreements, set forth at 11 Foreign Affairs Manual 720.

### 2. Reservation Practice: U.S. Reservations to Genocide Convention

On February 19, 1986, the U.S. Senate gave its advice and consent to U.S. ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1951), subject to two reservations, five understandings and one declaration. 132 CONG. REC. S1355 (Feb. 19, 1986). For a discussion of Senate consideration of the Treaty, see *Cumulative Digest 1981–1988* at 789–823.

The U.S. Government deposited its instrument of ratification on November 25, 1988, including the two reservations, as follows:

> (1) That with reference to Article IX 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.
>
> (2) That nothing in the Convention 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.

Senate Resolution 347, 132 CONG. REC. S1416 (Feb. 19, 1986). The United Nations circulated a notice with the U.S. reservations on December 29, 1988, U.N. Doc. CN.281.1988. Treaties-2.

On December 22, 1989, the Government of the United Kingdom objected to both U.S. reservations, as follows:

> The Government of the United Kingdom have consistently stated that they are unable to accept reservations to Article IX. Accordingly, in conformity with the attitude adopted by them in previous cases, the Government of the United Kingdom do not accept the first reservation entered by the United States of America.
>
> The Government of the United Kingdom object to the second reservation entered by the United States of America. It creates uncertainty as to the extent of obligations which the Government of the United States of America is prepared to assume with regard to the Convention.

Letter from T.L. Richardson, United Kingdom Mission to the United Nations to Javier Perez de Cuellar, Secretary-General, United Nations, December 22, 1989. *See Multilateral Treaties Deposited with the Secretary-General Status as at 31 December 1990, 101*. Other objections to the second U.S. reservation were received the same day from Finland, Sweden, Norway and Ireland, *Id*. at 99–101.

Thereafter, objections to both reservations were received from the Netherlands, Italy, and Greece, *id*. at 99–100. Denmark and Spain objected to the second reservation, *id*. at 99–101, and Mexico objected to the first reservation, *id*. at 100. The Government of the Federal Republic of Germany stated that it interpreted the second reservation as a reference to article V of the Genocide

Convention (in which Parties undertake to enact implementing legislation "in accordance with their respective Constitutions"), and therefore as not affecting U.S. obligations as a State Party to the Convention. *Id.* at 103.

A memorandum dated January 9, 1990 prepared by John Crook, Assistant Legal Adviser for Treaty Affairs, provided a legal analysis of the British objections to the U.S. reservations, as follows:

> *Relevant Rules—U.S. Practice*. There have been contending viewpoints as to customary international law regarding the effect of objections to reservations to multilateral treaties. (The [Vienna Convention on the Law of Treaties ("Vienna Convention" or "VCLT")] formula is consistent with the U.S. view of customary law, but is not in force between the United States and the United Kingdom because the United States is not a party to the Convention.)
>
> The United States has taken the position that, under customary international law, a party's objections to U.S. reservations to a multilateral treaty generally do not prevent the treaty from entering into force for the United States. The objections render the reservation ineffective between the United States and the objecting party. As a corollary, the article to which the reservation relates is regarded as not being in force between the United States and the objecting party. The objection thus in effect creates a hole in the bilateral treaty fabric. See, *e.g.*, 14 Whiteman, *Digest* 1095–98 (memorandum by Assistant Legal Adviser Bevans concerning effect of objections to U.S. reservations to 1955 Convention of the Postal Union of the Americas and Spain).
>
> This principle—that an objection does not prevent the rest of the treaty from entering into force bilaterally—is reflected in the *Third Restatement of Foreign Relations Law* at section 313(c)(ii):
>
> > [O]bjection to a reservation by another contracting state does not preclude entry into force of the agreement between the reserving and accepting states unless a contrary intention is expressed by the objecting state.

Comment (b) explains that in case of such reservation, "the agreement would be in force between the objecting and reserving state—except as to the provisions to which the reservation relates—unless the objecting state clearly indicates otherwise." *Id.* (vol I) at 181.

Under these principles, [the U.K.'s] objections to the U.S. reservations do not prevent the United States from having a treaty relationship with other parties under the Genocide Convention. The bilateral situation with the U.K. is more complex. There is no treaty relationship between the United States and the United Kingdom under Article IX. The bilateral effect of the British objection to the second U.S. reservation is less easy to state, since the second U.S. reservation might affect many articles of the Convention. However, the guarded language of the U.K. objection—and the principle that the objecting state must act explicitly to prevent a treaty relationship—indicate that there is some bilateral relationship. It perhaps consists of those articles judged (or to be judged by the parties) as not significantly or directly affected by the U.S. reservation.

[The U.K.'s] position concerning these principles is not clear. Sir Ian Sinclair's book on the Vienna Conventions seems generally sympathetic to the U.S. approach:

> This is hitherto untested ground, but in principle there would appear to be no reason why an objection to a reservation may not produce this effect [i.e., the dropping away of articles to which the reservation relates], provided the treaty is of such a nature that separability of its provisions is a practicable proposition.

I. Sinclair, *The Vienna Convention on the Law of Treaties* 68 (second ed. 1984). . . .

*Historical Background*. There has been much conflicting opinion concerning the effects of objections to reservations to multilateral treaties. The Genocide Convention provided the focal point for much of the debate. There have been three major schools of thought. Under the traditional ("League of Nations" or "unanim-

ity") view, any party's objections to a reservation rendered the attempted ratification ineffective. Thus, under the traditional rule, all existing parties had to consent to all reservations. The rule ensured the integrity of the treaty text, but at the cost of discouraging wider adherence.

In the 1920's and 1930's, the American States developed a different practice (the "Pan American Rule"). This followed from the notion that a reservation was an inherent right of sovereignty which should not be discouraged. Under this rule, it was possible to have a web of different treaty relationships among the parties to a multilateral treaty:

— The treaty was in force unaltered among states that became parties without reservations.

— It was in force in amended form among states making reservations and those states accepting the reservations.

— It was not in force among states that made reservations and existing parties that did not accept those reservations.

Many states made reservations to the Genocide Convention, creating uncertainty as to which states the Secretary-General (the depositary) should count when the Convention entered into force. The U.S. and the U.K. generally supported the traditional view. The Soviet Union and Poland contended that the requirement of unanimity interfered with the inherent right of states to make reservations.

The General Assembly sought guidance to resolve the dispute from both the ICJ and the ILC. It got different answers. In its 1951 advisory opinion (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (Advisory Opinion of May 28)), the Court, by 7 votes to 5, Judge Hackworth in the majority, Lord McNair dissenting) rejected the traditional rule and articulated a new one in the context of the Genocide Convention. The Court judged that it was the "object and purpose" of the negotiators "that as many

states as possible should participate" in the Genocide Convention, *id.* at 24, and that the unanimity rule was not a customary rule of international law. *Id.* The Court held that:

> —A state that has made a reservation accepted by some (but not all) prior parties is a party to the Genocide Convention, as amended by the reservation, if the reservation is compatible with the Convention's object and purpose.
> — That if the state objects to a reservation it considers incompatible with the object and purpose of the convention, it can consider the reserving state not a party.

Eminent writers and the International Law Commission were not persuaded. The ILC reported back to the General Assembly soon after the ICJ's advisory opinion, supporting the traditional rule and criticizing the ICJ's object and purpose test. *See* Sinclair at 58–59.

The ILC returned to the problem as it sought to codify the law of treaties, work that was the precursor of the Vienna Convention on the Law of Treaties. The Commission changed course with the appointment of Sir Humphrey Waldock as special rapporteur. It recommended a system that moved away from the traditional rule, and that melded the ICJ's "object and purpose" test with elements of the Latin American system. *Id.* at 59–61. As amended and adopted in the Vienna Convention, the relevant rules are as follows.

*Article 19* of the VCLT provides that a state may formulate a reservation when it acts to become a party to a treaty unless:

> — the reservation is prohibited by the treaty,
> — the treaty permits only specified reservations and the attempted reservation does not qualify, or
> — the reservation is "incompatible with the object and purpose of the treaty."

(The second principle was applied in 1988 by the European Court of Human Rights to invalidate a Swiss "interpretive declaration" to the European Human Rights

Convention, the first time an international court has held a reservation invalid. Bourguignon, "The Beilos Case: New Light on Reservations to Multilateral Treaties," 29 *Va. J. Int'l L.* 347 (1989).)

The VCLT then prescribes three different rules governing the effect of reservations:

*The Traditional Rule in Special Cases*. Under Article 17(2), "when it appears" from the limited number of parties *and* from the object and purpose that application of the treaty in its entirety is "an essential condition" of each party's consent to be bound, all must consent to any reservation. (The Advisory Opinion in the Genocide case establishes that the Genocide Convention is not such a treaty.)

*International Organization*. Under Article 17(2), where the treaty creates an international organization, the organization must consent to a reservation.

In other cases, unless the treaty otherwise provides, the VCLT reflects U.S. practice. Article 20(4) states:

In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting state of a reservation constitutes the reserving state a party to the treaty in relation to that other state. . . .

(b) an objection by another contracting state to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving state unless a contrary intention is definitively expressed by the objecting state.

[The U.K. Government] has followed the rule of 20(4)(b). In other cases, it has objected expressly when it wished to prevent a treaty relationship with another state whose reservations it found unacceptable. Thus, in 1972, regarding Syria's reservations to the Vienna Convention on the Law of Treaties, [the U.K. Government] stated:

> The United Kingdom objects to the reservation entered by the Government of Syria . . . and does not accept the entry into force of the Convention as between the United Kingdom and Syria.

> United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1988–792*. In 1977, [the U.K. Government] blocked the entry into force of the Vienna Convention between itself and Tunisia in similar terms. *Id*.
>
> In the circumstances, given the principle that an objecting state must act explicitly to prevent a bilateral treaty relationship from coming into being, and [the U.K.'s] past practice in other cases, the better argument is that there is a partial treaty relationship between the United States and the United Kingdom under the Genocide Convention.

Memorandum from Office of the Assistant Legal Adviser for Treaty Affairs at 2–6, available at *www.state.gov/s/l*.

# CHAPTER 5

# Federal Foreign Affairs Authority

## A. FOREIGN RELATIONS LAW OF THE UNITED STATES AND THE INDIVIDUAL IN INTERNATIONAL LAW

### 1. U.S. Government Employment of Foreign Nationals in the United States

In a letter of June 5, 1989, to the Office of the General Counsel of the Environmental Protection Agency, John R. Crook, Assistant Legal Adviser for Treaty Affairs, provided the views of the Office of Treaty Affairs regarding the statutory prohibition, with certain exceptions, on the use of appropriated funds for hiring of foreign nationals in the continental United States. The letter stated, in pertinent part:

> I understand that this issue arose in the context of Environmental Protection Agency requests for information from the Department [of State] on U.S. defense relations with India, Kenya, and Cameroon.
>
> The Treasury, Postal Service, and General Government Appropriations Act for FY 89 provides, as it has since 1943, certain exceptions to the general prohibition on use of appropriated funds by U.S. Governmental agencies employing non U.S. citizens in the continental United States. Included is the following exception:
>
> > This section shall not apply to citizens of Ireland, Israel, the Republic of the Philippines, *or to nationals of those countries allied with the United States in the current defense effort*.

(P.L. 100-440, Sept. 22, 1988, section 603, 5 U.S.C. § 3101 note; emphasis added.) The phrase "in the current defense effort" replaced the words "in the prosecution of the war" in [Fiscal Year ("FY")] 1952. The Republic of the Philippines has been specifically excepted since FY 44. Israel was exempted in FY 79 and Ireland in FY 84.

The Office of Treaty Affairs many years ago assumed the task of determining which countries are "allied with the United States" for the purposes of this statute. This role has been memorialized since 1979 in the Office of Personnel Management's publication BRE 27, "Federal Employment of Non-Citizens."

This exception has been applied only to those countries with which the United States has in force mutual security commitments. The term "security commitment" is generally understood to mean a legal obligation of the United States, expressed in a formal agreement, to take some action in the common defense in the event of an armed attack on the country concerned. All current U.S. security commitments are embodied in treaties, as opposed to executive agreements. Attached at Tab 1 is a Department publication, "United States Collective Defense Arrangements," which lists countries with which the United States has such commitments. [United States Collective Defense Arrangements, Special Report No. 81, Bureau of Public Affairs, Department of State, January 1988.]

The specific exceptions for the Philippines, Israel, and Ireland in this context are an indication of a narrow construction of this provision by the Congress. The legislative history that we have reviewed supports this narrow interpretation. Congress provided this exception, originally during wartime, to allow foreign nationals to work for the U.S. Government within the United States in defense-related positions. The exemption for Israel in FY 79 was accompanied by an expression of "concern" in the Conference Report about "the growing list of exemptions." (House Report No. 96-471, [Making Appropriations for the Treasury Department, the U.S. Postal Service, the Executive Office of the President, and Certain Independent Agencies,] September 24, 1979, p. 15.)

> It has been our view that to depart from the aforementioned "security commitment" standard in making these determinations could be to embark into an area of speculation and subjectivity which would not correspond with the intention of Congress, and might arouse sensitivities with other countries. India is a case in point. While a case could be made that India has a sufficient defense relationship with the United States to meet the current EPA standard . . . , it is our view that exception would be taken both here and in India to characterizing that country, inter alia, a leader of the Non Aligned Movement, as "allied with the United States in the current defense effort."
>
> This example, as well as others reflected in the EPA material you provided us, also points out the difficulties in having such determinations made by "the agencies whose appropriations are to be obligated," as suggested by the 1955 GAO opinion (35 Comp. Gen. 216, 218) you cite. While such "reasonable" determinations perhaps "would not be questioned by the General Accounting Office" (id. at 219), such a modus operandi is unworkable from the standpoint of sound, consistent Executive branch policy. This is why the Department of State, in the exercise of its prerogatives in the foreign affairs area and in consultation with OPM, acted to centralize such determinations in the Office of Treaty Affairs.

Letter from Assistant Legal Adviser for Treaty Affairs John R. Crook to Mr. Donnell Nantkes, Office of General Counsel, Environmental Protection Agency, June 5, 1989, available at *www.state.gov/s/l*. Discussion of similar exceptions contained in prior appropriations acts may be found in *Digest 1974*, pp. 92–95; *Digest 1976*, pp. 83–84; and *Digest 1978*, p. 302.

### 2. Ambassadorial Functions: Authority

On July 12, 1990, President George H. W. Bush signed a letter of instruction to U.S. chiefs of mission regarding their authorities and responsibilities. The letter replaced President Reagan's September 23, 1981 letter. The text of the letter follows in pertinent part:

I send you my very best wishes and appreciation for your efforts as Chief of the United States Mission in/at _____. We are entering a new, exciting time of change in international relations. The postwar era is drawing to a close. As leader of the democracies, our Nation faces an historic opportunity to help shape a freer, more secure, and more prosperous world, in which our ideals and our way of life can truly flourish. As President, I intend to advance these objectives and United States interests around the globe, and I look to you, as my personal representative, in/at _____, as my partner in this task.

As my representative, you, along with the Secretary of State, share with me my constitutional responsibility for the conduct of our relations with _____. I charge you to exercise full responsibility for the direction, coordination, and supervision of all Executive Branch U.S. offices and personnel in/at _____, except for personnel under the command of a United States area military commander, personnel under the authority of the Chief of another U.S. Mission (for example, one accredited to an international organization), or personnel detailed to duty on the staff of an international organization.

The Secretary of State is my principal foreign policy advisor. You will receive policy guidance and instructions from him or me. Except in the most unusual circumstances, as I shall determine, messages on policy proposals and policy implementation will be sent to you through official Department of State channels. You will normally report through the Secretary. I want to emphasize that the Secretary of State has the responsibility not only for the activities of the Department of State and the Foreign Service, but also, to the fullest extent provided by law, for the overall coordination and supervision of United States Government activities abroad.

You are to provide strong program direction and leadership to all Executive branch agency activities to carry out United States foreign policy. It is also your responsibility to foster conditions in which our regional or worldwide activities can achieve success. I have notified all heads

> of departments and agencies accordingly and instructed them to inform their personnel in the United States and abroad.
>
> You should cooperate fully with personnel of the U.S. Legislative and Judicial branches in/at_____ so that United States foreign policy goals are advanced, security is maintained, and Executive, Legislative, and Judicial responsibilities are carried out.
>
> You should instruct all Executive branch personnel under your authority of their responsibility to keep you fully informed at all times of their current and planned activities, so that you can effectively carry out your responsibility for United States Government programs and operations. You have the right to see all communications to or from Mission elements, except those specifically exempted by law or Executive decision.
>
> As Commander in Chief, I retain authority over United States Armed Forces. On my behalf you have responsibility for the direction, coordination, supervision, and safety, including security from terrorism, of all Department of Defense personnel on official duty in/at _____, except those personnel under the command of a U.S. area military commander. You and such commanders must keep each other currently informed and cooperate on all matters of mutual interest. Any differences that cannot be resolved in the field should be reported by you to the Secretary of State; unified commanders should report to the Secretary of Defense.

The Letter from President Bush is available at *www.state.gov/s/l*.

At the same time that he signed the letter of instruction, President Bush also signed a memorandum to agency heads stating, "I expect your support and cooperation in ensuring that the activities of your department or agency are conducted in accordance with the authorities and responsibilities of Chiefs of Mission, who serve as my personal representatives." *Id*. The text of the letter of instruction to the Chiefs of Mission was attached. See also *Digest 1977*, pp. 244–46; *Digest 1974*, p. 158.

### 3. Bipartisan Accord on Central America

On March 24, 1989, President George H. W. Bush and several U.S. congressional leaders signed a bipartisan accord on Central America. In general, the accord stated the broad objectives of the executive branch and Congress in achieving peace and democratization in Central America, and provided that the executive would propose and congressional leaders would act to extend current levels of humanitarian assistance to the Nicaraguan Resistance. In pertinent part, the accord stated:

> The Executive and the Congress are united today in support of democracy, peace, and security in Central America. The United States supports the peace and democratization process and the goals of the Central American Presidents embodied in the Esquipulas Accord. The United States is committed to working in good faith with the democratic leaders of Central America and Latin America to translate the bright promises of Esquipulas II into concrete realities on the ground.
>
> * * * *
>
> We also endorse an open, consultative process with bipartisanship as the watchword for the development and success of a unified policy towards Central America. The Congress recognizes the need for consistency and continuity in policy and the responsibility of the Executive to administer and carry out the policy and the programs based upon it, and to conduct American diplomacy in the region. The Executive will consult regularly and report to the Congress on progress in meeting the goals of the peace and democratization process, including the use of assistance as outlined in this Accord.
>
> * * * *
>
> To implement our purposes, the Executive will propose and the bipartisan leadership of the Congress will act promptly . . . to extend humanitarian assistance at current levels to the Resistance through February 28, 1990, noting that the Government of Nicaragua has agreed to

> hold new elections under international supervision just prior to that date. Those funds shall also be available to support voluntary reintegration or voluntary regional relocation by the Nicaraguan Resistance. Such voluntary reintegration or voluntary regional relocation assistance shall be provided in a manner supportive of the goals of the Central American nations, as expressed in the Esquipulas II agreement and the El Salvador Accord, including the goal of democratization within Nicaragua, and the reintegration plan to be developed pursuant to those accords.

H.R. Rep. No. 101-23, Pt. 1 at 2–3 (1989).

On April 18, 1989, Congress enacted Pub. L. No. 101-14, 103 Stat. 37 (1989) to implement the bipartisan accord. Section 2(a)(1) of the Act provided that "[t]he President may transfer to the Agency for International Development . . . up to $49,750,000, to provide humanitarian assistance to the Nicaraguan Resistance, to remain available through February 28, 1990." Section 7(a) prohibited the use of funds available under the Act to provide assistance to the Nicaraguan Resistance for military or paramilitary operations in Nicaragua, and section 7(b) barred assistance to any group with members who have engaged in gross violations of human rights, drug smuggling, or significant misuse of public or private funds. Section 11 of the Act obligated the Secretary of State to "consult regularly with and report to the Congress" in connection with the use of the authorized assistance and other peace efforts in Central America.

On April 28, 1989, the Secretary of State wrote to Congressional leaders, stating:

> Pursuant to the bipartisan agreement on Central America between the Executive and the Congress, the Congress has now voted to extend the current humanitarian assistance to the Nicaraguan Resistance at current levels through February 28, 1990. This assistance has been authorized and appropriated but will not be obligated beyond November 30, 1989, except in the context of consultation among the Executive, the Senate Majority and Minority leaders, the Speaker of the House of Representatives and the Minority leader, and the relevant authorization and appropriation

> committees, and only if affirmed via letters from the Bipartisan leadership of Congress and the relevant House and Senate authorization and appropriations subcommittees.
>
> This bipartisan accord on Central America represents a unique agreement between the Executive and the Legislative Branches. Thus, it is the intention of the parties that this agreement in no way establishes any precedent for the Executive or the Legislative Branch regarding the authorization and appropriation process.

The letter is available at *www.state.gov/s/l*. A draft of this letter had been included in the House report containing the bipartisan accord. H.R. Rep. No. 101-23, Pt. 1 at 4.

Following enactment of the legislation, four members of the U.S. House of Representatives sued the President and the Secretary of State seeking a declaratory judgment that the Secretary of State's undertaking in his draft letter to seek the approval of congressional leaders before expending funds after November 30, 1989 was unconstitutional and, therefore, null and void. *Burton v. Baker*, 723 F. Supp. 1550 (D.D.C. 1989). In particular, the plaintiffs asserted that this "side agreement" constituted a grant of legislative veto to several members of Congress, amended an Act of Congress by unilateral Executive Branch action, and effected a Presidential "impoundment" of funds duly appropriated by Congress to be spent as Congress intended. As a result of the side agreement's alleged nullity, the plaintiffs argued that the President would be obliged to continue to furnish humanitarian assistance to the Nicaraguan Resistance through February 28, 1990 without further permission from Congress.

On September 25, 1989, the Bush Administration filed motions to dismiss and for summary judgment. In its memorandum of points and authorities in support of the motions, the Administration argued that the action did not present a justiciable case or controversy for three reasons. First, the plaintiffs lacked standing. Second, the court should exercise its discretion, in any event, to dismiss the complaint because of the separation of powers issues it raised. Third, the claim presented a nonjusticiable political question, particularly because it involved foreign affairs. The memorandum argued:

> Plaintiffs are attacking the Secretary of State's letter to congressional leaders in connection with the statute and, perhaps to a lesser extent, the Bipartisan Accord on Central America between the President and Congress. It is apparent from the face of these documents, however, that they represent the type of purely political, foreign policy decision-making over which the courts may not exercise control.
>
> The Bipartisan Accord is an expression of cooperation between the Executive and Legislative Branches of government regarding the conduct of the country's foreign policy in Central America. Indeed, the Bipartisan Accord begins with the following sentence: "The Executive and the Congress are united today in support of democracy, peace, and security in Central America." It then proceeds to set forth the aims and intentions of the United States in connection with the policy in that region. Similarly, the letter from Secretary Baker to Congress manifests the intention of the Executive Branch to exercise its discretion under the Act in the spirit of the Bipartisan Accord. Nothing could be a more obvious product of the decision-making process that the Supreme Court has described as "delicate, complex and involv[ing] large elements of prophecy." Chicago & Southern Airlines [v. Waterman Steamship Corp.,] 333 U.S. 103, 111 [(1948)). And yet this, the substantive product of political foreign policy decisions, is what plaintiffs seek to invalidate. Surely this falls within the realm of controversies that have "long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." Id.

Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, No. 89-2929 (D.D.C. Sept. 25, 1989) at 12–13, available at *www.state.gov/s/l*.

The Administration's memorandum also argued that the challenged agreement was not a legislative act and had no legally binding effect, and therefore could not constitute a violation of constitutionally mandated lawmaking procedures.

On October 31, 1989, the district court granted the Administration's motion for summary judgment and dismissed the complaint. The court cited both standing problems and judicial discretion as bases for its decision:

> It is apparent to this Court that, although the debate may continue in the court of appeals as to the proper basis for doing so, the teaching of D.C. Circuit precedent is that lawsuits by members of Congress for declaratory or injunctive relief against either officials of the Executive Branch or their fellow legislators respecting the constitutionality of the way the latter have gone about their business are generally not to be entertained by the Judicial Branch. It is less important that district courts correctly identify the more academically respectable reason for declining to decide such disputes than that they do decline them.
>
> The plaintiffs here insist that they are interested only in vindicating the legislative process as established by the Constitution for enacting and executing the laws of the nation. They condemn the so-called "side agreement" as a constitutional aberration, because, by it, the Executive Branch abdicates its responsibility to execute the Act as they expected it to be executed, and also because certain of their fellows have acquired the ability to exercise disproportionate influence over the manner in which it will be executed.
>
> If standing is now the ground of decision of choice in such cases, the Court finds that the plaintiffs have no standing here. They have a collegial remedy: they can persuade a majority of their fellows to change the law or abandon the "side agreement." Alternatively, because the subject matter of both the Bipartisan Accord and the Act involves issues of national defense and foreign policy, the Court finds it to have been committed to the political branches of the Constitution. It would be imprudent for this Court to instruct the President, the Secretary of State, and the Congressional leadership how they must resolve their differences, and it declines to decide the case as a matter of discretion.

723 F.Supp. at 1553–1554.

## B. STATUS OF CONSTUTENT ENTITIES

### 1. Termination of Trust Territory of the Pacific Islands

On December 22, 1990, the U.N. Security Council adopted Resolution 683 (1990), determining that the 1947 Trusteeship Agreement creating the Trust Territory of the Pacific Islands had terminated with regard to the Federated States of Micronesia, the Marshall Islands and the Northern Marianas Islands, because the people of these entities had freely exercised their right to self-determination in approving new status agreements with the United States. Ambassador Thomas R. Pickering, Permanent Representative of the United States to the United Nations, made the following statement to the Security Council during its consideration of the resolution:

> Mr. President, it is rare for the Security Council to be able to take a seemingly small step that means so much to a group of people. I believe that today's action by the Council is such a step. One of the fundamental principles the United Nations seeks to uphold is the right to self-determination. The peoples of the former entities of the Trust Territory of the Pacific Islands participated in a process that led to true achievement of self-determination. The United Nations was an active promoter and observer of this successful process. The Trusteeship Council sent various missions to monitor plebiscites held in each of these entities. In 1986, the Trusteeship Council concluded that each of the peoples concerned had achieved self-determination. The action we have taken today gives the endorsement of this Council to this Trusteeship Council action which meant so much to these peoples. I would express my government's welcome for this endorsement of the will of the peoples involved.

U.N. Doc. S/PV.2972 at 27 (December 22, 1990).

### 2. Commonwealth of the Northern Mariana Islands

On May 18, 1990, the Department of State commented on S. 1025, 101st Cong. (1989), the Fishery Conservation Amendments

of 1990, making amendments to the Magnuson Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331 (1976), 16 U.S.C. §§ 1801–1883. The bill included provisions to extend U.S. fishery management authority to include tuna and highly migratory species in the exclusive economic zone. In so doing, it provided that these species in the exclusive economic zone around the Commonwealth of the Northern Mariana Islands (CNMI) would belong to the people of the Commonwealth and be managed for their benefit. The Department opposed the proposed legislation because, among other things, it disregarded the status of the Commonwealth in relationship to the United States. As explained in a letter from Assistant Secretary for Legislative Affairs Janet G. Mullins to Director of the Office of Management and Budget Richard Darman:

> . . . [U]nder the proposed amendments, the Commonwealth of the Northern Mariana Islands would implicitly be granted sovereign rights and jurisdiction to the exclusive economic zone surrounding these islands, which are under U.S. sovereignty pursuant to the Covenant that established the Northern Mariana Islands as a Commonwealth. [Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 99-239, 48 U.S.C.A. 1681 note; *see also* Presidential Proclamation No. 5564, November 3, 1986, 51 Fed. Reg.40,399.1] No state, commonwealth or territory of the United States owns the exclusive economic zone off its shores.
>
> * * * *
>
> Article VIII of the Covenant represents in all aspects an affirmative grant of rights to the Commonwealth in regard to real property only, and does not accord to the Commonwealth control over the exclusive economic zone. In 1976 the Magnuson Fishery Conservation and Management Act established the fishery conservation zone of the United States, the inner boundary of which was the seaward boundary of each of the coastal States. 16 U.S.C. 1811. Section 1802(21) of the Act defines "States" as

including "any other Commonwealth, territory or possession of the United States." Consequently the U.S. Congress has claimed the fishery conservation zone around the Northern Mariana Islands belongs to the United States. Presidential Proclamation No. 5030 of March 10, 1983, establishing the 200 nautical mile exclusive economic zone of the United States, defined the zone as including the Commonwealth of the Northern Mariana Islands "to the extent consistent with the Covenant and the United States Trusteeship Agreement."

The Commonwealth of the Northern Mariana Islands is no longer a trust territory and, of its own volition, freely became incorporated into another independent State. Thus, rights and obligations of the trusteeship are superseded by the rights and duties of the "parent" State and the Commonwealth as set out in the Covenant. . . .

The Commonwealth of the Northern Mariana Islands gave up control of its ocean resources in exchange for U.S. citizenship and other benefits of commonwealth status when it entered into close political relationship with the United States. The United States should not grant one commonwealth greater rights than those enjoyed by all the other coastal states, commonwealths and territories of the United States.

Another proposed amendment would authorize the Governor of the Commonwealth of the Northern Mariana Islands to negotiate international tuna fishery agreements. Generally speaking, no state, commonwealth or territory of the United States has the authority to enter into international negotiations. The amendment would also give the Governor the right to veto any tuna agreement negotiated by the United States and approved by the Secretary of State. These amendments are inconsistent with section 104 of the Covenant, which provides that the United States will have "complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands."

The letter also noted:

> It is the view of the United States that customary international law as reflected in article 64 of the 1982 United Nations Convention on the Law of the Sea does not grant coastal states sovereign rights in their exclusive economic zones over highly migratory species of tuna. The amendments proposed to S.1025 would thus be contrary to customary international law as interpreted by the United States.

Letter from Assistant Secretary for Legislative Affairs Janet G. Mullins to Director of the Office of Management and Budget Richard Darman, May 18, 1990, available at *www. state.gov/s/l*.

The bill as enacted did not contain the provisions relating to the Commonwealth of the Northern Mariana Islands. Pub.Law. No. 101-627, 104 Stat. 4436 (1990).

### Cross reference

*Status of Residents of Commonwealth of Northern Mariana Islands*, **Chapter 1.A.4.**

# CHAPTER 6

# Human Rights

## A. GENERAL

### Legal Status of the American Declaration of the Rights and Duties of Man

On July 14, 1989, the Inter-American Court of Human Rights in San Jose, Costa Rica, issued Advisory Opinion No. OC-10/89, in response to a request by the Government of Colombia. The question posed by Colombia was whether article 64 of the American Convention on Human Rights ("Convention"), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force June 18, 1978, authorized the Inter-American Court to issue advisory opinions on the interpretation of the American Declaration of the Rights and Duties of Man ("Declaration") (OEA/Ser.L.V/II.82 doc 6. rev. 1 at 17). The question thus raised was whether the Declaration came within the grant of jurisdiction in Article 64.1 of the Convention which provides:

> The member states of the Organization [of American States] may consult the Court regarding the interpretation of this Convention *or of other treaties concerning the protection of human rights in the American states*. . . . [emphasis added]

The United States submitted written comments and attended the public hearing on the request, arguing that the Declaration was not drafted as a legal instrument and thus was not covered by article 64. The U.S. position, as summarized in the Inter-American Court opinion, was as follows:

> The American Declaration of the Rights and Duties of Man is a noble statement of the aspirations of the American States with respect to human rights. Nevertheless, unlike the American Convention, the Declaration was not drafted as a legal instrument and lacks the necessary precision to resolve complex legal questions. Its normative value resides in the fact that it is a declaration of basic principles of a moral and political nature and that it serves as the basis for monitoring general human rights compliance by member States, not in the fact that it is a set of binding obligations.
>
> The United States recognizes the good intentions of those hoping to transform the American Declaration from a statement of principles into a binding legal instrument. Good intentions, however, do not make the law. It would seriously weaken the international law-making process—by which the sovereign states voluntarily assume specific legal obligations—to impose legal obligations on States through a process of "reinterpretation" or "inference" from a statement of non-binding principles.

I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights, Advisory Opinion O/C-10/89 of July 14, 1989, Series A No. 10, ¶12.

The court found, however, that it was competent to issue advisory opinions on the interpretation of the American declaration "within the scope and framework of the limits of its jurisdiction with respect to the Charter and the Convention or other treaties concerning the protection of human rights in the American States." Advisory Opinion No. O/C-10/89, ¶48.

On November 14, 1989, at a meeting of the First Committee at the 29th General Assembly of the Organization of American States in Washington, D.C., Deputy Legal Adviser Alan J. Kreczko commented on this advisory opinion in the course of reviewing the jurisprudence of the IACHR over the past year. In particular, Mr. Kreczko stated:

> [W]e are compelled to note our difficulties with the opinion of the Court in case OC-10, an advisory opinion on

the legal status of the American Declaration of the Rights and Duties of Man brought by Colombia. . . .

[T]he Court agreed with various submissions made to it, including from the United States, that the American Declaration is an important source for the interpretation of the OAS Charter and the American Convention on Human Rights. The Court also suggested, however, that as a legal matter the Declaration, which we all know was adopted as a resolution of the OAS General Assembly in 1948, has changed in some unspecified way from a non-binding to a legally binding agreement.

Although the Court's decision is not entirely clear on the latter issue because it does not suggest how the transformation took place, it seems the Court is asserting that the legal character of the American Declaration has changed over time.

The United States accepts and promotes the importance of the American Declaration. It is a solemn moral and political statement of the OAS member states, against which each member state's respect for human rights is to be evaluated and monitored, including the policies and practices of the United States. It is critical and necessary to the proper functioning of the Organization and to the protection of human rights in the hemisphere. The Inter-American Commission on Human Rights—which is often referred to as the "conscience of the OAS"—plays a vital role in the Organization when it undertakes to judge a member state's human rights performance in light of the fundamental principles contained in the Declaration.

The United States does not believe, however, that the American Declaration has binding legal force as would an international treaty. We believe that most if not all governments understand that even unanimously approved and formal declarations of international organizations such as the OAS or the United Nations general assemblies are not legally binding per se, but are political and moral statements. Submissions to the Court by Costa Rica and Venezuela made this same point. The U.S. submission in case OC-10/89 sets out in detail our views on the issue. We understand all submissions to the Court in this case,

> as well as a transcript of the hearing, will be published by the Court and available to interested governments and private persons.
>
> Given the strong U.S. support for the American Declaration and commitment to uphold its principles, our disagreement with the Court's decision may seem a technical one. However, it goes to the heart of international law. It is an important aspect of the sovereign equality of states that, generally speaking, they freely accept international legal obligations. Nonbinding international resolutions and declarations, however critical they are from a moral and political standpoint, do not evolve without state action into binding legal instruments. We do not believe it advances the development of international law or international institutions to say they do.

Statement by Deputy Legal Adviser Alan J. Kreczko, First Committee, 29th OAS General Assembly, November 14, 1989, at 2–4, available at *www.state.gov/s/l*.

## B. DISCRIMINATION

### Convention on the Elimination of All Forms of Discrimination Against Women

In 1980, the United States transmitted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), signed by the United States on July 17, 1980, to the Senate for advice and consent to ratification. *See Digest 1979* at 550–59. On August 2, 1990, Deputy Legal Adviser Alan J. Kreczko testified before the Senate Committee on Foreign Relations on the current status of consideration of CEDAW. In particular, Mr. Kreczko addressed a number of issues requiring resolution before the United States would be able to ratify the convention:

> [T]he United States participated actively in the drafting of CEDAW and voted in favor of Resolution 34/180 of the General Assembly. In explanation of the vote, the U.S. rep-

resentative in the General Assembly stated that, while we were not entirely happy with the 10th and llth preambular paragraphs (which include language on disarmament and decolonization irrelevant to the Convention), we supported the basic principles of the Convention. He nevertheless noted that some provisions of the Convention might, upon comprehensive review, raise "difficulties of a Constitutional nature, particularly in relation to our Federal-State system."

The Convention was signed on behalf of the United States on July 17, 1980. Four months later, on November 12, President Carter transmitted it to the Senate seeking advice and consent to ratification. In his transmittal letter, President Carter noted that, while "the great majority of the substantive provisions of the Convention are consistent with the letter and the spirit of the United States Constitution and existing laws . . . certain provisions of the Convention raise questions of conformity to current United States law."

President Carter's transmittal letter did not, however, propose specific reservations, understandings and declarations to remedy these concerns. Instead, it enclosed a report from the Department of State and a Memorandum of Law identifying "those areas of concern that will require further discussion and treatment."

This Administration regards CEDAW as an important human rights treaty. In our view, the object and purpose of the Convention are in full accord with the Constitution of the United States and with federal law. However, as with all human rights treaties, CEDAW raises a number of legal concerns that would need to be resolved.

The Department of Justice has conducted a preliminary review of the potential conflicts between CEDAW and current law. Based on that review, I would like to draw the Committee's attention to several major areas of potential conflict. I would stress that these comments are preliminary and are limited to major topics of concern.

1. *Federalism*. Several articles of the Convention would obligate the United States to undertake anti-discrimination initiatives in areas traditionally considered to be

within the province of State governments. For example, Articles 10 and 16 deal, respectively, with education and family relations—two subjects predominantly within the jurisdiction of the various States. In particular, the federal government would be obligated to require "revision of textbooks" to eliminate "stereotyped" sex roles, Art. 10(c), to ensure that women shall enjoy the "same opportunities to participate actively" in school sports, Art. 10(g), and to "specify a minimum age for marriage," Art. 16 (2).

2. *Private conduct*. Several articles of the Convention could be construed to require the United States to regulate conduct traditionally considered beyond the scope of governmental power at any level. For instance, . . . Article 7(c) would obligate the United State to assure women, "on equal terms with men," the right to participate "in non-governmental organizations and associations concerned with the public and political life of the country." This provision would appear to reach the principles of internal organization applied by political parties and private interest groups. Of course, there are no difficulties in complying with these anti-discrimination principles insofar as they apply to commercial activity, including employment, accommodation or associations intended to facilitate such activity, or to any activity sponsored, funded, or provided tax exemptions by the government.

* * * *

4. *Military Forces*. Article 2(f) requires the United States to "take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which would constitute discrimination against women." This broad requirement would shed doubt upon, *inter alia*, longstanding military policies barring women from combat missions.

5. *Employment*. Article 11(l)(d) would require the United States to ensure "[t]he right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value. . . ." This language could be construed to require legislation providing a cause of action for employment discrimination based upon the controversial

> "comparable worth" theory. The federal courts have heretofore resisted application of this theory in suits under Title VII of the Civil Rights Act of 1964.
>
> Article 11(l)(f) would obligate the United States to ensure "[t]he right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction." In its coming term, the Supreme Court will address for the first time the validity of policies by which female employees are excluded from particular jobs that may harm their reproductive functions. *See International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), *cert. granted* 110 S. Ct. 1522 (1990). Should the Court find such policies impermissible under current law, Article 11(l)(f) might be read to obligate Congress not only to overturn that decision by statute but, further, to place employers under an affirmative obligation to implement such policies. [In fact, the Supreme Court found that policies excluding women with childbearing capacity from certain jobs without proving the restriction was a bona fide occupational qualification violated federal discrimination law. *See International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187(1991).]

*Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the Senate Comm. On Foreign Relations*, 101st Cong. 50–52 (1990) (testimony of Deputy Legal Adviser Alan J. Kreczko, Dept. of State).

## C. CHILDREN

### Convention on the Rights of the Child

The adoption of the Convention on the Rights of the Child was considered during the 44th Session of the United Nations General Assembly. On November 10, 1989, Christopher H. Smith, the U.S. Alternate Representative to the General Assembly, made a statement in the Third Committee urging the General Assembly to adopt the Convention:

> The United States participated actively in the drafting of the Convention. We believe that it represents a notable step forward in the needed promotion and protection of the rights of children. Although the Convention is far from perfect—no agreement ever is—the United States strongly believes in the enumerated commitments and goals of the Convention, and it is our hope that the General Assembly will adopt the text without change.
>
> * * * *
>
> The Convention on the Rights of the Child grapples with many difficult issues and rests on several hard-fought compromises. A number of these compromises were necessitated by the differing cultural, legal, and religious views of the unique relationship between the rights of the child, the rights and responsibilities of parents, and the state's obligations of legal and moral protection. Other concessions were necessary on other matters. My government, like many others, is not completely satisfied with some of these compromises. But because we recognize the importance and desirability of adopting the Convention without further delay, we do not wish to reopen negotiation on any part of the text.

Press Release U.S.U.N. 144-(89) REV. 1, Nov. 10, 1989, at 1, 2. Mr. Smith also provided the views of the United States on several specific aspects of the Convention:

> *Protection of the Unborn*
>
> The United States fully supports the inclusion within the Preamble of the Convention language from the 1959 Declaration of the Rights of the Child confirming that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."
>
> Children—born and unborn—are precious and extremely vulnerable. Governments have a duty and sacred obligation to protect these children to the maximum extent possible.

. . . The most tender, formative nine months prior to [birth] will forecast the healthiness of the child after birth. One of the most positive protections for a healthy childhood . . . is proper prenatal care.

We in the United States are just now fully recognizing the positive effects of basic maternal and prenatal care. This does not demand elaborate, expensive medical facilities; the basics cost little but are extremely effective.

The United States Agency for International Development has launched a new project for maternal and neonatal health and nutrition in developing countries. Comprehensive research and experience, domestically and internationally—through organizations such as the World Health Organization have proven that proper prenatal and neonatal health care spell the difference between a healthy and health-threatened mother, and between a strong or vulnerable child. Healthy babies, right from the start, will help provide brighter futures for all of our children, who represent our own future and our legacy for the next generation.

*Religious Rights and Freedom of Conscience*

My government concurs fully and is pleased that the Convention reaffirms "the right of the child to freedom of thought, conscience and religion." The international community has long agreed that all people, including children, must be guaranteed religious rights.

* * * *

Although parents or guardians must of course offer guidance and assist young children in the exercise of their right to freedom of conscience, we must recognize that this inherent and inalienable right of religious freedom is a precious right of each individual, including children. If possible, the United States would have wished for a stronger reaffirmation of this in the Convention.

In particular, Mr. Chairman, we would have liked to specify that children continue to have such supplementary rights as the freedom to have or to change a religion, the

> right to worship according to their beliefs alone or with others, and the right to teach, learn, and practice their religion in public and in private. The Universal Declaration on Human Rights and other international instruments include references to such supplementary rights, and the United States continues to believe that they apply to everyone, including children.

The statement also expressed U.S. views on funding for the Committee on the Rights of the Child:

> The United States firmly believes that the costs of the Committee on the Rights of the Child that will be established by the Convention should be borne exclusively by the States that ratify the Convention. In our view, Mr. Chairman, the Committee established by the Convention is not a United Nations body, but an instrument of the States Parties to the Convention. Only those States may nominate and elect members of the Committee; only those States submit reports to it. Moreover, the Convention will enter into force when only twenty States have ratified it. We believe it would be inappropriate for the entire membership of the United Nations to bear the expenses of a body created to serve so small a number of states, at least initially.
>
> In any event, United Nations financing is no guarantee of full financing for committees such as this one. In times of budgetary constraint, the Members of the United Nations can and very well may decide which functions the Committee will have to forgo. The United States believes that state-party financing is more likely to preserve the independence of the Committee on the Rights of the Child, for that financing method would give the Committee complete power to decide how to use its funds.

Press Release U.S.U.N. 144-(89) REV. 1, Nov. N, 1989, at 3.

Finally, the U.S. statement highlighted several key elements of the Convention that the U.S. Government supported, including family reunification, abuse and neglect, adoption, and disabled children:

*Family Reunification*

We are particularly concerned about the reunification of families, so that children and parents can live together. Families have been torn apart by war, restrictive borders, and indiscriminate limits on emigration rights. This disruption in cohesive family ties is especially detrimental to the lives of children, who are generally the ones who suffer the most from forced separations. The Convention obligates the states parties to address reunification applications by children or their parents "in a positive, humane and expeditious manner." This is an easily attainable goal, and governments should not have difficulty in doing this.

*Abuse and Neglect*

The prevention of physical and mental abuse against children demands constant vigilance, a moral and ethical consciousness throughout our society—from government agencies, to churches, synagogues and mosques, to local community awareness efforts, to neighbors and families. The scourge of child abuse—whether physical or sexual abuse, whether negligence, neglect, or other forms of exploitation—is all too prevalent throughout the world. Governments must be committed to providing legal and administrative protection to children, as well as supporting social and educational programs that help prevent this gross scourge which has infected many of our communities.

*Adoption*

With the strong and active encouragement of President Bush, the United States Government has promoted the adoption of children by loving and caring families. Through legal safeguards and constructive adopting agencies, governments can help ensure that eligible children or orphaned children enjoy the love and nurture of a family. . . .

* * * *

*Disabled Children*

> The United States is keenly aware of the special needs of mentally or physically disabled children, and we fully support the Convention's call for a "full and decent life" for these children.

* * * *

Press Release U.S.U.N. 144-(89) REV. 1, Nov. 10, 1989, at 4–5.

On November 20, 1989, the U.N. General Assembly adopted Resolution A/RES/44/25 by consensus, adopting the Convention on the Rights of the Child and opening it for signature and ratification by all states.

On September 11, 1990, the Senate adopted, by unanimous consent, Resolution 231 "to urge the submission of the Convention on the Rights of the Child to the Senate for its advice and consent to ratification," concluding as follows:

> . . . It is the sense of the Senate that the issue of children's rights and their well-being is important both to the United States and the world at large and that, in consideration thereof, the President should promptly seek the advice and consent of the Senate to the ratification of the Convention on the Rights of the Child, adopted by the United Nations with the support of the United States on November 29, 1989 [sic].

S. Res. 231, 136 CONG. REC. S12,784–85 (daily ed. Sept. 11, 1990). For the Senate debate on the resolution, see 136 CONG. REC. S12785–86, S12787–90, S12806–11 (daily ed. Sept. 11, 1990). Key Senators subsequently withdrew their support of the Convention and asked that the Administration not submit it for advice and consent.

## D. TORTURE

### 1. United Nations Torture Convention

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, G.A, Res. 39/46 (Dec. 10, 1984) (entered into force June 26, 1987) which President Ronald Reagan had transmitted to the Senate on May 20, 1988. S. Treaty Doc. No. 100-20 (May 20, 1988).

In 1989, following consultations with the committee and interested private groups, the Department of State decided to reexamine the reservations, declarations and understandings contained in the 1988 transmittal, with a view to dropping, retaining or modifying them. By letter of December 10, 1989, from Janet G. Mullins, Assistant Secretary of State for Legislative Affairs, to Senator Claiborne Pell, chairman of the Foreign Relations Committee, the Department transmitted revised reservations, understandings and declarations agreed upon by the Departments of State, Justice and Defense. *See* S. Exec. Rep. No. 101-30 at 35 (1990).

Abraham D. Sofaer, Legal Adviser, Department of State, testified on the Convention at a hearing before the Senate Foreign Relations Committee on January 30. At the outset, he stressed the importance of prompt and favorable action on the Convention and reviewed the need for U.S. ratification of the Convention:

> The Bush Administration places a high priority on the early ratification of this important human rights treaty, for substantive as well as symbolic reasons. The need for this Convention, Mr. Chairman, stems from the tragic fact that torture continues to be practiced on a daily basis in many nations throughout the world, systematically and with the support or acquiescence of government officials. As President Reagan said in his letter of transmittal to the Senate, this Convention marks a significant step in the continued development of appropriate international measures to eliminate such barbaric practices. Early ratification of the Convention by the United States will clearly affirm our known abhorrence and condemnation of torture.
>
> * * * *
>
> Mr. Chairman, some may feel the United States has no need for the legal protections of the Convention Against Torture. Existing U.S. law makes any acts falling within the Convention's definition of torture a criminal offense,

> as well as a violation of various civil statutes. Potential remedies include incarceration, compensation, and the full range of equitable relief. Any public official in the United States, at any level of government, who inflicts torture (or instigates, consents to, acquiesces in, or tolerates torture), would be subject to an effective system and control and punishment in the U.S. legal system.
>
> This Administration nonetheless believes, Mr. Chairman, that, as a member of the international community, we must stand with other nations in pledging to bring to justice those who engaged in torture, whether in U.S. territory or in the territory of other countries. If we fail to become a party, we will lose credibility as well as the ability to influence the direction of developments in this important area. The United States opposes the use of torture, just as we oppose terrorism, genocide, or illicit drug trafficking, each of which is covered by multilateral conventions to which this nation has recently become a party. We therefore believe it is appropriate and in our interests to ratify this convention.

*Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 7–8 (1990) (statement of Abraham D. Sofaer, Legal Adviser, Department of State).

Among other issues, the Legal Adviser also discussed a new understanding, not previously proposed, regarding the death penalty:

> Questions have been raised about whether this Convention affects our application of the death penalty.
>
> Mr. Chairman, I want to emphasize my firm and considered opinion that the death penalty does not violate international law, nor does international law require the abolition of the death penalty. Many, perhaps even most, countries in the world today provide for capital punishment for some offenses under their domestic laws, and none of the major international human rights instruments prohibit the death penalty. The European Court on Human Rights recently held explicitly that the death penalty was not unlawful under international law.

> Moreover, international law could not develop a prohibition against capital punishment applicable to the United States, so long as the United States continues to impose the death penalty and object to development of such a norm.
>
> Nonetheless, some concerns have been expressed that the United States should take no risks in this regard. To allay these concerns, the Administration has decided to propose an additional understanding, addressed explicitly to the death penalty issue. Since the death penalty is clearly not a violation of international law, this is no way derogates from the Convention. Specifically, we propose that the following understanding be reflected in the Senate's resolution of advice and consent as well as in our instrument of ratification: "The United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty."
>
> I regret that this additional understanding was not included in the revised package of reservations, understandings and declarations transmitted to the Committee, but, in preparing for this hearing, we concluded that it was appropriate and prudent to be categoric with our treaty partners with respect to our position on the death penalty.

*Id*. at 10–11.

The Legal Adviser's testimony included a review of the other important changes made by the Administration's revised package of proposed reservations, understandings and declarations:

> *Definition of Torture*
>
> A second important revision we propose concerns the definition of "torture" under Article 1. The original package proposed an understanding to the effect that, in order

to constitute "torture," an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering." This proposal was criticized by some as possibly setting a higher, more difficult evidentiary standard than the Convention required. Substantial concern was expressed that the effect of this understanding might be to undercut the central feature of the Convention, at least as codified in U.S. law, and to encourage other States also to adopt higher domestic standards, thereby limiting the effectiveness of the Convention.

Although no higher standard was intended, we recognized the concern raised by this criticism. At the same time, our colleagues at the Justice Department felt that, since the definition of "torture" will constitute the basis for criminal punishment under U.S. law, some clarification of the Convention's definition was constitutionally required. Accordingly, and on the basis of extensive discussions with concerned representatives in the human rights community, we prepared a modified proposal which does not raise the high threshold of pain already required under international law, but clarifies the definition of mental pain and suffering and maintains the position that specific intent is required for torture.

The revised understanding reads as follows:

> The United States understands that, 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 (1) the intentional infliction of severe pain or suffering; (2) 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; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

While somewhat more lengthy than the earlier proposal, we believe this revised understanding accommodates the concerns of those responsible for seeing that prospective defendants are treated fairly under our domestic law, on the one hand, and those on the other hand who are concerned not to undermine the effective implementation of the Convention by other States around the globe.

*Lawful Sanctions*

Another point of criticism of the original package has been its proposed understanding concerning the scope of "lawful sanctions," as used in Article 1.

You will recall, Mr. Chairman, that Article 1 excludes from the definition of torture "pain or suffering arising only from, inherent in or incidental to lawful sanctions." The initial understanding indicated that the term "sanctions" would include "not only judicially-imposed sanctions but also other enforcement sanctions authorized by United States law or by judicial interpretation of such law." This clarification was thought necessary because the Convention does not itself indicate whether the "lawfulness" of sanctions (judicially imposed penalties as well as law enforcement actions) should be determined by domestic or international law. Our earlier proposal, Mr. Chairman, was intended to protect against illegitimate claims based on unclear standards that law enforcement actions authorized by U.S. law constitute torture within the meaning of the Convention.

Critics of this proposal pointed out, however, that such a formula would open the possibility for any State Party to the Convention to attempt to legitimize officially-sanctioned torture simply by authorizing it specifically as a matter of domestic law.

A State could then use the same rationale to exempt its torturers from prosecution under the Convention. This possibility, obviously, was not what we had intended. Upon further reflection, therefore, we have clarified our position to make clear that domestic legality does not remove an action from the Convention's definition of torture if the action violates a clear prohibition in international law. In

other words, we propose that States Party not be permitted to invoke the "lawful sanctions" exception to legitimize activities which clearly amount to "torture" in contravention of the basic object and purpose of the Convention, even if they are technically lawful under their own domestic law.

* * * *

*Cruel, Inhuman or Degrading Punishment*

The Convention deals primarily with "torture." In Article 16, however, the Parties also undertake to prohibit lesser forms of ill-treatment under the rubric of "cruel, inhuman or degrading treatment or punishment." The revised package retains a statement to the effect that the United States considers itself bound, under Article 16, to prevent "cruel, inhuman or degrading treatment or punishment" not amounting to torture only insofar as those words mean the cruel and unusual punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution. In fact, the revised package upgrades this point to a reservation from the status of an understanding.

The reason for this reservation is straightforward. The formulation used by Article 16 is ambiguous, particularly in its reference to "degrading treatment." Of course, our own 8th Amendment to the Constitution protects against cruel and unusual punishment. Our courts have interpreted this prohibition to protect against a broad range of practices that involve the unnecessary and wanton infliction of pain. This provision, which applies to convicted persons, covers their living conditions, disciplinary treatment, and medical care. These protections have been applied not only in prison contexts but also, under the Fifth Amendment, to any other detainee. The Fourteenth Amendment incorporates these protections and makes them applicable to the States.

We would expect, therefore, that our Constitution would prohibit most (if not all) of the practices covered in Article 16's references to cruel, inhuman and degrad-

> ing treatment or punishment. Nevertheless, we are aware that some countries give a broader meaning to this provision. For example, the European Court of Human Rights in Strasbourg has found the so-called "death row phenomenon" to constitute "cruel, inhuman and degrading treatment or punishment."
>
> While such decisions are not binding on our courts, it is prudent that the U.S. specify that, because the Constitution of the United States directly addresses this area of the law, and because of the ambiguity of the phrase "degrading," we would limit our obligations under this Convention to the proscription already covered in our Constitution.
>
> We also propose a reservation to the effect that the United States does not consider itself bound to submit to the jurisdiction of the International Court of Justice in cases of interpretation or application of the Convention, but reserves the right to agree to do so or to follow any other procedure for arbitration in a particular case. Such a reservation is consistent with the policy of this Administration, and its predecessor, concerning the International Court of Justice. It is also consistent with the Senate's decision to require such a provision in the Genocide Convention. We believe that, in due course, when a fair and reliable regime for using the ICJ is in place, the U.S. will be able to utilize the ICJ on a mandatory basis under this and other treaties.

*Id.* at 9–12.

Following this hearing, further correspondence between the Department of State and the Senate regarding the Torture Convention included a June 13, 1990, letter that addressed a "sovereignty" clause proposed by Senator Helms during the January 30, 1990 hearing:

> The "sovereignty" clause would condition the Senate's advice and consent to ratification of the Convention upon the same proviso which was applied to the Genocide Convention (and subsequently to several other treaties),

namely, that "nothing in the Convention 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."

We agree with the statement as a matter of fact and as a legal proposition. Nothing in this Convention does or could require any unconstitutional action by the United States. To our knowledge, no one—in formal testimony or otherwise—has identified any provision of the Convention that is potentially unconstitutional. (In that regard, the Torture Convention differs from the Genocide Convention, which arguably raised a potential First Amendment issue.) The Constitution is the supreme law of the land; neither a Treaty nor an executive agreement can, in our view, authorize action inconsistent with it. This was unambiguously established by the Supreme Court in *Reid v. Covert*, 354 U.S. 1 (1957), and remains true whether or not the Senate conditions its approval of the Convention (or any other Treaty) on a "sovereignty" clause. It was for these reasons that at the January 30 hearing we opposed the "sovereignty" clause as unnecessary.

Although unnecessary at the domestic level, the proposal becomes very damaging at the international level. In the year since we ratified the Genocide Convention subject to a similar "sovereignty" reservation, some twelve foreign governments (all of them European allies) have formally registered their objections to it. The United Kingdom is especially concerned. Other States have protested diplomatically, and have put us on notice that they will coordinate stronger objections if we repeat the reservation in other contexts. These governments have raised legitimate concerns about our reservation. It creates unacceptable uncertainty as to the extent of the legal obligations which the United States has in fact assumed under the Convention. They ask how a foreign country, not expert in the domestic constitution of another country, will know the extent of treaty obligations actually undertaken by a State which subjects its treaty obligations to such a general reservation.

> They have also expressed the concern that other countries may follow the U.S. lead in conditioning their acceptance of the Convention upon their own constitutions or internal law. This problem of reciprocity exists even if other States do not attach a similar reservation to the Convention. As a matter of international treaty law, our "constitutional" reservation is reciprocally available to all other treaty partners. Thus, our ability to invoke treaty rights against them would be subject to their Constitutions. The problem is compounded since the reservation attaches to the entire Convention, leaving the overall extent of legal obligations unclear and open to substantial abuse by countries with obscure or readily-changeable constitutions. This could be a particular problem with regard to the Mutual Legal Assistance Treaties, which we intend to overcome foreign bank secrecy laws in order to assist our anti-narcotics efforts.
>
> From the international perspective, therefore, the proposed "sovereignty" clause is not harmless but instead threatens to upset the very object and purpose of the Convention, which is the establishment of an effective international legal prohibition against torture.
>
> In the course of our consultations, our staffs discussed a possible accommodation of our respective concerns wherein the "sovereignty" clause would be adopted as a declaration and included in the Senate's resolution of advice and consent but would not be included in the formal instrument of ratification submitted by the United States to the United Nations. The clause would thus have its intended effect domestically, clarifying the issue of U.S. law about which you are concerned, while avoiding the difficulties that trouble us on the international level.

Letter from Janet G. Mullins, Assistant Secretary of State for Legislative Affairs, to Senator Helms, June 13, 1990, S. Exec. Rep. No. 101-30, 42–43 (1990).

A July 9, 1990, letter from Assistant Secretary Mullins to Senator Claiborne Pell, Chairman of the Senate Foreign Relations Committee, reviewed the Administration's difficulties with the

"sovereignty" clause. *Id.* at 43. The letter also discussed again the issue of accepting the competence of the Committee Against Torture:

> After careful consideration, we continue to believe it appropriate to adopt the middle course proposed in our package of reservations and accept two of the three optional competences of the committee: one under Article 20 of the Convention, which empowers the committee to examine country situations when it receives reliable information containing well-founded indications that torture is being systemically practiced, and the other under Article 21, which permits the committee to consider complaints from one State party that another is not fulfilling its obligations under the convention. We would not, however, propose to accept the third competence of the committee, under Article 22, to consider complaints by individuals subject to U.S. jurisdiction claiming to be victims of a violation of the Convention.
>
> We continue to believe strongly that our substantial interest in eliminating torture around the world will best be served by participating actively in the work of the committee and directing its attention to situations in which torture is still practiced. The committee has, to date, held four sessions, during which it began consideration of initial reports from States Parties on implementation of the Convention as well as communications submitted under Article 22. Obviously, we cannot help shape the committee's direction if we do not participate, and since Article 21 requires reciprocity, we cannot call another State's actions into question unless we are also prepared to accept the committee's competence to consider reciprocal claims against us.
>
> We do not believe that the United States has anything to fear from such participation. There is no possibility of a well-founded indication of systematic torture in the United States (to our knowledge, no human rights group has ever accused the U.S. of systematic torture), and we do not believe that States with a political motivation to

> charge us with torture are likely to expose themselves to reciprocal charges. Moreover, with the changes in Eastern Europe, the risks of politically motivated "bloc voting" are substantially diminished from several years ago. In any event, the committee has no authority to make binding decisions.
>
> We are not inclined to accept the committee's third competence, to hear complaints of individuals subject to our jurisdiction who claim to be victims of a violation of the Convention. Claims submitted against the United States are likely to be frivolous, particularly since the claimant must have first exhausted all available domestic remedies; given the extensive remedies provided by U.S. law, we do not believe there is any need to create an additional international remedy for persons subject to our jurisdiction, nor any justification to commit substantial resources to respond to the claims that would be submitted. Moreover, there could be more serious problems concerning implications for our own domestic proceedings if the committee did not scrupulously respect the exhaustion of remedies rule. We therefore believe it would be prudent to await further committee experience before deciding to accept the third competence of the committee.

*Id.* at 44–45.

The resolution of ratification was made subject to two reservations, nine understandings, two declarations and a proviso. Its operative paragraphs follow:

> I. The Senate's advice and consent is subject to the following reservations:
>
> (1) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to Article 30(2), the United States declares that it does not consider itself bound by Article 30(l), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

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 Convention:

(1)(a) That with reference to Article 1, the United States understands that, 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: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article I is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article I of the Convention, the United States understands that "sanctions" includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to Article I of the Convention, the United States understands that the term "acquies-

cence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article I of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not per se constitute torture.

(2) That the United States understands 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."

(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10–14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.

III. The Senate's advice and consent is subject to the following declarations:

> (1) That the United States declares that the provisions of Articles I through 16 of the Convention are not self-executing.
> (2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

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:

> The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention 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.

136 CONG. REC S17,486–01 (daily ed. Oct. 27. 1990). *See also Cumulative Digest 1981–1988* at 823–852.

### 2. U.S. Legislation

On June 22, 1990, David P. Stewart, Assistant Legal Adviser for Human Rights and Refugees, testified before the Subcommittee on Immigration and Refugee Affairs of the Senate Committee on the Judiciary on the Torture Victim Protection Act, S. 1929 and H.R. 1662. *Torture Victim Protection Act of 1989: Hearing on S. 1929 and H.R. 1662 Before the Senate Comm. On the Judiciary*, 101st Cong. 18–35 (1990) (testimony of David P. Stewart, Assistant Legal Adviser for Human Rights and Refugees,

Department of State). Mr. Stewart described the reasons the Executive Branch did not support enactment of the bill:

> There is no question, of course, about our support for the goals of the proposed Act, namely, to deter torture and extra-judicial killing, to punish those who engage in such abhorrent acts, and to provide a means of compensating their victims. Our desire to ratify the Torture Convention is testament to the strong belief that torture, wherever it occurs, must be punished as a criminal act; our support for the United Nations Voluntary Fund for Victims of Torture reflects our view that victims of torture deserve compensation.
>
> Our disagreement with the Torture Victims Protection Act is one purely of means, not ends. The Act would allow individuals (aliens as well as U.S. citizens) to bring cases in Federal courts for damages resulting from extraterritorial acts of torture or extra-judicial killings when such acts occurred "under color of" foreign law (to use the language of H.R. 1662) or "under actual or apparent authority of any foreign nation" (S. 1629). To the best of our knowledge, no other country has similar legislation. We have serious reservations about the appropriateness or effectiveness of providing a unilateral assertion of civil jurisdiction over acts of foreign governments or officials which take place in their own countries. The prospect of opening U.S. courts to suits against foreign governments or officials for extraterritorial acts of torture or extra-judicial killings raises three particular concerns: consistency with the international approach reflected in the UN Convention, the problem of reciprocity and retaliation, and unwarranted judicial involvement in the conduct of foreign affairs.
>
> The U.N. Convention Against Torture represents a significant step in the development of international measures against torture. Building upon other international instruments condemning torture (such as the Universal Declaration of Human Rights), it establishes an agreed multilateral peacetime regime for cooperation among

States in the prevention of torture and the punishment of those who engage in acts of torture.

In the Department's view, the multilateral regime contemplated by the Convention is more appropriate, and in the long run likely to more effective, than a unilateral approach permitting private suits in U.S. courts for acts of torture and extra-judicial killings that take place in foreign countries. The elimination of torture on a global scale requires international cooperation. Our efforts should be directed towards encouraging all foreign countries to adhere to the Convention and effectively implement its central obligations, in particular the prevention of torture, the imposition of criminal sanctions on those who commit such acts, and the provision of effective means of fair and adequate compensation to victims with respect to acts taking place in their own jurisdictions.

* * * *

The United States can, in our view, best demonstrate its commitment to the prevention and punishment of torture and extra-judicial killings by ratifying the Convention and actively working within the multilateral framework to get others to do likewise. By comparison, we do not believe that it is appropriate for the United States to use its courts to police the world or that torture can in fact be effectively eliminated by unilaterally creating a cause of action in damages in the United States. The threat of civil suit here is unlikely to have the desired effect of reducing the incidence of officially sanctioned or tolerated torture in other countries.

On the contrary, unilateral enactment of extraterritorial jurisdiction may well be perceived by other countries as inconsistent with the Convention and overreaching on our part. It could even lead to enactment of reciprocal legislation in countries which perceive themselves as targets of such suits, and to retaliation against U.S. citizens or governmental officials travelling abroad for actions which took place within the United States. This has been a concern of the law enforcement community.

From a foreign policy perspective, we are particularly concerned over the prospect of nuisance or harassment suits brought by political opponents or for publicity purposes, where allegations may be made against foreign governments or officials who are not torturers but who will be required to defend against expensive and drawn-out legal proceedings. Even when the foreign government declines to defend and a default judgment results, such suits have the potential of creating significant problems for the Executive's management of foreign policy. This is especially troubling because, in order to meet the statutory requirements, plaintiffs will have to allege as a preliminary matter that the conduct in question took place under the authority of the foreign government or under color of its law. In every case, therefore, the "lawfulness" of foreign government sanctions will be at issue. We believe that inquiry by a U.S. court into the legitimacy of foreign government sanctions is likely to be viewed as highly intrusive and offensive. In fact, it is also likely to be unnecessary, since even those states which engage in torture do not assert a legal right to do so.

The "exhaustion of local remedies" requirement will not eliminate this problem, because the defendant will have to litigate that issue as an affirmative defense.

Nor is it clear that the proposed legislation would in fact provide tangible relief to victims of torture abroad. We understand that under either version of the Act, the prospective defendant must be found in the United States or otherwise submit himself (or itself) to U.S. jurisdiction. This may well limit the number of suits actually brought under the Act. However, because the statute would extend only to acts under color of foreign law or under the actual or apparent authority of a foreign nation, there will inevitably be serious questions of immunity, both with respect to the establishment of personal jurisdiction, the production of documents and witnesses, and the enforcement of any resulting judgment either in the United States or abroad. In any event, we believe that foreign governments which condone or tolerate acts of torture, or which do not provide adequate domestic remedies for the victims

> of torture, are not likely to honor or acquiesce in the enforcement of a U.S. civil judgment against their officials or assets. Nor are such judgments likely to be enforceable in third countries.

*Id.* at 23–29. (Bills on the same subject were introduced in the 102d Congress, second session (H.R. 2092 and S. 313). The Torture Victim Protection Act of 1991 became law on March 12, 1992, P.L. 102-256, 106 Stat. 73. 28 U.S.C. § 1350 note.

## E. LABOR ISSUES

### Convention on Migrant Workers

On December 18, 1990, the U.N. General Assembly adopted Resolution A/RES/45/158 by consensus, adopting the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and opening it for signature and ratification. The United States joined consensus on the resolution. During the Convention's consideration before the Third Committee, the United States made the following comments:

* * * *

> — The United States joined consensus on this resolution because we share the view that the rights of migrant workers and members of their families should be protected. Individuals who work in countries where they are not nationals are often subject to abuse and mistreatment. The United States firmly believes that all necessary measures should be taken to respect the rights of such individuals, both domestically and internationally.
> — The United States nevertheless remains skeptical about the utility of this new convention. There are already two treaties on migrant worker rights, both concluded under the auspices of the International Labor Organization.
> — The United States also has some concerns about the venue in which this new convention was negotiated. From the start, it was our view that the ILO, because of its

decades-old constitutional mandate and well-known expertise in this field, remains the appropriate forum for dealing with issues related to migrant workers.

— This Committee nonetheless decided to establish its own working group to draft the convention. Although the United States actively participated in the negotiations, relatively few other countries followed the negotiations closely. This unfortunately small number of participating countries, coupled with the extraordinary length and complexity of the convention, may contribute to a low rate of ratification.

— Despite these concerns, the United States is generally satisfied that the convention sufficiently protects the rights of migrant workers and members of their families. We are also pleased that the convention reflects the varying approaches to the issues of labor migration adopted in different parts of the work, while also respecting the sovereignty of each country to control the admission of people into its territory.

### Cross references

*Asylum and refugees, and related issues*, **Chapter 1.D.**

# CHAPTER 7

# International Organizations and Multilateral Institutions

## A. ISSUES RELATING TO NAMIBIAN INDEPENDENCE

### 1. United Nations Plan for Namibian Independence

On April 1, 1989, large numbers of heavily armed forces of the South West African People's Organization ("SWAPO") infiltrated the Angola/Namibia border, in violation of the United Nations Plan for Namibian Independence. It also violated SWAPO's commitments to adhere to a cease-fire and to redeploy its forces north of the 16th parallel in Angola, all as required by the Protocol of Geneva, signed by the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa, August 5, 1988, 28 I.L.M. 944, 953 (1989).

In response to the SWAPO infiltration, the UN Secretary-General's Special Representative for Namibia authorized South African forces, which had been confined to bases in Namibia in accordance with the UN Plan, to deploy temporarily in northern Namibia. In addition, strong international pressure was brought to bear on SWAPO to comply with its commitments. The U.S. government reviewed SWAPO's commitments in a cable rebutting SWAPO's argument that it could establish bases in Namibia:

> The 1978 contact group proposal approved by UNSCR [United Nations Security Council Resolution] 435 provided for "the restriction of South African and SWAPO armed forces to base." No specific locations were given for the SWAPO bases. However, the proposal stated that "provision will be made for SWAPO personnel outside

the territory to return peacefully to Namibia through designated entry points to participate freely in the political process." South Africa categorically rejected any implication that SWAPO bases already existed on Namibian territory and made it crystal clear that the SAG [Government of South Africa] would not/not permit such bases to be established as part of the UN Plan. In an attempt to address South African concerns, the Secretary General informed the SAG in March 1979 "that SWAPO would not/not be entitled, after the cease-fire, to introduce armed personnel who had not previously been based in Namibia to bases which would be established by the United Nations on their behalf . . . no party to a conflict may expect to gain after a cease-fire a military advantage which it was unable to obtain prior to it." [U.N. Doc. S/13156.] In June 1979 the Secretary-General informed South Africa that "the Governments of Angola and Zambia have reassured me that no infiltration of armed SWAPO personnel would take place from their territory into Namibia after the cease-fire." U.N. Doc. S/14011.

Despite these assurances, South Africa insisted that SWAPO could be confined to bases only outside Namibia and that those bases would have to be monitored by UNTAG [United Nations Transition Assistance Group for Namibia]. This view prevailed: it was agreed in 1982 by SWAPO, the FLS [Front Line States), Nigeria, the Contact Group [United States, Germany, United Kingdom, Canada and France], and South Africa "that UNTAG, with the cooperation of host governments and in the context of implementation of Resolution 435 (1978) would monitor SWAPO bases in Angola and Zambia." [U.N. Doc. S/15776.] (Note that there are no longer any SWAPO bases in Zambia.) In paragraph 35 of his report of January 23, 1989 [U.N. Doc. S/20412], the Secretary-General stated expressly that this agreement was included in the "United Nations Plan for Namibia." The Security Council, in turn, approved in Resolution 632 the Secretary-General's report for the implementation of this UN Plan. In summary, the UN Plan contemplates no/no SWAPO bases in Namibia before or after the April 1 implementation date. SWAPO

personnel may return to Namibia peacefully through designated entry points under the auspices of the UN. On the other hand, the infiltration of armed SWAPO personnel is prohibited.

In the Protocol of Geneva signed on August 5, 1988, it was agreed that "Angola and Cuba shall use their good offices so that, once the total withdrawal of South African troops from Angola is completed, and within the context also of the cessation of hostilities in Namibia, SWAPO's forces will be deployed to the north of the 16th parallel." (The Geneva Protocol was reaffirmed expressly in the Brazzaville Protocol of December 13 [1988, 28 I.L.M.951 (1989)] and implicitly in the Tripartite Agreement of December 22 [1988, 28 I.L.M. 957 (1989)].) As required by the Geneva Protocol, South African troops withdrew from Angola prior to the deadline of September 1. The three parties also maintained in force the existing de facto cessation of hostilities. Accordingly, Angola and Cuba are required by the Geneva Protocol to ensure that SWAPO's forces are deployed to the north of the 16th parallel. It is obvious that permitting the infiltration of SWAPO combatants into Namibia, not to mention supporting the establishment of SWAPO bases there, would be a flagrant violation of this obligation.

Although not a signatory to the Geneva Protocol, SWAPO's president, Sam Nujoma, informed the Secretary-General in a letter dated August 12, U.N. Doc. S/20129, that SWAPO would comply with the cessation of hostilities agreed by the three parties and that "in accordance with the spirit of the Geneva Agreement" SWAPO had "committed itself to take the necessary steps to help make the peace process in the South West African region irreversible and successful." In his letter to the Secretary-General of March 18, 1989—in which he agreed to a formal ceasefire with South Africa—Nujoma cited his August 12, 1988 letter, referring specifically to "SWAPO's acceptance of the de facto cessation of armed hostilities . . . in accordance with the Geneva Protocol of 5 August 1988." SWAPO cannot argue in good faith that it is free to act in utter disregard of the Geneva Protocol or otherwise

seek changes in the Tripartite Settlement accords that made implementation of UNSCR 435 possible.

On April 8 and 9, 1989, a joint commission created by the Protocol of Brazzaville met at Mount Etjo, Namibia, to discuss the crisis. This joint commission was established to "serve as a forum for discussion and resolution of issues regarding the interpretation and implementation of the tripartite agreement [of December 22, 1988, 28 I.L.M. 944, 957 (1989)]." A U.S. delegation participated as an observer.

On April 9, 1989, the joint commission issued a declaration, 28 I.L.M. 944, 1011 (1989), which set forth an agreed withdrawal procedure in order to return to the situation in existence on March 31, 1989. The Mount Etjo Declaration provided that SWAPO troops would be withdrawn from Namibia and would be granted free passage to certain border assembly points during an unspecified period. The withdrawal procedure would take place under UNTAG supervision, and with verification by the Administrator-General of South-West Africa and UNTAG. According to the Declaration, SWAPO leadership announced on April 8, 1989, the withdrawal of SWAPO forces from the northern part of Namibia to Angola.

### 2. Namibia Impartiality Package

In 1982, the parties to the Namibia negotiations reached informal understandings on a list of measures to ensure UN impartiality, referred to as the "impartiality package." These understandings among the United Nations, the contact group (United States, Germany, the United Kingdom, Canada and France), the front line states, Nigeria, and the South West African People's Organization ("SWAPO") addressed activities within the UN system once the Security Council met to authorize the implementation of Resolution 435 (1978). The understandings also included corresponding obligations on the part of the Government of South Africa in order to ensure free and fair elections in Namibia.

The impartiality package was included in the final UN Plan for Namibia that was approved by the Security Council in Resolution 632 (1989), and went into effect on April 1, 1989,

when implementation of the UN Plan began. The Secretary-General circulated the contents of the impartiality package to the Security Council and General Assembly on May 16, 1989. UN Doc. A/44/280, S/20635, at 3–4 (1989).

The impartiality package was addressed by the United States in connection with a November 8, 1989, presidential determination, made pursuant to Title II of the Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989 (Pub. L. No. 101-45, 103 Stat. 97). As discussed below, the Act required the President to make certain determinations in order to provide funds to the UN to implement the Angola/Namibia settlement agreements. In particular, as required by section 4(b)(4) of the Act, the President determined and certified to Congress that: "the United Nations and its affiliated agencies have terminated all funding and other support, in conformity with the United Nations impartiality package, to the South West African People's Organization (SWAPO)." Presidential Determination No. 90-4, 54 Fed. Reg. 48,569 (Nov. 24, 1989).

### 3. U.S. Contributions to Peacekeeping Forces

Section 1 of Title II of the Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. No. 101-45, 103 Stat. 97, authorized the President to transfer up to $125 million from certain accounts to satisfy U.S. obligations for UN peacekeeping activities. Section 4 of Title II conditioned the availability of such funds, in two allocations of $38,950,000 each, to the United Nations for implementation of the Angola/Namibia agreements on the President's making certain determinations and certifying them to Congress. Pub. L. No. 101-45, 103 Stat. 97.

On August 31, 1989, the President made the determinations required under section 4(a) and certified as follows in order to make the initial contribution of $38,950,000:

> (1) the armed forces of the South West Africa People's Organization (SWAPO) have left Namibia and returned north of the 16th parallel in Angola in compliance with

> the Agreement Between the Government of the People's Republic of Angola and the Republic of Cuba for the Termination of the International Mission of the Cuban Military Contingent (the Bilateral Agreement) signed at the United Nations on December 22, 1988, and the Agreement among the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa, signed at the United Nations on December 22, 1988;
>
> (2) the United States has received explicit and reliable assurances from each of the parties to the Bilateral Agreement that all Cuban troops will be withdrawn from Angola by July 1, 1991, and that no Cuban troops will remain in Angola after that date; and
>
> (3) the Secretary General of the United Nations has assured the United States that it is his understanding that all Cuban troops will be withdrawn from Angola by July 1, 1991, and that no Cuban troops will remain in Angola after that date.

Presidential Determination No. 89-26, 54 Fed. Reg. 37,927 (Sept. 14, 1989).

Section 4(b) of Title II of the Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. No. 101-45, 103 Stat. 97, conditioned the availability of the second contribution of $38,950,000 to the U.N. for implementation of the Angola/Namibia agreements on the President's making additional determinations and certifications. Pub. L. No. 101-45, 103 Stat. 97.

On November 8, 1989, President Bush made the determinations required under that section and certified as follows:

> (1) each of the signatories to the Agreement Among the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa, signed at the United Nations on December 22, 1988, is in compliance with its obligations under the Agreement;
>
> (2) the Government of Cuba has complied with its obligations under Article 1 of the Agreement between the Governments of the People's Republic of Angola and the

> Republic of Cuba for the Termination of the International Mission of the Cuban Military Contingent, signed at the United Nations on December 22, 1988 (relating to the calendar for redeployment and withdrawal of Cuban troops), specifically with respect to its obligations as of August 1, 1989;
>
> (3) the Cubans have not engaged in any offensive military actions against UNITA, including the use of chemical warfare;
>
> (4) the United Nations and its affiliated agencies have terminated all funding and other support, in conformity with the United Nations impartiality package, to the South West Africa People's Organization (SWAPO); and
>
> (5) the United Nations Angola Verification Mission is demonstrating diligence, impartiality, and professionalism in verifying the departure of Cuban troops and the recording of any troop rotations.

Presidential Determination No. 90-4, 54 Fed. Reg. 48,569 (Nov. 24, 1989).

## B. STATUS OF PALESTINE LIBERATION ORGANIZATION

In 1988 the Palestine Liberation Organization ("PLO") purported to declare a "State of Palestine." In 1989 and 1990, the PLO successfully sought membership for the State of Palestine in several UN specialized agencies. On May 1, 1989, Secretary of State James A. Baker III released the following statement:

> The United States vigorously opposes the admission of the PLO to membership in the World Health Organization or any other UN agencies. We have worked, and will continue to work, to convince others of the harm that the PLO's admission would cause to the Middle East peace process and to the UN system.
>
> Political questions such as this should not be raised in specialized agencies because such politicization detracts from the important technical work of these organizations.

> To emphasize the depth of our concern, I will recommend to the President that the United States make no further contribution—voluntary or assessed—to any international organization which makes any change in the PLO's present status as an observer organization.

U.S.-UN Relations: Program Funding and PLO Status, Current Policy No. 1171, Bureau of Public Affairs, Department of State. The matter was also addressed by Deputy Assistant Secretary for International Organization Affairs Sandra Vogelgesang in testimony before the Subcommittee on Foreign Operations of the Senate Appropriations Committee on May 4, 1989, as follows:

> As you know, we are currently facing a serious challenge in the World Health Organization [WHO] where the PLO, which has observer status, has submitted an application for membership for "the states of Palestine." This application is expected to be considered at the upcoming annual meeting of the World Health Assembly, which begins May 8. The PLO has also expressed interest in making similar applications in other UN agencies; success in WHO could encourage the PLO to do so.
>
> The Administration fully appreciates congressional concerns over these developments. I can assure you we share those concerns. We are engaged in a major effort to head off these attempts, which, if successful, would politicize the specialized agencies—thus complicating their essential technical work—and would also be seriously detrimental to the search for Middle East peace. U.S. policy in this regard is clear.
>
> — The self-declared Palestinian state, which the United States does not recognize, does not satisfy the generally accepted criteria under international law for statehood and, thus, does not qualify for membership in UN agencies.
> — The United States is opposed to the introduction of such a divisive political issue into the technical work of the specialized agencies.
> — Moreover, we are convinced that any effort to bestow legitimacy on the self-proclaimed Palestinian state would

> harm efforts underway in the region to promote peace. The Arab-Israeli problem can be resolved only through a process of negotiations between the parties, not through unilateral acts by either side—such as the declaration of Palestinian statehood—that seek to prejudge the outcome of such negotiations.
>
> * * * *
>
> I can assure you that we will continue our vigorous efforts to oppose the admission of the self-proclaimed state of Palestine as a member in WHO or any other organization in the UN system.

Testimony of Deputy Assistant Secretary for International Organization Affairs Sandra Vogelgesang before the Subcommittee on Foreign Operations of the Senate Appropriations Committee, May 4, 1989, U.S.-UN Relations: Program Funding and PLO Status, Current Policy No. 1171, Bureau of Public Affairs, Department of State.

The U.S. Congress enacted two statutes that would have restricted U.S. funding to the UN, its specialized agencies, and affiliated organizations if the PLO's efforts were successful. The first made funds unavailable "for the United Nations or any specialized agency thereof which accords the Palestine Liberation Organization the same standing as member states." Section 414(a), Foreign Relations Authorization Act, FY 90 and 91 (Pub L. No. 101-246, 104 Stat. 15, 70), 22 U.S.C. § 287e note. The second prohibited contributions by the United States "(1) to any affiliated organization of the United Nations which grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood, or (2) to the United Nations, if the United Nations grants full membership as a state in the United Nations to any organization or group that does not have the internationally recognized attributes of statehood." Section 526(b), Foreign Operations, Export Financing and Related Programs Appropriations Act, 1990. Pub.L. No. 101-513, 104 Stat. 1979(1990).

## C. CLAIMS SETTLEMENT AGREEMENT WITH MULTINATIONAL FORCE AND OBSERVERS

On December 12, 1985, 248 U.S. servicemen returning from duty with the Multinational Force and Observers (MFO) were killed when an Arrow Air aircraft chartered by the MFO crashed on take-off from Gander, Newfoundland. The MFO is a peacekeeping force in the Sinai which operates pursuant to the 1979 Treaty of Peace between Egypt and Israel; *see Digest 1980* at 1021–23. Since the creation of the MFO there had been 14 other deaths and one case of permanent disability of U.S. military personnel serving with the MFO in the Sinai.

Accordingly, in 1987, Assistant Secretary of State for Near East and South Asian Affairs Richard Murphy wrote to the director general of the MFO stating the intention of the United States to submit formal claims for reimbursement of death and disability payments and related expenses in connection with these cases.

The claims were based on terms of U.S. participation in the MFO, which provide for "reimbursement for payments made by governments based upon national legislation and/or regulations for death, injury, disability or illness attributable to service with the MFO. . . . Where periodic payments are called for . . . reimbursement will be made in a lump sum based on actuarial data." *See* Appendix to Protocol between Egypt and Israel, entered into force August 3, 1981,34 U.S.T. 3341, T.I.A.S. No. 10556, *reprinted in American Foreign Policy: Current Documents*, 1981 (1984) at 693–703 and 81 *Dep't St. Bull.* at 44–50 (Sept. 1981). Assistant Secretary Murphy's letter included a list of the possible specific provisions of national legislation and regulations applicable under the terms of U.S. participation.

On May 3, 1990, the United States Government and the MFO exchanged notes agreeing to settle all U.S. claims against the MFO, and through it Israel and Egypt, "arising out of or in connection with certain fatalities, disabilities, or injuries of U.S. military personnel attributable to service with the MFO and occurring prior to May 1, 1988," in exchange for payment by the MFO of $19,678,100 to the United States. T.I.A.S. NO. 11,899.

As part of the agreement, the U.S. agreed to provide the following assistance should the MFO, Egypt, or Israel be sued by third parties in the U.S.:

> C. On request, the United States Government, consistent with its normal practice in respect of legal proceedings against foreign governments and international organizations in United States courts, shall consult with the MFO, the Government of the Arab Republic of Egypt and/or the State of Israel, as the case may be, regarding any third party litigation against them or any of them in the United States arising out of any event underlying the subject matter of this agreement, in which they or any of them may invoke their respective immunities, and shall, as appropriate, offer support and cooperation, including participation in legal proceedings, in securing proper recognition and enforcement of such immunities.

*Id.* at 3.

Each party noted that it entered into the settlement agreement "in light of the unique circumstances of this matter and without prejudice to their respective rights under the terms of the United States participation in the MFO." *Id.* In addition, each party reserved particular rights as follows:

> [T]he MFO reserves its right to require individual accounting, adjustment and certification of future claims of this nature strictly subject to and in accordance with the relevant terms of participation. The United States reserves its rights regarding the formulation and valuation of claims that may hereafter arise relating to death, injury, disability or illness of United States military personnel in MFO service.

*Id.*

## D. INTERNATIONAL COURT OF JUSTICE INITIATIVE

At the end of 1988, the Legal Adviser of the Department of State, Abraham D. Sofaer, called upon the international legal community to increase the use of the ICJ in resolving international disputes. In particular he pointed to:

> three developments—the tremendous growth of international law through treaties and agreements; the greatly increased use of international adjudication; and the possible willingness of the Soviets to utilize the ICJ—[as] combin(ing] to create an extraordinary opportunity to establish a new and more meaningful version of mandatory jurisdiction for the Court.

Abraham D. Sofaer, Adjudication in the International Court of Justice: Progress through Realism, 44 *Rec. of the Ass'n of the Bar of the City of N.Y.* 459 (1989). To achieve this objective, the Legal Adviser made several proposals:

> First, we must seek to secure the broadest possible acceptance of the Court's mandatory jurisdiction. Instead of pressing as an ideal those declarations that confer unlimited authority on the Court, we should focus on attaining at least some degree of commitment from all the major powers. Second, a real effort should be made to ensure that the Court acts only upon the consent of States, and special protection should be provided against the Court's assuming jurisdiction against the wishes of a party in matters bearing upon its national security. Third, every State should automatically have the right to insist that a case in which it appears as a party be heard by a Special Chamber. This measure will enhance confidence in the fairness of all adjudications, and thereby encourage use of the Court. Finally, these measures should be implemented through a binding international agreement, drawn in a manner that avoids the need to amend the Court's Statute.

*Id.* at 478.

The legal advisers of the permanent members of the United Nations Security Council met several times during 1989–90 to conduct informal consultations concerning the compulsory jurisdiction of the ICJ. In a joint communique following a round of consultations held in Paris on February 12–13, 1990, the five legal advisers described their goal as finding "ways of providing for

more frequent recourse to the International Court of Justice, as part of the development of international law." The communique is available at *www. state.gov/s/l*.

Finally, Congress enacted legislation in February 1990 stating that it "commends and strongly supports efforts by the United States to broaden, where appropriate, the compulsory jurisdiction and enhance the effectiveness of the International Court of Justice." Section 411, Foreign Relations Authorization Act FY 90 and 91, P.L. 101-246, 104 Stat. 15 (1990).

### Cross references

*Privileges and immunities of international organizations*, **Chapter 10.D.**

# CHAPTER 8

# International Claims and State Responsibility

## A. GOVERNMENT-TO-GOVERNMENT CLAIMS

### 1. Downing of Iran Air Flight 655

On July 3, 1988, the U.S.S. *Vincennes*, during a surface engagement with Iranian gunboats in the Persian Gulf, shot down an unidentified aircraft that had just departed from the joint military-civilian airfield at Bandar-e Abbas. After repeated, unsuccessful efforts by the *Vincennes* to establish contact with the unidentified aircraft, the captain, believing that his vessel might be attacked within minutes by an Iranian military aircraft sent to assist the gunboats engaged in the surface exchange, ordered the aircraft to be fired upon. After the aircraft was shot down, it was identified as a civilian airliner, Iran Air Flight 655. Two hundred-ninety passengers and crewmembers from six nations—India, Iran, Italy, Pakistan, the United Arab Emirates, and Yugoslavia—were killed.

The United States consistently maintained that the *Vincennes*' action was a proper exercise of self defense. On July 4, 1988, President Ronald Reagan expressed his sympathy and condolences for the victims and shortly thereafter offered to make humanitarian payments on an *ex gratia* basis to the families of the victims. Iran immediately requested the Council of the International Civil Aviation Organization ("ICAO") to take measures condemning the United States. ICAO adopted a resolution on March 17, 1989, urging "States to take all necessary measures to safeguard the safety of air navigation, particularly by assuring effective co-ordination of civil and military activities and

the proper identification of civil aircraft." ICAO Document C-DEC 126/20, Appendix. Sixty days after the date of the ICAO resolution, Iran filed suit with the International Court of Justice ("ICJ"), asking the Court to declare the U.S. Government "responsible to pay compensation to the Islamic Republic . . . as measured by the injuries suffered by the Islam Republic—and the bereaved families . . . ." ICJ Communique No. 89/6, May 17, 1989. See discussion of these matters in the *Cumulative Digest 1981–1988* at 2340–2349.

A number of representatives of those who died in the incident filed suit in U.S. courts against the United States, alleging negligence in the Iran Air incident.

In a suit brought by families and dependents of four Iranian victims against the United States and twelve defense contractors, *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989), the U.S. moved to dismiss on grounds that (1) the complaint was based on nonjusticiable political questions, (2) the State Secrets Doctrine prevented disclosure of materials necessary for the litigation to proceed, and (3) the United States had not waived its sovereign immunity. The U.S. memorandum of points and authorities in support of the motion to dismiss first addressed the political question issue. It argued that consideration of plaintiffs' claims "would require the judiciary to inquire into the reasonableness of actions taken as part of the conduct of foreign policy and military operations. Because such matters are committed to the legislative and executive branches of our government, they are not reviewable by the judiciary and the Complaint must be dismissed." Memorandum of Points and Authorities, *Nejad v. United States*, Civil Action Nos. 89-3991 AWT (C.D. Cal.), Sept. 22, 1989, at 5, available at *www.state.gov/s/l*.

After reviewing the characteristics of nonjusticiable questions laid out by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), the United States argued:

> The conduct of foreign policy and military operations is committed by the United States Constitution to the Executive Branch of our government. Article II section 2 invests the President with exclusive authority over the armed forces of the United States as Commander-in-Chief, and over the conduct of foreign affairs. The formulation,

conduct and debate over military operations are clearly placed in the political branches of government, and not in the judiciary. "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981), inasmuch as they are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952). Similarly, there is a lack of judicially discoverable and manageable standards for resolving the issues presented by Plaintiffs' Complaint. Clearly, the courts cannot and should not be required to undertake such an exercise. See *Sanchez-Espinoza v. Reagan*, 569 F.Supp. 596, 600 (D.D.C. 1983), *aff'd* 770 F.2d 202 (D.C. Cir. 1985).

Any judicial inquiry into the "reasonableness" of the decisions at issue would require the second guessing by this Court of Executive Branch decisions, many of which were made while military authorities and personnel were engaged in combat. The entire exercise would be fraught with classified intelligence considerations, not to mention judicially-unmanageable political and military issues. Similarly, a review in tort of the matters alleged in the Complaint would be impossible without an initial policy determination of a kind clearly for nonjudicial discretion. These would involve determinations, among many others, as to whether the Executive, under the facts alleged, pursued an appropriate foreign policy objective in designing and carrying out the protection of non-combatant vessels in the Gulf, whether due care for the life and property of other nations was exercised in formulating the military Rules of Engagement and standing orders for the naval units there; whether other means of accomplishing the President's foreign policy objectives would have avoided the July 3, 1988, incident; and whether the decisions of the Vincennes' crew during the military engagement of July 3, 1988, were reasonable. Not only are there no judicially manageable standards for the Court to follow in resolving these issues, but an independent resolution would express a lack of respect due to a coordinate branch.

> Finally, the clear potentiality of embarrassment from multifarious pronouncements by various departments on one question marks this case as nonjusticiable. The United States Government has asserted before the United Nations and the International Civil Aviation organization (ICAO) that the actions of the *Vincennes* constituted justifiable self-defense. Further, the President has announced that, while it has no duty or obligation to compensate the families of the Iran Air decedents, nevertheless as a humanitarian and compassionate gesture, the United States will make *ex gratia* payments consistent with international practice in such matters.
>
> Moreover, the United States currently is defending a case before the International Court of Justice (ICJ) on this very incident. Should this Court launch an inquiry intended by Plaintiffs to establish a legal duty or obligation for the United States to pay damages under some domestic statute, treaty or international law, the "potentiality of embarrassment from multifarious pronouncements by various departments" would be realized and the admonition of *Baker v. Carr* to adhere to "single-voiced statement[s]" for the Government would be shattered.

*Id.* at 7–9.

The U.S. memorandum of points and authorities discussed Iran's application to the ICJ in support of its arguments concerning the foreign policy elements of the political questions raised by the Iranian plaintiffs' complaint:

> By filing suit before the ICJ seeking redress for injury to its nationals, Iran is exercising its right of diplomatic protection of its nationals. *See, Nottebohm Case*, 1955 I.C.J. Reports, p. 4 at 20–21.
>
> "Espousal" is the public international law term for protection afforded by a government to its nationals in advocating their claims. This right to "espouse" the claims of its nationals is premised upon the doctrine that injuries to a country's nationals are injuries to the country itself. See, e.g., *Frelinghuysen v. Key*, 110 U.S. 63, 70–71 (1884).

> Having made the claim its own, the government assumes the character of the party claimant. *Restatement of the Law (Third) of Foreign Relations*, Section 713, comment a ("The claim derives from an injury to an individual, but once espoused it is the state's claim, and can be waived by the state.")
>
> Espousal often occurs without the consent of the nationals and is done "usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981). Having taken over the claim, the State has considerable control over its disposition. As a matter of international law, the State may determine what international remedies to pursue and whether to abandon the claim or settle it. *Restatement of the Law (Third) of Foreign Relations*, Section 902, comment i. In the United States this power is vested in the President. *Dames & Moore v. Regan*, 453 U.S. at 681–82. The President on behalf of the United States has entered into at least ten settlements with foreign nations affecting the rights of United States nationals since 1952. Id. at 680.
>
> The GOI's [Government of Iran's] application to the ICJ constitutes, *inter alia*, an espousal of the claims of Iranian nationals against the United States for this incident. The application to the ICJ, as yet, does not constitute the equivalent of a claims settlement agreement, but it has triggered an established dispute settlement process created by international agreement. At the very least, the issues raised by the GOI's espousal of its nationals' claims points out the broad foreign policy implications raised by Plaintiffs' actions in this United States Court.

*Id*. at 16–17.

The memorandum of points and authorities also addressed the issue of U.S. sovereign immunity under the Public Vessels Act ("PVA"), 46 U.S.C. app. § 781–790, on which Plaintiffs relied. The PVA grants jurisdiction in U.S. federal courts for claims for "damages caused by a public vessel of the United States." A foreign national plaintiff, however, may bring a suit under the PVA

only if the plaintiff can prove that a U.S. citizen would be allowed, under similar circumstances, to sue in the courts of the plaintiff's country. *See* 46 U.S.C. app. § 785. The memorandum stated the following regarding the existence of such reciprocity in Iran:

> The issue of whether reciprocity, in terms of reasonable access to Iranian courts, exists has been addressed by several courts in this country. Despite protestations from well financed and well represented litigants, these courts have consistently held that, as a practical matter, effective access to Iranian courts does not exist. *See, e.g., Rockwell International Systems, Inc. v. Citibank, N.A.*, 719 F.2d 583, 587–88 (2d Cir. 1983) (citing numerous other cases); *Harris Corporation v. National Iranian Radio and Television*, 691 F.2d 1344, 1357 (llth Cir. 1982), *McDonnell Douglas Corporation v. Islamic Republic of Iran*, 591 F.Supp. 293, 303–08 (E.D.Mo. 1984), *aff'd* 758 F.2d 341 (8th Cir.), *cert. denied* 474 U.S. 948 (1985); and *American Bell International Inc. v. Islamic Republic of Iran*, 474 F.Supp. 420, 423 (S.D.N.Y. 1979).
>
> * * * *
>
> The reasons for the holding of these courts revolve around certain consistent findings, including: the replacement of professionals trained in a legal system compatible with Western legal traditions with clerics and individuals trained in the traditions of the Islamic religion; the inability to obtain competent and effective legal assistance from individuals in Iran willing to vigorously represent Western litigants, particularly Americans, against the Government of Iran or its entities; and the physical danger posed to Americans and those allied to them while in Iran for purposes of pursuing their claims. These concerns are real and continuing.

*Id.* at 33–34.

On November 7, 1989, the district court dismissed the case, finding that the action raised nonjusticiable political questions, was barred by the state secrets privilege, and could not be brought under

the PVA because U.S. citizens did not have access to Iranian courts for similar claims. *Nejad v. United States*, 724 F. Supp. 753 (C.D.Cal.1989). Similar U.S. cases arising out of the Iran Air incident include *Bailey v. Varian Associates*, No. 89-2388 (N.D. Calif June 11, 1990) and *Koohi v. U.S.*, No. 90-1716 (N.D. Cal. June 11, 1990), which were both dismissed in unpublished opinions on June 11, 1990, affirmed *Bailey v. Varian Associates and Koohi v. U.S.*, 976 F.2d 1328 (9th Cir. 1992), *cert denied*, 508 U.S. 960 (1993).

### 2. United States-Iraq: U.S.S. *Stark*

On May 17, 1987, the guided missile frigate U.S.S. *Stark*, while stationed in the Persian Gulf about 70 miles northeast of Bahrain, was struck by Iraqi Air Force missiles. One missile exploded, and the *Stark* suffered serious casualties: 37 members of the ship's company were killed, and others were injured. The vessel sustained heavy damage. Negotiations leading to the March 29, 1989, agreement between the Governments of the United States and Iraq on payment of claims on behalf of those suffering loss as a result of the deaths of the 37 crew members and payment of the agreed amount of $27,350,374 by Iraq on April 14, 1989, are discussed in the *Cumulative Digest 1981–88* at 2337–2340.

In formally presenting its claims to the Government of Iraq on April 4, 1988, the United States had indicated that, in addition to the claims arising from the 37 deaths, it intended to submit claims on behalf of the members of the crew who suffered personal injuries and claims of the Government of the United States for its losses, including the physical damage to the ship. On May 19, 1989, the U.S. Government sent a diplomatic note to the Iraqi Embassy in Washington, D.C. transmitting an accompanying series of notes setting forth claims on behalf the *Stark* crew members who suffered personal injuries as a result of the attack.

An accompanying note also transmitted the U.S. Government claim for its losses, including for the damage to the ship. The amounts claimed were prepared by the Department of State in conjunction with the Departments of the Navy, Defense and Justice. The claims were calculated consistent with principles of international law and practice, taking into consideration the nature and severity of the injuries, the pain and suffering associated with

those injuries, any special medical expenses the claimant incurred as a result of the injuries, and any resulting lost earning capacity. The covering note listed the name and the amount claimed by each injured crewman. Sixty-two claims were presented, ranging from $1,062,265 to $1,000, for a total of $2,314,565. The note stated, in part:

> The foregoing constitutes all the claims arising out of injuries sustained by personnel aboard the *U.S.S. Stark* that the United States will present. In view of the substantial hardship and anguish imposed on these claimants, the United States Government anticipates that the Government of Iraq will wish to consider the claims expeditiously with a view toward prompt and full payment. To that end, the United States Government is prepared to furnish the Government of Iraq documentary evidence as desired to support the claims, and to answer any questions regarding the claims with representatives of the Government of Iraq at the earliest possible date.

On January 13, 1990, the Government of Iraq sent a diplomatic note offering to pay $1,500,000 for the claims of the *Stark* crewmen injured as a result of the attack.

On May 2, 1990, the U.S. Government sent a diplomatic note to the Iraqi ambassador in Washington, D.C. setting forth its understanding of the agreement with Iraq regarding the personal injury claims:

> 1. The Government of the Republic of Iraq will pay to the Government of the United States of America the sum of U.S. dollars 1,500,000, which the Government of the United States of America considers as adequate compensation under international law, in a single payment as promptly as possible.
> 2. The Government of the United States of America will accept the amount paid on behalf of all the claimants seeking compensation as a result of the injuries of the 62 United States Navy sailors involved and will be solely responsible for the distribution of the funds.
> 3. The amount of U.S. dollars 1,500,000, when fully paid

> as agreed, will constitute a full and final settlement of all claims concerning the injuries of the 62 United States Navy sailors involved.
>
> The Government of the United States of America now proposes that in the near future the Government of the Republic of Iraq and the Government of the United States of America consider the remaining category of claims arising out of the May 17, 1987 attack on the U.S.S. *Stark*, including the claim for damage to the vessel, in a spirit of cooperation.

Despite this agreement, payment was not received by the United States prior to Iraq's unlawful invasion and occupation of Kuwait in August 1990. After international sanctions were imposed as a result of the invasion, Iraq announced that it would no longer honor its debts to the United States. Accordingly, the full claim continued to be outstanding at the end of 1990. *See also* 83 Am. J. Int'l L. 561 (1989).

### 3. Settlement of Expropriation Claims against Honduras

Pursuant to an agreement entered into on June 28, 1990, between the United States and Honduras, signed by U.S. Ambassador Crescencio S. Arcos, Jr., and by Benjamin Villanueva, Honduran Minister of Finance and Public Credit, and Ricardo Maduro, President of the Central Bank of Honduras, the Government of Honduras transferred the amount of $7.8 million to the Government of the United States. The payment was in full and final settlement of all claims of the United States and its nationals that had been the subject of special provisions in the Supplemental Appropriations Act of 1987. Ch. IV, Pub. L. No. 100-71, 101 Stat. 391, 406–07 (1987) and Pub. L. No. 101-167, § 563, 103 Stat. 1195, 1242 (1989), the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990. Those provisions conditioned availability of certain foreign assistance funds for Honduras on its settlement of claims arising from the expropriation by the Government of Honduras of land from a Honduran company which, through a chain of corporate ownership, was ultimately owned by a U.S. citizen, Temistocles Ramirez

de Arellano. The land had been used to establish a Regional Military Training Center to provide instruction and training of Honduran soldiers and soldiers of friendly countries in the region, with trainers and equipment provided by the United States.

The Department of State transferred the $7.8 million to the claimant Temistocles Ramirez de Arellano on July 5, 1990, against a release signed by him in his own right and as agent and attorney in fact for four named Honduran corporations. For a full discussion of the background of the claim and related U.S. litigation and legislation, beginning in 1983, *see Cumulative Digest 1981–1988* at 1695–1701 and 2322–2332. *See also* 84 Am. J. Int'l L. 887 (1990).

### 4. Iran-United States Claims Tribunal

#### *a. Congressional testimony on status of claims*

On November 9, 1989, the Subcommittee on Europe and the Middle East of the House Committee on Foreign Affairs held a hearing on the economic and political situation in Iran, the status of Iranian assets and the Iran-United States Claims Tribunal, U.S. policy on American hostages in the Middle East, and Iran's foreign policy and relations with other countries.

The Legal Adviser of the Department of State, Abraham D. Sofaer, presented a prepared statement on the status of matters at the Claims Tribunal, that provided in part:

> As of January 1981, US banks held a total of nearly $10 billion of Iranian assets which had been frozen in 1979 at the outset of the hostage crisis. The Algiers Accords provided for the use of most of these assets for the initial funding of three escrow accounts. Specifically, about $3.7 billion [$3.667 billion] was placed in Dollar Account No. I (held by the N.Y. Federal Reserve Bank) for syndicated bank claims; about $1.4 billion [$1.418 billion] in Dollar Account No. 2 (held by the Bank of England) for non-syndicated bank claims; and $1 billion in the Security Account (held by the Netherlands Central Bank) for Tribunal awards to other US claimants. The rest of the frozen

Iranian funds-almost $3.9 billion-was returned to Iran. Since January 1981, each of these accounts has been accumulating interest; which has provided substantial additional funds for the payment of U.S. claims.

Under the Accords, Iran has an obligation to replenish the Security Account whenever its balance drops below $5 million as a result of Tribunal awards to American nationals; to date, Iran has been able to replenish the Security Account from accumulated interest paid on the Account. Under the Accords, the balance of each of the three accounts is to be returned to Iran when all claims against the account in question have been paid.

In 1987 [May 13, 1987] the Tribunal, in ruling on an application filed by Iran, ordered the return to Iran of the balance of Dollar Account No. 1, less a small amount needed to deal with a few remaining syndicated bank claims. The US sought a ruling from the Tribunal refusing to order the return to Iran of the balance of the Account, but instead leaving the disposition of the balance to bilateral negotiation. But the Tribunal rejected that request. Instead, it ordered the return to Iran of almost the entire balance (a total of nearly $500 million); less than $10 million remains in the Account today to deal with the last claims.

Dollar Account No. 2 now contains a balance of over $820 million, of which less than $10 million is needed to pay the few remaining claims against the Account. Last week [November 3, 1989], the US and Iran reached agreement on the following distribution of the balance of the Account: $243 million (or about 30% of the balance) will go to the Security Account, where it will be used to pay Tribunal awards to American claimants; $567 million (or about 70%) will be returned to Iran; and the remainder (about $10 million) will be retained in the Account to pay the few remaining claims.

Iran's decision to transfer to the Security Account almost a quarter of a billion dollars of Iranian funds is an important step which will provide a significant source of added security for US nationals with claims before the

Tribunal. By taking this step, Iran has signaled its continued commitment to fulfill its obligations under the Algiers Accords.

Our acquiescence in the transfer of $567 million to Iran from this Account was also entirely appropriate. The claims on this Account have largely been adjudicated, so no American claimant will be prejudiced by the transfer. Had we chosen to litigate this issue, we would at best have been able only to delay the return of these funds to Iran. Instead, we avoided the costs of contentious and expensive litigation, and reached a result which is in the interests of US claimants.

Meanwhile, the Claims Tribunal has decided a considerable portion of the claims put before it. To date, it has awarded over $1.3 billion to US claimants, and a number of other large claims have been heard and await judgment. The Tribunal has provided a businesslike forum in which American claimants can seek the full value of their legitimate claims, including interest.

Many claims remain undecided, however, including the great majority (over 2700) of the so-called small claims—that is, claims of US nationals for less than $250,000. In addition, the Tribunal has only begun the enormous task of resolving the large government-to-government claims between Iran and the US, particularly the Iranian claims arising out of the sale of defense article services prior to 1979. It would obviously be desirable to resolve these issues by negotiation-if that can be done on reasonable terms-so as to avoid the necessity for case-by-case arbitration that could take many years.

In our discussions last week with Iranian representatives, we made some progress in establishing a process within which the parties should be able to clear up many of the remaining disputes. Specifically, we resolved several relatively small government-to-government claims that were before the Claims Tribunal. These claims involved disputes over the performance of contracts for the supply of goods and services prior to 1979. In none of these cases did we agree to return military properties to Iran, which

> we have no intention of doing. We did, however, make monetary settlements which, we believe were fair deals based on the circumstances involved. If we are able to make similar settlements of larger cases or groups of cases before the Tribunal, we intend to do so.
>
> Finally, I want to make clear that these discussions with Iranian representatives in The Hague are entirely technical and legal in character. If the resolution of these technical issues should contribute to improvement in US-Iranian relations, that would of course be to the benefit of both our countries. Nonetheless, our discussions in The Hague have not been directed at political objectives, but at the resolution of legal matters before the Tribunal.

United States-Iranian Relations: Hearing Before the Subcomm. on Europe and the Middle East of the House Comm. on Foreign Affairs, 101st Cong., 18–24 (1989).

Following the hearing, the Department of State forwarded written responses to a number of questions submitted by the subcommittee, including the following:

> **III. IRANIAN ASSETS ISSUE**
>
> *QUESTION:*
>
> 1. Iran also has 6 FMS [foreign military sales] claims against the United States totalling $10 billion, but only really two of them have been adjudicated, a small one in Iran's favor and a larger helicopter case in the U.S.'s favor.
>
> — Why has progress been so slow on these claims?
> — How much money is in the Iran FMS Trust Fund today before these remaining claims are settled and does this figure include interest accrued over the last decade?
> — Have any FMS claims awards been made to Iran pending resolution of issues relating to billing for equipment and services rendered as well as payment for equipment held in the United States?
> — When can we expect the resolution of these issues relating to billing procedures?

*ANSWER:*

The Tribunal has a very large docket. It has been addressing Iran's FMS claims against the United States at the same time it considers numerous other claims between the two governments and thousands of claims brought by private nationals of one government against the other government.

The Trust Fund is the subject of complex, technical litigation. The amount to which Iran may be entitled will be determined after all litigation concerning the Trust Fund is complete. The Trust Fund balances have not been credited with interest.

No FMS claims awards have been made to Iran pending resolution of FMS issues relating to billing for equipment and services. In August 1988, however, the Tribunal issued a partial award concerning equipment held in the United States. The Tribunal held that the United States was not required by the Algiers Accords to return the equipment to Iran but must instead pay Iran the value of the equipment as of March 26, 1981, the date on which the United States informed Iran that it would not allow the export of the equipment. The parties are currently engaged in briefing the valuation issue.

A final decision on the issues concerning billing procedures will probably not be issued by the Tribunal for at least a year or two, possibly longer.

*QUESTION:*

2. How are you determining the valuation of Iranian properties still held by the United States?

— What is your estimate of the value of this equipment as of 1981?
— Is it correct that none of this equipment will have to be shipped to Iran but that Iran must be compensated for its value as of 1981?
— When will you have completed your valuation of that equipment?

*ANSWER:*

The Tribunal issued an award holding that Iran is entitled to the full value of Iranian military property held by the United States as of 26 March 1981. It then ordered further briefing of the value of the items as of this date. The United States is in the process of determining the full value of the goods as of March 1981, taking into account age, condition, state of disrepair, and other relevant factors.

The Department of State, working with Department of Defense, is still in the process of identifying and analyzing the equipment at issue. Iran has filed a briefing claiming the value of this equipment to be $415.7 million, including interest. We will present our views to the Tribunal in a brief that we anticipate will be filed in April of 1990. We estimate that our valuation will be substantially below Iran's.

*QUESTION:*

3. Is it accurate that there are some 3,800 U.S. weapons that Iran had bought before 1981 but did not receive by 1981?

— Are the main items on this list an F-14, two helicopters, missiles and spares, a TSQ-73 system (air defense), and ammunition?
— Why is it so difficult to evaluate what this equipment is worth?

*ANSWER:*

The property subject to the Tribunal's award consists of two categories. The first category consists of approximately 3,800 items that Iran had returned to the United States for repair, calibration, or modification. For the most part, these items are not "weapons" as such, but parts of military equipment such as circuit cards, valves, fuses, and the like. The second category consists of other Iranian-

titled equipment which was in the United States at Iran's request for various purposes.

There are additional items which Iran bought before 1981 but as to which title never passed to Iran. However, the 3,800 U.S. weapons referred to in the question appear to be a reference to the 3,800 items returned for repair.

The major items comprising the second category of property referenced in the prior question include an F-14, two helicopters, a Hawk Battery and spares, three TSQ-73 firing control systems and spares, and a submarine.

The valuation process is so difficult in part because the Tribunal's August 1988 award was the first notice the parties had that they would be expected to value the equipment as of the March 26, 1981 date. Thus, neither party had been collecting or preserving documentation and information with respect to physical deterioration and market condition as of that point.

Moreover, the valuation process itself is inherently complex. The first category of property consists of more than 3,800 individual items returned for repair. An assessment must first be made as to the 1981 condition of each of 3,800 items. Even if an item was repaired, a value must be assigned that reasonably reflects its prior use by Iran. If not repaired, an entirely different value must be assigned.

The second category of property consists of highly complex military systems almost all of which were used by Iran in the United States (e.g., for training of Iranian military personnel). Reasonable adjustment must be made, as of 1981, for depreciation, refurbishment requirements, and other non-recoverable costs. Other factors such as availability of willing purchasers, sales of comparable equipment, and technical obsolescence may also be relevant. The Hawk Battery, for example, consists of over 40 individual component subunits, each of which must be valued separately.

*QUESTION:*

4. You have stated that the amount of FMS claims Iran seeks-some $10 billion-is vastly inflated.

— Why is it inflated?
— Do you estimate the total to be far less than half the figure they give?
— One official was quoted as saying that the value of this equipment is about $250 million. Is that figure accurate?
— Was their figure of $10 billion in your view simply taken from thin air because it equaled the assets the United States turned over originally in 1981 to Iran and to the Hague Tribunal?
— How long will it take to get a better fix on the actual amount of FMS claim due Iran? Several years?
— What is delaying the process? The U.S. valuation process or Iran or the pace of work of the Hague Tribunal?

*ANSWER:*

Of the $10 billion, $5 billion is for nonspecific "consequential" damages which Iran claims is owed as a result of alleged breaches by the United States of obligations relating to the FMS program. We doubt that Iran will be able to recover much, if anything, on this claim. Much of the remainder of the Iranian claim is based on allegations of defects, non-deliveries and overcharges which we believe are without merit or greatly exaggerated.

Apart from its claim for consequential damages, Iran has not yet presented specific evidence in support of large portions of its claims, including its claims of more than $2 billion in overbilling. It is impossible to speculate on how much Iran will prove and recover.

The figure of $250 million relates to one aspect of the FMS case—the value of Iranian military properties detained in the U.S. We are working to formulate estimates of the equipment's value as of 1981.

We do not know why Iran selected the $10 billion figure, beyond the fact that it includes the portions of Iran's claim (sections 1 through 5) in which it has sought particular dollar amounts in damages, as well as a $5 billion figure for consequential damages.

It will probably be at least one year, and more likely several years, before we have a good idea of how much is

due Iran. We are working now on the valuation of Iran's equipment in the United States; that issue may be decided in a little over another year. As to the issues concerning overbilling, additional time will be required to evaluate both the legal arguments and the factual support that can be mustered. In a number of cases the final charges for Iranian purchases cannot be determined until the overall procurement contracts under which the U.S. purchased these items are closed and the costs accounted for.

There has not really been "delay"' in reviewing Iran's FMS claims. It is simply inevitable that in a case of this magnitude and complexity years will be needed to wrap up the contracts and address the issues.

*QUESTION:*

5. Will the Security Account claims be the major focus of work at The Hague in the coming months?

— How many claims in rough magnitude have been adjudicated and how many remain?
— Is Iran still committed to keep that account above $500 million at all times?
— In your negotiations over dissolving Dollar Account No. 2, did Iran reaffirm its commitment to keep the balance in the Security Account above $500 million?

*ANSWER:*

Under the Algiers Accords, the Security Account is used on a continuing basis for the payment of awards by the Iran-United States Claims Tribunal to American claimants. Of a total of 3,856 claims filed at the Tribunal, approximately 2,600 remain of those disposed of, about 800 were the results of terminations of cases by the claimant, 220 of awards on agreed terms, and 230 of adjudications. American claimants have been awarded approximately $1.3 billion by the Tribunal. Iran is committed under the Algiers Accords to replenish the Security Account whenever it falls below $500 million. Iran has affirmed to the

United States, including at the November 1989 discussions, that it intends to honor this commitment.

*QUESTION:*

6. Is it fair to say that the claims in the Security Account will take years to adjudicate?

*ANSWER:*

If all the cases that remain and are not withdrawn need to be adjudicated by the Tribunal, it is fair to say this will take many years. If it is possible to resolve large numbers of these cases by negotiations, the process would be considerably shortened.

*QUESTION:*

7. In an answer to the subcommittee, the State Department said that the United States is "always prepared to settle claims on a realistic basis. Until Iran is ready to do so as well, there is nothing we can do to release the funds."

— Which accounts are you referring to?

— Precisely where, other than in the FMS claims areas, is Iran being unrealistic?

— What can be done to speed up the process on both sides?

*ANSWER:*

In general, the Algiers Accords created several accounts for the payment of claims by Americans, and provided that the balance would not be returned until the claims in question are paid.

In our view, a number of Iran's claims or its defenses to American claims are unrealistic, such as its $ 10 billion claim for the former Shah's assets, its $770 million claim for damages to Iranian railways in World War II, and its opposition to the payment of valid claims by "dual

> national" claimants—that is, claimants who have both U.S. and Iranian nationality. If we can expedite the Tribunal process by negotiations which serve the interests of the U.S. and American citizens, we will attempt to do so.

*Id.* at 67–71.

*See also* 84 Am. J. Int'l L. 729 (1990).

### *b. Small claims settlement*

On May 13, 1990, the United States Government concluded a settlement agreement with the Government of Iran for an overall amount of $105 million that covered: (1) the remaining 2,361 "small claims" (less than $250,000 each) of U.S. nationals still pending before the Iran-United States Claims Tribunal in The Hague; and (2) the United States Government's own claim against Iran (Case No. B38) for repayment of fifteen loans made between 1955 and 1967 as part of the U.S. long-term economic development assistance program in Iran. On June 22, 1990, pursuant to a joint request for an arbitral award on agreed terms from the two governments, filed with the Claims Tribunal on May 17, 1990, the Tribunal rendered an award on agreed terms (Award No. 483), recording and giving effect to the settlement agreement.

The agreement settled all "Claims of less than $250,000," defined as any and all claims less than $250,000 filed with the Iran-U.S. Claims Tribunal by the United States on behalf of U.S. nationals, included in Cases Nos. 10,001 through 12,785 and still pending (set out by number on a list attached to the agreement), whether or not recategorized as Official "B" (government-to-government) Claims by the Tribunal (such as the claims in Cases Nos. B76 and B77, specifically mentioned as having been originally filed as Cases Nos. 10, 189 and 11,651, respectively), and "whether or not the amount of any of such claims is ultimately adjudicated to be more than $250,000." The settlement agreement also included and specifically mentioned Case No. 86, the umbrella case that the U.S. Government filed with the Tribunal to cover all the small claimants. The term "claims of less than $250,000" did not include the claims in Cases Nos. 12,129 and 12,130, in which settlements had already been concluded between the par-

ties. The Agreement defined "claimants" as "any and all of the natural or juridical persons or other entities" who had made the claims of less than $250,000 covered by the Agreement.

The United States and Iran agreed, in addition, to consider as "claims of less than $250,000" for purposes of the settlement agreement (1) claims of U.S. nationals for less than $250,000 that had been submitted to the U.S. Department of State but were not timely filed with the Tribunal (its filing deadline of January 19, 1982, having been established pursuant to the Claims Settlement Declaration of Algiers, Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran. Jan. 19, 1981, Dep't. St. Bull., 3, (February 1981), reprinted in 20 I.L.M. 230 (1981); and (2) claims of U.S. nationals for less than $250,000 that the claimants had withdrawn or the Tribunal had dismissed for lack of jurisdiction.

Article II of the settlement agreement defined its scope and subject matter:

> (i) to settle, dismiss, and terminate definitively, forever and with prejudice all the disputes, differences, claims, counterclaims and matters directly or indirectly raised or capable of arising out of the relationships, contracts, transactions, occurrences, obligations, rights and interests contained in, arising out of, or related to the Claims of less than $250,000, Case No. 86 and Case No. B38.
>
> (ii) to quitclaim and transfer to the Islamic Republic of Iran property of the Claimants as specified in Article VIL

Under article III, the settlement amount of $105 million was to be paid to the United States out of the security account established pursuant to paragraph 7 of the (first, or basic) Declaration of Algiers. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, Dep't. St. Bull. 3, (February 1981), *reprinted in* 20 I.L.M. 224 (1981). The United States acknowledged that the settlement amount was the sole amount to be paid in consideration of "complete, full, final and definitive settlement, liquidation, discharge, and satisfaction of

all the disputes, differences, claims, counterclaims and matters directly or indirectly raised or capable of arising out of the relationships, contracts, transactions, occurrences, obligations, rights and interests contained in or related to" the claims of less than $250,000, Case No. 86 and Case No. B38. Further, the Islamic Republic of Iran (including all respondents in the claims of less than $250,000) would not have to pay any other amount nor make any other consideration to the United States or any person, whether natural or juridical, in relation to the claims of less than $250,000, Case No. 86, and Case No. B38. Article III provided further that the distribution of the settlement would be carried about by the U.S. Foreign Claims Settlement Commission:

> (iii) The Government of the United States shall place the Settlement Amount in one or more interest bearing accounts pending distribution. The distribution of the Settlement Amount falls within the sole competence and responsibility of the Government of the United States and shall in no way engage the responsibility of the Islamic Republic of Iran or any Iranian natural or juridical person.
>
> (iv) The United States Department of State shall refer the Claims of less than $250,000 to the Foreign Claims Settlement Commission, United States Department of justice, for adjudication.
>
> (v) In adjudicating such claims, the Foreign Claims Settlement Commission shall apply Tribunal precedent concerning both jurisdiction and the merits, and shall take into account all issues including counterclaims and liens. Notwithstanding any other section of this Agreement, the Commission will adjudicate on the merits any claim, among those settled by this Agreement, which the claimant demonstrates to the Commission's satisfaction could have been properly pursued in any forum other than the Tribunal. The Commission shall also take into account, as appropriate, any transfers under Article VII of this Agreement, without in any manner entailing any liability for the Islamic Republic of Iran or for any respondents in Claims of less than $250,000.

Article V, Termination of the Claims, set out, *inter alia*, the obligation of the United States to cause, without delay, all proceedings against the Islamic Republic of Iran (including all respondents named in the claims of less than $250,000) in relation to the claims, counterclaims and matters related to the claims of less than $250,000, and/or Case No. 86 and/or Case No. B38, in all courts, fora, or before any authority or administrative body to be definitively and with prejudice dismissed, withdrawn and terminated. Further, it barred the United States "from instituting or continuing with any such proceedings (including interpretive disputes and official claims) before the Tribunal or any other forum, authority or administrative body whatsoever, including but not limited to any court in the United States or the Islamic Republic of Iran." The provision did not affect the proceedings envisaged by the United States in paragraphs (iv) and (v) of Article III, "and which will not in any manner entail any liability for the Islamic Republic of Iran or for any respondents in Claims of less than $250,000." A corresponding obligation was also placed upon Iran.

Article VI set out the mutual obligations of the parties regarding releases of any and all claims, causes of action, rights, interests and demands, whether *in rem* or *in personam*, past, present or future, which have been raised, may in the future be raised, or could have been raised in connection with disputes, differences, claims, counterclaims and matters stated in, related to, arising from, or capable of arising from the claims of less than $250,000 and/or Case No. 86 and/or Case No. B38.

Article VII constituted a blanket quitclaim and transfer by the United States, "unconditionally, irrevocably and without any right to recourse, 'as is and where is,'" to the Islamic Republic of Iran, of "all of the Claimants' tangible and intangible assets, rights, properties and real estate, of any kind, located in the Islamic Republic of Iran, asserted in the Claims of less than $250,000 and/or Case No. 86."

Article IX prescribed in detail the delivery of documents connected with the automatic transfer of real and personal assets, which the United States covered by article VII. It provided:

> (i) Within three months of receipt of a written request from the Islamic Republic of Iran, the United States agrees

to furnish the Islamic Republic of Iran copies of any formal statements of claims submitted by U.S. nationals to the Foreign Claims Settlement Commission, including documentary evidence, as well as the Commission's decisions with respect to the validity and amounts of such claims. The Commission shall require, as a precondition to granting compensation to a claimant, that the claimant furnish any original share certificates and title deeds in his possession concerning assets, rights and properties transferred to the Islamic Republic of Iran under Article VII above. Following the adjudication of each claim, the United States shall furnish such documents to the Islamic Republic of Iran. Where a claimant is able, on justifiable grounds, to prove that the originals of such documents are not in his possession, the Commission shall require from him a notarized affidavit in which the claimant sets out his reasons for not being in possession of the originals of the said documents, and waiving his rights thereto. In such cases, the United States shall furnish the Islamic Republic of Iran with the submitted affidavits and copies of the documents at issue.

(ii) Within three months of receipt of a written request from the Government of the United States, and for a period up to three years following the issuance by the Tribunal of the Award on Agreed Terms, the Islamic Republic of Iran agrees to furnish to the Government of the United States available documents, information, evidence, and records, including details as to the ownership and value of property, rights and interests pertaining to any of the Claims of less than $250,000.

Article X addressed the delivery of property in the United States to Iran:

At any time prior to adjudication by the Foreign Claims Settlement Commission, the interested parties to any of the Claims of less than $250,000 may reach agreements concerning the delivery to the Islamic Republic of Iran of tangible property located in the United States. To become

> effective, any such agreement must be submitted to, and approved by, the Commission, which shall upon approval authorize any payment due from the Settlement Amount. Property shall be transferred to the Islamic Republic of Iran pursuant to such agreements in accordance with United States law.

Under Article XI, nothing in the Settlement Agreement could be relied upon or construed as relevant to, or could affect in any way, any arguments the parties had raised, or might raise, concerning the jurisdiction or the merits of other cases, whether before the Tribunal or any other forum.

Article XIII provided: "Upon the issuance by the Tribunal of the Award on Agreed Terms, and in contemplation of the payment of the Settlement Amount, the releases, dismissals, waivers, withdrawals, and transfers of property located in Iran, contained and referred to in this Settlement Agreement shall automatically become self-executing." For the text of the settlement agreement, *see* Iran Award 483-86-1, issued June 22, 1990, 1990 WL 769549.

A fact sheet on the settlement of the small claims, prepared by the Office of the Legal Adviser under date of May 14, 1990 (with bracketed additional information from Office records), read in part:

> Originally 2795 U.S. small claims were filed with the Tribunal. The Tribunal has decided only 36 of these [i.e., only 1.29 percent of the total-with awards to "small" claimants totaling $1,359,186]. Another 72 cases have been settled by the parties, with these settlements approved by the Tribunal [for a total payment to the "small" claimants of $1,661,124]. The settlement agreement covers 2361 small claims still pending at the Tribunal, 10 dismissed by the Tribunal for lack of jurisdiction, 326 filed with the Tribunal but subsequently voluntarily withdrawn, and 415 submitted to the State Department but not filed with the Tribunal because the time limit for filing had expired.
>
> The small claims will be transferred to the Foreign Claims Settlement Commission, an agency within the U.S. Department of Justice. Legislation enacted in 1985 author-

> ized this Commission to receive and determine the validity and amounts of these claims. In due course, the Commission will inform claimants and the public of the procedures and deadlines that will be applicable to its adjudication of claims. The Commission's processing of the claims will be much quicker than the Tribunal's.
>
> The Tribunal's caseload of U.S. small claims has now been settled. In addition, to date the Tribunal has previously disposed of 1310 cases of the 3856 cases filed: 13 disputes concerning interpretation of the Algiers Accords, 65 claims of Iran or the United States against each other, 797 claims of U.S. nationals against Iran for $250,000 or more ("large claims"), and 435 small claims. The Tribunal has awarded U.S. claimants $1.3 billion. After the small claims settlement, there will remain at the Tribunal 12 interpretive disputes, 11 disputes between the governments, 160 U.S. large claims, 2 Iranian large claims, and 108 Iranian small claims. Included, for example, among the remaining claims are claims by U.S. oil companies against Iran and Iran's claim against the U.S. Government arising out of the Iranian Foreign Military Sales Program [which, spanning a fifteen-year period, consisted of over 2800 contracts by 1979, with a cumulative value of over $20 billion].

The Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, title V, 99 Stat. 405, 437 (1985), had authorized the Foreign Claims Settlement Commission to determine the validity and amounts of claims by U.S. nationals against Iran that had been settled en bloc. In settling these claims, it required the Commission to apply, in the following order:

(1) the terms of any settlement agreement;
(2) the relevant provisions of the Declarations of the Government of the Democratic and Popular Republic of Algeria of January 19, 1981, giving consideration to interpretations thereof by the Iran-United States Claims Tribunal; and
(3) applicable principles of international law, justice, and equity.

50 U.S.C. § 1701 note.

In a letter to Stanley J. Glod, Chairman, Foreign Claims Settlement Commission, dated June 28, 1990, Michael J. Matheson, Acting Legal Adviser of the Department of State, formally transferred to the Commission the responsibility to adjudicate the claims of U.S. nationals of less than $250,000 that were covered by the award and settlement agreement. *See also* 84 Am. J. Int'l L. 890 (1990).

## B. CLAIMS OF INDIVIDUALS

### 1. Claims against Nicaragua

On August 30, 1990, the Office of International Claims and Investment Disputes, Office of the Legal Adviser, Department of State, issued a notice describing a claims program established by the Government of Nicaragua:

> The Government of Nicaragua has issued a decree which established a National Commission to Review Confiscations for the review of claims arising from confiscation or other taking by the previous government of property located in Nicaragua. This is a program which the Government of Nicaragua has undertaken; the United States Government does not have any official role or responsibility in this program. Persons with claims against the Government of Nicaragua for property losses are advised that they have less than two months to register their claims. The deadline for all such registrations is November 6, 1990. All persons who wish to preserve their right to make a claim based on a taking of property are, therefore, urged immediately to file their claims with the National Commission to Review Confiscations through the Embassy of Nicaragua.

Public Notice 1258, 55 Fed. Reg. 37,393 (Sept. 11, 1990). On September 25, 1990, the Office of International Claims and Investment Disputes sent letters to all persons who had contacted the office concerning claims against Nicaragua informing them

of the Nicaraguan Decree and the above public notice. The standard letter is available to *www.state.gov/s/l*.

### 2. Claims against the German Democratic Republic

In August 1990, the Foreign Claims Settlement Commission ("FCSC") and the Department of State distributed information to individuals and organizations with actual or potential claims for property rights taken by the German Democratic Republic ("GDR") concerning a new GDR law providing for registration of these claims. The law, a Decree on the Registration of Property Claims, issued July 11, 1990, provided that those wishing to register a claim for property taken by the GDR could do so by writing to the appropriate GDR office by October 13, 1990. Although the decree had originally set a deadline of January 31, 1991, the deadline was moved up in the interest of settling property issues quickly. The law constituted the first step in the implementation of the Joint Declaration of the Governments of the Federal Republic of Germany and the German Democratic Republic on the Settlement of Outstanding Issues of Property Rights, issued June 15, 1990.

The U.S. Government notice contained a number of enclosures to assist claimants in the registration process, including documents prepared by the Federal Republic of Germany explaining the law, including the types of claims covered, where the claims should be registered, and information that should be included in an application. The U.S. Government could not, however, advise claimants on the validity of their claims.

The Notice also discussed the status of claims against the GDR that had already been espoused by the United States and adjudicated by the FCSC:

> Pursuant to Title VI of the International Claims Settlement Act (Title 22, U.S. Code, sections 1644–1644m), enacted in 1976, the Foreign Claims Settlement Commission (FCSC), an agency of the U.S. Government, adjudicated 3,898 property claims of U.S. nationals against the GDR. The FCSC completed its program in 1981, and certified

to the Secretary of the Treasury the 1,899 claims that it found to be compensable under the terms of the statute. Since then, it has had no further authority to receive or consider claims against the GDR.

Since 1981 the U.S. Government has espoused these claims and pursued a lump-sum settlement of them with the GDR. The U.S. will continue to pursue a lump-sum settlement with a unified Germany. Claimants whose claims have been espoused by the U.S. Government may not now remove their claims from the level of government-to-government negotiation, whether or not they register under the GDR's July 11 law, and the U.S. Government continues to reserve the right to settle all claims covered by the FCSC's German claims program.

The U.S. Government recognizes, however, that some claimants whose claims have been espoused may wish to register under the July 11 law. In particular, claimants who wish to recover their property should note that the July 11 law may provide an opportunity for such recovery, and that a lump-sum settlement would not result in the return of property. Registering claims now, as a precautionary step, will protect possible rights to return of property.

Therefore, those individuals and organizations whose claims have been espoused by the U.S. Government may register under the July 11 law. Such claimants should note, however, that it is not yet clear whether claims espoused by the U.S. Government will result in recovery under the July 11 law. Although the U.S. Government and Germany have not yet decided how to resolve claims espoused by the U.S. Government that are also registered under the July 11 law, it is to be expected that no claim will be allowed to result in a double recovery.

Notice Concerning Claims Against Property in the German Democratic Republic, 55 Fed. Reg. 37,392–01 (Sept. 11, 1990).

In January 1991 the the FCSC and the Department of State issued the Supplemental Notice Concerning Property Claims against the Former German Democratic Republic. The Supple-

mental Notice described several important changes regarding property claims, including the effect of German unification and the existence of new German laws modifying and expanding upon the original registration decree. 56 Fed. Reg. 5,053–03 (Feb. 7, 1991).

### Cross reference

*Proposed vesting of Vietnamese assets for payment of claims*, **Chapter 17.A.1.**

*Invocation of disputes treaty with Chile to resolve claims related to deaths of Chilean and American in U.S.*, **Chapter 17.B.**

# CHAPTER 9

# Diplomatic Relations, Continuity and Succession of States

## A. DIPLOMATIC RELATIONS OF THE UNITED STATES

### 1. General

On June 4, 1990, the Department of State reviewed the status of its relations with certain states in an internal memorandum as follows:

> Relations with Iran were severed on January 3, 1980; the Swiss Government handles United States interests. The United States does not maintain diplomatic relations with Vietnam, Cambodia, North Korea, Albania, and Angola. There are no protecting powers for Vietnam, Cambodia, North Korea, and Albania. In Angola, Italy handles some consular services for the United States, usually on an emergency basis.
>
> Additionally, diplomatic relations are not actively maintained with Bhutan and Maldives (i.e., these states do not maintain diplomatic representation to the United States and the United States does not have diplomatic representation there, although Bhutan maintains a Deputy Consul General in New York).
>
> Regarding the Western Hemisphere, relations with Cuba were severed on January 3, 1961; the Swiss Government handles United States interests.
>
> The United States maintains diplomatic relations with Afghanistan, but U.S. nationals at the American Embassy

were evacuated in January 1989. Before American personnel were evacuated, the U.S. Embassy did not conduct normal diplomatic relations with the current Kabul regime. Our limited presence there did not imply acceptance of the regime as the lawful government in Afghanistan. Similarly, our acting as guarantor of the political settlement does not imply acceptance of the regime.

Although diplomatic relations with Libya have not been formally severed, in 1981 relations with Libya were reduced to "the lowest level consistent with maintenance of diplomatic relations" (Transcript of State Department Special Briefing, May 6, 1981). No diplomatic missions have been maintained since 1981, and protecting powers have been designated (Belgium for the United States; the United Arab Emirates for Libya).

The United States maintains diplomatic relations with the three Baltic states of Estonia, Latvia, and Lithuania, although the United States does not presently have representatives in those countries. The United States has never recognized the forcible incorporation of the three states into the Soviet Union in 1940. The United States continues to recognize and accredit diplomatic representatives of the Baltic states. The representatives are Charges d'Affaires for Latvia and Lithuania in Washington and a Consul General in Charge of Legation for Estonia in New York.

Memorandum of the Office of the Legal Adviser, Office of Diplomatic Law and Litigation, June 4, 1990, available at *www.state.gov/s/l*.

### 2. Access to U.S. Courts: Vietnamese Nationals

On June 29, 1989, in response to a request from an attorney representing a Vietnamese national who had brought suit in a U.S. court in connection with an automobile accident in the United States, the State Department stated the following regarding access by Vietnamese nationals to U.S. courts:

> It is the position of the Department of State that access by nationals of Vietnam to U.S. courts for resolution of purely private claims arising in the United States after 1975, such as those brought by your client, would not be inconsistent with the foreign policy interests of the United States. The question of possible suits by purported governmental entities is, of course, entirely separate and is not addressed by this letter. Further, the position expressed here in no way affects the current U.S. governmental restrictions that apply to financial transactions with nationals of Vietnam.

Letter of Deputy Legal Adviser Elizabeth G. Verville, June 29, 1989, available at *www.state.gov/s/l*.

### 3. Protection of Lebanese Embassy

On January 23, 1990, a suit was filed in the United States District Court for the District of Columbia in the names of "The Government of Prime Minister Michel Aoun, President-in-Interim of the Republic of Lebanon" and Abdallah Bouhabib, purporting to act as the ambassador of the alleged Aoun government and in his individual capacity, against the Secretary of State, the Secretary of the Treasury and the Director of the U.S. Secret Service. *Aoun v. Baker*, No. 90-0156 (D. D.C. filed Jan. 23, 1990) (HHG). The complaint sought to prohibit the defendants from interfering in any way with the plaintiffs' use of the Lebanese Embassy and ambassador's residence in Washington, D.C., and to require the United States to submit the matter to the International Court of Justice for adjudication. The plaintiffs also sought an immediate temporary restraining order to bar any action by the U.S. Government in attempting to remove the ambassador and others associated with the Aoun regime from the premises.

The case arose out of changes in the Lebanese Government in the preceding months. In November 1989 the United States recognized the government of Rene Moawad, who was elected president of Lebanon on November 5, 1989. On November 18, 1989, the United States ambassador to Lebanon presented his credentials to the Moawad government. President Moawad was

assassinated on November 22, 1989, and Elias Hrawi was elected to succeed him as president on November 24, 1989. The United States recognized the Hrawi government and at no time recognized a government headed by Prime Minister Aoun.

On December 11, 1989, the Hrawi government formally notified the Department of State that it had terminated the appointment of Abdallah Bouhabib as its ambassador on December 7. However, Bouhabib continued to claim that he was the ambassador, and indicated that he would not leave the embassy and the ambassador's residence. On January 24, 1990, the Department of State received a request from the Hrawi government to remove Bouhabib from the Lebanese diplomatic premises.

At a hearing on the temporary restraining order held on January 24, 1990, the U.S. Government represented that it would take no immediate action to carry out the Lebanese Government's request in order to permit the court to review the merits of the claim.

On January 25, 1990, the United States filed an opposition to the motion for a temporary restraining order and a motion to dismiss the claim on the grounds of lack of jurisdiction and failure to state a claim. The U.S. memorandum of points and authorities in support of the motion to dismiss argued that the President has the exclusive authority to recognize foreign governments, and that such recognition decisions are not reviewable by the courts:

> Under the Constitution of the United States, the President has the exclusive authority to recognize or not to recognize a foreign government, as well as to maintain or not to maintain diplomatic relations. As the Supreme Court stated in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964), "political recognition is exclusively a function of the Executive." This exclusive authority derives from the President's constitutional authority to appoint and receive Ambassadors (Article II, sections 2 and 3), and the President's necessary power to conduct the foreign relations of the United States. See United States v. Curtiss-Wright Export Corp., 200 U.S. 304, 318–22 (1936).
>
> The courts of the United States have long found that the Executive's determinations of recognition are binding on the courts. Deciding whether to recognize a sovereign

government or which of competing governments to recognize are foreign policy decisions that must be accepted by the courts as conclusive determinations by the political branch of the government. Jones v. United States, 137 U.S. 202, 212–14 (1890) ("who is the sovereign, de jure or de facto, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances"); Oetgen v. Central Leather Co., 246 U.S. 297, 322 (1918); Guaranty Trust Co. v. United States, 304 U.S. 126, 137–38 (1938) ("What government is to be regarded here as representative of a foreign state is a political rather than a judicial question, and is to be determined by the political department of the government. . . . Its action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination"); Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize and to withdraw recognition from, foreign regimes").

This principle has been recently upheld in Republic of Panama v. Citizens & Southern International Bank, 682 F.Supp. 1544, 1545 (S.D.Fla. 1988) (doctrine that the executive branch has exclusive power to recognize a foreign government held to bar intervention and participation of competing regime in litigation brought by the recognized government of Panama to enjoin transfer of funds held in its name). See also United States v. Belmont, 301 U.S. 324, 330 (1937); United States v. Pink, 315 U.S. 203, 229–30 (1937); Restatement (Third) of Foreign Relations Law of the United States section 204 (1987).

Courts have similarly held that the Executive's determination that a regime is not recognized is also binding on the courts. The Maret, 145 F.2d 431, 442 (3d Cir.

1944) ("Nonrecognition of a foreign sovereign and nonrecognition of its decrees are deemed to be as essential a part of the power confided by the Constitution to the Executive for the conduct of foreign affairs as recognition"). This point was addressed by the United States Court of Appeals for the District of Columbia Circuit in Latvian State Cargo Lines & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C.Cir. 1951), cert. denied, 342 U.S. 816 (1951). The Court of Appeals stated:

> We are of the opinion that when the executive branch of the Government has determined upon a foreign policy, which can be and is ascertained, and the nonrecognition of specific foreign decrees is deliberated and is shown to be a part of that policy, such nonrecognition must be given effect by the courts. The rule applicable in such circumstances is the same rule applicable to an act of recognition. Any other treatment of a deliberate policy and act of non-recognition would reduce the effective control over foreign affairs by the executive branch to a mere effectiveness of acts of recognition. The control of the executive branch over foreign affairs must necessarily be broader than that.
>
> *Id.* at 1003.

Defendants' Opposition to Motion for a Temporary Restraining Order and Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 4–7, *Aoun v. Baker*, No. 90-0156 ("U.S. Memorandum"), available at *www.state.gov/s/l*.

A declaration by Assistant Secretary of State for Near Eastern and South Asian Affairs John H. Kelly was attached to the U.S. memorandum. The declaration stated that "[t]he United States does not recognize the 'Government of Prime Minister Michel Aoun' referred to in the pleadings filed in this proceeding, and the United States has never recognized the Aoun government. United States policy in this regard is consistent with that of the international community: to my knowledge, no state in the world currently recognizes the Aoun government." The U.S. brief argued that "this determination is a foreign policy decision that is exclusively within the function of the Executive, as the substantial

authority cited earlier in this memorandum makes clear, and the courts cannot look behind this binding determination." U.S. Memorandum at 7.

Turning to the consequences of non-recognition of the Aoun regime by the United States, the U.S. memorandum argued, first, that the Aoun regime could not bring suit in U.S. courts:

> An Executive decision not to recognize a purported government results in that regime and its representatives normally being denied the right to sue in U.S. courts, absent a statement by the Executive declaring that the denial of recognition should not preclude such court access. As the Supreme Court has stated, "[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 v. India, 434 U.S. 308, 319 20 (1978). See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 11 (1964)(noting that denial of access to unrecognized governments relates to "the incongruity of judicial 'recognition' by permitting suit of a government not recognized by the Executive").
>
> Thus, for example, before the Soviet Government was recognized by the United States in 1933, it was consistently denied access to U.S. courts. Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938) ("suits on its [the sovereign state's] behalf may be maintained in our courts only by that government which has been recognized by the political department of our government as the authorized government of the foreign state"). See also Republic of Vietnam v. Pfizer, 556 F. 2d 892, 894 (8th Cir. 1977) (denying access to unrecognized regime); Transportes Aereos de Angola v. Ronair, Inc. 544 F.Supp. 858, 863–64 (D.Del. 1982) (granting access to an unrecognized regime based on Executive's desire to remove this impediment because "that determination necessarily frees this Court from any strictures placed on the exercise of its jurisdiction"). See generally United States v. Belmont, 301 U.S. 324, 328, 330 (1937); United States v. Pink, 315 U.S. 203,

> 230 (1942); Restatement (Third) of the Foreign Relations Law of the United States section 205 (1987). Hence, the Aoun regime lacks standing to bring suit in this Court.

*Id.* at 8–9.

Second, the U.S. memorandum pointed out that non-recognition of the Aoun regime and recognition of the Hrawi government meant that only representatives of the Hrawi government were considered to be representatives of the government of Lebanon by the United States:

> [T]he United States Government considers the Hrawi government as the proper party to conduct diplomatic relations on behalf of Lebanon, and to exercise international rights and responsibilities of Lebanon because the Hrawi government is the recognized government of Lebanon. Among these international rights and responsibilities are those accorded parties to the Vienna Convention on Diplomatic Relations, to which Lebanon and the United States are parties.
>
> Thus, the U.S. Government looks to the Hrawi government to inform us who its authorized representatives are, in accordance with the terms and procedures set forth in Article 10 of the Vienna Convention on Diplomatic Relations, done at Vienna April 18, 1961, 23 U.S.T. 3227, T.I.A.S. NO. 7502, 500 U.N.T.S. 95. This article provides, in pertinent part, that "the Ministry of Foreign Affairs of the receiving State . . . , shall be notified of the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission. . . ."

*Id.* at 9–10.

The attached declaration of Assistant Secretary Kelly reviewed the pertinent provisions of the VCDR and explained their importance to the U.S. Government:

> 9. As a senior diplomatic official, I am also familiar with United States policy on adherence to the Vienna Convention on Diplomatic Relations. . . . The United

States attaches the utmost importance to its rights and obligations under the Vienna Convention, including the obligation in Article 22(l) to treat the premises of the diplomatic mission as inviolable. The United States views with equal seriousness the provision in Article 22(l) that states, "The agents of the receiving State may not enter [the premises of the Mission], except with the consent of the head of the mission." Further, the United States is acutely aware of its obligations under Article 22(2), which provides that, "The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage."

10. The United States depends on these provisions for the protection and security of its embassies abroad. The principle of inviolability, of course, protects the integrity of United States diplomatic missions abroad. In addition, the United States occasionally must request assistance from the agents of the receiving State to remove trespassers and take other actions to protect United States diplomatic missions in accordance with Articles 22(l) and 22(2).

11. To ensure that United States embassies receive the benefit of the above mentioned protections abroad, and to comply with its international legal obligations, the United States is scrupulous in ensuring that these protections are accorded to foreign embassies here in Washington. Thus, the United States is dedicated to the principle of inviolability and to the principle that the United States is obliged to assist a foreign mission that requests assistance to protect it from intruders or damage. When the United States is requested by foreign governments to take such steps to rid foreign missions of trespassers and other unwanted intruders, United States practice is to comply without delay. The United States views this practice, which is enshrined in the Vienna Convention, as fundamental to the orderly conduct of diplomatic relations.

As to the consequences of failing to carry out U.S. obligations under the VCDR, the U.S. memorandum explained:

> The VCDR contains a number of obligations placed upon the receiving State with regard to diplomatic missions and personnel within its territory. One of the most important is set forth in Article 22(2), which provides that "the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." (The premises of the mission include the ambassador's residence in accordance with the definition in Article l(i) of the VCDR.)
>
> When there is an intrusion or forcible entry into a mission's premises by someone unauthorized or unwelcomed by the sending State, it is the normal practice for the United States to remove the intruders, upon the request of the sending State or its authorized representative. . . . The practice of confirming that the removal is based upon a request of the sending State is to ensure that any actions by law enforcement authorities would not be in violation of Article 22, including the duty to protect and the grant of inviolability to the premises of the mission, permitting entrance only upon the consent of the sending State.
>
> The special duty to provide protection to a mission premises is one the United States views particularly seriously. As the Declaration of Assistant Secretary Kelly explains, United States missions overseas rely heavily on the obligation of the receiving State to provide protection, as the Iran hostage incident made abundantly clear. Failure of the United States to abide by this duty, or hindrance of the United States' ability to carry it out, may cause the sending State to withdraw protection to U.S. missions in its state on the basis of Article 47(2)(a) of the VCDR. This article permits the receiving State to apply the VCDR obligations restrictively to another State where that State has restrictively applied the provision to its mission in the sending State.

*Id.* at 12. (Citations to Kelly Declaration omitted.)

Finally, the U.S. memorandum addressed the plaintiffs' request to have the matter heard in the International Court of Justice.

Because Lebanon was not a party to the VCDR's Optional Protocol Concerning the Compulsory Settlement of Disputes, done at Vienna April 18, 1961, 23 U.S.T. 3374, T.I.A.S. No. 7502, 500 U.N.T.S. 95, there was no basis for ICJ jurisdiction. Moreover, even if Lebanon were a party to the Optional Protocol, there was no dispute between the recognized government of Lebanon and the United States.

On January 26, 1990, the district court entered a temporary restraining order for 10 days to preserve the status quo until the court could more carefully consider the arguments of the parties. In particular, the court expressed concern about infringement without due process of law on the alleged property rights of the plaintiffs. *Aoun v. Baker*, No. 90-0156 (D.D.C. Jan. 26, 1990) (unpublished order granting temporary restraining order).

On January 29, 1990, the U.S. Government filed an emergency motion with the United States Court of Appeals for the District of Columbia Circuit seeking reversal of the district court order or, in the alternative, for a writ of mandamus directing the district court to vacate its order. At the outset, the U.S. Government addressed the necessity for the emergency motion:

> The district court's order usurps the Executive Branch's authority in foreign affairs and, unless reversed forthwith, will cause substantial and irreparable harm to the foreign policy interests of the United States in the Middle East. Although the district court's Order is styled as a temporary restraining order . . . it commands the Executive Branch not to honor the request of the recognized government of Lebanon to protect the premises of the Lebanese diplomatic mission in the United States from unauthorized intruders or occupants. Because the Order altered irreversibly "the delicate diplomatic balance" in the United States' relations with Lebanon, and continues to do so, it is "in purpose and effect a mandatory injunction appealable under 28 U.S.C. section 1291(a)(1)." Adams v. Vance, 570 F.2d 950, 953 (D.C. Cir. 1977).
>
> A party requesting an injunction that affects the ability of the Executive Branch to conduct the foreign affairs of the United States "must make an extraordinarily strong

showing to succeed." Id. at 955. As the Court noted in Adams v. Vance:

> This country's interests in regard to foreign affairs and international agreements may depend on the symbolic significance to other countries of various stances and on what is practical with regard to diplomatic interaction and negotiation. Courts are not in a position to exercise a judgment that is fully sensitive to these matters. Id. It is for precisely these reasons that the merits of this appeal "are so clear as to justify expedited action," and that the circumstances of the case counsel "a speedy resolution." Ambach v.Bell, 686 F.2d 974, 980 (D.C. Cir. 1982) (per curiam). Alternatively, since the district court has intruded upon the President's constitutional authority to recognize governments, the court has acted in clear excess of its jurisdiction and mandamus is justified.

Emergency Motion for Summary Reversal or, in the Alternative, Petition for Writ of Mandamus, pp. 2–3, *Aoun v. Baker*, No. 90-5016, slip op. (D.D.C. Jan. 30, 1990), available at *www.state.gov/s/l*.

The U.S. Government's emergency motion then addressed in detail the harm, both actual and potential, caused by the district court's order:

> In *Adams v. Vance*, supra, this Court held that it had jurisdiction over an appeal from a grant of a temporary restraining order because the order in question did not merely preserve the status quo pending further proceedings, but commanded an unprecedented action irreversibly altering a delicate balance involving the foreign relations of the United States. See also, *Office of Personnel Management v. AFGE*, 473 U.S. 1301, 1304–05 (1985) (Burger, J., in chambers). The order entered by the district court, unless vacated, will continue to cause substantial and irreparable harm to the ability of the Executive Branch to conduct the foreign affairs of the United States government. Indeed, the Order constitutes a clear intrusion "into the core con-

cerns of the executive branch." *Adams v. Vance*, 570 F.2d at 954. The "delicacies of diplomatic negotiation, (and) the inevitable bargaining for the best solution of an international conflict" will be lost irretrievably due to the "premature interposition" of the District Court unless the Order is reversed forthwith. Id. at 954–55 (quoting *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973)).

As set forth in the attached declaration of Secretary of State James A. Baker, III, [dated January 29, 1990 and attached as Exhibit E to the Emergency Motion] the occupation of the Lebanese Embassy by Bouhabib and the district court's order restraining the United States from honoring its international legal obligations to the Government of Lebanon are causing grave, immediate and irreparable harm to the foreign policy of the United States. The district court's order adversely affects United States policy interests in Lebanon, strains relations between the United States and Lebanon, and damages broader foreign policy interests of the United States. (Baker Decl., para. 5)

The Government of Lebanon has repeatedly expressed to the Department of State the seriousness with which it views this matter. The Prime Minister has taken the highly unusual step of calling the Department directly to indicate that Bouhabib's continued presence in the embassy would be paralyzing to his government. (Id., para. 6)

The Hrawi government, the legitimate government of Lebanon, is barely two months old and is seeking to consolidate its authority in Lebanon, in the face of considerable difficulty. Its efforts are being actively resisted by General Aoun. General Aoun and his supporters will look carefully at foreign reaction in judging how long and how strongly to resist the Government of Lebanon's authority. Indeed, General Aoun has ordered certain Lebanese Ambassadors sympathetic to him not to turn over Lebanese embassies to the representatives of the Government of Lebanon. (Id., para. 7)

It has been long-standing United States policy to promote the extension of the authority of the legitimate government of Lebanon throughout Lebanon. This policy is directly undermined by the district court's decision. Each

day that Aoun's purported representative remains in the embassy is used by Aoun to retain and build support for his efforts to resist the legitimate government of Lebanon's authority. General Aoun's supporters have already begun to use the court decision to argue that the United States is not fully committed to the Hrawi government. The Hrawi government has relied heavily on the political support of the United States in its efforts to persuade Aoun to cease his unauthorized occupation of the Presidential Palace near Beirut. Our critical support is seriously undermined by the fact that Aoun's purported representative is allowed to occupy the embassy property in Washington. (Id., para. 8)

The Hrawi government, faced with the task of asserting its authority over numerous armed elements, is understandably sensitive to any suggestion that it is not the legitimate government of Lebanon. Officials of the Hrawi government, unversed in the complexities of the American legal system, are likely to misinterpret our inability to remove Boubabib as a lack of commitment to and support for the Hrawi government. No amount of reassurance to Lebanese officials by United States diplomats removes the suspicion that the United States Government is not fully committed to supporting the legitimate government as long as Bouhabib remains in the Lebanese embassy in Washington. (Id., para. 9)

The district court's order also threatens broader U.S. interests. The United States relies upon the Vienna Convention for the protection of its embassies and diplomats overseas. In the hostage crisis in Teheran, the United States appealed to the International Court of Justice and the world community, citing the Government of Iran's obligation to make immediately available to the United States our diplomatic premises. When an American Embassy abroad requests assistance from the host government in removing intruders, violent or otherwise, the United States considers it unacceptable for that government to delay unnecessarily for even a few hours. Ten days' delay—the daunting precedent set by the district court here would be intolerable. (Id., para. 10)

*Id.* at 6–9.

After reiterating the legal arguments made to the district court regarding the executive branch's exclusive authority in the area of recognition, the brief addressed the district court's order and its apparent concern about the plaintiffs' property interests in the embassy premises and papers:

> The first flaw is the assumption that Mr. Bouhabib, who no longer represents the Republic of Lebanon in the United States, has any interest whatsoever, personally or by reason of his former position, in either the premises of that government's embassy or any of its official papers. As the Supreme Court has recognized, "the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it." Guaranty Trust Co. v. U.S., 304 U.S. 126, 137 (1938). *See also, The Sapphire*, 78 U.S. (11 Wall.) 164, 168 69 (1870); *National Union Fire Ins, Co. v. The Republic of China*, 254 F.2d 177, 186 (4th Cir.), *cert. denied*, 358 U.S. 823 (1958), *The Rogdai*, 278 F.2d 294, 296 (N.D. Cal. 1920). In short, the premises of the Lebanese embassy grounds and all official papers present therein belong to the Republic of Lebanon, not Mr. Bouhabib, either in a personal or representative capacity.[11]
>
> The second fallacy of the district court's reasoning is that, by a change in recognition of Lebanese governments by the United States, some change in "property rights" to the embassy premises and any official papers has taken place which requires judicial supervision. As numerous cases which deal with a foreign state's right to pursue a claim in our courts have recognized, "the state is continuous and the right of action really resides in the aggregate body of the people *who are merely represented by particular governmental organizations which may change in character or personnel*." *State of Yucatan v. Argumendo*, 92 Misc. 547, 157 N.Y.S. 219, 1225 (Sup. Ct. 1915) (emphasis added) citing *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897). Or, as the Supreme Court stated in The Sapphire concerning the right of the French Government to pursue, in the name of Emperor Napoleon,

a claim for damages to its warship after Napoleon had been deposed:

> On [Napoleon's] deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or the National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. *A change in such representative works no change in the national sovereignty or its rights.*

78 U.S. (11 Wall.) at 168 (emphasis added). See also *Lehigh Valley Ry. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927) ("though the government changes, the nation remains, with rights and obligations unimpaired") *quoting* 1 Moore, Digest of International Law 249. So too here, the embassy premises and all official papers therein both prior, during and subsequent to Mr. Bouhabib's tenure as Ambassador belong to the Republic of Lebanon. No change in "property rights" is at issue here.

Third, upon recognition of the Hrawi government by the United States Government, title to the embassy premises and all official papers immediately vested in that government, which thereby becomes entitled to *immediate* possession of the premises and all official papers therein. 1 L. Oppenheim, International Law section 75, at 132–33 H. Lauterpacht 7th ed. (1948) (upon recognition, a government "becomes entitled to demand and receive possession of property situate within the jurisdiction of the recognizing State, which formerly belonged to the preceding government at the time of its supersession.") (collecting authorities); *Voevodine v. Government of Commander In Chief*, 232 App. Div. 204, 249 N.Y.S. 644, 649 (1st Dept.), aff'd 257 N.Y. 557 (1931) ("The property of such a government belongs to the state, as sovereign, and, upon the overthrow of the [prior] * * * government, another government replacing it would succeed to the representative right of such * * * government in all of its property.") (emphasis added); State of *Yucatan v. Argumendo*, 157 N.Y.S. at 225 ("Plaintiff, as the recognized state govern-

ment, is vested with all state property, including title to (property] accumulated during previous * * * regimes"). Indeed, as we noted above, the United States Government, under the VCDR, has a special obligation to protect the embassy premises for the Hrawi regime—not for plaintiff and "those aligned with him." . . . In short, plaintiff is a *trespasser* with respect to the embassy property and unlawfully holds possession of official papers of the Republic of Lebanon. That he came by that possession as a result of his prior position is irrelevant. At present, he has no "property rights" therein which require protection by the due process clause. The district court's conclusion to the contrary must be reversed.

Moreover, even if plaintiff has a "property right" in the premises and papers, the district court's conclusion that Bouhabib lacked adequate notice of his termination as ambassador from Lebanon and the requirement that he vacate the embassy and mission was neither alleged by plaintiffs nor supported by the record. Nowhere did Bouhabib assert that he lacked notice of his termination as ambassador to the United States, and nowhere did he assert that he had no notice that the recognized government expected him to leave the embassy premises by December 20, 1989; to the extent the record below addressed this issue, it confirms that Bouhabib had sufficient notice. (See Kelly Decl. at 3.) [Footnote omitted.] Consequently, the district court's theory that some undefined notice requirement was not satisfied was not presented or supported by the record. [Footnote omitted.] Nor would there be any basis for a hearing because plaintiff concedes all material facts supporting defendants' right to provide immediate access to the Lebanese embassy to duly recognized representatives of the Republic of Lebanon.

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[11] Since Mr. Bouhabib is no longer the accredited representative of the Republic of Lebanon to the United States, he can no longer claim any "rights" in the embassy premises or official papers by reason of his former position. Cf. VCDR, Art. 39(2).

*Id*. at 16–19.

On January 30, 1990, the Court of Appeals denied the emergency motion, finding:

> The grant of a temporary restraining order is generally not appealable. *See Office of Personnel Management v. American Federation of Government Employees*, 473 U.S. 1301 (1985). *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977), departed from that rule to stop implementation of an order upsetting the status quo and directing action with potent, irretrievable consequences. *Id*. at 953. This case has not been shown to fit that bill. In view of the brief duration of the order at issue, it is plain that the district court did not direct the equivalent of a preliminary injunction. See Sampson v. Murray, 415 U.S. 61, 86 (1974).
>
> [T]he petition for writ of mandamus is denied. The circumstances of this case are not so exceptional as to warrant resort to this extraordinary writ. . . .

*Aoun v. Baker*, No. 90-5018, slip op. pp. 1–2 (D.C. Cir. Jan. 30, 1990).

On February 1, 1990, the U.S. Government filed an emergency application for a stay pending certiorari in the Supreme Court, seeking an immediate stay of the district court's order on the ground that it "constitute[d] an intolerable intrusion into the exclusive powers of the President under Article II of the Constitution and imposes serious and increasingly adverse consequences for the Nation's foreign relations in a sensitive area of the world." Emergency Application for a Stay Pending Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 12, *Baker v. Aoun*, No. A-549. In support of the emergency application, the U.S. filed a supplemental declaration by Secretary of State James A. Baker III, dated January 31, 1990. The supplemental declaration added the following information about the situation in Lebanon and the effects of the case:

> 6. Since I submitted the January 29 Declaration, the situation in Lebanon has further deteriorated as General Aoun has, within the past few days, stepped up his campaign to destabilize and unseat the Hrawi government, whose well being is an essential ingredient to United States foreign

policy in the Middle East. For example, Aoun has within the past two days cut off the flow of water to West Beirut. Aoun has also threatened to cut off electricity in West Beirut. In addition, he has moved to crush by military force his Christian opponents within the small, 300-square mile enclave over which he claims control. The existence of the District Court's order prevents the United States from providing a dramatic indication of United States political support to the Government of Lebanon by assisting it to recover possession of its diplomatic premises in the United States.

7. As I stated in my Declaration of January 29, 1990, the Government of Lebanon has repeatedly expressed to the Department of State the seriousness with which Lebanon views this matter. Within the past two days, serious concern has also been raised by representatives of Morocco and Algeria. In my judgment, the representatives of these governments are particularly important. These Arab governments were charged by the League of Arab States to work to restore the unity, sovereignty and territorial integrity of Lebanon. With strong United States support, these governments established and implemented an inter-Arab process that permitted establishment of the Hrawi government. These governments have now expressed concern over whether the United States remains committed to the Hrawi government. We cannot provide a convincing answer so long as the District Court prevents us from honoring the Lebanese Government's request to help it gain control of its own Embassy in Washington.

8. I understand that during the hearing on this matter, the District Court stated that "the public interest would not appear to favor leaving the United States Embassy in the territory of the Aoun government unprotected, perhaps, against reprisals and retaliation for what the State Department attempts to do here and now." (Tr., at 46.) This statement suggests that Michel Aoun has been protecting the United States Embassy in East Beirut. In fact, the United States was forced to evacuate its American personnel from the Embassy in September 1989 because Aoun

> attempted to incite the Lebanese populace against the United States Embassy and threatened "Christian terrorism" against the United States.
>
> 9. The situation in Lebanon is worsening daily. This restraining order—however brief—does great damage to the authority and credibility of the President in his conduct of the nation's foreign affairs.

*Id.*, Supplemental Declaration.

In its emergency application to the Supreme Court, the United States argued as follows:

> The district court's order, which the court of appeals has allowed to remain in effect, constitutes an intolerable intrusion into the executive powers of the President under Article II of the Constitution and imposes serious and increasingly adverse consequences for the Nation's foreign relations in a sensitive area of the world. These consequences are demonstrated by the declaration of the Secretary of State filed in the court of appeals . . . , as well as the supplemental declaration of the Secretary, signed yesterday evening, January 31, 1990 . . . , explaining that "the situation in Lebanon has further deteriorated as General Aoun has, within the past few days, stepped up his campaign to destabilize and unseat the Hrawi government, whose well-being is an essential ingredient to United States foreign policy in the Middle East." (Footnote omitted.)
>
> The district court acknowledged, and respondents conceded below, that the United States has recognized the Hrawi government (not the purported "Aoun government") as the legitimate Government of Lebanon, and that the President has the indisputable authority to do so. That uncontested fact and undisputed proposition of constitutional law conclusively dispose of the merits of this case, because the diplomatic representative of the recognized Government of the Republic of Lebanon has the right to the immediate and undisturbed possession of the Embassy of Lebanon in the United States, and the United States has the duty under the Vienna Convention to render immedi-

> ate assistance to the Government of Lebanon in securing that possession. Respondents clearly have no right under the Due Process Clause of the United States Constitution to resolve a dispute with the recognized Government of Lebanon regarding the diplomatic premises belonging to the Republic of Lebanon. Furthermore, the court of appeals had both jurisdiction and an obligation, either on appeal or a petition for a writ of mandamus, to correct the grave error by the district court. In these circumstances, an immediate stay of the district court's order pending certiorari is clearly warranted.

*Id.* at 12–14.

With regard to the public interests at stake, the emergency application stated:

> Once these representations concerning the foreign policy interests of the United States [made by the Secretary of State and other State Department officials] are credited, as they must be, the balance of the equities and the dictates of the public interest are clear. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," and "[p]rotection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot be neatly compartmentalized." Haig v. Agee, 453 U.S. 280, 307 (1981). Weighed against the compelling foreign policy interests supporting a stay are respondents' interests, as the purported "Aoun government" and its purported representative, to possession of the Embassy. But those supposed "interests" weigh further in favor of a stay, because those interests (and their very recognition by the courts of the United States) directly undermine the foreign policy interests of the United States. If the United States is to speak with one voice, through the Executive Branch, in recognition of the Hrawi government and the nonrecognition of the "Aoun government"—with all that this implies for the diplomatic prerogatives of the Hrawi government—no legitimacy can be attached to the interests

> of the "Aoun government" in retaining possession of the Embassy premises. Indeed, as a rival and unrecognized faction, respondents do not even have the capacity to sue in United States courts to invoke the rights of the Republic of Lebanon in any respect—much less to contest the right of the legitimate Government of Lebanon to possession of its Embassy [footnote omitted.]

*Id.* at 17–18. After reviewing in detail the remaining arguments developed in the earlier U.S. Government briefs (including recognition, U.S. Government responsibilities under the Vienna Convention on Diplomatic Relations, the lack of property rights of the purported Aoun government and Mr. Bouhabib in the Embassy premises and papers, and the political-question doctrine) the emergency application concluded:

> We also believe that the court of appeals clearly erred in dismissing the petitioners' appeal in these circumstances and denying their alternative petition for a writ of mandamus. As the majority below recognized, the District of Columbia Circuit previously held that, despite the characterization of a district court order as a temporary restraining order, if the order alters irreversibly a "delicate diplomatic balance," it is "in purpose and effect a mandatory injunction appealable under 28 U.S.C. 1291(a)(1)." *Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1977). See also *Sampson v. Murray*, 415 U.S. 61, 86–88 (1974); *OPM v. Government Employees*, 473 U.S. 1301, 1304–05 (1985) (Burger, Circuit Justice).
>
> The majority below apparently believed that this case was distinguishable from Adams v. Vance, because, in its view, the district court's order simply maintains the "status quo." Contrary to that apparent view, however, the district court's order substantially altered the status quo in the extraordinary circumstances of this case, when the respective positions of the parties and the Government of Lebanon are taken fully into account. Prior to entry of the district court's order, the President was free, as he must be, to carry out his responsibilities under the Constitution

> and Vienna Convention in the manner he deemed the interests of the United States to require, and to respond both to the formal request by the recognized Government of Lebanon to make its Embassy available and to the circumstances that lend urgency to that request. The district court's order drastically changes that status quo, because it intrudes the courts into diplomatic matters that are committed to the President and intolerably circumscribes the discretion of the President to respond immediately and appropriately to often fluid circumstances throughout the world. For these reasons, Judge Williams correctly concluded that, although the district court's order is "negative in form," it presents the same considerations that warranted immediate appeal in Adams v. Vance. *Compare Zardui-Quintan v. Richard*, 768 F.2d 1213, 1215 n.7 (11th Cir. 1985).

*Id*. at 32–33.

On February 2, 1990, following a further round of pleadings in the Supreme Court, Justice Brennan denied the U.S. emergency application for a stay. In the meantime, the U.S. Government had filed a supplemental memorandum of points and authorities in the district court, in support of its motion to dismiss and in opposition to the plaintiffs' request for a preliminary injunction. The memorandum urged the district court promptly to resolve the case because of the serious and irreparable harm to foreign policy interests caused by Mr. Bouhabib's occupation of the embassy. Supplemental Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Request for a Preliminary Injunction.

On the same day, the district court granted the U.S. Government's motion to dismiss, holding as follows:

> It is settled that the President, and through him the Department of State, has plenary authority with respect to the recognition or non-recognition of foreign governments. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *The Maret*,145 F.2d 431, 442 (3d Cir. 1944). These decisions are binding on the courts.

> [footnote omitted.] The President's representatives have recognized the Hrawi government as the legitimate Government of Lebanon, and that government is accordingly entitled to that status here.[2]
>
> It is also clear, contrary to plaintiffs' contentions, that they have no rights under the Optional Protocol to the Vienna Convention, 23 U.S. Treaties and Other International Agreements 3227, both because Lebanon is not a party to the Protocol and because there is here no dispute between the United States and Lebanon as such. There is therefore also no merit to plaintiffs' suggestion that the instant controversy be decided by the International Court of Justice.
>
> [2] The United States is also correct in its argument that there is no significant distinction for that purpose between a non-recognized government and a derecognized government. However its present status came about, the Aoun government is not, at this time, the Government of Lebanon insofar as the Executive Branch of the United States Government is concerned.

*Aoun v. Baker*, 1990 U.S. Dist. LEXIS 1156 at *3–*5, (D.D.C. Feb. 2, 1990). The district court also found that the plaintiffs had adequate notice of the Hrawi government's request to vacate the premises of the embassy and residence, "however any notice requirement is to be construed." *Id.* at *6.

### 4. Status of Jerusalem

On September 27, 1988, Congress enacted legislation authorizing the construction of new diplomatic facilities for U.S. personnel in Israel, Jerusalem, or the West Bank. Section 305 of the Department of State Appropriations Act of 1989, Pub. L. No. 100-459, 102 Stat. 2186 provide:

> Notwithstanding section 130 of the Foreign Relations Authorization Act, Fiscal Years 1988–89 and section 414 of the Diplomatic Security Act and any other provisions of law, such funds as are authorized, or that may be authorized, under the Diplomatic Security Act or any other

> statute, and appropriated to the Department of State under this or any other Act, may be hereafter obligated or expended for site acquisition, development, and construction of two new diplomatic facilities in Israel, Jerusalem, or the West Bank, provided that each facility (A) equally preserves the ability of the United States to locate its Ambassador or its Consul General at that site, consistent with United States policy; (B) shall not be denominated as the United States Embassy or Consulate until after construction of both facilities has begun, and construction of one facility has been completed, or is near completion; and (C) unless security considerations require otherwise, commences operations simultaneously.

Following this authorization, the United States and Israel entered into an agreement on January 18, 1989, regarding potential acquisition of sites for these new facilities.

On June 13, 1989, Representative Lee H. Hamilton, Chairman of the Subcommittee on Europe and the Middle East of the House of Representatives Committee on Foreign Affairs, wrote to Secretary of State James A. Baker III regarding the January agreement. Specifically, Rep. Hamilton's letter made the following request:

> The subcommittee has been contacted by Americans concerned that this agreement might represent a new policy on Jerusalem and might tacitly represent an admission that Israel has title to disputed land or lands that we have believed in the past are subject to negotiations for a settlement of the Arab-Israeli conflict. I would appreciate your examination of the January agreement and your assessment of the implications of that agreement for United States policy on the question of Jerusalem and its status, both now and for the future.

The letter is available at *www.state.gov/s/l*.

On June 28, 1989, Assistant Secretary of State for Legislative Affairs Janet G. Mullins responded on behalf of the Secretary of State. Her letter stated, in pertinent part:

> The January agreement . . . provides for the lease of property in Jerusalem and ownership of a property in Tel Aviv for the construction of new U.S. diplomatic properties. We have identified a suitable site in Jerusalem. The property is located within the portion of the city administered by Israel prior to 1967. It was formerly used by the British Army as a barracks and, in more recent times, has been used by the Israeli police. We are still in the process of identifying a site in Tel Aviv. Under the terms of the agreement, no obligations with respect to the Jerusalem site become effective until a site is agreed in Tel Aviv.
>
> We are aware of claims that the Islamic Trust (Waqf) holds an interest in a portion of the agreed site in Jerusalem. We have not been able to locate any record of, or support for, this claim during a thorough title search completed by us. The Government of Israel is obligated under its own domestic law to compensate any private claimants presenting valid pre-existing claims to interests in the property.
>
> The agreement does not change our policy with respect to Jerusalem. The final status of the city should be resolved through negotiations, and the outcome of such negotiations should not be prejudged by the actions of any party. Jerusalem should remain undivided and there should be free access to the Holy Places.
>
> The location of the U.S. Embassy remains in Tel Aviv. We will address the issue of moving our embassy only in the context of a negotiated settlement of the status of the West Bank and Gaza.

Letter from Assistant Secretary for Legislative Affairs Janet G. Mullins to Representative Lee H. Hamilton, June 28, 1989, available at *www.state.gov/s/l*.

On August 4, 1989, Representative Hamilton wrote to Secretary of State Baker, enclosing a memorandum from law professor Francis A. Boyle, providing his views on international law and the January 1989 agreement. Representative Hamilton sought the State Department's comments on this memorandum. On September 6, 1989, Assistant Secretary Mullins provided the following response on behalf of the Secretary of State:

Professor Boyle's memorandum first argues that the lease agreement "can only be interpreted as a last-minute attempt by the Reagan Administration to lock its successors into a policy of moving the United States Embassy from Tel Aviv to Jerusalem . . . ." The Department disagrees with this assertion. The Helms Amendment [Section 305 of Pub. Law No. 100-459, quoted above] specifically provides that the two new facilities shall both be capable of housing the Ambassador or Consul General "consistent with United States policy." Senator Helms' statements acknowledge that the legislation preserves Presidential discretion concerning the location of our embassy. In that regard, United States policy has not changed: We will address the issue of whether to move our embassy to Jerusalem only in the context of a negotiated settlement of the status of the West Bank and Gaza.

In addition, Professor Boyle's memorandum expresses concern that the Islamic Trust (Waqf) may have a claim to an interest in a portion of the agreed site in Jerusalem. As stated in the letter to you of June 28, 1989, we have concluded a thorough title search with respect to the property, and we have located no record of or support for a Waqf claim. Questions have also been raised about possible private claims for the land in question. We are aware of no such claims. As stated, the Government of Israel would be obligated under Israeli law to compensate for any private claimants presenting valid preexisting claims to interests in the property.

Professor Boyle argues that this statement is disturbing because it reflects an assumption that Israeli domestic law has some applicability in Jerusalem. In fact, he argues that the entire lease agreement is in violation of international law. His view is based on his premise that the law of belligerent occupation applies to all of Jerusalem, including West Jerusalem.

The United States does not accept this view. The longstanding position of the United States is that the law of belligerent occupation applies to East Jerusalem, which was occupied by Israel in 1967. The United States has not accepted the sovereignty of any state over any part of

> Jerusalem, and has opposed unilateral acts by any state in the area to change the status of Jerusalem. We have, however, acknowledged the practical necessity of administration by Israel of West Jerusalem, including the application of Israeli law, just as the United States accepted Jordanian administration of East Jerusalem from 1948 to 1967. The United States has never taken the position that the status of East Jerusalem should be settled apart from West Jerusalem. In fact, the United States has consistently taken the position that the status of Jerusalem should be settled through negotiation in the context of a comprehensive peace settlement.

Ms. Mullins letter is available at *www.state.gov/s/l*.

### 5. Federated States of Micronesia and Marshall Islands

In August and September 1989, the United States, the Federated States of Micronesia, and the Marshall Islands agreed upon procedures to govern their diplomatic relations in accordance with the 1961 Vienna Convention on Diplomatic Relations. The agreements were effected through an exchange of notes between Secretary of State James A. Baker III and Jesse B. Marehalau, Representative of the Federated States of Micronesia, dated August 23 and 24, 1989, and between Secretary Baker and Wilfred I. Kendall, Representative of the Republic of the Marshall Islands, dated August 23 and September 6, 1989. The agreed procedures were as follows:

> (1) The Government of the United States and the Government of (the Federated States of Micronesia/ the Republic of the Marshall Islands) will provide all necessary assistance for the establishment and performance of the functions of diplomatic missions in their respective capitals in accordance with international law and practice. Both governments will make arrangements pursuant to their respective legal and administrative procedures to commence and conduct diplomatic representation at the Ambassadorial level.

(2) Diplomatic relations between the United States and the (Federated States of Micronesia/ the Republic of the Marshall Islands) shall be governed by the 1961 Vienna Convention on Diplomatic Relations. Rules of customary international law shall govern questions not expressly regulated by the provisions of the Vienna Convention on Diplomatic Relations or the applicable provisions of the Compact of Free Association.

(3) The two governments will facilitate, consistent with Article 21 of the Vienna Convention on Diplomatic Relations, the establishment and occupancy of mutually satisfactory Embassy premises and accommodations for Embassy personnel by the sending state in the national capital area of the receiving state. The two governments will consult further regarding the terms and conditions of any acquisition or construction of real property, taking account of applicable domestic legislation where appropriate.

(4) In accordance with Article 27(l) of the Vienna Convention on Diplomatic Relations, both governments consent to the installation and use of wireless transmitters by the respective diplomatic missions for the purposes of official communication, subject to compliance with the laws and regulations of the receiving state. Such laws and regulations shall, however, be applied so as to give full effect to the consent hereby recorded.

(5) The Government of the (Federated States of Micronesia/Republic of the Marshall Islands) may establish offices in Hawaii, Guam, or, on the basis of mutual agreement with the Government of the United States, elsewhere in the United States, its territories and possessions, for the purpose of providing citizen services and performing governmental liaison functions. Any such offices and the personnel assigned thereto shall be accorded treatment by the United States consistent with the [1963] Vienna Convention on Consular Relations. Rules of customary international law shall govern questions not expressly covered by the provisions of the Vienna Convention on Consular Relations or the Compact of Free Association. The locations, number of personnel and other

> specific matters related to the establishment and operation of such offices shall be established by separate, mutual agreement. Any such offices in existence upon acceptance of these proposed procedures by the Government of the (Federated States of Miicronesia/ Republic of the Marshall Islands) shall continue to operate in accordance herewith.
>
> (6) The two governments do mutually agree, on a beneficial and practical basis, to implement the agreement between our two governments to amend the Governmental Representation Provisions of the Compact of Free Association pursuant to section 432 of the Compact and the terms set forth above in accordance with the provisions of the international agreements between them, including the Compact of Free Association.

Sections 151 and 152 of the Compacts of Free Association (Compact of Free Association, Oct. 1, 1982, United States-Federated States of Micronesia, and June 25, 1983, United States-Republic of the Marshall Islands, approved by Pub. L. No. 99-239, 99 Stat. 1770 (entered into force Nov. 3, 1986, and Oct. 21, 1986, respectively)) had originally provided for the conduct of diplomatic relations between the United States and the Federated States of Micronesia and the Republic of the Marshall Islands in terms that departed from those set forth in the 1961 Vienna Convention on Diplomatic Relations. The provisions had reportedly had an unintended negative effect on the willingness of other governments to recognize and to enter into full diplomatic relations with the Republic of the Marshall Islands and the Federated States of Micronesia. In March 1988 the governmental-representation provisions of the Compact of Free Association were therefore amended through agreement. Agreement to Amend the Governmental Representation Provisions of the Compact of Free Association Pursuant to Section 432 of the Compact, Mar. 9, 1988. United States-Federated States of Micronesia; identical agreement, United States-Republic of the Marshall Islands, Mar. 18, 1988. Congress approved the amendments on July 26, 1989. Pub. L. No. 101-62, 103 Stat. 162.

The identical agreements amended section 151 (under Article V, Representation) of the Compact of Free Association to read:

> Section 151. Relations between the Government of the United States and the Governments of the Federated States of Micronesia and the Republic of the Marshall Islands shall be conducted in accordance with the Vienna Convention on Diplomatic Relations. In addition to diplomatic missions and representation, the Governments may establish and maintain other offices and designate other representatives on terms and in locations as may be mutually agreed.

*See also* 84 Am. J. Int'l L. 238 (1990).

## B. STATUS OF BALTIC STATES

On March 11, 1990, the Supreme Council of the Republic of Lithuania issued a decree declaring that:

> [T]he sovereign rights of the Lithuanian state (usurped) by foreign power in 1940, are fully restored.
>
> The Declaration of Independence of the Lithuanian Council of February 16, 1918 and Resolution of the Founding Congress on the Restoration of the Lithuanian State, passed on May 15, 1920, have never been annulled. They remain fully binding and form the constitutional foundation of the Lithuanian state.
>
> The territory of Lithuania is whole and inviolable, within whose borders no other constitution (can function).
>
> The Lithuanian State guarantees all human rights for its citizens and national groups, and recognizes the principle of inviolability of borders, as it is formulated in the Helsinki Conference Final Act.
>
> The Supreme Council of the Republic of Lithuania, as the sole expressor of sovereign rights, will continue to seek the realization of full state sovereignty.

Decree of the Supreme Council of the Republic of Lithuania Concerning the Restoration of the Lithuanian State, March 11, 1990, available at *www.state.gov/s/l*.

Following the issuance of this decree, the White House press secretary made the following statement:

> The United States has never recognized the forcible incorporation of the independent states of Estonia, Latvia, or Lithuania into the USSR. We have consistently supported the Baltic peoples' inalienable right to peaceful self determination.
>
> The new Parliament has declared its intention to restore Lithuanian independence. The United States would urge the Soviet government to respect the will of the citizens of Lithuania as expressed through their freely elected representatives and expects the government of Lithuania to consider the rights of its minority population.
>
> The United States believes it is in the mutual interest of Lithuania, the Soviet Union, and all CSCE countries to resolve this issue peacefully.
>
> We call upon the Soviet government to address its concerns and interests through immediate constructive negotiations with the government of Lithuania.
>
> We hope that all parties will continue to avoid any initiation or encouragement of violence.

White House, Office of the Press Secretary, March 11, 1990, available at *www.state.gov/s/l*.

On May 1, 1990, Secretary of State James A. Baker III testified before the Subcommittee on Foreign Operations of the Senate Appropriations Committee, reviewing the Bush Administration's foreign policy priorities and the Administration's Fiscal Year 1991 budget request for foreign assistance. In his testimony, Secretary Baker discussed the situation in Lithuania:

> First, as the President and I have repeatedly made clear, both publicly and privately, the people of Lithuania must not be denied their rights. We support the aspirations of the Lithuanian people for freedom and self-determination, and we have never recognized the forcible incorporation of Lithuania, Latvia, and Estonia. The Supreme Soviet itself has called the 1939 Molotov-Ribbentrop Pact and its secret protocols illegitimate, effectively making the incorporation illegal.
>
> Our position is clear, and President Gorbachev and the rest of the Soviet leadership know how strongly we

> feel that the aspirations of the Lithuanian people should be fulfilled.
>
> Second, we remain deeply concerned about the escalation of tensions between the two sides. As the President stressed last week, we encourage the Soviets and the Lithuanians to go forward right now with dialogue. Over the last week, both sides have discussed in the press various possibilities for compromise. It is our hope that now the two sides can start talking to each other. This, in our view, holds the greatest potential for the freedom that we seek for the Lithuanians. As the President has also made clear, we are involved in quiet diplomacy in an effort to promote such a dialogue—the only real answer to an effective resolution of this conflict.
>
> Third, with both sides beginning to talk of compromise, we do not wish to see their efforts toward dialogue complicated in any way. Meanwhile, the President has said that if there were to be any US action, it would be in the economic area.
>
> Finally, we continue to believe that perestroika, glasnost, and democratization hold the greatest hope for long-term sustainable improvement in U.S.-Soviet relations. But perestroika, glasnost, and especially democratization cannot be divisible. The reform process will not go forward and succeed if it is applied in some republics and denied in others. And it won't succeed if dialogue becomes impossible.

*Foreign Operations, Export Financing, and Related Programs Appropriations, FY91, Part 1*. Before the Senate Committee on Appropriations, 101st Cong. 309–453 (1990) (statement of James A. Baker III, Secretary, Department of State).

Secretary Baker also discussed the Baltic States in his remarks at the Conference on Security and Cooperation in Europe ("CSCE") ministerial meeting in New York on October 1, 1990. In particular, Secretary Baker reaffirmed:

> President Ford's statement at the signing of the [1975 Helsinki] Final Act did not change the position of the United States on the status of the Baltic states. At the Washington

> summit, President Bush stressed again our view that a systematic dialogue must be pursued so that the aspirations of the Baltic peoples can be achieved.

Department of State, Bureau of Public Affairs, Current Policy No. 1274, p.2.

The Senate, in its consideration of the Treaty on the Final Settlement with Respect to Germany, raised questions about the relationship between German unification and the status of Estonia, Latvia, and Lithuania. On October 5, 1990, Secretary Baker sent a letter to Senator Claiborne Pell, Chairman of the Senate Foreign Relations Committee addressing these concerns. The letter stated, in pertinent part:

> I would like to reaffirm personally what I said in Moscow when I signed this treaty and what Counselor Zoellick said in his testimony before the Committee on September 28:
>
> The position of the United States, of course, is different [from the Soviet position], and that is no secret between us. The United States does not recognize the incorporation of the Baltic states into the Soviet Union, and in fact, we still fly the Baltic flags in the auditorium of our State Department. With respect to the question insofar as it pertains to this treaty, this treaty of course deals only with Germany and does not pretend to deal with anything else.
>
> In this connection, I also want to call your attention to the following statement by President Bush in his German-American Day Proclamation, made on October 3, the day of German unity:
>
> > The achievement of German unity will also give hope to others, particularly the Baltic peoples, that a peaceful but determined struggle for national self-determination can succeed even over seemingly insurmountable obstacles. The United States remains true to its policy of nonrecognition of the annexation of the Baltic states, just as we never wavered in our support for German unity even through the darkest hours of the Cold War.

The letter is available at *www.state.gov/s/l*. The Treaty is also discussed in Chapter 4, *supra*.

On December 10, 1990, President Bush met with Lithuanian President Vytautas Landsbergis in Washington, during a private visit to the United States by President Landsbergis. Following the visit, the White House press secretary made the following statement:

> The President noted the value of personal contacts with the Baltic leaders who have shown discipline and foresight in their commitment to a non-violent solution to their problems with the Soviet government.
>
> The President reaffirmed United States policy pertaining to the Baltic States. He told President Landsbergis the U.S. supports the right of Lithuania and other Baltic States to self-determination. The President added that the U.S. has never recognized the forcible incorporation of the Baltic States into the U.S.S.R. and assured President Landsbergis that this policy would not change. The President indicated that he and other Senior Administration officials had made this point directly on more than one occasion to senior Soviet officials.
>
> The President stressed that the U.S. wanted a peaceful solution to the problem between the Baltic States and the U.S.S.R. and hoped the Soviet government would work constructively with Baltic leaders, without resorting to threats, intimidation or the use of force.

White House, Office of the Press Secretary, December 10, 1990, available at *www.state.gov/s/l*.

# CHAPTER 10

# Immunities and Related Issues

## A. SOVEREIGN IMMUNITY

### 1. Appearance of the USSR in a U.S. Sovereign Immunity Case: The Wallenberg Case

In 1984, relatives of Raoul Wallenberg sued the Soviet Union in the U.S. District Court for the District of Columbia, alleging that its treatment of Wallenberg violated international law, international agreements, and U.S. law. The district court described the background of the case as follows:

> During the course of World War II, the United States Government, in an effort to save from extermination by the German Nazis the thousands of Jews then domiciled in Hungary, sought the assistance of Sweden, a neutral nation. This was an effort that the United States could not undertake alone. Because the United States was at war with Hungary, its diplomatic presence was withdrawn. Raoul Wallenberg agreed to join the Swedish Legation in Budapest, and to otherwise cooperate with the efforts of Sweden and "to act at the behest of the United States." Joint Resolution of Congress declaring Raoul Wallenberg to be an honorary citizen of the United States, Pub. L. No. 97-54, 95 Stat. 971 (1981) ("Joint Resolution").
>
> Granted full diplomatic status by Sweden, and funded by the United States, Wallenberg arrived in Budapest, Hungary, in July 1944. . . . In the next six months, until his arrest by Soviet officials, Wallenberg saved the lives

> of nearly one hundred thousand Jewish persons providing them with funds and other means of support provided by the United States. . . .
>
> Hungary was later overrun by the Soviets and in early 1945, Wallenberg was arrested by their occupation forces in Budapest.
>
> From that time forward, his precise whereabouts and his status within the Soviet Union have not been ascertained. . . .
>
> * * * *
>
> There is insufficient evidence before the Court to support a definitive finding as to whether at this time, Wallenberg is dead or alive. While the USSR has continuously represented that Wallenberg died in 1947, those representations are inconsistent with and at odds with credible and uncontroverted evidence presented by the plaintiffs in this proceeding and they are rejected. On the basis of the record here presented, the Court finds that the Soviet Union has always had knowledge and information about Wallenberg; that it has failed to disclose and has concealed that information; and that otherwise, defendant's representations are suspect and should be given little, if any, credit. If alive, Wallenberg would be 72 years of age and he would have been held in custody for nearly 40 years.

*Von Dardel v. Union of Socialist Soviet Republics*, 623 F. Supp. 246, 248–250 (D.D.C. 1985).

The Soviet Union refused to appear in the case, asserting absolute sovereign immunity from suit in non-Soviet courts.

On October 15, 1985, a default judgment against the Soviet Union was entered. *Id*. As amended in November 1986, the default judgment ordered the Soviet Union to produce Wallenberg or his remains and any documents relating to the matter, and awarded compensatory damages of $39 million to his relatives. When the Soviet Union did not comply with this judgment, the plaintiffs asked the court to impose daily fines for contempt. At this point the court sought the views of the U.S. Government. The U.S. Government filed a statement of interest (December 1986) and a supplemental statement of interest (February 1987), arguing that contempt would be inappropriate because it was incon-

sistent with the purposes of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1610, and because there were serious questions as to the validity of the underlying judgment. The court did not rule on the motion for contempt, and the U.S. continued its efforts to convince the Soviet Union to appear in the case to assert sovereign immunity.

On June 8, 1989, the Soviet Union appeared and filed a motion for relief from the default judgment and to dismiss the case. On June 29, 1989, the U.S. Government filed a third statement of interest, available at *www.state.gov/s/l*. This Statement set forth the interests of the United States in the case as follows:

> The Soviet Union has long held and asserted the principle that it and its agencies and instrumentalities are entitled under international law to absolute immunity from jurisdiction of foreign courts and cannot properly be compelled to appear in foreign courts. For several years, representatives from the Departments of State and Justice have met with high-ranking Soviet officials to explain the United States legal system and our law on foreign sovereign immunity and to urge the Soviet Union to obtain United States counsel to assist it in participating in and resolving cases brought against the Soviet Union and its instrumentalities in United States courts. The United States Government has undertaken these efforts with the Soviet Government and other foreign governments because we believe that their participation in our judicial system serves the interests of justice and of all concerned parties, including U.S. plaintiffs. These representatives advised the Soviet officials that it could appear in United States courts to assert its immunity without either conceding its principled adherence to the theory of absolute sovereign immunity or waiving its claim to immunity. In addition, these representatives explained that it was desirable for the courts to have all factual and legal arguments before them prior to entering judgments and that, in appropriate cases, the United States Government would file Statements of Interest to set forth the United States' views on the correct interpretation and application of the Foreign Sovereign Immunities Act.

As a result of these discussions, the Soviet Union has appeared in several cases which involved its commercial activities or those of its instrumentalities. The Soviet Union, however, had chosen not to appear in this case because it believed that its immunity relieved it of any obligation to appear in cases which implicated its sovereign and political rather than commercial functions. The Soviet Government's decision to appear in this case is very important because it is the first time that the Soviet Union has appeared in a proceeding that relates solely to allegations concerning its governmental acts. This appearance, we believe, indicates the Soviet Union's intent to regularize its activities in the United States further and to participate in cases against it in United States courts. Given the extensive U.S. diplomatic efforts to this end, the Soviet Government's decision to appear in this case and to present its jurisdictional defenses to the court is thus very much in the interest of U.S. foreign policy.

Furthermore, the United States maintains a strong interest in the correct interpretation and implementation of the FSIA. Misinterpretations of the FSIA may encourage plaintiffs to file frivolous cases against foreign sovereigns and to discourage foreign states from appearing in cases brought against them properly under the FSIA. In addition, departure from a strict adherence to the jurisdictional requirements of the FSIA may adversely affect United States relations with foreign sovereign defendants and may lead to retaliatory applications of foreign law against the United States in foreign courts.

In stating its views, the United States wishes to make clear that its views on this court's jurisdiction to entertain this suit have no impact on the United States position concerning the Soviet Government's treatment of Mr. Wallenberg. The United States abhors the Soviet Union's unjust imprisonment of Mr. Wallenberg and continues, through government channels, to seek a full and satisfactory accounting for his fate. The proper forum for such matters, however, is the diplomatic arena and not the courts of the United States.

Statement of Interest of the United States at 3–5., filed in *Von Dardel v. Union of Soviet Socialist Republics*, Civil Action No. 984-0353(BDP)(D.D.C. 1989).

The statement then argued that the default judgment should be set aside, based on *Practical Concepts, Inc. v. Republic of Bolivia*, 613 F. Supp. 863 (D.D.C. 1985), *vacated on other grounds*, 811 F.2d 1543 (D.C. Cir. 1987), and the case dismissed on the basis of sovereign immunity.

In entering the default judgment against the Soviet Union in 1985, the court had held that it had subject matter and personal jurisdiction over the Soviet Union under the FSIA on the following grounds: (1) sovereign immunity is an affirmative defense that must be pleaded and proved by the sovereign defendant, and by failing to appear the Soviet Union had waived this defense; (2) the FSIA incorporates recognized standards of international law and therefore does not extend immunity to clear violations of such principles; (3) immunity under the FSIA is "subject to" international agreements to which the United States is a party, and these international agreements preempt provisions of the FSIA insofar as the FSIA provisions would extend immunity to violations of such agreements; and (4) in ratifying certain international agreements, the Soviet Union implicitly waived the defense of sovereign immunity with regard to claims based upon violations of such agreements. 623 F. Supp. at 252–256. It also concluded that the Alien Tort Claims Act, 28 U.S.C. § 1350, provided an independent basis for subject matter jurisdiction. *Id.* at 256–59. Following the Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989), the plaintiffs conceded that the Alien Tort Claims Act and recognized standards of international law could not serve as bases of jurisdiction.

The U.S. statement of interest addressed the reasons why the remaining alleged bases of jurisdiction must also fail in this case. First, the U.S. Government's statement argued that a foreign sovereign does not waive immunity by failing to appear, as follows:

> In *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987), the Court [of Appeals for the District of Columbia Circuit] rejected plaintiff's argument that Bolivia, which had acknowledged service but previously

failed to appear and had defaulted in a breach of contract action, was not entitled to challenge the district court's jurisdiction in a Rule 60(b)(4) motion filed after judgment execution proceedings commenced. *Id.* at 1547–48.

The Court held that a defendant which believes the court lacks jurisdiction may either appear and raise the jurisdictional objection, or choose not to appear, thus risking a default judgment. *Id.* at 1547. Should the defendant choose the latter course, the default judgment will be set aside if it prevails on the jurisdictional objections. If, however, it does not prevail, the defendant ordinarily loses the right to defend on the merits. *Id.*

This Court's determination that the Soviet Union's failure to raise immunity as an affirmative defense deprives it of immunity overlooks the fact that foreign sovereigns are entitled to this choice. To require the foreign sovereign to plead sovereign immunity affirmatively at the outset of the litigation deprives it, as a practical matter, of the choice to not appear until later in the case. The *Practical Concepts* court's recognition that foreign sovereigns may choose not to appear initially and later advance their jurisdictional objections necessarily means that foreign sovereigns do not waive immunity and, therefore, subject matter jurisdiction by choosing not to appear until a default judgment is entered against them. [Footnote omitted.]

Plaintiffs nevertheless continue to argue that the foreign sovereign waives immunity and therefore consents to subject matter jurisdiction, *see* 28 U.S.C. section 1330(a), if it fails to appear and assert its immunity. Plaintiffs' Supplemental Statement at 5. This position clashes with the observation made by the Supreme Court in *Verlinden*, 461 U.S. at 493–94 n.20:

The House Report on the Act states that "sovereign immunity is an affirmative defense which must be specially pleaded." H.R. Rep. No. 94-1487, p. 17 (1976). Under the Act [FSIA], however, subject matter jurisdiction turns on the existence of an exception to foreign sovereign immunity, 28 U.S.C. 1330(a). Accordingly, even if the foreign state does not enter an appearance to assert

> an immunity defense, a district court still must determine that immunity is unavailable under the Act.
>
> *See also Frolova* [v. USSR] 761 F.2d [370] at 373, 378; *MOL. Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984). *See also Meadows v. Dominican Republic*, 628 F. Supp. 509, 603 (N.D. Cal. 1986), *aff'd*, 817 F.2d 517 (9th Cir.), *cert. denied*, 108 S.Ct. 486 (1987) (defendants do not waive jurisdictional defenses by failing to appear). If the failure to appear automatically waives sovereign immunity and thus confers jurisdiction on the court, a district court need not "determine" whether the FSIA entitles the foreign sovereign to immunity. The requirement that it do so logically precludes the conclusion that immunity is automatically waived by non-appearance.

Statement of Interest of the United States, *supra* at 12–15.

Plaintiffs had alleged that the Soviet Union's treatment of Wallenberg violated the Vienna Convention on Diplomatic Relations (April 14, 1964, 23 U.S.T. 3227, 500 U.N.T.S. 95) ("Vienna Convention") and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (December 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167)("1973 Convention"). Section 1604 of the FSIA provides that a foreign state is immune from U.S. jurisdiction with specific exceptions, "subject to existing international agreements to which the United States is a party at the time of enactment" of the FSIA. Accordingly, the plaintiffs argued that the "subject to" language confers jurisdiction on United States courts where foreign states have violated such agreements.

The U.S. Government's statement first argued that alleged violations of international agreements do not establish jurisdiction under section 1604 unless the agreements expressly conflict with FSIA:

> In *Amerada Hess* . . . the Supreme Court rejected the notion that the alleged violation of an international agreement in and of itself eliminates the immunity conferred in section 1604. Rather, the Court stated that a foreign sovereign loses immunity under section 1604 only where the

"international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA." *Amerada Hess*, 109 S.Ct. at 692. *Amerada Hess* found support for that view in the House Report to the FSIA which states:

> In the event an international agreement *expressly conflicts* with [the FSIA], the international agreement would control. . . . To the extent such international agreements are silent on a question of immunity, the [FSIA] would control; the international agreement would control only where a *conflict was manifest*.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17–18, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6616 (emphasis added).

Since plaintiffs concede that the Vienna Convention contains no provisions which expressly conflict with the FSIA, . . . the remaining issue is whether the 1973 Convention contains any such provisions. It clearly does not; there are no provisions which declare that signatory states waive immunity from suits claiming breaches of the Convention by private individuals in the courts of the United States. The Convention requires states to exercise jurisdiction over certain criminal offenses committed by private individuals, but does not deal with the sovereign immunity of states. Because the Convention is silent on the issue of sovereign immunity, there can be no "manifest" or "express" conflict with FSIA provisions on immunity. *See Colonial Bank v. Compagnie Generale Maritime et Financiere*, 645 F.Supp. 1457, 1460 n.5 (S.D.N.Y. 1986).

In support of its conclusion that the international agreements reviewed in *Amerada Hess* did not expressly conflict with the FSIA's immunity provision, the Supreme Court noted that these agreements did not create private rights of action for foreign corporations to recover for the alleged breach of such agreements against foreign sovereigns in U.S. courts. *Amerada Hess*, 109 S.Ct. at 692. Similarly, the 1973 Convention does not create private rights of action for individuals to sue foreign sovereigns in United States courts for alleged violations of the

> Convention. This bolsters the conclusion that the Soviet Union did not waive its immunity from suit pursuant to section 1604 by signing the Convention.

*Id*. at 15–17. The statement then provided an extensive analysis of the failure of the 1973 Convention or its implementing legislation to provide a private right of action for individuals. *Id*. at 17–23.

The plaintiffs had also argued that the Soviet Union implicitly waived its sovereign immunity by becoming a party to international agreements containing obligations to respect human rights and diplomatic immunities. Section 1605 of the FSIA provides that foreign sovereigns are not immune in cases where they have explicitly or by implication waived immunity. The U.S. statement of interest argued against the court exercising jurisdiction on this ground, as follows:

> The Supreme Court in *Amerada Hess* . . . has rejected the proposition that the act of acceding to an international agreement in itself effects an implicit waiver of sovereign immunity in cases alleging a breach of such agreements. The Court observed:
>
> > Nor do we see how a foreign state can waive its immunity under section 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States.
>
> *Amerada Hess*, 109 S.Ct. at 692.
>
> *Amerada Hess* reaffirms a growing body of case law which has narrowly construed implicit waivers of sovereign immunity under 28 U.S.C. 1605(a)(1). *See Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1077 (1988); *Frolova*, 761 F.2d [370] at 377 [7th Cir. 1985]; *Colonial Bank*, 645 F.Supp. (1457) at 1461 [S.D.N.Y. 1986]. Such waivers are ordinarily found only where: "(1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that a contract is governed by the

law of a particular country; and (3) a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity." *Joseph*, 830 F.2d at 1022 (quoting *Frolova*, 761 F.2d at 377).[13] This case appears to be the only one in which a Court has implied a waiver of sovereign immunity in a factual setting not listed by Congress in the legislative history as warranting an implied waiver.

Furthermore, these three prerequisites to a waiver of sovereign immunity have themselves been narrowly interpreted to avoid a substantial increase in federal court jurisdiction over these kinds of cases which raise difficult foreign policy questions. See Maritime Ventures Int'l v. Caribbean Trading & Fidelity, 689 F. Supp. 1340, 1351 (S.D.N.Y. 1988). Although the first ground suggests that there is an implied waiver of immunity from suit in United States courts when an agreement refers to arbitration in any country, courts have nevertheless not implied waivers when the agreement specifies that arbitration is to occur in a foreign country. Ohntrup v. Firearms Center Inc., 516 F. Supp. 1281, 1284–85 (E.D. Pa. 1981), aff'd mem., 760 F.2d 259, 263 (3rd Cir. 1985); Verlinden B.V. v. Central Bank of Nigeria, 488 F.Supp. 1284, 1300–02 (S.D.N.Y. 1980), aff'd, 647 F.2d 320 (2d Cir. 1981), rev'd on other grounds, 461 U.S. 480 (1983). See also Maritime Int'l Nominees Establishment, 693 F.2d at 1102–04 (immunity is not waived when agreement did not contemplate role for United States courts, although arbitration would probably take place in U.S.). Similarly, although the second ground suggests that a foreign sovereign's agreement that a contract would be governed by the laws of any country implicitly waives immunity, courts have rejected claims of implied immunity when the contract simply provides for resort to the laws of foreign countries. See Zernicek v. Brown & Root. Inc., 826 F.2d 415, 419–20 (5th Cir. 1987), cert. denied, 108 S.Ct. 775 (1988); Falcoal, Inc, v. Turkiye Komur Isletmeleri Kurumu, 660 F.Supp. 1536, 1539 (S.D. Tx. 1987).[14] But see Ipitrade Int'l v. Federal Republic of Nigeria, 465 F.Supp. 824, 826 (D.D.C. 1978) (contract's

choice of Swiss laws and European forum to resolve disputes waived sovereign immunity in U.S. courts).

Since plaintiffs do not and cannot argue that the 1973 Convention contains an express waiver of immunities of signatory states from suits in the United States which allege breaches of the Convention, the question here is whether the 1973 Convention contains an implied waiver of sovereign immunity. [Footnote omitted.] Quite clearly, this case falls outside those three circumstances listed above which were recognized by Congress as sufficient to effect an implied waiver of immunity. Plaintiffs therefore have attempted to squeeze within the narrow view of implied waiver suggested by Amerada Hess by arguing that the 1973 Convention "mentions . . . the availability of a cause of action in the United States."

Unlike contracts or agreements which contain choice of law provisions governing the resolution of disagreements arising from the agreement, see, e.g., Marlowe v Argentina Naval Commission, 604 F.Supp. 703, 708–09 (D.D.C. 1985), the 1973 Convention contains no provision suggesting that a cause of action is available to private citizens in the United States who allege a violation of the Convention. . . .

* * * *

[13] These three circumstances in which courts have implied waivers of sovereign immunity are those listed in the legislative history to the FSIA. H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6617; S. Rep. No. 1310, 94th Cong., 2d Sess. 18.

[14] It is worth noting that the legislative history's specific mention that implied waivers may be found under grounds (1) and (2) underscores the well-established point that the FSIA's primary purpose was to permit suits against foreign sovereigns in their commercial, rather than sovereign, capacities. *Transamerica Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1001 (D.C. Cir. 1983).

*Id.* at. 24–27.

On July 31, 1989, the U.S. filed a reply to the plaintiffs' response to the statement of interest. The reply addressed two new

issues raised by the plaintiffs: first, that the United States had failed to demonstrate by affidavit or other evidence how the case implicated its foreign policy interests; and second, that the court had jurisdiction over the case pursuant to the non-commercial tort exception of the FSIA, 28 U.S.C. § 1605(a)(5). The Reply pointed out that the non-commercial tort exception was inapplicable because the tortious activity and injuries alleged in the plaintiffs' complaint occurred outside the United States, and therefore did not fall within the exception. Reply of the United States of America to Plaintiffs' Response to the Statement of Interest of the United States. The reply and attached declarations are available at *www.state.gov/s/l*.

With regard to the foreign policy interests of the U.S., the reply noted that "neither the text, purpose, nor legislative history of the FSIA suggest any requirement that the United States must present an affidavit or evidence detailing its foreign policy interests in those cases brought against foreign sovereigns in which it participates pursuant to 28 U.S.C. section 517," and that "Congress enacted the FSIA in part to free the State Department from these pressures and to transfer immunity determinations from the State Department to the courts, which would apply impartial legal principles." *Id*. at 3–4. Nonetheless, in order to make absolutely clear the interests of the United States in the action, and to explain the lengthy and successful negotiations conducted by the United States Government, the reply included two declarations by State Department officials.

The declaration of Department of State Legal Adviser Abraham D. Sofaer described the culmination of the negotiations as follows, in pertinent part:

> 9. On November 18, 1988, I headed a delegation of State and Justice Department officials that met in Washington, D.C. with a high-level Soviet delegation to continue the discussions. At this meeting, the Head of the International Law Department at the Soviet Ministry of Foreign Affairs, Yuri Rybakov, and I signed a Memorandum of Understanding to record discussions and understandings on the subject of promoting mutual understanding in the legal sphere, including sovereign immunity. The

Memorandum reviewed the three rounds of consultations. It noted that the United States and Soviet delegations followed different theories of sovereign immunity and, in particular, that the Soviet Union adhered to the absolute immunity of foreign states from suit. The Memorandum also acknowledged that suits in the courts of one state against a foreign state may create difficulties and tensions, and agreed that better understanding of applicable procedures may serve to minimize potential problems stemming from suits against a foreign state. The two delegations agreed that appearances in court to assert sovereign immunity are not regarded as waivers of immunity and noted that the states would provide appropriate positions, consistent with their usual practice, to their courts on the application of their laws on sovereign immunity. The Memorandum closed by confirming the Parties' intention to continue periodic bilateral consultations on foreign sovereign immunity and legal proceedings in one state against another state. Once again, at this time, I expressed my view that it would be consistent with the measures set forth in this Memorandum of Understanding for the Soviet Union to appear through private counsel in this case, in order to assert the defense of foreign sovereign immunity.

* * * *

11. The Soviet Union has now engaged counsel and has appeared to assert appropriate defenses to set aside the default judgment in this case. This action represents the completion of the U.S. diplomatic objective of convincing the Soviet Union to litigate its immunity claims in U.S. courts in all cases. In accordance with our belief that this major shift in Soviet behavior and policy warrants the vacating of default judgments entered prior to our effort's commencement, the United States has filed a Statement of Interest providing its views on the jurisdictional issues presented by this case. The Plaintiffs' Statement in Opposition to the Soviet Union's Motion states that the U.S. Statement of Interest "neglects to mention any specific, concrete foreign policy concerns involving this particular

> case." To the contrary, this particular case involves very substantial and specific foreign policy concerns. To my knowledge, the Soviet appearance in this case is the second time that the Soviet Union has appeared in a United States court in a proceeding brought solely against the Soviet Government, and not against one of its agencies or instrumentalities. More importantly, to my knowledge, this is the first time that the Soviet Union has appeared in a proceeding that relates solely to alleged governmental acts, unrelated in any way to a commercial undertaking or commercial considerations. The Soviet Union's appearance in this case indicates its intent to regularize its activities in the United States, and to participate in cases against it in United States courts. Such steps could lead to general principles that would greatly increase the likelihood that the Soviet Union, as well as persons who sue it, obtain decisions on the merits that are likely to resolve difficult disputes.
>
> 12. As the accompanying Kamman Declaration indicates, this case has become a significant issue in bilateral United States-Soviet relations. The United States Government has expended considerable effort to urge the Soviet Government to appear in this case and raise its defenses including the contention that it is absolutely immune, before the court instead of through diplomatic channels. In light of the Soviet view of international law and Soviet domestic law, the Soviet Union's decisions to appear in these cases is a very important development in the process of adapting to United States procedures, including the FSIA. Against this background, I believe that United States interests would be served, as well as the interests of justice, if counsel for the Soviet Government were permitted to make its arguments to the court.

Declaration of Abraham D. Sofaer, *id.* at 1–13.

The declaration of Deputy Assistant Secretary of State for European and Canadian Affairs Curtis W. Kamman elaborated on the foreign policy implications of the Wallenberg case. In particular, the declaration stated Mr. Kamman's view that "the Soviets' willingness to appear and to participate in these pro-

ceedings is an important step to remove an irritant in our bilateral relations." A copy of the November 18, 1988 Memorandum of Understanding discussed in the Sofaer Declaration is attached to the Kamman Declaration.

On March 9, 1990, the district court set aside the default judgment against the Soviet Union and dismissed the case on the ground that action was barred by sovereign immunity. *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1 (D.D.C. 1990). Further background on the case and discussion of the inapplicability of the noncommercial torts exception to the FSIA are provided in *Cumulative Digest 1981–88* at 1610–1617.

### 2. Applicability to Foreign Naval Vessel Engaged in Commercial Activity

On June 25, 1989, the *Presidente Rivera* ran aground in U.S. internal waters off Marcus Hook in the Delaware River, spilling oil. The *Presidente Rivera* was an auxiliary ship of the Uruguayan Navy, one of its two oil tankers operating under charter to the Uruguayan state-owned oil company (ANCAP). At the time of the incident, the ship was preparing to offload some Brazilian fuel oil, with the balance to be delivered to ANCAP.

A memorandum of July 13, 1989 by David Small, Assistant Legal Adviser for Oceans, Environment and International Scientific Affairs, reviewed the status of the ship. The memorandum first discussed the basic principles of sovereign immunity of government vessels and relevant U.S. law:

> Both the United States and Uruguay accept the restrictive theory of sovereign immunity for government vessels, i.e., the immunity of a government vessel, under international law, from the enforcement jurisdiction of the coastal state depends on the nature of the activities engaged in by the vessel at the time of the incident. Only warships and other government ships operated for non-commercial purposes and not engaged in commercial activity are entitled to sovereign immunity. Under international law government ships operated for commercial purposes are treated in the same fashion as merchant ships.

The rule appears in the International Convention for the Unification of Certain Rules regarding the Immunity of State Owned Vessels, Brussels, 1926, 26 Am. J. Int'l L. Supp. 566 (1932), entered into force in 1937, to which Uruguay but not the United States is a party, and in articles 34 and 35 of the Treaty on the Law of International Commercial Navigation, Montevideo, March 19, 1940, 37 Am. J. Int'l L. Supp. 109, 114 (1943), not in force, which Uruguay has ratified but which the United States has not signed. Both Conventions provide that, except for men-of-war, supply vessels, and other vessels "which are the property of the State, or operated by it, and which are employed, at the time when the claim arises, in some public service outside the field of commerce," vessels which are the property of the contracting States or operated by them are subject to the laws and rules of responsibility applicable to private vessels.

The rule later appeared in treaties of more general acceptance, the 1958 Geneva Conventions of the Territorial Sea and the Contiguous Zone (article 21) and on the High Seas (article 9), after the Socialist States failed to achieve sovereign immunity for merchant vessels engaged in commercial service which had been nationalized and were now owned or operated by the State for those purposes. While the United States is a party to both of these 1958 Geneva Conventions, Uruguay is not a party to either one. Nevertheless, Uruguay made no comments on the International Law Commission's reports which included these provisions in its draft law of the sea convention. Further, the 1958 High Seas Convention is expressly a codification of customary international law.

This rule is also reflected in the 1982 UN Convention on the Law of the Sea, articles 32 and 236 (regarding sovereign immunity) and subsection B of Section 3 of Part II (regarding merchant ships). While the United States has not signed the 1982 Law of the Sea Convention, the United States considers the non-seabed provisions to be declarative of customary international law. We are unaware of any objections by Uruguay during the negotiations to

> the restrictive immunity provisions. Uruguay has signed but not ratified the LOS Convention.
>
> Although a government-owned vessel may not be entitled to sovereign immunity under international law, U.S. law imposes other limits on civil suits involving foreign government-owned vessels. In particular, under the FSIA, 28 U.S. Code sec. 1605(b) and (c), a foreign state-owned vessel may not be arrested as a means of enforcing a maritime lien against the vessel or its cargo. Rather, these subsections of the FSIA permit an in personam proceeding against the government-owner but otherwise use in rem rules and procedures.

Memorandum, "Immunity of Uruguayan Oil Tanker *Presidente Rivera*," July 13, 1989, available at *www.state.gov/ s/l*, pp. 1–3. The memorandum concluded that the vessel in this case was not entitled to sovereign immunity but would be afforded certain protections under U.S. law:

> The *Presidente Rivera* is properly characterized, at the time of its grounding, as a government ship operated for commercial purposes and engaged in commercial activity, and not as a warship. The vessel does not meet all the criteria set out in the LOS Convention's definition of a warship, article 29. While the ship belongs to the armed forces of Uruguay, under the command of an officer duly commissioned by that government and whose name appears in the appropriate service list, and is manned by a crew under regular armed forces discipline, it does not bear the external marks distinguishing warships of its nationality. The ship's name and home port appear on the stern, and the ship's name appears on the bow, traditional markings of merchant ships. The ship bears no hull number or other marking characteristic of a warship or other government vessel on non-commercial service. It appears to be operating in civilian colors: red hull, white upperworks. Further the ship is carrying SOLAS (Safety of Life at Sea) and COFR (certificate of financial responsibility) papers required of merchant ships. Further the oil is documented

> in a bill of lading originally destined for Consolidated Edison and New Jersey Power and Light Companies. The vessel is clearly a government tanker, on commercial service, chartered to the Uruguayan state oil company (ANCAP).
>
> Although the *Presidente Rivera* is not entitled to sovereign immunity under international law (because the *Presidente Rivera* was engaged in commercial activity when the accident occurred), the commercial activity exception of the FSIA would permit civil suit against the Government of Uruguay only in accordance with its terms. (Even if the ship had not been engaged in commercial service, the FSIA would permit suits in tort against the Government of Uruguay.)

*Id.* at 3.

### 3. Litigation against the United States in Foreign States

In July 1989 the Office of Diplomatic Law and Litigation, Office of the Legal Adviser, provided guidance to a U.S. Embassy on the policies and practice of the United States Government with regard to litigation against it arising in foreign states. The guidance explained that the U.S. does not assert sovereign immunity in cases where the U.S. would not recognize a foreign state's immunity under the Foreign Sovereign Immunities Act ("FSIA"). This policy "applies even where local law on sovereign immunity would permit us otherwise to claim sovereign immunity. . . . It is the position of the U.S. that [the FSIA] is consistent with international law on sovereign immunity of foreign states." Telegram from the Department of State.

Included in the guidance was the text of a diplomatic note providing an explanation of these U.S. policies to the foreign government and application to actions brought by locally employed local nationals under local labor law seeking wages, benefits, or monetary damages in connection with employment. The text reads, in pertinent part:

> It is the strict policy of the United States that whenever the United States Government, including its agencies and instrumentalities, is made a party to a foreign legal pro-

ceeding and is properly served, the United States will retain legal counsel and enter an appearance in court.

Customary international law requires that before a foreign sovereign may be required to appear before a court of the receiving state, proper notice of suit must be provided by the receiving state through diplomatic channels or under an applicable treaty, and that at least forty-five to sixty days be provided after such service before any court appearance or responsive pleading is required. Moreover, United States Embassies and consulates are missions of the United States Government. These missions are not separate juridical entities subject to suit. Accordingly any suit involving a mission of the United States must be brought against the United States Government, rather than its diplomatic or consular mission.

It is the consistent practice of the United States not to plead sovereign immunity in foreign courts for instances where, under United States law, the United States would not recognize a foreign state's immunity if it were sued in the United States. In the United States, the sovereign immunity of foreign states is set forth in a statute, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq*. A copy of this law is attached. This law provides for certain exceptions to sovereign immunity, including cases in which the action is based on a commercial activity carried on in the United States by a foreign state. The law defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

As the claim [at issue] . . . is a monetary claim for termination benefits under [foreign state] labor law by a [foreign] national employee, the United States Government has determined that this claim is within the commercial claim exception to foreign sovereign immunity under U.S. law. Accordingly, the U.S. Government will appear in court for this case and will not raise sovereign immunity. . . .

> This determination does not waive any sovereign, diplomatic or other immunity or any other defenses to which the United States may be entitled in this case or any other case, including immunity from execution should any judgment be rendered in this case.

### 4. Execution Against Property of Foreign States

On April 14, 1989, the Embassy of Italy sent a diplomatic note to the Department of State asking whether the Foreign Sovereign Immunities Act ("FSIA") provided protection with regard to execution against foreign state property in the United States analogous to the protection provided under Italian law. The Embassy's note included a copy of an Italian law, Decree No. 1621 of August 30, 1925, which stated in pertinent part, that "[p]ersonal or real property, ships, credits, notes, bonds, securities, assets and any other possessions belonging to a foreign State, cannot be subject to seizure or attachment without the authorization of the Minister of Justice. . . . The regulations mentioned above apply only to States that assent to reciprocity, which has to be declared with a decree of the Minister."

On October 16, 1989, the Department of States responded as follows:

> The Department refers the Embassy to the United State Foreign Sovereign Immunities Act of 1976 (the "FSIA"), which governs all suits against foreign states and their agencies and instrumentalities in the United States and which is consistent with the United States view of international law on foreign sovereign immunity. As section 1602 of the FSIA makes clear, claims of foreign states to immunity, including the immunity of foreign state's property from jurisdiction and the immunity of foreign state's property from attachment and execution, are decided by the courts of the United States and the fifty states in conformity with the FSIA.
>
> Under the FSIA, the immunity of a foreign state from jurisdiction is treated differently from the immunity of a foreign state's property from attachment or execution. In

general, the immunity of a foreign state from jurisdiction is not as broad as the immunity of a foreign state's property from attachment and execution, in part because it is expected that states will honor valid judgments entered against them and because of potential difficulties that arise with seizure of foreign state property.

In particular, sections 1609, 1610 and 1611 of the FSIA pertain to attachment and execution of property of a foreign state and its agencies and instrumentalities. The principles laid down in these sections provide substantial protection to the property of a foreign state in the United States.

Section 1609 states the rule that a foreign state's property shall be immune from arrest and execution except as provided in section 1610 of the FSIA, or where an international agreement to which the United States is a party provides otherwise. Section 1610 provides for certain limited exceptions to immunity from attachment or execution. Section 1611 describes the types of property that are completely immune from execution.

Section 1610(a) of the FSIA permits courts in the United States to order execution against the property in the United States of a foreign state under certain limited circumstances. The only foreign state property available for execution is property used for a commercial activity in the United States. Moreover, absent a waiver, this commercial property can only be attached for the five types of judgments listed in the statute at subsections 1610(a)(2) through (a)(6). Importantly, in a claim based upon the commercial activity exception to immunity from jurisdiction, only property of the foreign state that is used for the activity on which the claim is based is subject to execution to satisfy that particular judgment.

The Department of State notes that the FSIA provides additional grounds for the attachment and execution of property of separate agencies or instrumentalities of foreign states engaged in commercial activity in the United States under section 1610(b) of the FSIA. Section 1610(b) provides that any property in the United States of such an

agency or instrumentality shall not be immune from attachment or execution if the agency or instrumentality has waived immunity, or the judgment relates to a claim for which the agency or instrumentality is not immune under certain provisions of the FSIA.

The Department also notes that the FSIA defines agencies and instrumentalities of a foreign state as separate legal persons which are organs or political subdivisions of a foreign state, or which are majority owned by the foreign state. The Department wishes to assure the Government of Italy that well-established law of the United States respects the separate juridical identities of a foreign state and its agencies and instrumentalities. Thus, United States law does not generally permit execution against the property of a foreign state to satisfy a judgment against an agency or instrumentality of that foreign state, or vice-versa.

Even under those very limited circumstances where execution may proceed against foreign state property in the United States, section 1610(c) of the FSIA requires that a court must order such execution. In addition, in the United States, execution against property upon a judgment is taken by a court only after a separate proceeding is brought specifically to consider the matter of execution. The FSIA is consistent with this two step scheme by providing for distinct standards applicable to the question of immunity of foreign state property from attachment and execution in sections 1609, 1610 and 1611.

Moreover, a U.S. court can only order execution after a reasonable time has elapsed following the entry of a judgment. Such procedural protections were specifically included in the law in order to provide a foreign state sufficient time to carry out its own procedures to honor a judgment entered against it. The United States would request that Italy also accord such procedural protections to the United States on the basis of reciprocity and international law.

Finally, section 1610(d) of the FSIA forbids attachment of property of a foreign state prior to the entry of judgment unless the foreign state has explicitly waived its immunity from such pre-judgment attachment.

The Department wishes especially to draw the attention of the Embassy to section 1611 of the FSIA, which provides absolute immunity from execution for certain property, unless the foreign state has made an explicit waiver. First, funds of foreign states that belong to a foreign central bank or monetary authority held for the bank or the authority's own account are not subject to attachment or execution. Such funds are those used or held in conjunction with central banking activities.

Section 1611 also protects property that is or is intended to be used in connection with a military activity, and is of a military character or is under the control of a military authority or defense agency. This military property is not subject to attachment or execution. The United States Congress, in passing this statute, clearly indicated its intent to protect military property that is essential to military operations, such as fuel and office equipment, although not in itself of a military character. This protection was enacted, in part, to ensure that foreign states would not permit execution against military property of the United States under a reciprocal application of the FSIA.

The FSIA is consistent with U.S. obligations under international law to accord appropriate protections, such as immunity from attachment and execution, to diplomatic and consular property, including diplomatic and consular bank accounts used to maintain and carry out the functions of diplomatic and consular missions.

Accordingly, as described above, the United States provides absolute protection from attachment and execution to certain foreign state property. Such protection is analogous to the protection provided in the Italian decree no. 1621. (The Department notes its understanding that this decree was converted into law no. 1263 on July 15, 1926.) In the view of the United States Government, for reciprocity to exist under the Italian law no. 1263 and decree no. 1621, the Government of Italy should determine whether the United States would provide effective immunity from execution for property of the state of Italy in a reciprocal case of comparable nature in the United States. As described earlier in this note, U.S. law provides substantial protection

> to the property of a foreign state in the United States. Thus, the fundamental issue is whether immunity from execution is actually granted in practice. Accordingly, the United States expects that the Government of Italy will provide protection to equivalent United States property in Italy on the basis of reciprocity, as stated in the Italian law.

The U.S. response is available at *www.state.gov/s/l*.

On May 11, 1990, officials of the United States and Italy met in Rome to exchange views on reciprocity between the two countries with regard to pre-judgment attachment of and execution against foreign state property. At the request of the Italian delegation, the U.S. delegation agreed to provide additional documentation with regard to procedural rules authorizing the executive branch to intervene in judicial proceedings against a foreign state; U.S. case law illustrating the ability of courts to take into account foreign policy considerations when deciding execution issues; and U.S. case law showing the limited number of instances when pre-judgment attachment or execution has been permitted against foreign state property. The note transmitting the requested information stated, in pertinent part:

> [A]s we have previously informed the Government of Italy, intervention in judicial proceedings against a foreign state may arise in two ways. In some cases U.S. courts request the Attorney General to file an amicus brief to assist the court in its determination of a particular issue. In other cases, the United States participates in the case as an amicus on its own initiative where foreign relations issues are involved and circumstances warrant such participation.
>
> * * * *
>
> With respect to the second request, we are providing the following U.S. court decisions:
>
> 1. *Jackson v. People's Republic of China*, 794 F.2d 1490 (1986) (including the statement of interest of the United States). We refer you to page 1496, paragraph 2 of the court's decision: "In considering whether it should exercise its equitable discretion and whether

extraordinary circumstances were involved, the court properly gave consideration to the Secretary of State's assessment of the foreign policy implications of the default judgment."

2. *Carl Marks & Co., Inc. v. U.S.S.R.*, 841 F.2d 26 (1988) (including the statement of interest of the United States).
3. *Liberian Eastern Timber v. Government of the Republic of Liberia*, 659 F.Supp. 606 (1987) (including the statement of interest of the United States).
4. *Gregorian v. Izvestia*, 871 F.2d 1515 (1989) (including the statement of interest of the United States).
5. *Von Dardel v. U.S.S.R.*, 736 F.Supp. 1 (1990). (We note for your consideration the court's reliance on the United States' arguments raised in its third statement of interest filed in this case.)

The U.S. delegation [provides the following] citations to U.S. case law that show that pre-judgment attachment or execution against foreign state properties is rarely permitted.

*United States v. Arlington*, 669 F.2d 925 (4th Cir. 1982).

*Libra Bank v. Banco Nacional de Costa Rica*, 676 F.2d 47 (2d Cir. 1982).

*S & S Machinery Co. V. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983).

*O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115 (2d Cir. 1984).

*Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984).

*Hercaire International, Inc. v. Argentina*, 821 F.2d 559 (11th Cir. 1987).

*Atwood Turnkey Drilling. Inc. v. Petroleo Brasileiro*, 875 F.2d 1174 (5th Cir. 1989).

*Ferrostaal Metals Corp, v. S.S. Lash Pacifico*, 652 F.Supp. 420 (S.D.N.Y. 1987).

*Gadsby & Hann v. Socialist Republic of Romania*, 698 F.Supp. 483 (S.D.N.Y. 1988).

*Bowers v. Transportes Navieros Ecuadorianpa*, 719 F.Supp. 166 (S.D.N.Y. 1989).

In summary, the Department wishes to reiterate that U.S. law provides substantial protection to the property of a foreign state in the United States. Accordingly, the United States renews its request that the Government of Italy will provide protection to equivalent United States property in Italy on the basis of reciprocity, as stated in the Italian law.

Text of note contained in Telegram from the Department of State to U.S. Embassy, Rome, September 5, 1990.

### 5. Applicability of FSIA to Individuals Sued in their Official Capacity

On May 9, 1990, the U.S. Court of Appeals for the Ninth Circuit affirmed dismissal of a complaint against an official of the Philippine Government on the basis of the defendant's sovereign immunity. *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), *aff'ng* No. CV 86-2255-RSWL, slip op. (D.C.Cal. Apr. 14, 1988). Plaintiff Chuidian, a Philippine citizen, had sued Raoul Daza, a Philippine citizen and member of the Philippine Presidential Commission on Good Government ("Commission") for instructing the Philippine National Bank to dishonor a letter of credit issued by the Republic of the Philippines to Chuidian. Daza's actions were taken in his capacity as a member of the Commission, established by the government of President Corazon Aquino and charged with recovering "ill-gotten wealth" accumulated by Marcos and his associates. Plaintiffs claimed *in personam* jurisdiction on the basis of personal service of Daza in the Philippines.

In the proceedings below, the United States had taken the position that Daza, being sued in his individual capacity, was protected from suit in accordance with general principles of sovereign immunity, rather than in accordance with the Foreign Sovereign Immunities Act ("FSIA"). The district court found that Daza was entitled to immunity and dismissed without reaching the question of the applicability of the FSIA. *See Cumulative Digest 1981–1988* at 1581–1582.

The appellate court affirmed the dismissal based on sovereign immunity. It concluded, however, that individuals were covered by the FSIA and that Daza's immunity must be and was established under the Act. The court explained its conclusion as follows:

> . . . While section 1603(b)[of Title 28 United States Code] may not explicitly include individuals within its definition of foreign instrumentalities, neither does it expressly exclude them. The terms "agency," "instrumentality," "organ," "entity," and "legal person," while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals. Nowhere in the text or legislative history does Congress state that individuals are *not* encompassed within the section 1603(b) definition; indeed, aside from some language which is more commonly associated with the collective, the legislative history does not even hint of an intent to exclude individual officials from the scope of the Act. Such an omission is particularly significant in light of numerous statements that Congress intended the Act to codify the existing common law principles of sovereign immunity. As pointed out above, pre-1976 common law expressly extended immunity to individual officials acting in their official capacity. If in fact the Act does not include such officials, the Act contains a substantial unannounced departure from prior common law.
>
> The most that can be concluded from the preceding discussion is that the Act is ambiguous as to its extension to individual foreign officials. Under such circumstances, we decline to limit its application as urged by Chuidian and the government. We conclude that the consequences of such a limitation, whether they be the loss of immunity urged by Chuidian or the reversion to pre-Act common law as urged by the government, would be entirely inconsistent with the purposes of the Act.
>
> It is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly [citations omitted]. Thus, to take Chuidian's argument first, we cannot infer that Congress, in passing the Act, intended to

allow unrestricted suits against individual foreign officials acting in their official capacities. Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly. It would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment. Moreover, such an interpretation would defeat the purposes of the Act: the statute was intended as a comprehensive codification of immunity and its exceptions. The rule that foreign states can be sued only pursuant to the specific provisions of sections 1605–07 would be vitiated if litigants could avoid immunity simply by recasting the form of their pleadings.

Similarly, we disagree with the government that the Act can reasonably be interpreted to leave intact the pre-1976 common law with respect to foreign officials. . . .

The principal distinction between pre-1976 common law practice and post-1976 statutory practice is the role of the State Department. If individual immunity is to be determined in accordance with the Second Restatement, presumably we would once again be required to give conclusive weight to the State Department's determination of whether an individual's activities fall within the traditional exceptions to sovereign immunity [citations omitted]. As observed previously, there is little practical difference between a suit against a state and a suit against an individual acting in his official capacity. Adopting the rule urged by the government would promote a peculiar variant of forum shopping, especially when the immunity question is unclear. Litigants who doubted the influence and diplomatic ability of their sovereign adversary would choose to proceed against the official, hoping to secure State Department support, while litigants less favorably positioned would be inclined to proceed against the foreign state directly, confronting the Act as interpreted by the courts without the influence of the State Department.

Absent an explicit direction from the statute, we conclude that such a bifurcated approach to sovereign immunity was not intended by the Act. First, every indication

> shows that Congress intended the Act to be comprehensive, and courts have consistently so interpreted its provisions [citation omitted]. Yet the rule urged by the government would in effect make the statute optional: by artful pleading, litigants would be able to take advantage of the Act's provisions or, alternatively, choose to proceed under the old common law.
>
> Second, a bifurcated interpretation of the Act would be counter to Congress's stated intent of removing the discretionary role of the State Department [citation omitted]. Under the government's interpretation, the pre-1966 common law would apply, in which the State Department had a discretionary role at the option of the litigant. But the Act is clearly intended as a mandatory rather than an optional procedure. To convert it to the latter by allowing suits against individual officials to proceed under the old common law would substantially undermine the force of the statute. There is no showing that Congress intended such a limited effect in passing a supposedly comprehensive codification of foreign sovereign immunity.
>
> Furthermore, no authority supports the continued validity of the pre-1976 common law in light of the Act. Indeed, the American Law Institute recently issued the Restatement (Third) of Foreign Relations Law, superseding the Second Restatement relied upon by the government in this action. The new restatement deletes in its entirety the discussion of the United States common law of sovereign immunity, and substitutes a section analyzing such issues exclusively under the Act [citation omitted].
>
> For these reasons, we conclude that Chuidian's suit against Daza for acts committed in his official capacity as a member of the Commission must be analyzed under the framework of the Act. We thus join the majority of courts which have similarly concluded that section 1603(b) can fairly be read to include individuals sued in their official capacity [citations omitted].

921 F.2d at 1102–1103.

The court of appeals then addressed Chuidian's arguments that three exceptions to immunity under the FSIA were applica-

ble to his claim, including the waiver exception, the "takings" exception, and the torts exception. It concluded that none of the three were applicable to the case at hand.

The court first dismissed Chuidian's argument that Daza's immunity was implicitly waived under 28 U.S.C. §1605(a)(1) because the Philippine National Bank ("Bank") and the Philippine Export and Foreign Loan Guarantee Corporation ("Guarantee Corporation") participated in the litigation, allegedly without raising the sovereign immunity defense:

> Since the Bank and the Guarantee Corporation are both instrumentalities of the Republic of the Philippines, Chuidian argues that their participation should waive the immunity of other Philippine instrumentalities, including Daza [citations omitted].
>
> We see no need to decide whether the Bank and the Guarantee Corporation have in fact waived sovereign immunity. It is uncontested that Daza has no official ties with either institution, aside from working for the same government. The Bank and the Guarantee Corporation are state-owned commercial enterprises, while Daza is employed by the Commission, an executive agency involved in political and financial matters. Chuidian urges us to hold that a waiver by one foreign instrumentality simultaneously waives immunity for all other instrumentalities of the same state, even though the instrumentalities are wholly unrelated. But to adopt such a cavalier disregard for the separate juridical existence of foreign instrumentalities is unwarranted and contrary to existing law and policy.
>
> In a slightly different context, the Supreme Court has instructed us on the need to respect the separateness of foreign instrumentalities. In *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 77 L.Ed.2d 46, 103 S.Ct. 2591 (1983)( *Bancec*), Bancec brought suit on a letter of credit issued by First National City Bank (now Citibank). Citibank counterclaimed, asserting a right to set off the value of assets seized by the Cuban government. Bancec asserted sovereign immunity. The court ultimately rejected this defense, but nonetheless cautioned against "freely ignoring the separate status of government

instrumentalities." "Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude . . . that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626–27 (citation omitted). The Court found support for its conclusion in the legislative history of section 1610(b) of the Act, which generally prohibits execution against the property of one instrumentality to satisfy a judgment against another. The legislative history on section 1610 states in part:

> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.

House Report at 6628–29 (citation omitted), *quoted in Bancec*, 462 U.S. at 627–28. The Court concluded that, as a general rule, the policies opposing execution upon one instrumentality for judgments against another similarly militated against allowing suits against one instrumentality for the wrongs of another. *Bancec*, 462 U.S. at 626–28.

Thus, a person injured by the Guarantee Corporation could not assert a claim against Daza, nor could the holder of a judgment against the Guarantee Corporation execute upon property belonging to Daza, even though both are instrumentalities of the Republic of the Philippines. The policies identified in *Bancec* similarly lead us to conclude that any waiver of immunity by the Guarantee Corporation or the Bank should not operate against Daza. The Republic of the Philippines has established these instrumentalities as separate juridical entities, and absent allegations of fraudulent purposes, *see id. at 629*, we must treat them as such.

* * * *

> Practical considerations also support our decision. Different foreign instrumentalities may have different abilities to claim sovereign immunity. In this case, for example, one may easily imagine a situation in which Daza would have immunity but the Bank or the Guarantee Corporation would not. The Guarantee Corporation and the Bank, as commercial enterprises, may lack immunity under the commercial activities exception, 28 U.S.C. § 1605(a)(2). Daza, on the other hand, as a purely political actor clearly would not be denied immunity under the commercial exception. Under Chuidian's view of the law, the Bank would nevertheless be required to assert a frivolous defense of sovereign immunity to avoid waiving Daza's immunity. Because there is no showing that Congress intended such a result, we are satisfied that only Daza (or his sovereign), and not juridically separate Philippine instrumentalities, can waive Daza's immunity. Chuidian does not contend that any action by Daza himself amounts to an implied waiver. Therefore, we hold that section 1605(a)(1) is inapplicable.

*Id.* at 1103–1105.

The court of appeals also refused to find that preventing payment under the letter of credit amounted to a taking of Chuidian's property in violation of the United States Constitution, for which an exception is provided under 28 U.S.C. § 1605(a)(3):

> . . . The Act does contain a "takings" exception: section 1605(a)(3) states that immunity does not extend to cases "in which rights in property taken *in violation of international law* are in issue." (Emphasis added.) Thus, even if Chuidian could demonstrate a taking under United States law, section 1605(a)(3) would not apply unless the taking also violated international law.
>
> Expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law [citations omitted]. Chuidian is a citizen of the Republic of the Philippines, the state which,

> through its agent Daza, allegedly confiscated Chuidian's property. Hence, even if Daza's actions did constitute a taking, they did not contravene international law. Therefore, section 1605(a)(3) cannot provide an exception to immunity.

*Id.* at 1105.

The court also rejected Chuidian's argument that immunity should be denied under 28 U.S.C. § 1605(a)(5) because Daza's actions constituted a tort:

> We have previously rejected litigants' attempts to recharacterize takings claims as tort claims. In *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963), the government allegedly damaged plaintiffs' property during the construction of a road. Plaintiffs brought an action for trespass and waste under the Federal Tort Claims Act (FTCA), which permits suits against the government under circumstances similar to section 1605(a)(5). We held that plaintiffs' recharacterization of their takings claim did not allow them to proceed under the FTCA.
>
> > It is clear to us that the claims of the appellants asserted against the United States are to recover damages for the taking for public use of property claimed to be owned by the appellants. . . . The repeated characterization by the appellants of the taking by the United States as one of trespass and the commission of waste . . . does not convert the claims to cases sounding in tort and thereby confer jurisdiction on the District Court under the Federal Tort Claims Act. The Fifth Amendment to the Constitution prohibits the taking of private property for public use without just compensation. To us the claims of appellants against the United States are founded upon the Constitution, and the acts of the United States complained of are in the nature of inverse condemnation.
>
> *Id.* at 583.

The Fifth Circuit applied *Myers* in the international context in *De Sanchez*, 770 F.2d at 1398–99, a case factually similar to the present one. De Sanchez, an associate of former Nicaraguan president Somoza, was the holder of a check issued to her by a Nicaraguan state bank. Following the overthrow of Somoza, the bank's new directors stopped payment on the check. De Sanchez sued the bank, arguing for exceptions to immunity under sections 1605(a)(3) (takings) and 1605(a)(5) (tort). After rejecting the takings claim, the court declined to consider the allegations sounding in tort. Citing *Myers*, the court held that De Sanchez's claim

> is not the type of tort claim that the [section 1605 (a)(5)] exception was intended to cover. Mrs. Sanchez's claim, although sounding in tort, is essentially a claim for an unjust taking of property. As noted, Congress has provided an exception in Section 1605(a)(3) for takings of property that violate international law. We do not believe that Congress intended plaintiffs to be able to rephrase their takings claims in terms of conversion and thereby bring the claims even where the takings are permitted by international law.

*Id*. at 1398.

We agree with the reasoning of the Fifth Circuit. Daza's instruction to stop payment to Chuidian, like the bank's refusal to honor De Sanchez's check, is in substance a taking of property, not a tortious injury to property. As such, it should be considered only under the takings exception of section 1605(a)(3). To hold otherwise would be to allow plaintiffs to escape the requirements of section 1605(a)(3) through artful recharacterization of their takings claims.

*Id*. at 1105–1106.

Finally, the court rejected Chuidian's argument that Daza did not commit the acts complained of while acting in his official capacity, but rather out of malice against Chuidian, holding that:

> The most Chuidian can allege is that Daza experienced a convergence between his personal interest and his official duty and authority. Such a circumstance does not serve to make his action any less an action of his sovereign.

*Id*. at 1107.

## B. HEAD OF STATE IMMUNITY

### 1. Suit by Libya against U.S. and U.K. Officials

In 1988, a number of Libyan plaintiffs brought suit in the U.S. District Court for the District of Columbia against the President and other U.S. officials, Prime Minister Margaret Thatcher of the United Kingdom, and the United States and the United Kingdom in connection with injuries suffered in airstrikes against Libya in April 1985. For a discussion of the air strikes, *see Cumulative Digest 1981–1988* at 3405–3410. At the end of 1988, the court dismissed the case on the grounds that Prime Minister Thatcher was entitled to head of state immunity, the U.K.'s actions were acts of state, the U.S. had not waived sovereign immunity, and all the U.S. officials were acting in their official capacities. The court denied sanctions requested by defendants, however. *Saltany v. Reagan*, 702 F.Supp. 319 (D.D.C. 1988).

The plaintiffs appealed the district court decision. The United States and the United Kingdom moved for summary disposition of the appeal. In its reply to the opposition to its motion, the U.S. argued that it had not waived sovereign immunity. As to plaintiffs' contention that the U.S. did not have immunity because the air strikes violated international law, the reply argued:

> Plaintiffs' insistence that the United States must be held accountable for its "war crimes" is most remarkable for what is omitted —any citation to "[s]pecific language in [a] treaty waiving the immunity of the United States." *Canadian Transport Co. [v. United States,]* 663 F.2d [1081,] 1092 [D.C.Cir. 1985]. Without that specific language, "the treaty must be interpreted in accord with the

> rule that treaty violations are normally to be redressed outside the courtroom." *Id.* This was the same point made in *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 692 (1989), when the Court concluded that a foreign state does not waive its immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602–1611, "by signing an international agreement that contains no mention of a waiver of immunity to suit. . . ."
>
> Plaintiffs do not argue that the air strikes violated an international agreement which contains an express waiver of the United States immunity. As such, without an express waiver, they have no claim for damages against the United States for violation of international law.

United States' Reply to Appellant's Opposition to Motions for Summary Dispositions, *Saltany v. Reagan*, No. 89-5051, June 26, 1989, p. 4, available at *www.state.gov/s/l/*.

The reply also addressed the plaintiffs' assertion that the President and other U.S. officials may be amenable to suit for violations of customary international law:

> Once again, plaintiffs fail to cite any specific treaty or agreement that creates or imposes individual damages liability in any situation even remotely like the one presented here. Moreover, plaintiffs proceed as if this Court had never considered the issue of a United States officer's amenability to suit under international law for his official actions. In *Sanchez-Espinoza*, [770 F.2d 202 (D.C. Cir. 1985)] this Court held that a suit against the President under the Alien Tort Statute for violating customary international law—assuming the Statute applies to governmental as opposed to private acts—would have to be brought against him in his official capacity and, thus, be barred by sovereign immunity. 770 F.2d at 206–07.

*Id.* at 6–7.

The reply also addressed the foreign sovereign immunity and head of state issues presented by the U.K. plaintiffs' appeal:

We are initially disturbed by plaintiffs' insistence on pursuing their action against the United Kingdom. "Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States" and have been the source of irritation in our bilateral relations with defendant states, which often placed diplomatic pressure on our State Department. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487, 493 (1983). The FSIA was enacted to "free the Government from the case-by-case diplomatic pressures" by imposing a "comprehensive scheme" that expressly provides when a foreign State may be sued and when it may not. *Id*. at 488–89.

The claims against the United Kingdom here fall squarely in the latter category. In *Amerada Hess*, the Supreme Court ruled unanimously and unequivocally that the FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in our courts." 109 S.Ct. at 686. Seven members of the Court further agreed that a foreign state's use of military force allegedly in violation of international law fell outside any of the exceptions to sovereign immunity provided by the FSIA. *Id*. at 690–92. When plaintiffs filed their appeal here, with the ink barely dry in *Amerada Hess*, no conceivable argument could be made that their appeal was warranted by existing law or by a good faith argument for reversal of existing law.

The United States agrees with and supports the United Kingdom's request for sanctions in these circumstances. The important goals of Congress in enacting the FSIA cannot be met if litigants may hail foreign sovereigns into court on frivolous FSIA claims with impunity. Deterrence of such suits, through the imposition of sanctions, will assure foreign sovereigns that United States courts, guided by the FSIA, will not condone attempts by plaintiffs to intrude into sensitive political and military judgments and activities of the defendant state.

The United States also agrees that sanctions are appropriate for plaintiffs' appeal against Prime Minister Thatcher. The Supreme Court long ago recognized the binding and conclusive nature of the executive's suggestion of immunity. *See Ex Parte Peru*, 318 U.S. 578, 588–89 (1943); The

> *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136–39, 147 (1812). Plaintiffs did not address this authority below; nor is it addressed here.
>
> Suits against foreign heads of state, like suits against foreign sovereigns, raise serious diplomatic concerns. Through the imposition of sanctions under Rule 38, Fed. R. App. P., plaintiffs like these must be discouraged from attempting to circumvent the strictures of the FSIA by pressing frivolous claims against a foreign head of government or other foreign officials for the acts of their government.

*Id*. at. 7–10 (footnotes omitted).

The U.S. court of appeals affirmed the district court's dismissal of the case, but reversed the district court's denial of sanctions. *Saltany v. Reagan*, 886 F.2d 438 (D.C.Cir. 1989). The Court also granted the U.K.'s request for attorneys' fees and costs in having to pursue a frivolous appeal, finding that *Argentine Republic v. Amerada Hess*, 488 U.S. 429 (1989) "clearly bars plaintiff's claim against the United Kingdom and that so much was apparent to counsel for plaintiffs before they imposed upon the United Kingdom the burden of this appeal." *Id*. at 441. The Supreme Court denied the plaintiffs' petition for certiorari, 495. U.S. 932 (1990).

### 2. Divorce Action against President of Foreign Country

On January 31, 1989, General H.M. Ershad, President of the People's Republic of Bangladesh, was sued by Mareium Mumtaz in New York state court, seeking dissolution of their alleged marriage. *Mumtaz v. Ershad*, Index No. 74258/89 (N.Y. Sup. Ct.). On March 20, 1990, the Embassy of Bangladesh formally requested that the U.S. Government suggest the immunity of President Ershad in the case.

On May 30, 1990, the United States Attorney for the Southern District of New York filed a suggestion of immunity of General Ershad. This submission described the nature of head of state immunity as follows:

> 3. Under customary rules of international law, recognized and applied in the United States, the head of a foreign

state is immune from the jurisdiction of United States federal and state courts. *See Saltany v. Reagan*, 702 F.Supp. 319 (D.D.C. 1988), aff'd in relevant part, No. 89-5051 (D.C. Cir. Sept. 29, 1989) (per curiam), petition for cert. filed, No. _ (U.S. Mar. 22, 1990) (dismissal of complaint as against U.K. Prime Minister Thatcher); *Kline v. Kaneko*, 141 Misc. 2d 787, 535 N.Y.S.2d 303 (Sup. Ct. 1988), aff'd mem., sub nom. *Kline v. Cordero De La Madrid*, 546 N.Y.S.2d 506 (1st Dep't 1989)(dismissal of suit against wife of President of Mexico); L. Oppenheim, 1 International Law section 348, 349 (8th ed. 1955); G. Hackworth, 2 Digest of International Law section 170 (1941)(discussion of dismissal of divorce case brought in England against foreign head of state). The Supreme Court has mandated that the courts of the United States are bound by suggestions of immunity, such as this, which are submitted to the courts by the Executive Branch. *Ex Parte Peru*, 318 U.S. 578, 588–89 (1943). *See also Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945). Indeed, in *Peru*, the Supreme Court, without further review of the Executive's determination, declared that the suggestion of immunity must be accepted by the Judiciary as a "conclusive determination by the political arm of the Government" that the continued retention of jurisdiction would jeopardize the conduct of foreign relations. 318 U.S. at 589; *see Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974). Accordingly, upon the filing of a suggestion of immunity such as this, it becomes the "court's duty" to surrender jurisdiction for which immunity has been recognized. *Peru*, 318 U.S. at 588; *see also Hoffman*, 324 U.S. at 35.

4. That the courts of the United States are mindful of the Supreme Court's teaching with respect to Executive Branch suggestions of immunity is evidenced by such recent cases as *Gerritsen v. De la Madrid*, CV 85-5020-PAR (C.D. Cal. 1986) (in suit against Mexican President De la Madrid and others for conspiring to deprive plaintiff of constitutional rights, action against De la Madrid dismissed pursuant to suggestion of immunity); *Estate of*

*Silme G. Domingo v. Marcos*, No. C82-1055V (W.D. Wash. 1982) (action alleging political conspiracy by then President Ferdinand E. Marcos and Imelda Marcos, then First Lady of the Philippines, and others dismissed against President and Mrs. Marcos pursuant to suggestion of immunity); *Psinakis v. Marcos*, No. C-175-1726 (N.D. Cal. 1975) *result reported* in (1975) *Digest of United States Practice of International Law*, pp. 344–45 (libel action against Ferdinand Marcos dismissed pursuant to suggestion of immunity).

5. This traditional and appropriate deference of the judiciary to Executive Branch suggestions of immunity is predicated on "compelling" considerations arising out of the conduct of our foreign relations. *Spacil v. Crowe*, 489 F.2d at 619. Several reasons support the justification for this deference.

First, (s)eparation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy. *Id., citing United States v. Lee*, 106 U.S. 196, 209 (1882). *See also Peru*, 318 U.S. at 588. Second, in comparison with the Executive's institutional resources and extensive experience in the day-to-day conduct of the country's foreign affairs, the Judiciary is ill-equipped to second-guess Department of State determinations that may affect such interests. *Spacil*, 489 F.2d at 619. Finally, as the Court of Appeals for the Fifth Circuit also observed in *Spacil*, "[p]erhaps more importantly, in the chess game that is diplomacy, only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Id.*

Suggestion of Immunity Submitted by the United States of America, *Mumtaz v. Ershad*, at 2–5, Index No. 74258/89 (N.Y. Sup. Ct.), available at *www.state.gov/s/l*.

Attached to the suggestion of immunity was an affirmation by the Legal Adviser, advising the court of the views of the U.S. Government with regard to the immunity of President Ershad and

the implications of the matter for the foreign policy interests of the United States. In pertinent part, the Legal Adviser's affirmation stated:

> 5. In [a letter to the Department of Justice requesting filing of a suggestion of immunity], I noted that President Ershad is entitled to head of state immunity under customary international law. I also described the particular importance attached by the Department of State to obtaining a prompt dismissal of this suit because of the significant foreign policy implications of such an action against the head of state of a friendly foreign country. . . .
>
> 6. The Department of State also places particular importance on the appropriate assertion of head of state immunity because of its implication for reciprocal treatment of our President if subject to the jurisdiction of a foreign state. We would clearly expect another state to extend head of state immunity to our President if named as a defendant in a case similar to this one. The failure to extend such immunity would have a serious adverse effect on our relationship with that state.

On June 15, 1990, the U.S. Government filed a memorandum of law in support of the suggestion of immunity in response to the plaintiff's assertions that immunity did not apply because the claim involved personal, and not official, acts of President Ershad. The memorandum pointed out that the suggestion of immunity was binding upon the court:

> It has long been settled that suggestions made by the United States that immunity be granted or denied are conclusive on the courts. *See United States v. Lee*, 106 U.S. 196, 209 (1882). As the Supreme Court has observed, courts must follow "the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *Id*. . . .
>
> * * * *
>
> Against this weight of authority plaintiff urges this Court to become the first to hold that a suggestion of immunity

filed by the Executive Branch is not binding on the judiciary. . . . Plaintiff's attempt to distinguish factually the cases cited in the Suggestion of Immunity is unavailing. None of those decisions contains the faintest hint that the court's decision to adhere to the suggestion of immunity depended on the nature of the conduct before the court. Indeed, in *Ex Parte Peru*, the Supreme Court couched its decision in broad terms holding that upon filing of a suggestion of immunity, it becomes the "court's duty" to surrender the jurisdiction for which immunity has been conferred. Using similarly broad language, the New York Court of Appeals held that the question of whether sovereign immunity should obtain "ceased to be a judicial question when the Department of State [] authoritatively recognized the claim of immunity." *United States of Mexico v. Schmuck*, 293 N.Y. [264] at 272, 56 N.E. 2d [577] at 580–81 [1944]. . . .

* * * *

Giving an executive suggestion of immunity conclusive effect is warranted because the claim of a foreign sovereign of immunity from suit presents a political rather than a judicial question. *See New York & Cuba Mail S.S. Co. v. Republic of Korea*, 132 F.Supp. 684, 686 (S.D.N.Y. 1955); *Et Ve Balik Kurumu v. B.N.S. International Sales Corp*., 25 Misc. 2d 299, 204 N.Y.S. 971, *aff'd without op*., 17 A.D.2d 927, 233 N.Y.S.2d 1013 (lst Dep't 1960). Under such circumstances a court's proper function is to enforce the "political decisions" of the State Department to grant or deny immunity. *New York & Cuba Mail S.S. Co*., 132 F.Supp. at 656. The political determination of immunity binds the courts and has the effect of withdrawing the cause from the sphere of litigation. *Wolchok v. Statni Bank Cesoslovenska*, 15 A.D.2d 103, 104, 222 N.Y.S.2d 140 (1st Dep't 1961); *see Peru*, 318 U.S. at 588; *Matter of United States of Mexico v. Schmuck*, 293 N.Y. 262, 272, 56 N.E.2d 577 (1944).

* * * *

> In short, the practice of the courts to follow the executive determination does not entail an abdication of judicial power; rather, "it is a self-imposed restraint to avoid embarrassment of the executive branch in the conduct of foreign affairs." *New York & Cuba Mail S.S. Co.*, 132 F.Supp. at 686.
>
> . . . Although the United States does not know whether plaintiff in fact would have no alternative forum in which to adjudicate this case, this question is not relevant. As in other settings where a defendant is entitled to immunity, the assertion of this immunity may leave an allegedly wronged plaintiff without civil redress. *See Gregoire v. Biddle*, 177 F. 2d 579, 580–81 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950); *United States of Mexico v. Schmuck*, 293 N.Y. at 272.

Memorandum of Law in Support of the Suggestion of Immunity Filed on Behalf of the Defendant by the United States, *Mumtaz v. Ershad*, pp. 5, 7, 8–9, 10, 11–12, Index No. 74258/89 (N.Y. Sup. Ct.), available at *www.state.gov/s/l*.

On June 27, 1990, in an unpublished opinion, the Court dismissed the case, deferring to the suggestion of immunity filed by the U.S. Government with regard to President Ershad, *Mumtaz v. Ershad*, Index No. 74258/89 (N.Y. Sup. Ct. June 27, 1990). The plaintiff appealed the decision.

On December 6, 1990, President Ershad announced his resignation as President of Bangladesh. The plaintiff moved for reconsideration of the court's dismissal, based on this development. On January 23, 1991, the U.S. Government filed a motion of changed circumstances with the appellate division of the court, stating that Ershad was no longer entitled to head-of-state immunity and that "the determination of the United States that Ershad is no longer entitled to head-of-state immunity is binding on this Court." Further, although as a former head of state Ershad enjoyed immunity "for official acts performed pursuant to governmental authority as head of state," he was "no longer entitled to immunity in any action involving a purely private matter." Notice of Changed Circumstances submitted by the United States of America at 3–4, *Mumtaz v. Ershad*, Index No. 74258/89 (N.Y. App. Div.), available at *www.state.gov/s/l*.

### 3. Deposition of Foreign President and Vice President

On May 10, 1990, President Corazon Aquino and Vice President Salvador Laurel of the Republic of the Philippines were noticed for deposition by the defendant Westinghouse in *The Republic of the Philippines v. Westinghouse Electric Corp*., Civ. Action No. 88-5150 (D.N.J.) (DRD). After the Philippines refused to produce President Aquino or Vice President Laurel, the court directed the defendant to move to compel the depositions and invited the Departments of State and Justice to appear as *amici curiae* on the motion. On July 9, 1990, the United States filed a statement of interest in the matter. The statement provided the views of the United States as follows:

> 4. Discovery in U.S. courts involving such high level officers of a friendly foreign state is novel and implicates foreign policy interests of the United States. Because such cases are also rare in other countries, U.S. practice may well influence how foreign courts handle this issue in the future. In particular, foreign courts confronted with a request to compel discovery against a U.S. President or Vice President could apply reciprocally the standards used by U.S. courts. . . .
>
> 5. The United States therefore believes that U.S. courts should not require personal discovery from a foreign head of state or vice head of state in the absence of a demonstrated need for testimony concerning material facts in the personal knowledge of that individual. *Cf. Societe Nationale Industrielle Aerospatiale v.United States-District Court*, 482 U.S. 522, 546 (1987) (enjoining U.S. courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantaged position" and to "demonstrate due respect . . . for any sovereign interest expressed by the United States.").
>
> 6. In addition, the United States believes that it would be appropriate for the Court, to the extent consistent with principles of fairness to the parties concerned and with the needs of the Court, to be receptive to proposals to min-

> imize any intrusion on the dignity of President Aquino's and Vice President Laurel's offices, and on the performance of their official duties, that personal discovery can entail.

United States Statement of Interest, *The Republic of The Philippines v. Westinghouse Electric Corp*. at 2–4 July 9, 1990, available at *www.state.gov/s/l*. At a hearing on September 7, 1990, the court denied the motion to compel the depositions. Transcript of Hearing at 26–28.

### 4. Deposition of Foreign Minister

At the end of December 1988, the U.S. District Court for the Western District of Washington granted a request by plaintiffs to depose Foreign Minister Raul Manglapus of the Philippines. *Estate of Domingo v. Republic of Philippines*, No. C82-1055VR (W.D. Wash. 1988). On June 22, 1989, the plaintiffs moved to compel the Republic of the Philippines to produce Foreign Minister Manglapus after he did not appear for a June 5, 1989 deposition for which he had been served with a subpoena by the plaintiffs. On July 14, 1989, the United States filed a statement of interest expressing its views on the motion to compel:

> The United States notes that, insofar as the requested order is premised upon the subpoena recently served on Secretary Manglapus, the foreign minister of a friendly foreign state, a question could be raised regarding his immunity from such subpoena. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 138–139 (1812). *Domingo v. Marcos*, No. C82-1055V (W.D. Wash., Dec. 23, 1982); *Chong Boon Kim v. Yim Young Shik*, Civ No. 12565 (Cir. Ct., lst Dir. Ha. 1963), cited at 48 Am. J. Int'l L., 1986 (1964); *Restatement (Second) of the Law of Foreign Relations*, Section 66. In view of this Court's earlier order, however, and on the further understanding that the Government of the Philippines and Secretary Manglapus himself are willing for him to be deposed on matters relating to his period of residence in the United States as a private citizen, provided only that the time and place are

convenient, the United States does not express any view on whether Secretary Manglapus may enjoy any form of immunity from the jurisdiction of the courts of the United States in connection with these proceedings. Our silence on these or any other issues in these proceedings should not be taken as an indication of our views.

The United States is, nonetheless, of the view that it would be appropriate for the Court, to the extent consistent with principles of fairness to the parties concerned and with the needs of the Court, to be receptive to proposals that such deposition be scheduled at a time and place convenient to the Foreign Secretary, and such other proposals as may be made in order to minimize the intrusion on the performance of Secretary Manglapus' official duties or on the dignity of his office.

In general, as the Supreme Court stated in *Societe National Industrielle Aerospatiale v. United States District for the Southern District of Iowa*, "we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. See *Hilton v. Guyot*, 159 U.S. 113 (1895). American courts should therefore take care to demonstrate due respect . . . for any sovereign interest expressed by a foreign state." 482 U.S. 522, 107 S.Ct. 2542, 2552 (1987). In keeping with the principles of international comity, we believe that it is appropriate to seek to accommodate the schedule and duties of a high-level foreign official in such matters. The compelling of personal discovery with respect to a Foreign Secretary of another nation is in any event a novel and exceptional circumstance, with significant potential for implicating the foreign policy interests of the United States. Not only is such accommodation important in the interests of bilateral relations with the country concerned, but it is also important in terms of the treatment which we would expect to be granted by foreign courts to the United States Secretary of State.

Statement of Interest of the United States at 2-4, available at *www.state.gov/s/l*.

On July 19, 1989, Chief Judge Barbara J. Rothstein denied the motion to compel Foreign Minister Manglapus to appear for a deposition. The Court stated, in part:

> [T]he Philippines was remiss in failing to inform plaintiffs about Foreign Minister Manglapus' unavailability for a deposition in the United States. . . . However, the court does not believe that sanctions should follow nor will it order Foreign Minister Manglapus to appear for a deposition in the United States. Given the circumstances of his presence in San Francisco and the demands of his position, the court does not find it unreasonable that he failed to appear on the previously scheduled date. That date was selected unilaterally by plaintiffs and did not take into account the witness's other commitments.

Order Denying Motion to Compel Deposition of Raul Manglapus, C82-1055VR, at 3 (July 19, 1989).

## C. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

### 1. Diplomatic Privileges and Immunities

#### *a. Appointment, accreditation and notification of diplomatic personnel*

On May 23, 1989, the Department of State sent a circular note to chiefs of mission in Washington, D.C., concerning standards for accreditation of foreign diplomatic personnel assigned to the United States, and for registration of nondiplomatic staff members of diplomatic missions.

As set forth in the note, the United States requires that, to be recognized as a diplomatic agent, a person must possess a recognized diplomatic title and in addition must perform duties of a diplomatic nature. Accreditation of diplomats is solely within the discretion of the Department of State, and requests for accreditation in diplomatic status of personnel performing duties of an administrative and technical nature are incompatible with both

Department policy and the Vienna Convention on Diplomatic Relations (1961). The note also informed chiefs of mission that any promotion from the administrative and technical staff to diplomatic agent status must be accompanied by a formal position description for each person or detailed description of the diplomatic duties that each would perform.

Enclosed with the note of May 23, 1989, was an earlier circular note addressing the same subject in greater detail, dated May 1, 1985. *See Cumulative Digest 1981–1988* at 904–908. *See also* 83 Am. J. Int'l L. 910 (1989).

### *b. Violations of criminal law*

#### *(1) New U.S. policies on abuse of diplomatic immunity*

On November 15, 1989, the Department of State sent a diplomatic note to all chiefs of mission in the United States explaining new measures adopted by the Department to address the problems of criminal violations committed by diplomats and other abuses of diplomatic immunity:

> Despite cooperative measures among the Department of State, United States law enforcement authorities, and the addressee missions, there continues to exist a relatively small, but unacceptable, number of members of the foreign diplomatic community in the United States who abuse their immunity from criminal jurisdiction under international law. The Department has taken a number of reaffirming measures, particularly since enactment of the Diplomatic Relations Act of 1978 and the Foreign Missions Act of 1982, to ensure that the activities of the foreign diplomatic community and other persons who have immunity from criminal jurisdiction by virtue of their official status as representatives of a foreign government or international organization conform with U.S. and applicable provisions of international law. Nonetheless, the Department of State, sharing the concern of the United States Congress and the public at large, has devised a strengthened, comprehensive program for regulating diplo-

matic immunities, in a manner that is both effective and consistent with international law.

Under international law and practice persons extended immunity from the jurisdiction of host country laws nonetheless are obligated to respect those laws. As all nations recognize, diplomatic immunity is based upon the principle that duly accredited members of diplomatic missions must be able to pursue their official duties free from harassment and possible intimidation and without impediment to their performance of those duties. However, immunity is not a license for misconduct. It is in fact a doctrine intended to benefit the functioning of the mission, not to personally benefit its individual members. Consequently, the Government of the United States in the first instance looks to the chiefs of diplomatic missions, to their counterparts in missions to international organizations, and to the heads of international organizations headquartered or maintaining offices in the United States to counsel members of their staffs, as well as family members who enjoy derivative immunity, on their duty to respect the laws and regulations of this country. Ultimately, the United States will hold the Chief of Mission and the sending government responsible for the conduct of persons sent to the United States as diplomatic representatives or of others entitled to immunity. The Department also expects all missions to consider in good faith requests made for waivers of immunity and, in addition, to take appropriate action against those who may abuse their immunity.

The Department of State reiterates that criminal violations will not be tolerated by the United States Government or the community at large. While the Department will continue to take necessary action as required by international law to safeguard and preserve the immunity of persons allegedly involved in criminal behavior, the Department wishes to communicate the corrective measures consistent with international law that are being taken in cases involving serious criminal conduct, in particular crimes of violence, recurrent offenses of a less serious nature, or other egregious abuses of immunity.

In this regard, the Department wishes to emphasize the following points:

1. The Chiefs of Mission must ensure that the members of their missions and eligible members of their families apply for and receive identity cards issued by the Department of State. Those cards contain not only the official identification of the person but also a statement of the extent of the bearer's immunity. Only persons properly notified to and accepted by the United States Government can be issued documents stating their immunity, and have their status confirmed through the Office of Protocol of the Department of State. In order to ensure that proper notification is given of termination of mission members upon departure, except for those missions subject to a bilateral ceiling restricting the number of official employees at the mission, henceforth notification of new personnel to be accredited must include either information on which person is being replaced at the mission and the date of termination of the predecessor, or a certification that the new person will occupy a new position. . . .

2. A diplomatic agent possessing proper identification may not be arrested or detained. It is emphasized, however, that the United States has a duty to protect the safety and welfare of the public, including other diplomats, and to take reasonable steps to prevent the commission of crimes. United States law enforcement authorities therefore have been instructed that, in circumstances where public safety is in imminent danger or it is apparent that a serious crime may otherwise be committed, police authorities may intervene to the extent necessary to halt such activity, even in cases involving diplomatic agents. This includes the power of the police to defend themselves and others from personal harm. At the same time, law enforcement authorities will also take any necessary action to ensure that a diplomatic agent does not bring harm to himself. Mission personnel having a lesser degree of immunity, of course, are also subject to these measures, as well as any other measures consistent with their more limited immunity.

3. Persons with immunity from criminal jurisdiction, consistent with international law, are subject to criminal investigation to the same extent as any other person residing in the United States, as may be required. Chiefs of Mission are requested to instruct members of their missions, and the family members of those members, to cooperate fully with such investigations. United States law enforcement authorities have been instructed to pursue investigations vigorously, to prepare cases carefully and completely, and to document properly each incident of alleged commission of a crime. These steps are required so that charges against alleged offenders may be pursued as far as possible in the United States judicial system consistent with their immunity. These steps are also necessary to ensure that investigative reports provide sufficient information to initiate diplomatic measures against an alleged offender. Such steps may be important also to protect foreign mission personnel alleged to have been involved in criminal misconduct, as investigation of allegations of wrongdoing will determine whether or not they are substantiated.

4. As a matter of general policy, in all cases involving allegations of criminal misconduct, the Department requests the sending government to waive immunity so that allegations of criminal or other misconduct may be adjudicated fully and resolved pursuant to U.S. law. Where a waiver of immunity is refused, the United States Government normally will require in the case of serious offenses that the alleged offender depart the country, including, where necessary, in the case of serious offenses by family members, departure of the mission member from whom the family member's immunity derives. Even where a waiver of immunity has been granted, the Department retains discretion to require the departure of the alleged offender where necessary. For the guidance of the mission, the Department considers serious offenses to include: (1) any felony, (2) any crime of violence, such as an attack with a firearm or dangerous weapon, (3) driving under the influence of alcohol or drugs, which causes injury to

persons. In addition, the Department is particularly concerned about those situations where there is a pattern of recurrent, though less serious, offenses, especially those involving drugs or driving without insurance.

5. The Department of State further, as a matter of policy, seeks to prevent the return to the United States of persons entitled to immunity who, as alleged offenders, have been required to leave this country. The Department will not accept such persons in representative capacities thereafter which would establish any degree of immunity from criminal jurisdiction in their behalf.

6. In all cases involving injury to person or damage to property, the Department of State intends to pursue vigorously the interests of the aggrieved parties in obtaining prompt restitution by individual offenders or from their governments.

7. The Department wishes to remind the missions that in any case involving criminal activity no immunity exists against the arrest and prosecution of a person formerly entitled to privileges and immunities who returns to the United States following the termination of his or her official duties, unless it can be proved that the crime related to the exercise of official functions. The defense is adjudicated by the courts. The Department recognizes that the threat of prosecution may serve, as a practical matter, to prevent individuals who commit crimes while in privileged status from returning to the United States. To ensure that such individuals do not return without appropriate review by United States authorities, the Department reaffirms its requirement that the sending government forward the passport of the alleged offender (and of family members in appropriate cases) to the Department before he or she departs the United States so that the visa may be revoked and the form 1-94 returned to the Immigration and Naturalization Service. Should the alleged offender leave the United States before the visa is cancelled, the Department reserves the right to refuse a replacement for the offender (or his or her principal in the case of a crime committed by a dependent) on the mission staff, to the

extent permitted under international obligations, until the outstanding visa is revoked.

8. The Department of State has measures already in place to prevent persons, for whom there is reason to believe that they have committed a serious criminal offense, from reentering the United States in a diplomatic or consular capacity after having been required to leave this country. These measures include entering data on the alleged offender in the Department's Automated Visa Lookout System. This information is shared with the Immigration and Naturalization Service and used by the INS at ports of entry into the United States. . . .

9. In addition, the Department of State is seeking legislation which would add a new category of ineligibility for visas and for admission to the United States. This new provision would exclude from the United States persons for whom there is reason to believe that he or she committed a serious criminal offense in the United States, for whom immunity from criminal jurisdiction was exercised, and who left the United States as a consequence, thus preventing adjudication of guilt or innocence in United States courts.

10. The Department of State defines "member of the family" for purposes of immunity from criminal jurisdiction as a person who is in one of the following relationships to an official representative of a foreign government or another person who has immunity from criminal jurisdiction by virtue of his or her official status:

(A) the spouse of such a representative or other person and his or her unmarried children under 21 years of age, who are not members of some other household, and who reside exclusively in the principal's household, if the spouse or children are not nationals (in the case of a diplomatic agent) or (in the case of other representatives) nationals or permanent residents of the United States;

(B) the unmarried children of such representative or other person who are under 23 years of age and attending an institution of higher education on a full-time basis, if they are not nationals (in the case of a diplomatic agent) or

(in the case of other representative) nationals or permanent residents of the United States; and

(C) under exceptional circumstances and with the express advance approval of the Department of State, other persons who are not members of some other household, who reside exclusively in the principal's household, and who are recognized by the sending State as members of the family forming part of the household.

* * * *

The Department of State reminds the Chiefs of Mission that, as in the case of personal immunity of individuals, the inviolability of diplomatic and consular pouches is based upon the need of missions to have free communication with their governments and missions in other countries or elsewhere in the United States. The Department will not tolerate abuses of this inviolability, to bring into the United States or transport within the United States illegal substances, such as narcotics, explosives, firearms and other material illegal under United States law and regulation. The Government of the United States will take all steps consistent with international law to detect, prevent, and punish such abuse.

In conclusion, the Department of State urges the Chiefs of Mission to ensure that members of their missions, and their dependents, pay their just debts, and that all necessary and appropriate steps are taken by waiver of immunity, insurance, or otherwise to discharge obligations arising from the presence and activities of the mission, their members and dependents. The Department strongly recommends that the missions and their members obtain liability insurance, in addition to the level of motor vehicle insurance already required by the U.S. Government, to cover property losses or injury arising out of their activities. Where the Department learns that missions or their members have failed to discharge legitimate debts within a reasonable time, or are otherwise financially liable for activities undertaken in the United States, upon request, the Department will intervene to secure payment. In par-

> ticular, it is the Department's practice to assist in resolving outstanding debts of mission members where the complainant notifies the Department of the matter in writing, and can produce satisfactory evidence 1) that a debt or civil liability is owed, 2) that the matter has been brought to the attention of the mission member concerned and to the head of the mission, without resolution for an unreasonable period (pending without resolution for six months or more), and 3) immunity would preclude judicial or administrative action. The Department must advise the Chiefs of Mission that reliance on immunity to evade a financial obligation under law could call into question a mission member's continued acceptability in the United States. In addition, the departure of a mission member without settling outstanding financial liabilities could affect the Department's willingness to accept a replacement, and could cause the United States to advise prospective creditors of the financial unreliability of the mission or its members.
>
> The Department will closely study the manner in which the respective missions discharge this responsibility and will take those diplomatic measures which will be both effective and consistent with international law.

Note from the Department of State to Chiefs of Mission, Washington, D.C., November 15, 1989. Dept. of State Publication 2 Foreign Affairs Manual ("FAM"), Exhibit 233.4 to 2 FAM 230. Many of these policies and practices were adopted as Department of State regulations and may be found at 2 FAM § 230, Immunities and Liabilities of Foreign Representatives in the United States.

The visa ineligibility provision referred to in paragraph 9 of the note, excluding persons for whom immunity from criminal jurisdiction was exercised where there is reason to believe that he or she committed a serious criminal offense in the United States, was adopted in 1990 in section 131 of Pub. L. No. 101-246, 104 Stat.15, Foreign Relations Authorization Act for FYs 1990 and 1991. The exclusion is codified at section 212(a)(2)(E) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(E).

*(2) Report to Congress on compensation for victims of crimes*

Section 131(d) of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, 104 Stat. 15, required the State Department to prepare a report on the need for and feasibility of a compensation program for victims of crimes committed by persons with diplomatic immunity in the United States (referred to as "diplomatic crimes" in the report). On October 23, 1990, the State Department transmitted the report to Congress, available at *www.state. gov/s/l*.

The introduction reviewed the purpose and rules regulating diplomatic immunity. In particular, it addressed the existing remedies available for such crime:

> Certain remedies do exist if a diplomat commits a crime. The receiving state may request the sending state to waive the offender's diplomatic immunity. In recent years, the U.S. has vigorously pursued this option, requesting waiver in every instance where there is probable cause to believe that a person entitled to immunity has committed a crime, and has obtained results. (Regulations to be adopted by the Department will formally require a request for waiver in every case.) If the sending state declines to waive immunity, or for other reasons, the receiving state may declare the offending diplomat (or other mission members) *persona non grata* ("PNG"). If the diplomat fails to leave, he or she will be stripped of diplomatic immunity. The receiving state may also request the sending state to prosecute the offending diplomat under the sending state's own laws. While these remedies may prevent or deter future abuses by the particular offending diplomat, they do not address the losses sometimes incurred by the victims of diplomatic crime.
>
> Such victims may be able to receive compensation through other means.[6] For example, in some instances the sending state may be willing to waive immunity from civil jurisdiction as well as inviolability (to permit execution [of a monetary award]). In other instances, . . . an individual with criminal immunity may nevertheless be subject to civil jurisdiction (although again a waiver of

inviolability would be necessary to permit execution). This would be the case, for example, with a member of the administrative and technical staff of a mission who commits a crime outside the course of his official duties. In certain other cases, the Foreign Sovereign Immunities Act of 1976 might provide the victim with an avenue for relief. [Footnote omitted.] Where an action is not only criminal but also tortious in nature, recovery might be possible through a suit against the foreign government concerned, if it could be shown that the individual who committed the offense was acting within the scope of his office or employment. Finally, where relief is not otherwise obtainable, the Department may seek an *ex gratia* payment from the foreign government.[8]

As a general matter, except in instances of vehicular negligence or cases where the sending government agrees to an *ex gratia* payment, victims of crimes by diplomats and their families have received no financial compensation for their losses. This fact has understandably aroused indignation on the part of many Americans. At the same time, however, the records available to the Department of State indicate that the number of actual cases involving alleged criminal offenses in which diplomatic immunity would likely have precluded recovery of physical and financial losses suffered by U.S. citizens or permanent residents is relatively small. The Department is aware of only a few such cases arising in the first six months of 1990, and a handful of such cases arising in 1989. Of these, none involved serious injuries, and in one case compensation was in fact received. [Footnote omitted.]

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[6] See *Study and Report Governing the Status of Individuals with Diplomatic Immunity in the United States* 57–58 (United States Department of State, March 18, 1988). The report was prepared pursuant to Public Law 100–204, Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, section 137.

* * * *

[8] *Ex gratia* payments have been received from a number of governments, including Panama, Swaziland, Mexico and Nigeria. In many such cases, the payments were made in connection with automobile accidents. *Id*., pp. 2–3.

The report reviewed prior Congressional consideration of compensation for crime victims during the passage of the Diplomatic Relations Act of 1978, *id.* at 5–6, and victim compensation programs in existence in the United States and abroad, *id.* at 6–8. The report indicated that the Department of State was not aware of any U.S. state or foreign country that had established a fund or program specifically to compensate victims of a crime committed by someone entitled to diplomatic immunity, but noted that "in principle there does not appear to be any reason why individuals in states with compensation programs could not already recover under those programs for injuries caused by diplomatic crimes." *Id.* at 9.

The report examined two means of creating a compensation program specifically including victims of such crime. First, it pointed out that Congress could take steps to ensure that state compensation programs in the United States include victims of persons entitled to diplomatic immunity in their compensation schemes. The Victims of Crime Act of 1984, 42 U.S.C. §§ 10601–10603, provided for federal grants to state crime victim compensation programs that meet the act's eligibility criteria; Congress could amend the Act to require state programs to include compensation for victims of such crimes. The report addressed the merits of this method as follows:

> This approach avoids much of the expense involved in establishing a separate fund for diplomatic crime victims and maintains a uniform approach to compensation for victims of crime in a locality, regardless of the status of the perpetrator. Funding for a state program covering victims of diplomatic and other crimes would continue, as at present, to be provided by the federal and state governments in partnership. The administration and procedure of the program, including standards for compensation and payment of awards and rights of appeal, would remain the same as the state currently applies in managing its program.
>
> While the handling of some cases might conceivably present issues of sensitivity from a foreign relations perspective, it is to be noted that decisions in commercial,

> tort and certain other kinds of cases that are brought directly against foreign states under the Foreign Sovereign Immunities Act are also made outside the Executive Branch. Further, there might be some instances in which full compensation could not be granted because of statutory limits on recovery. [Footnote omitted.] However, this circumstance would not be unique to victims of diplomatic crime, since the limits on recovery are also applicable to victims of other crimes who seek compensation under these programs. Moreover, for victims of diplomatic crime the other possible remedies discussed earlier would remain, including waiver and *ex gratia* payment. The utilization of state mechanisms does not represent, at present, a perfectly complete solution inasmuch as two states still do not have any victim compensation programs. From a practical standpoint, however, this would probably not present a serious problem, since those states do not have a large diplomatic population, and of course they could adopt victim compensation programs should they find it advantageous to do so.

*Id.* at 10.

The report then addressed compensating victims of crimes committed by persons with diplomatic immunity through a separate fund administered by the federal government. The report's discussion of the problems with this approach, some of which would be equally applicable to state compensation programs, concluded:

> The comparatively small number of diplomatic crimes does not appear to justify establishing a separate federal structure. Moreover, a separate federal structure would face a number of practical problems. Any such program would have to take into account certain evidentiary difficulties arising from the diplomatic context. Foreign diplomatic officials could not be compelled to assist a compensation board in its investigation, and therefore there could be cases in which it would be very difficult for the board to determine whether a victim's allegations were true, especially where there were no witnesses. This could be a problem since the board's authority to make payments would

> presumably depend upon a finding not only that the loss was caused by a criminal act but also that the perpetrator was a diplomat. Further, establishment of a separate bureaucratic structure for a limited number of cases could be inefficient and costly. Centralized consideration of criminal acts could also cause victims to incur greater expense and inconvenience in presenting their cases.

*Id.* at 11.

The report also considered alternatives to compensation programs. With regard to further restrictions on the scope of immunity, the report made the following comments:

> In addition to placing U.S. diplomats at risk of speculative charges before hostile foreign courts with potentially inadequate legal protections, proposals to remove diplomatic immunity also present other significant problems. A unilateral removal of immunity would place the United States in violation of its treaty obligations, create tensions in the international community, and undermine friendly treaty relations. The risk of exposure to sanctions in a foreign country might also deter some individuals from joining the foreign service, or prompt others to resist serving in countries with underdeveloped or hostile legal systems where effective diplomatic relations may be particularly necessary.

*Id.* at 4–5.

As to requiring diplomatic missions to carry insurance to cover criminal activity, the report made the following comments:

> First, it would likely be difficult to find insurance companies willing to furnish this kind of insurance. The commercial insurance market does not generally provide insurance against criminal activity. There are liability plans that could insure an Embassy for the negligent acts of its employees. However, most crimes are intentional, rather than negligent, acts. Moreover, the insurance may be limited to official conduct. [Footnote omitted.] Second, even if insurance companies were willing to offer insurance

> against criminal activity, they might only be willing to do so for countries whose diplomats had a good history of complying with U.S. law. In the case of nations with poor diplomatic crime records, insurance companies might not be willing to shoulder the additional risk. Finally, if there were insurance companies willing to provide this form of insurance, their rates would undoubtedly be very high and burdensome for the less developed nations which, as a consequence, might not be able to maintain their mission in the United States or might impose similar requirements on the United States.

*Id.* at 5.

In its conclusion, the report took the following position on how to compensate for victims of diplomatic crimes:

> The utilization of state victim compensation programs would appear to offer the most practical approach to providing compensation for victims of diplomatic crime. While those programs could serve as a model for the establishment of a federally administered program to provide such compensation, as noted above, the administrative and financial burdens associated with such a federal program are uncertain but potentially significant. The Department of State does not believe that the dimensions of this problem are so substantial as to justify the creation of a separate system at the federal level for adjudicating claims arising out of diplomatic crimes.
>
> The need for compensatory adjudications by federal officials is still less compelling when viewed in light of the fact that these victim compensation programs are in place in almost all states, including those in which diplomatic personnel are most heavily concentrated. Legislation to ensure coverage in these programs for victims of diplomatic crime, which would underscore Congress' concern for such victims, would appear to be achievable through relatively simple means. The Department of State would be prepared to support legislative action to that end.

*Id.* at 12–13.

For current codification, see 42 U.S.C. §§ 10601–10608.

### *(3) Waiver of diplomatic immunity in criminal case in the United States*

On January 8 and 9, 1989, Corporal Rudy A. Van Den Borre, a member of the administrative and technical staff of the Embassy of Belgium in Washington, D.C., allegedly shot and killed two persons in Florida. Corporal Van Den Borre voluntarily turned himself into the police in Florida on January 12, 1989. As a member of the administrative and technical staff, Corporal Van Den Borre was entitled to immunity from the criminal jurisdiction of the United States pursuant to Articles 31 and 37(2) of the Vienna Convention on Diplomatic Relations.

At the request of the prosecutors in Florida, the Department of State asked the Government of Belgium to waive Corporal Van Den Borre's diplomatic immunity so that he could be prosecuted for the murders. The Government of Belgium agreed to such a waiver on the condition that the death penalty would not be sought or imposed in the case.

On January 27, 1989, the prosecutor filed an affidavit in Florida state court providing the following assurances:

> I hereby proclaim that this State Attorney will not seek or obtain the death penalty against Mr. Van Den Borre for the shooting deaths of Michael J. Egan and Gerald Simons. Attached herewith is a judicial ratification of these assurances through the trial Court order, which makes them legally binding on the State [of Florida] as well as the Court.
>
> These written assurances are conditioned on the Government of Belgium waiving the diplomatic immunity afforded to Mr. Van Den Borre in accordance with Article 32 of the Vienna Convention on Diplomatic Relations and on assurance that the Government of Belgium will not revoke or withdraw the waiver.
>
> I certify that I have discussed this matter with the State Attorney for the 17th Judicial Circuit, in and for Broward County Florida and that the State Attorney concurs in

> offering this assurance in support of obtaining a waiver of diplomatic immunity from the [Belgian] Government. Finally, I certify that I have discussed this matter with authorized representatives of the arresting agencies as well as the relatives of Michael J. Egan and that they concur in offering this assurance. Prosecutor's Affidavit in Aid of Waiver of Diplomatic Immunity, *State of Florida v. Van Den Borre*, Case No. 89-1055 CFA, January 27, 1989.

On the same day, the trial court issued an order approving, accepting and ratifying the prosecutor's affidavit. On January 31, 1989, the Government of Belgium waived Corporal Van Den Borre's immunity from criminal jurisdiction for judicial proceedings arising out of the two murders. Van Den Borre was convicted of the two murders by the Circuit Court for Broward County, Florida, Case Nos. 89-2203 and 89–2875, *aff'd, Van Den Borre v. State*, 596 So.2d 687 (Fla. 1992).

### 2. Consular Privileges and Immunities: Immunity from Criminal Charges

On December 1, 1988, Bahrudin Bijedic, the consul-general of Yugoslavia in Chicago, was arrested on charges of conspiracy to launder U.S. currency belonging to Americans through Yugoslavia. Bijedic filed a motion requesting that the court find that he was entitled to immunity in the case, on three grounds: first, that he was entitled to immunity on the basis of a most-favored-nation ("MFN") clause in the U.S.-Serbian Consular Convention; second, that his actions fell within the scope of consular immunity in the Vienna Convention on Consular Relations ("VCCR"); and, third, that he was immune because he was not charged with a grave crime within the meaning of the VCCR.

On March 21, 1989, the U.S. Government filed its response opposing Bijedic's motion. Government's Memorandum of Law in Response to Defendant's Motion to Recognize the Applicability of Consular Immunity, *United States v. Cole*, 717 F. Supp. 309 (E.D. Pa. 1989), available at *www. state.gov/s/l*.

The brief pointed out that the plain language of the U.S.-Serbian Convention (Convention Defining the Rights, Immunities

and Privileges of Consular Officers, October 14, 1881, United States-Serbia, 22 Stat. 968, T.S. No. 320) and the consistent practice of the United States provide that MFN clauses only apply reciprocally. The brief explained the overall role of reciprocity in consular relations and under the VCCR as follows:

> Reciprocity is an appropriate and permissible standard under U.S. and international law for determining the treatment to be accorded consular personnel in the United States. The concept of reciprocity is deeply engrained in the custom and history of the exchange of diplomatic and consular representatives, arising out of the concept that the best method to assure desirable treatment for one's own government personnel in a foreign country is to treat that foreign country's representatives in this country reciprocally. . . . One commentator notes that "the real sanction of diplomatic law is reciprocity. Every State is both a sending and receiving State. Its own representatives abroad are hostages and even on minor matters their treatment will depend on what the sending State itself accords." E. Denza, *Diplomatic Law* 2 (1976).
>
> That countries may choose to grant each other reciprocal advantages in the area of consular and diplomatic immunities that are not given to third states, is expressly addressed and permitted in the Vienna Conventions on both Consular and Diplomatic Relations, [citing Article 72 of the VCCR and Article 47 of the VCDR]. . . . Thus, the VCCR permits states to extend to each other higher immunities than those provided for in the VCCR itself, but very clearly envisions that such extensions are to be granted on a reciprocal basis.

*Id.* at 5–7.

The U.S. brief then discussed the consistent policy and practice of the U.S. Government, which permits the extension of MFN treatment under consular conventions only after the other state has provided formal written assurances of reciprocal treatment to U.S. personnel serving in that state, even where the agreement in question does not include reciprocity in the text. The brief described this U.S. policy and practice as follows:

In addition to consular treaties, MFN clauses frequently appear in commercial treaties, where they provide for such things as MFN treatment for import of the goods of one party into the territory of the other, or that nationals are entitled to MFN treatment with regard to doing business in the territory of the other. Until 1923, the general practice of the U.S. Government was to consider all MFN clauses in U.S. international agreements as "conditional," that is, as requiring reciprocity on the part of the country claiming the benefits of a treaty between the United States and a third country. See *generally*, 5 G. Hackworth, *Digest of International Law*, 271–75 (1943). In 1923, however, the U.S. changed its position and adopted the unconditional most-favored-nation clause in its commercial treaties. This change was occasioned by the U.S. belief that the principle of automatic equality of treatment and one uniform practice for all trading partners was in its commercial interest. Id. at 271–72.

The U.S. Government, however, did not change its view that MFN clauses in consular conventions were conditioned on the basis of reciprocity. Thus, in 1931, the Department of State stated: "The recent change in our treaty-making policy as regards matters of commerce does not affect earlier treaties which do not contain these unconditional most-favored-nation clauses. . . . At no time have the favored national provisions in our Consular Conventions been construed by the Department as other than conditional provisions." *Id.* at 274. In response to a 1931 inquiry from Switzerland about the application of an MFN clause in an 1850 treaty with that country, the Department wrote:

> This Department has consistently held that the most-favored-nation clause with respect to rights and privileges of consular officers does not embrace unconditionally specific rights and privileges which are granted on the basis of reciprocity to consular officers of third countries, but that the right to enjoy such specific rights and privileges is embraced in the most-favored-nation clause in the event that the country

> whose consular officers assert such rights of privileges thereunder accords in fact the same rights and privileges to American consular officers in their territories. *Id.* at 275. [Footnote omitted.]

In addition to the Swiss inquiry, there are numerous instances of U.S. refusals to extend automatically MFN treatment to consular officers on the basis of MFN clauses in consular conventions, despite the change in practice after 1923 with regard to commercial MFN clauses. The *Digest of International Law* lists examples form Italy (1925), Denmark (1926), Spain (1927), Latvia (1928), Italy (1930), and Japan (1939). *See*, 4 G. Hackworth, *Digest of International Law*, 701–05, 784–85 (1942).

Of particular importance is an instance in 1930 involving interpretation of the MFN clause of the U.S.—Serbia Consular Convention, the clause at issue in this case. In a diplomatic note to the Department of the Yugoslav Legation regarding the privilege of duty free importation of articles for personal use, the Department cited Article II of the 1881 Convention, and stated:

> The Department of State does not however, consider that Yugoslav consular officers assigned to the United States are entitled under the most-favored-nation clause of the Convention to exemption from duty on articles imported for their personal or family use *unless it be shown that a like privilege is extended to American consular officers in Yugoslavia*. Upon receipt of information from the Yugoslav Legation that American consular officers assigned to Yugoslavia are accorded this privilege, the Department of State will take steps with a view to having such benefit extended to Yugoslav consular officers assigned to the United States, under the most-favored-nation clause of Article II of the Consular Convention concluded between the United States and Serbia in 1881.

*Id.* at 704 (emphasis added).

The majority of consular conventions in force containing MFN clauses were undertaken by the U.S. in the latter part of the 19th century and the early part of the 20th century. It is important to understand that during this period essentially the same level of limited immunities were afforded all foreign consular representatives serving at consulates in the United States. [Footnote omitted.]

The incentive to invoke MFN clauses increased greatly in the 1960s. At that time the U.S. ratified several bilateral consular conventions which dramatically increased privileges and immunities for consular personnel of certain states, such as the U.S.S.R. and Poland, where it was clearly in the national interest of the U.S. to assure a higher level of privileges and immunities for U.S. consular officers assigned to these states. *See*, L. Lee, *Vienna Convention on Consular Relations*, 133–34 (1966). [Footnote omitted.] As the grant of privileges and immunities of any type in the United States creates an extraordinary situation where the recipient is raised above the law applicable to ordinary residents of the U.S., particularly so where the recipient receives complete immunity, the U.S. is careful to extend such privileges and immunities only where there is a clear basis under treaty or express grant of legislation in the absence of a treaty. Thus, the requirement that reciprocity be guaranteed as a condition to extend most-favored- nation treatment in the area of consular privileges and immunities continued in U.S. practice and policy as a means of ensuring the clear legal authority to do so.

The Executive and Congress were well aware that these new bilateral agreements might increase the interest of other governments in invoking the MFN clauses to attain higher privileges and immunities. The U.S. Government made clear to Congress that it would continue to accord MFN treatment only where conditions of actual reciprocity were met. *See* Consular Convention with the Soviet Union: Hearings Before the Senate Comm, on Foreign Relations, 89th Cong., lst Sess. 23–24 (1965); Consular Convention with the Soviet Union: Hearings Before the Senate Comm,

on Foreign Relations, 90th Cong., 1st Sess. 3–4, 12, 18, 143, 159, 299 (1967).

Other contemporaneous U.S. statements and practice make clear that the U.S. Government continued to require the guarantee of reciprocal treatment before according another government's consular personnel most-favored-nation treatment. For example, during Senate consideration of the Vienna Convention on Consular Relations in 1969, the Department of State was asked about the effect of MFN clauses on provisions in that treaty. In responding that bilateral MFN clauses would not affect the VCCR, the Department specifically stated "that many United States bilateral consular treaties having the most-favored-nation clause specifically require reciprocity before such clause takes effect. Other earlier United States treaties do not have such a condition of reciprocity. The Department of State has, however, for many years made reciprocity a prerequisite for according such most-favored-nation treatment with regard to those earlier treaties." S.Exec. Rep. No. 91-9, 91st Cong., lst Sess. 19 (1969). [Footnote omitted.]

Recent examples of inquiries from foreign governments regarding MFN clauses and the treatment accorded thereunder, and the Department of State responses to those inquiries, are further evidence that formal assurances of reciprocity are required before the U.S. will extend MFN treatment.

The U.S. Government accorded MFN treatment in two cases in which the foreign government expressly guaranteed that the U.S. would receive the same treatment in its country. An Exchange of Notes contains the request of the Government of the Philippines to invoke an MFN clause for heightened immunity for its consular officers in the United States, and confirmed that "consular officers of the United States enjoy reciprocally in the Philippines rights, privileges, exemptions and immunities no less favorable in any respect than those that are enjoyed by Polish consular officers in the United States." The U.S. response provides that the request "is granted on the basis of the representations and guarantee of reciprocity set forth in

the Embassy's note." *See also*, M. Nash, 1978 *Digest of United States Practice in International Law*, 605–06 (1980) (MFN treatment for property tax exemption granted to Chile, on assurances of reciprocal treatment; U.S. stated in its note of response that "continued exemption . . . will be based upon the strictest reciprocity.") These examples illustrate, again, the long held principle that foreign governments must formally request the extension of MFN treatment and provide guarantees of reciprocal treatment in order to receive MFN treatment for consular officers. [Footnote omitted.]

The U.S. has declined to extend MFN treatment in other cases. In 1975, the Austrian Government sent a diplomatic note to the Department seeking heightened immunity for its consular officers in the United States on the basis of an MFN clause. The U.S. responded that it would be prepared to grant such immunity "on the condition that United States consular personnel serving in Austria will receive the same immunities requested for Austrian consular officers in the United States." E. McDowell, 1975 *Digest of International Law* 257–58 (1976). As described in *Cocron v. Cocron*, 84 Misc.2d 335, 338, 375 N.Y.S.2d 797, 803–04 (1975), the Austrian Government's response did not acknowledge reciprocal treatment for U.S. consular personnel in Austria, but objected to the Department's requirement of reciprocity. The court noted that: "it is clear that, based upon the above notes, the State Department has not extended immunity to the defendant in this case." However, because the State Department did not take a formal position in the case denying immunity under the MFN clause to the defendant, the court undertook its own examination of the question, finding:

> First, the most-favored-nation clause does not embrace, unconditionally, the specific rights and privileges which are granted on the basis of reciprocity to the consular officers of third countries; *the country whose consular officers assert such rights and privileges must, in fact, accord the same rights and privileges to American consular officers in their territories*. The United States

> Department of State has interpreted the most-favored-nation clause of consular treaties as containing such a qualification of reciprocity even though not expressly included in the treaty (47 Iowa L. Rev. 672). This interpretation is in accord with the State Department's position in this case as regards the most-favored-nation clause of the United States—Austria Treaty. Thus, until the Austrian Government acknowledges reciprocity, this most-favored-nation clause is not to be given effect here so as to confer the immunity requested by the defendant.

*Id.*, 84 Misc. 2d at 339–40; 375 N.YS. 2d at 805 (emphasis added).

Other recent examples of U.S. Government practice include correspondence with Thailand in 1981 . . . in which the U.S. responded to a request from Thailand to extend MFN treatment for sales tax exemption by requiring an assurance of reciprocity, and correspondence with Sweden in 1988, in which the U.S. responded to a request for heightened immunity by pointing out the requirement for reciprocity.

In addition, the Fourth Circuit recognized U.S. practice with regard to the condition of reciprocity in refusing to extend heightened privileges and immunities to a consular officer from Thailand convicted on drug charges. *U.S. v. Chindawongse*, 771 F.2d 840, 848 n.10 (4th Cir. 1985), *cert. denied*, 474 U.S. 1085 (1986).

As set forth in the Declaration of [Deputy Legal Adviser] Mary V. Mochary . . . the Government of Yugoslavia has never invoked the most-favored-nation clause of the United States—Serbia Convention. Nor has the Government of Yugoslavia ever provided the necessary formal assurances guaranteeing that United States personnel serving at U.S. consulates in Yugoslavia are entitled to reciprocal treatment. Under these circumstances, consular officers of Yugoslavia in the United States such as defendant Bijedic are entitled only to the privileges and immunities accorded to consular officers by the Vienna Convention on Consular Relations.

*Id.* at 8–19.

The brief also pointed out that an MFN clause in a consular convention cannot be invoked by an individual:

> In general, a treaty creates obligations only as between the states that are parties and not between one party and the nationals of the other party, or between the nationals of the two parties. Thus, absent an express provision in a treaty, an individual cannot, on his/her own, seek to activate a portion of the treaty. Absent a provision to the contrary, international treaties, even though directly benefiting private persons, do not create private rights or provide for a private cause of action in domestic courts. A. McNair, *Law of Treaties* 323 (1961); 14 M. Whiteman, *Digest of International Law* 293–94 (1970); Restatement (Third) of the Foreign Relations Law of the United States, section 907 comment a and reporter's note 1 (1986). As stated in *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975): "[E]ven where a treaty provides certain benefits for nationals of a particular state—such as fishing rights—it is traditionally held that 'any rights arising from such provisions are, under international law, those of states and . . . individual rights are only derivative through the states,'" quoting Restatement (Second) of the Law of Foreign Relations, section 115, comment e (1965). Thus, treaties do not generally confer privately enforceable rights in the absence of treaty language clearly manifesting such intent. *See generally, Head Money Cases*, 112 U.S. 580, 598–99 (1884); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *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); *Dreyfus v. Von Finck*, 534 F.2d 24–29 (2d Cir. 1976); L. Henkin, *Foreign Affairs and the Constitution* 224 (1972).
>
> The U.S.–Serbia Consular Convention does not provide the individual consular officer with the right to invoke any of its provisions. Although consular officers would derive benefits from invocation of the MFN clause of the

> convention, it is clear that such benefits are not granted for the personal benefit of the officer, but to ensure that each state is able to perform efficiently the functions of the consular mission in the other state. Accordingly, the defendant is not the proper entity to invoke the MFN clause of this convention.

*Id.* at 19–20

Consul-General Bijedic also argued that the actions alleged in the indictment fell within the scope of consular immunity for "acts performed in the exercise of consular functions" set out in Article 43 of the VCCR. Consular functions are defined in Article 5 of the VCCR. The U.S. Government's brief addressed the procedure and legal standards for determining consular immunity, as follows:

> Whether a particular action or activity would be considered an exercise of a person's consular functions is a matter for judicial determination. *See United States v. Chindawongse*, 771 F.2d 840, 848 (4th Cir. 1985), *cert. denied*, 474 U.S. 1085 (1986); Milhaupt, The *Scope of Consular Immunity under the Vienna Convention on Consular Relations: Towards a Principled Interpretation*, 88 Colum. L. Rev. 841 (1988). The State Department has also opined that it is for the courts to determine the question of whether a particular act by a consular officer was within his "official function." In October of 1979, the Embassy of the Socialist Federal Republic of Yugoslavia asked the Department of State for information relating to the scope of consular immunity for official activities, referred to in Article 43 of the VCCR. In essence, Yugoslavia inquired how the applicability of Article 43 of the VCCR to a particular case might be determined, construed, or interpreted. The Department of State replied in an aide memoire dated October 28, 1978, which also discussed the threshold question of recognized or accepted consular functions under international law. Its substantive paragraphs read:
>
> The Department of State reads this provision as requiring judicial and administrative authorities in the receiving

state to refrain from exercising jurisdiction over consular officers and consular employees once it is established that the activity giving rise to the judicial or administrative proceeding was performed in an official capacity and in pursuit of the exercise of accepted consular functions.

Regarding the scope of the immunity provided, the Department regards itself as being in a position to give advice to sending states concerning whether a particular activity qualifies as a recognized consular function. Reference is made for this purpose to applicable international agreements, whether of a bilateral or multilateral nature. A listing of consular functions is, for example, contained in article 5 of the Vienna Convention. Such a list would be supplemented by any consular functions recognized as acceptable through mutual agreement between two states or through mutually recognized state practice.

*Nevertheless, it is the Department's view that, in the vast majority of cases, it is only the trier of facts which is in a position to make the determination as to the "official" nature of the activity*. To this end, the State Department does not normally make a certification or other finding, intended to be binding on the affected receiving state authority, that any particular activity by a consular official does or does not constitute an "official act."

M. Nash, *1978 Digest of United States Practice in International Law*, 629–30 (1980) (emphasis added). [Footnote omitted.]

* * * *

There is little case law that serves as a guide in developing useful criteria for determining whether particular criminal conduct is within the scope of a consular function. In the context of a civil case, the Department of State has advised a court that an act is performed in the exercise of a consular function, *first*, if there is a logical nexus between the act and the function, and *second*, if the act can reasonably be considered part of a course of action appropriate to the performance of the function. See Brief of the United States as amicus curiae in *Gerritsen v.*

*Escobar y Cordova*, No. CV 85-5020, pages 12–13 (C.D. Cal., filed August 27, 1988).[11] Therefore, while an act amounting to a serious crime would not be, *per se*, outside the scope of a consular function, the seriousness of the crime would be a fact the court could weigh in determining whether the act was within the scope of the consular function. *Cf. L. v. The Crown*, 68 I.L.R. 175 (New Zealand Supreme Court 1977) (consular officer's sexual assault against passport applicant found to be "as unconnected with the duty to be performed by the consular officer as an act of murder.") In determining the applicability of "official acts" immunity, the court should consider all of the facts and circumstances as a whole; the absence or presence of any one fact should not be determinative. Therefore, considering all the facts of a particular case, an act that substantially deviates from a course of action appropriate to the performance of the function would not be an act performed in the exercise of that function.

* * * *

Consular immunity under the VCCR is not intended to benefit the individual. The VCCR states in its Preamble that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." [Footnote omitted.] Thus, one commentator has suggested that the determinative question under the VCCR "is not whether the defendant *consular officer* deserves immunity solely because he would have been unable, without the act, to perform the function, but whether the *consular process* would be impeded if consular officers were amenable to the jurisdiction of the receiving state for such acts." See Milhaupt, *supra*, 88 Colum. L. Rev. at 857–88 (emphasis in original). Application of this principle leads one to the inescapable conclusion that protection of the *consular process* does not require granting immunity to a consular officer who knowingly conspires to assist Americans to launder United States currency to avoid the payment of taxes owed to the receiving state. Cf. *United States v. Chindawongse*, 771 F.2d

840, 848 n.10 (4th Cir. 1985), *cert. denied*, 474 U.S. 1085 (1986) (no immunity under VCCR for conspiracy to distribute heroin); *United States v. Coplon*, 84 F.Supp. 472, 474 (S.D.N.Y. 1949) (no immunity, pursuant to 22 U.S.C. section 288d, for United Nations employee for conspiracy to commit espionage, since acts did not fall within defendant's function as employee of the U.N.).

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[11] In a Statement of Interest of the United States filed in the case of *Indiana v. Strom*, No. 45 603-8801-CF-00010 (Super. Ct., Ind.), the government similarly advised the court that in deciding a claim of immunity under the VCCR, the court should determine "(1) whether the alleged conduct falls within the outer perimeter of a recognized consular function; and (2) whether there is a clear logical nexus between the alleged conduct and a recognized consular function."

*Id*. at 26–27, 29–30, 32–33.

The defendant also argued that the crime he allegedly committed was not a grave crime within Article 41 of the VCCR, and that he therefore could not be arrested or tried. The United States opposed this argument in its brief as follows:

> By making this assertion, the defendant has confused the distinct concepts of "inviolability" and "immunity." . . . [T]he text of the treaty, both in its plain language and written context, as well as the treaty's negotiating history, show that whether the crime charged here is grave is not relevant to the issue of the defendant's immunity. . . . [A] consular officer's immunity from criminal jurisdiction is limited to "acts performed in the exercise of consular functions." Article 41 provides a separate protection to consular officers—it extends to them "personal inviolability" [except in the case of a grave crime] which it defines as "freedom from arrest or detention."

*Id*. at 36–37.

Furthermore, the U.S. argued that the defendant was charged in this case with a felony, which the United States defines as a grave crime. Accordingly, his arrest pursuant to a warrant did not violate the VCCR. The brief provided the following information on the definition of "grave crime" in the VCCR:

> The Vienna Consular Convention does not define the meaning of the term "grave crime." Nonetheless, the U.S. has consistently and publicly interpreted the term "grave crime" to apply to any felony; this interpretation is appropriate under the VCCR, and is supported by the Treaty's negotiating history. . . . The extensive negotiating history of this provision makes clear that the negotiators rejected any definition requiring a certain number of years of imprisonment. Moreover, there was *no* discussion concerning whether the term should be limited to crimes that are dangerous or threaten harm, contrary to the defendant's assertion. *See* Official Records of the United Nations Conference on Consular Relations, U.N. Doc. A/CONF. 25/16. Several states also noted at the Vienna Conference that it is up to the receiving State to determine what would constitute a grave crime. *See id*. (Pakistan at p. 365; Byelorussia p. 52; India p. 53.) The United States Government, through the Department of State, as the agency responsible for implementing the Vienna Consular Convention, has consistently applied the term grave crime in the United States as including all felonies. *See* S. Exec. Rep. 91-9, 91st Cong., lst Sess. 14, 8. *Guidance for Law Enforcement Officers: Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel*, Department of State Publication 9533, at 7 (March 1987) ("Consular officers may be arrested pending trial provided that the underlying offense is a felony and that the arrest is made pursuant to a decision by a competent judicial authority (e.g., a warrant issued by an appropriate court)").

*Id*. at 41 n. 14.

On June 7, 1989, the district court denied the defendant's motion in full, after considering each of the grounds raised by the defendant, and found that he was not entitled to consular immunity for the acts charged in the indictment, based on the facts alleged therein. *United States v. Cole*, 717 F. Supp. 309 (E.D. Pa. 1989), aff'd without opinion, *U.S. v. Spanjol*, 958 F. 2d 365 (3d Cir. 1992).

## D. INTERNATIONAL ORGANIZATIONS

### United Nations Special Rapporteur

On May 24, 1989, the United Nations Economic and Social Council ("ECOSOC") adopted a resolution concluding that "a difference has arisen between the United Nations and the Government of Romania" and requesting an advisory opinion from the International Court of Justice "on the legal question of the applicability of article VI, section 22, of the Convention on Privileges and Immunities of the United Nations ('General Convention') in the case of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission." Resolution 1989/75. The referenced sub-commission was the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, a subordinate entity of the Commission on Human Rights, created by the Economic and Social Council in 1946.

The question arose in the context of the inability of Mr. Mazilu, a Romanian national resident in Romania, to fulfill his functions as Rapporteur due to the actions of the Government of Romania, a state party to the General Convention. Mr. Mazilu was elected a member of the Sub-Commission in 1984. In 1985 the Sub-Commission requested Mr. Mazilu to prepare a report on human rights and youth. Mr. Mazilu did not come to the 1987 session of the Sub-Committee at which he was scheduled to give his report, apparently due to ill health. The Sub-Commission deferred consideration of the report until its next session in 1988, notwithstanding the scheduled expiration of Mr. Mazilu's term as a member of the Sub-Commission in 1987. In the meantime, the U.N. made attempts to contact Mr. Mazilu in Romania. The Romanian government stated that he had been retired for health reasons.

In a series of letters, Mr. Mazilu stated that he had been forced to retire, and was refused a travel permit, despite his willingness to come to Geneva for consultations with U.N. authorities. Accordingly, U.N. authorities contacted the Romanian government seeking assistance in locating Mr. Mazilu so that a member of the Sub-Commission could visit and help him complete his report. The Romanian Government rejected the U.N. effort as interference in Romania's internal affairs.

Following more fruitless efforts to contact Mr. Mazilu, the Economic and Social Council passed its resolution seeking the advisory opinion from the International Court of Justice. The United States filed a written statement in the case with the Court on July 27, 1989, and additional comments on August 31, 1989, both available at *www.state.gov*.

### *a. Jurisdiction of the Court*

In addressing the jurisdiction of the Court to render an advisory opinion in the matter, the United States referred to the Court's authority to render advisory opinions, set forth in Article 65, paragraph 1, of its Statute, and ECOSOC's authority to request advisory opinions on legal questions arising within its scope of activities, pursuant to Article 96, paragraph 2 of the U.N. Charter and General Assembly Resolution 89(1)(1946). The United States then concluded that the Court had jurisdiction in the instant case:

> In fulfilling its task to undertake studies on specific subjects, the Sub-Commission regularly appoints "special rapporteurs" to carry out the necessary research and to report his or her findings to the Sub-Commission. Legal questions relating to the privileges and immunities to which such a special rapporteur is entitled while engaged in these activities are accordingly legal questions arising within the scope of the activities of the Sub-Commission and its parent body, ECOSOC. The Court therefore has jurisdiction under Article 65, paragraph 1 of its Statute to render an advisory opinion on the question presented to it by ECOSOC.

Written Statement of the Government of the United States of America, I.C.J. Pleadings, Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (1989), p. 5.

The United States also addressed the Court's discretion not to provide an advisory opinion, consistent with the Court's repeated statements that it should only refuse to do so where compelling reasons would justify the refusal:

> This request for an advisory opinion, the first ever by ECOSOC, presents the Court with no compelling reason to refuse the request. Indeed, the humanitarian concerns underlying the request, as well as the necessity for the United Nations to ensure that its experts receive the privileges and immunities to which they are entitled, provide the Court with strong grounds to render the requested advisory opinion, and to render it on a priority basis in accordance with ECOSOC Resolution 1989/75.

*Id.* at 6.

The United States filed additional comments on August 31, 1989, to respond to the Government of Romania's Written Statement asserting that the Court was without jurisdiction to render the advisory opinion because of Romania's reservation with respect to Article 30 of the Convention on the Privileges and Immunities of the United Nations. Article 30 provides that if there is a difference between the United Nations and a Member arising out of the interpretation or application of the Convention, an advisory opinion shall be requested on any legal question involved.

The United States first argued that section 30 of the Convention was not relevant to this request for an advisory opinion, which was brought on the independent authority of article 96, paragraph 2 of the Charter and the General Assembly resolution authorizing ECOSOC to request advisory opinions of the Court on legal questions arising within the scope of its activities. In particular, the U.S. noted:

> The advisory opinion issued by the Court with respect to *Reservations to the Genocide Convention* fully supports this conclusion. In that case, the General Assembly of the United Nations requested the Court to respond to several questions concerning the effect of reservations to that Convention and of objections to those reservations. As a preliminary matter, the Court first considered whether Article IX of that Convention—which also calls for submission of disputes to the Court—prevented the Court from rendering the advisory opinion sought by the General Assembly:

> The existence of a procedure for the settlement of disputes, such as that provided by Article IX, does not in itself exclude the Court's advisory jurisdiction, for Article 96 of the Charter confers upon the General Assembly and the Security Council in general terms the right to request this Court to give an Advisory opinion "on any legal question."[5]
>
> ECOSOC therefore has the authority to request an advisory opinion under both the General Convention and under the Charter, although only under the Convention could the resulting opinion be "decisive." Accordingly, the mere existence of section 30 does not deprive the Court of jurisdiction to render this advisory opinion pursuant to Article 96 of the Charter and General Assembly resolution 89(1). It necessarily follows that Romania by its unilateral action in connection with the Convention could not prevent ECOSOC from requesting an advisory opinion in the exercise of its independent authority to make such a request pursuant to Article 96 of the Charter.

[5] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Report* 1951, at p. 20.

Additional comments of the Government of the United States of America, I.C.J. Pleadings, Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (1989) at 5–7.

The United States also argued that Romania's reservation to section 30 of the Convention on Privileges and Immunities did not address requests for an advisory opinion, but only the effect to be given any such opinion:

> The first sentence of Romania's reservation specifically addresses only "the terms of section 30 which provide for the *compulsory jurisdiction* of the International Court of Justice in differences arising out of the interpretation or application of the Convention." (emphasis added.) [Footnote omitted.] It is in regard to the exercise of such

compulsory jurisdiction that the first sentence goes on to assert the requirement for "the consent of all parties to the dispute." This is clear not only from the context in which this reservation is asserted, i.e., with reference to requirements of the first sentence of section 30, but from the references in the reservation to "parties to the dispute." A request for an advisory opinion technically does not involve such "parties to the dispute."

The second sentence of the reservation addresses only the legal effect to be given to an advisory opinion rendered by the Court pursuant to that section, specifically addressing the provisions contained in section 30 which stipulate that "the advisory opinion . . . is to be accepted as decisive." Indeed, this aspect of the reservation, contrary to Romania's construction, clearly contemplates requests for advisory opinions under section 30 and simply seeks to prevent the resulting opinions from being "accepted as decisive." While this part of Romania's reservation prevents advisory opinions issued under section 30 from being "decisive" on the legal questions addressed in the opinions, it does not prevent the Court from rendering such advisory opinions in the first instance.[7]

[7] See Memorandum from The Legal Counsel, United Nations, cited in Statement of the United States, p. 5., fn. 3. Moreover, were the Romanian reservation incorrectly construed to apply to a request for advisory opinions under Article 96 of the Charter, a possible conflict would arise between the General Convention and the Charter, in which case Article 103 of the Charter would become relevant. Article 103 provides 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." *See* Memorandum from the Legal Counsel, id. at 22.

*Id*. at 7–9.

Finally, the U.S. comments addressed Romania's argument that there was no difference between the U.N. and Romania regarding the interpretation of the Convention, thereby depriving the Court of jurisdiction over a request for an advisory opinion:

> Neither the Charter nor the General Convention, however, establishes the existence of a dispute as a prerequisite to a request for an advisory opinion. Article 96, paragraph 2 of the Charter simply authorizes requests to the Court for advisory opinions on legal questions; Article 65, paragraph 1 of the Statute of the Court gives the Court jurisdiction to render such opinions. As a result, the Court has jurisdiction to render the opinion requested by ECOSOC pursuant to Article 96 of the Charter whether or not a dispute exists.
>
> Section 30 of the General Convention does not refer to "disputes" either, but instead provides that, if a "difference" arises between the United Nations and one of its Members, a request shall be made to the Court for an advisory opinion. In this regard, while Romania and the United Nations may share the same general view that the privileges and immunities provided experts under Article VI, section 22 are functional in character, they manifestly disagree over the application of Article VI in the specific case of Mr. Mazilu as a special rapporteur. Romania appears to claim that this is merely "a difference of opinion" with respect to the "factual elements" of Mr. Mazilu's situation. However, the question of whether Mr. Mazilu is entitled to the privileges and immunities set forth in Article VI, section 22 is a legal one which turns on an application of that provision to the facts of this case. In any event, because ECOSOC has not requested this advisory opinion under section 30, the question of whether a "dispute" exists does not arise even under Romania's construction of its reservation to that provision of the General Convention.

*Id.* at 10–11.

Abraham D. Sofaer, Legal Adviser of the Department of State, presented the oral argument of the United States before the Court, available at *www.state.gov/s/l*. As to the jurisdictional issues, the Legal Adviser noted:

> The jurisprudence of this Court establishes that a reservation to a dispute settlement provision in a multilateral

> convention, however clearly expressed, cannot deprive the United Nations or any authorized United Nations body of its independent authority to seek, and this Court of its discretion to provide, an advisory opinion concerning appropriate legal questions.
>
> [T]he Court reaffirmed this principle in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*. While the Court in that case upheld the authority of Unesco to request an advisory opinion under Article XII of the Statute of the Administrative Tribunal, which permits an international organization to challenge a decision of the Tribunal on jurisdictional and procedural grounds, it expressly confirmed that Unesco also had the general power to request advisory opinions on legal questions arising within the scope of its activities under Article 96 of the agreement between Unesco and the United Nations—though it had chosen not to predicate its request on that general power.
>
> As the Court's decisions in these cases suggest, dispute settlement provisions in multilateral conventions are not to be construed as displacing, but rather as supplementing the general authority of United Nations bodies to seek legal advice from this Court. Hence, no reservation to such provisions can be effective to deprive those general authorities of their intended force. Any other rule would enable a State to reduce the intended scope of the Court's advisory jurisdiction under Article 96 by refusing to agree to a dispute settlement provision under particular multilateral conventions.

I.C.J. Pleadings, Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations (1989), p. 34.

With regard to Romania's argument that there was no dispute between the United Nations and Romania over the applicability of the Convention, the Legal Adviser asserted:

> Romania's description of the Convention's application to Mr. Mazilu is at odds with that of the United Nations and with the high value that must be placed on the independence of

> rapporteurs and other experts. The limitations proposed by Romania cannot be applied consistently with the preservation of this value because: the privileges and immunities accorded to Mr. Mazilu, though limited to the needs of his function, cannot arbitrarily be denied within the territory of any State, even that of his own nationality; because Romania cannot be recognized to possess absolute, unverifiable discretion in determining his capacity to perform, particularly in light of substantial and credible evidence to the contrary; and because the United Nations body that appointed Mr. Mazilu, not Romania, must decide when his job expires.
>
> The United States recognizes, of course, that this Court has the discretion to refuse to issue an advisory opinion if the circumstances warranted such restraint. Nothing in the present case supports such abstention, however. The question posed is not hypothetical, but concerns a real and ongoing controversy between the United Nations and Romania, over a matter of fundamental importance to the United Nations and Romania, and involving a human dimension that the Secretary-General was specifically requested by the Sub-Commission "to follow closely. . . ."

*Id.* at 35–36.

On December 15, 1989, the Court issued an advisory opinion, finding as a preliminary matter that it had jurisdiction. First, the Court determined that ECOSOC's request for an advisory opinion fulfilled the conditions of Article 96, paragraph 2 of the U.N. Charter because the issue was a legal question arising within the scope of the activities of ECOSOC. Next, the Court dismissed Romania's argument that its reservation to section 30 of the Convention precluded the Court from exercising jurisdiction:

> The jurisdiction of the Court under Article 96 of the Charter and Article 65 of the Statute, to give advisory opinions on legal questions, enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law. These opinions are advisory, not binding. As the opinions are intended for

> the guidance of the United Nations, the consent of States is not a condition precedent to the competence of the Court to give them.
>
> [I]n the present case, the resolution requesting the advisory opinion made no reference to Section 30, and it is evident from the dossier that, in view of the existence of the Romanian reservation, it was not the intention of the Council to invoke Section 30. The request is not made under that Section, and the Court does not therefore need to determine the effect of the Romanian reservation to that provision.

Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion, Dec. 13, 1989), 1989 I.C.J. 177 at 188.

Finally, the Court addressed the propriety of the Court giving an advisory opinion. Citing the "compelling reason" doctrine, and its obligation to consider whether "to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent," the Court determined that it found no compelling reason to refuse an advisory opinion. 1989 I.C.J. 177 at 190–92.

### *b. Merits*

As explained in the written statement of the United States,

> The General Convention accords various privileges and immunities to the United Nations as an organization, to representatives of Members of the United Nations, to United Nations officials and to experts on missions for the United Nations. Article VI, section 22 of the General Convention specifically requires States Parties to accord to "experts (other than officials coming with the scope of article V) performing missions for the United Nations" such privileges and immunities as are necessary for the independent exercise of their functions, and sets out what those privileges and immunities are "in particular."

Written Statement of the Government of the United States of America, I.C.J. Pleadings, Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, July 27, 1989, at 2.

As to whether Mr. Mazilu was an expert on a mission for the United Nations within the meaning of article VI of the Convention on Privileges and Immunities of the United Nations, the U.S. Statement pointed out that the Sub-Commission, as a body established by virtue of powers conferred by the U.N. Charter, clearly falls within the Convention. The United States then addressed the applicability of article VI to special rapporteurs of the Sub-Commission:

> Article VI . . . may be read to apply to individuals who have been appointed or elected under the auspices of the United Nations or one of its organs to perform a specific mission, but who serve in their personal capacity and do not officially represent a Member State of the United Nations.
>
> Special rapporteurs appointed by the Sub-Commission are similarly experts on missions for the United Nations. The Sub-Commission appoints individuals to be special rapporteurs to monitor worldwide compliance with human rights standards in that area or to collect data and produce reports on specialized topics within that area. while serving as Sub-Commission special rapporteurs, these individuals must act in their personal capacity, not as representatives of governments.
>
> As a member of the Sub-Commission, Mr. Mazilu was an "expert on a mission for the United Nations" within the meaning of Article VI of the General Convention by virtue of holding that office. The provisions of Article VI also applied to Mr. Mazilu from the time the Sub-Commission appointed him as a special rapporteur on the topic of human rights and youth in 1985. Although the term of Mr. Mazilu as Member of the Sub-Commission expired on December 31, 1987, his appointment as Special Rapporteur continued after that date. The decision of the Sub-Commission in September 1987 extending consideration of Mr. Mazilu's report until the Sub-Commission's 1988

> session, with full knowledge that his term would expire before that time, effectively continued Mr. Mazilu's appointment as Special Rapporteur, and therefore as an expert on a mission for the United Nations, beyond the expiration of his term as a Member of the Sub-Commission.
>
> While some types of missions by their very nature are complete when a term of appointment expires, this is not the case in connection with missions involving the completion and submission of reports. In such cases, the expert involved may need additional time to complete the assignment, and the agency involved may—as in this instance—require the expert's participation in the consideration of the report when it is completed.
>
> In short, Mr. Mazilu became an expert on a mission for the United Nations within the meaning of Article VI from the beginning of his term of office as a member of the Sub-Commission in 1984. His status as an expert on a mission for the United Nations continues by virtue of his ongoing assignment as Special Rapporteur for the Sub-Commission on human rights and youth, which the Sub-Commission concluded was necessary in order to permit him to complete and present to report he was assigned.

*Id.* at 13–15.

The U.S. statement then addressed the applicability of article VI, section 22 as between a state and its own nationals:

> Traditionally, the subjects of international law are States. The relationship between a State and its nationals has been viewed as an incident of the sovereignty of States, and accordingly outside the scope of international law. Certain exceptions, however, have been recognized, for example, in the area of human rights. An exception of particular relevance to this case has developed exclusively on the basis of the consent of States and relates to the relationship between a State and its nationals employed by international organizations. In the view of the United States, derogations of sovereignty of the State over such nationals must be construed with appropriate respect for

> the sovereign rights of the State concerned as well as the objective of the fulfillment of the purposes of international organizations.
>
> An analysis of the terms of Article VI, section 22, of its history and the practice under the General Convention demonstrate that its provisions specifically obligate Romania, in the circumstances of this case, to permit the United Nations and Mr. Mazilu to communicate regarding Mr. Mazilu's mission for the Sub-Commission and to allow Mr. Mazilu to travel to Geneva to complete that mission.
>
> . . . Section 22 enumerates the following specific privileges and immunities to which . . . experts are entitled:
>
> (a) immunity from personal arrest or detention . . . ;
>
> * * * *
>
> The obligation to accord the specified privileges and immunities is unqualified. Section 22 makes no distinction between the privileges and immunities to be accorded experts who are nationals of a State Party and those to be accorded to other experts. Moreover, it is clear that where the drafters of the General Convention intended to make such a distinction, they did so. Section 15 of the General Convention makes inapplicable "as between a representative and the authorities of the State of which he is a national" the privileges and immunities accorded to representatives of Members. Section 22 contains no comparable provision.

*Id.* at. 15–18.

The United States also found support for the proposition that parties to the Convention must apply the provisions of article VI, section 22 to their own nationals who are experts, in the history of the Convention and subsequent practice of the parties to it:

> . . . With respect to the immunity of officials of the United Nations from suit or legal process, the United Nations Preparatory Commission stated in its study of privileges and immunities:

> While it will clearly be necessary that all officials, whatever their rank, should be granted immunity from legal process in respect of acts done in the course of their official duties, *whether in the country of which they are nationals or elsewhere*, it is by no means necessary that all officials should have diplomatic immunity . . . .[12]

The subsequent practice of the parties to the General Convention also supports this view. At least eight States, including the United States, have become parties to the General Convention subject to reservations restricting or precluding the application of certain privileges and immunities as between those States and their nationals. [Footnote omitted.] The reservation of the United States, for example, provides that,

> Paragraph (b) of section 18 regarding immunity from taxation and paragraph (c) of section 18 regarding immunity from national service obligations shall not apply with respect to United States nationals and aliens admitted to permanent residence.

The United Nations and at least one State Party to the General Convention informally expressed disagreement with the United States reservation and others like it. In their view, the obligation of States Parties to accord all privileges and immunities to qualified persons, including their own nationals, was so central to the proper functioning of the United Nations as to make those reservations inconsistent with the object and purposes of the General Convention.[14] Both the reservations and the resulting responses, however, demonstrate the view that, in the absence of a reservation, the privileges and immunities accorded by the General Convention under Section 18 to officials apply as between a State Party and its nationals. The same conclusion applies equally to experts under Section 22 of the General Convention.

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[12] Report of the Preparatory Commission of the United Nations, [London, 1945] p. 62.

* * * *

[14] See, e.g., Note No. 3822 from the Permanent Representative of the Kingdom of the Netherlands to the United Nations to the Secretary-General of the United Nations, date October 13, 1970.

*Id.* at. 18–20.

The U.S. statement then addressed more specifically what limitations, if any, a state could place upon the privileges and immunities accorded to its nationals who are experts on missions for the United Nations. In the view of the United States:

> . . . The privileges and immunities a State Party must accord to experts who are its nationals are, of course, qualified in accordance with the general principles which informed the drafting of the General Convention. One such principle was that "no official can have, in the country of which he is a national, immunity from being sued in respect of his non-official acts and from criminal prosecution."[15]
>
> Thus, for example, if an individual serving as an expert were convicted of a serious non-political crime unrelated to the United Nations mission in the State of which he was a national, that State would retain a sovereign right to imprison him even if this restricted his ability to perform his mission for the United Nations. In such a case, the State of nationality would be obligated to afford the expert as full an opportunity to perform his mission as the circumstances reasonably would allow, but travel outside the State's jurisdiction and custody would not necessarily be required.
>
> Mr. Mazilu has not been prosecuted for, or even accused of, any crime. Therefore, in the view of the United States, the refusal of the Government of Romania to allow Mr. Mazilu to travel to Geneva, in the circumstances of the instant case, violates subsection (a) of section 22, which obligates Romania to accord Mr. Mazilu immunity from detention for the purposes of performing his official acts, *i.e.*, the preparation and presentation of his report. The Government of Romania refuses to grant Mr. Mazilu the necessary official authorization to travel to Geneva to perform his mission for the United Nations. In that respect,

> the Goverment of Romania continues to detain Mr. Mazilu in Romania. In addition, the refusal of the Government of Romania to allow the United Nations and Mr. Mazilu to communicate, in the circumstances of the instant case, violates subsection (d) of Article VI, section 22, obligating the Government of Romania to accord Mr. Mazilu the right to communicate with the United Nations.

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[15] Report of the Preparatory Commission of the United Nations, [London, 1945] p. 62.

*Id*. at. 20–21.

In its additional comments of August 31, 1989, the United States addressed Romania's arguments that Mr. Mazilu was no longer a special rapporteur; that special rapporteurs were not experts; and that even if Mr. Mazilu were such an expert, Romania need not accord him any privileges and immunities due to the fact that he is not actually on any mission in Romania.

In rebutting Romania's argument that "the Convention does not place rapporteurs, whose activities are occasional, on the same footing as the experts who carry out missions for the United Nations," the U.S. statement provided as follows:

> . . . An analysis of Article VI, including the practice of the United Nations under that Article, [footnote omitted] demonstrates that special rapporteurs of the Sub-Commission are experts within the meaning of that Article. [Footnote omitted.]
>
> The only ground on which Romania disputes this conclusion is that the activities on special rapporteurs are too "occasional." Nothing in the text of Article VI provides a basis for excluding special rapporteurs from the category of experts on this ground. Quite to the contrary, the "occasional" character of the activities of an expert is one of the primary factors for distinguishing experts from officials of the Organization.

Additional Comments of the Government of the United States of America, I.C.J. Pleadings, Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, August 31, 1989, at 15–16.

In his oral statement, Abraham D. Sofaer, Legal Adviser for the Department of State, noted that this was the first time that ECOSOC had requested an advisory opinion from the court, and that it had done so in response to a situation that threatened the ability of ECOSOC and its subsidiary organs to carry out their work. The Legal Adviser's comments on the merits of the question addressed the limited nature of the question before the Court as follows:

> The United Nations has avoided any suggestion that the scope of Mr. Mazilu's privileges and immunities extend beyond the needs of his functions . . . , and nothing in the record requires any restriction in this case on the legitimate scope of national control over United Nations experts by their home States. The United States would be greatly concerned with any claim that an individual could use his immunity as a United Nations expert to evade the legitimate domestic laws of his State, fairly applied. The United Nations in this respect has pointed out its obligation under the Convention in such circumstances is to waive immunity.

I.C.J. Pleadings, Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (1989), at 37.

In its advisory opinion of December 15, 1989, the International Court of Justice held, unanimously, "that Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Mr. Dumitru Mazilu as a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities."

With regard to the definition of "experts on missions," the Court found that the purpose of Section 22 was clearly:

> to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization. . . . The experts thus appointed or elected may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period or a short time. The essence of the matter

> lies not in their administrative position but in the nature of their mission.

Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion, Dec. 1989), 1989 I.C.J. 177, 194.

Next, the Court considered the meaning of "mission" in Section 22:

> Section 22, in its reference to experts performing missions for the United Nations, uses the word "mission" in a general sense. While some experts have necessarily to travel in order to perform their tasks, others can perform them without having to travel. In either case, the intent of Section 22 is to ensure the independence of such experts in the interests of the Organization by according them the privileges and immunities necessary for the purpose. . . . Accordingly, Section 22 is applicable to every expert on mission, whether or not he travels.

1989 I.C.J. 177, 195. The Court further advised that experts on missions enjoy the privileges and immunities of the Convention in the states of which they are nationals, in the absence of a reservation, because "the privileges and immunities of Article V and VI are conferred with a view to ensuring the independence of international officials and experts in the interests of the Organization. This independence must be respected by all States including the State of nationality and the State of residence." 1989 I.C.J. 177, 195.

The Court then determined that special rapporteurs fell within the definition of experts on missions:

> [R]apporteurs or special rapporteurs are entrusted by the Sub-Commission with a research mission. Their functions are diverse, since they have to compile, analyse and check the existing documentation on the problem to be studied, prepare a report making appropriate recommendations, and present the report to the Sub-Commission. Since their

> status is neither that of a representative of a member State nor that of a United Nations official, and since they carry out research independently for the United Nations, they must be regarded as experts on missions within the meaning of Section 22, even in the event that they are not, or are no longer, members of the Sub-Commission. Consequently they enjoy, in accordance with Section 22, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the Sub-Commission.

1989 I.C.J. 177, 197

Finally, the Court found that section 22 was applicable to Mr. Mazilu because the facts indicated that he remained a special rapporteur of the Sub-Commission. *Id.*

## E. OTHER ISSUES OF STATE REPRESENTATION

### 1. U.S. Custody of Mission at Request of Foreign Government

On May 7, 1989, Guillermo Endara was elected President of Panama. However, General Manuel Noriega, the then-dictator of Panama, refused to let him take office. On September 1, 1989, the term of office of the previous constitutionally elected president, Eric Arturo Delvalle, expired pursuant to the Panamanian constitution. In anticipation of this expiration, the Panamanian embassy in Washington, D.C., which represented the Delvalle government, requested that the U.S. Government take custody of Panama's missions in the United States.

Accordingly, on August 31, 1989, the Acting Under Secretary of State for Management, Jill Kent, signed the following Determination Regarding Missions of Panama in the United States:

> Pursuant to the authority of the President of the United States to conduct foreign affairs under Article II of the

United States Constitution, including his authority to receive ambassadors, and the authority vested in the Secretary of State by the Foreign Missions Act, 22 U.S.C. 4301 *et seq* ("the Act") and delegated to the Under Secretary for Management in Department of State Delegation Authority Number 147, dated September 13, 1982, I hereby make the following findings and determinations.

1. As of September 1, 1989, the term of office of the constitutionally elected head of the Government of Panama, President Eric Arturo Delvalle, will come to an end pursuant to the constitution of the Republic of Panama. Because, as of that date, there will exist no constitutional head of government recognized as such by the United States, the Embassy of Panama has requested that the Department take custody of Panama's diplomatic and consular property in the United States in order to protect and preserve this property for the benefit of the people of Panama. The imposition of the following terms, conditions and restrictions concerning the property and operation of foreign missions of Panama in the United States is reasonably necessary in order to comply with the Embassy's request, to fulfill the international legal obligations of the United States to preserve and protect property of the Republic of Panama, and to accomplish the purposes set forth in 22 U.S.C. 4301(c) and 4304(b), including protecting the interests of the United States.

2. Effective September 1, 1989, all property, real or personal, tangible or intangible, wherever located in the United States, which is at present owned by the Government of Panama currently recognized by the United States, and which is used for the conduct of bilateral diplomatic or consular relations, including residential properties, shall be subject to the control and custody of the Office of Foreign Missions for the purposes of protecting and preserving such property until further notice. This custody and control shall not extend, however, either to bank accounts registered in the name of individuals accredited as of August 31, 1989, as diplomatic or consular personnel of Panama, or their dependents, provided that such

accounts are not held for the benefit of the Government of Panama, or to property used exclusively in connection with representation of the Republic of Panama before any international organization.

3. The Office of Foreign Missions is hereby authorized to administer and manage the aforesaid properties in such a manner and through such procedures as it deems proper to fulfill the international legal obligations of the United States with respect thereto. In addition, to the fullest extent possible, the Office of Foreign Missions shall endeavor to avoid the expenditure of United States Government funds in connection with these properties. Accordingly, the Office of Foreign Missions may, if financial exigencies relating to the property in question so dictate, rent or dispose of any of the properties, real or personal, pursuant to 22 U.S.C. 4305(c)(2). Funds resulting from such rental or disposition shall be used for the maintenance of Panamanian diplomatic or consular property, or, if exceeding the amount necessary for this purpose, held for the account of the Republic of Panama. In light of the fact that all property in the United States owned or controlled by the Government of Panama is "blocked" pursuant to Executive Order 12635 and the International Emergency Economic Powers Act, 50 U.S.C. 1601 *et seq*., any such rental or disposition, and the management of any funds resulting therefrom, shall conform to any regulations and licenses issued pursuant to these authorities.

4. Permitting the operation of a foreign mission in the United States by any unrecognized authority purporting to be the Government of Panama would be contrary to the purposes of the Act, including protecting the interests of the United States. Therefore, effective September 1, 1989, any and all benefits, as defined in 22 U.S.C. 4302(a)(1), provided to any entity that has been or is hereafter designated by the Secretary of State or his delegate as a foreign mission of Panama in the United States, as defined in 22 U.S.C. 4302(a)(4), shall be provided exclusively by and through the Director of the Office of Foreign

Missions, under such terms and conditions as the Director may hereafter prescribe, pursuant to 22 U.S.C. 4304. This provision shall not apply to missions representing Panama to international organizations.

5. In order to achieve the objective of preventing the operation in the United States of a foreign mission of any unrecognized authority purporting to be the Government of Panama, I hereby designate as a benefit, pursuant to 22 U.S.C. 4302(a)(1), employment of any agent or employee by any entity that has been or is hereafter designated by the Secretary of State or his delegate a foreign mission of Panama in the United States, and determine that it is reasonably necessary to accomplish the purposes set forth in the Act to require any such entity to forego the acquisition or use of this benefit. This prohibition, however, shall not apply to members of a mission of Panama to an international organization, provided that:

(a) Such individual members have been duly accredited to and accepted by an international organization as *bona fide* members of such mission; and
(b) Such individual members confine their activities to matters and activities directly and exclusively related to representation before the relevant international organization and do not in any manner engage in other activities, including, but not limited to, public relations, lobbying, propaganda, consular, commercial, economic, or political activities in the United States.

6. Notice is hereby given that, pursuant to 22 U.S.C. 4311(a), it shall be unlawful, for any person to make available any benefit to any entity that has been or is hereafter designated by the Secretary of State or his delegate as a foreign mission of Panama in the United States in any manner contrary to the provisions and restrictions set forth in this Determination.

7. Pursuant to 22 U.S.C. 4308(b), compliance by any person with the provisions of this Determination shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the

> same. No person shall be held liable in any court or administrative proceeding for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on any provision of this Determination or any instruction or requirement hereafter promulgated by the Director of Office of Foreign Missions in the implementation hereof.
>
> 8. Pursuant to 22 U.S.C. 4304(c) and (d), the Director of the Office of Foreign Missions is hereby designated as the agent for all foreign missions of Panama within the United States for the purposes of effectuating any waiver of recourse by such a mission, or the assignee or beneficiary of such a mission, which may be required in the implementation of this Determination. Wherever relevant and necessary, the granting of such a waiver of recourse by a mission of Panama in the United States is hereby expressly made a term and condition of receiving any benefit pursuant to this Determination of the Act in general.

54 Fed. Reg. 38,924 (1989).

### 2. Location of Diplomatic and Consular Buildings

#### *a. Limitation on diplomatic agents outside Washington, D.C.*

On July 31, 1989, the Department of State sent a circular diplomatic note to all chiefs of mission regarding the status of offices of diplomatic missions located outside of Washington, D.C. The note stated:

> The Department of State most recently set forth criteria governing accreditation in the United States in its Circular Note of May 1, 1985, including the requirement that a diplomatic agent must reside in the Washington, D.C. area, with the exception of certain designated senior financial, trade, economic and commercial positions in New York City expressly agreed to by the Department. The Department wishes to remind the Chiefs of Mission that the accreditation of diplomatic personnel is solely within the

discretion of the receiving State and that the establishment of offices forming part of the mission in another locality is not permitted without the prior express consent of the receiving State.

The Department recently has reviewed its policy of permitting governments to maintain such offices in New York City headed by a senior diplomat accredited to the mission of the sending State in Washington. As a result, the Department has determined that the changing nature of business and commerce in the United States has greatly reduced the need for such offices, especially as their maintenance always has constituted an exception to the Department's policy of limiting diplomatic offices and personnel to the Washington, D.C. area. Moreover, a limited number of problems stemming from the unusual status of these offices and their personnel has convinced the Department of the need to change their status.

Accordingly, the Department has adopted the following new policies, which are effective immediately, concerning the operation of diplomatic posts and personnel outside the Washington, D.C. area:

1. Those senior financial, economic, trade or commercial officers presently accredited as diplomatic agents at their missions in Washington but assigned to financial, economic, trade, or commercial offices in New York City shall continue to be accepted as diplomatic agents until the conclusion of their assignments in New York in that capacity.
2. Where the existence of the office and the conditions for its establishment have been set forth in an express written bilateral agreement between the United States and the sending State in question, concluded prior to the date of this note, the office may continue to function without change.
3. For all other economic, commercial, trade and financial offices, upon the departure of the present head of the office, replacements no longer will be accredited as diplomatic agents, and the office may continue to function in New York only if it is incorporated into an

existing New York consulate of the sending State, or, if there is no consular office in New York, its status is changed to a miscellaneous foreign government office (none of the personnel of which enjoy diplomatic status or immunities).

4. The Department will not accept new offices of diplomatic missions that are located outside of the Washington, D.C. area, nor will it accredit as diplomatic agents persons who reside outside the Washington, D.C. area, with the exception of those States with which it already has express agreements, as described in paragraph 2.

Note from the Department of State to all Chiefs of Mission, July 31, 1989, available at *www.state.gov/s/l*.

On February 19, 1990, Bulgaria sent a diplomatic note to the State Department stating its view that an agreement existed between Bulgaria and the United States permitting Bulgaria's commercial office to move to New York and to be considered part of the Bulgarian Embassy in Washington, D.C. On August 24, 1990, the Department of State responded to the Bulgarian note, disagreeing with Bulgaria's assertions, as follows, in pertinent part:

> Upon the request of the Embassy of Bulgaria, the Department has reviewed its records concerning the establishment of the Bulgarian Trade Office in New York, including the documents referred to in the Embassy's note of February 19. The Department has determined that there is no express bilateral agreement between the United States and Bulgaria establishing the New York office as part of the Bulgarian diplomatic mission and according privileges and immunities to the head of that office through accreditation to the mission. Rather, the Department has permitted the Chief of the Trade Office in New York to be accepted in diplomatic status and listed on the Diplomatic List in Washington as a unilateral policy decision. Accordingly, the replacement of the Trade Office chief will not be accredited as a diplomatic agent.

The note is available at *www.state.gov/s/l*.

### *b. Embassy property: zoning issues*

#### *(1) Sweden*

On April 18, 1990, the Republic of Cape Verde filed an application to the Foreign Missions Board of Zoning Adjustment ("FM-BZA") concerning the proposed sale of certain property to the Kingdom of Sweden. Opponents filed a motion to dismiss alleging that the Department of State, in exercising its approval authority in section 205(a) of the Foreign Missions Act, 22 U.S.C. § 4305(a), had not complied with section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. Section 106 provides that the head of a federal agency having licensing authority over any undertaking must take into account the effect of the undertaking on any historic site or building. The Department of State's opposition to the motion first noted that, "[t]o have any validity, . . . the Department of State must have 'license[d]' the 'undertaking' of the Kingdom of Sweden to construct its chancery, thereby 'triggering the requirements of § 106,' as the opponents allege." Department of State Motion and Memorandum of Points and Authorities in Opposition to Motion to Dismiss Application for Failure to Comply with Section 106 of the National Historic Preservation Act, p. 3, May 25, 1990, available at *www.state.gov/s/l*.

The Department argued that the approval procedure in section 205(a) does not in fact involve any "licensing" by the Department:

> Read together, sections 205 and 206 leave no doubt that it is the FM-BZA, and not the Department of State, which is the licensing agency with regard to the pending application.

*Id*. at 6–8.

The Department also argued that even if its approval of chancery location under the Foreign Missions Act did constitute licensing, sections 206 and 207 of the Foreign Missions Act preclude application of section 106 of the National Historic Preservation Act:

Section 207 of the Foreign Missions Act . . . was enacted to ensure the primacy of the Secretary of State in administering the provisions of the Act. . . .

In enacting this provision, Congress expressly wished to avoid conflicting or inconsistent decisions among federal agencies affecting foreign missions. The Conference Report on the final bill makes this intent crystal clear:

Section 207 expresses the preemptive effect of the right of the Federal Government, through the Secretary of State, to preclude the acquisition of any benefits by a foreign mission within the United States. A denial by the Secretary for example, of a right of a particular foreign government to open or maintain a mission within the United States, or a condition limiting the number of their personnel or other factors relating to the mission, would be controlling. This is consistent with current practice and reflects the policy of Federal preemption in foreign relations. . . .

* * * *

This section also requires coordination among Federal agencies, under the leadership of the Secretary of State, in order to achieve an effective policy of reciprocity so as to fulfill the purposes of this legislation *by precluding any Federal agency from taking any action inconsistent with the Foreign Missions Act. The provision has the effect of rendering unenforceable any rules or regulations of any Federal agency, to the extent that such rules or regulations would confer or deny benefits contrary to this title.* (Emphasis added.)

H.R. Conf. Rep. No. 97-693, 97th Cong., 2d Sess. 43–44, *reprinted in* 1982 U.S. Code Cong. & Ad. News 691, 702–03. . . .

* * * *

Section 207 makes it clear that Congress intended that chancery location decisions not be subject to the actions of other federal agencies or federal entities. Such other proceedings, decisions, or review and comment

> present the potential for inconsistent positions among competing federal agencies that could undermine or complicate the Secretary's reciprocity policy under the Foreign Missions Act.
>
> Even action of another federal entity which . . . may not be outcome-dispositive but which poses an additional hurdle for a foreign mission to overcome, may undercut the Secretary's conduct in the field of foreign relations. Such potential for inconsistent action among differing federal agencies, in short, is precisely and expressly disapproved under section 207.
>
> Section 206, by its terms, requires historic preservation issues related to chancery location to be considered exclusively by the FM-BZA, upon the Department of State's failure to disapprove under section 205 of the Act. The language of the statutory provisions in question simply leaves no room for an extra proceeding or review or comment by another federal agency.

Memorandum at 18, 19–20, 21, available at *www.state.gov/ s/l*.

On June 29, 1990, the FM-BZA disapproved the application, on the grounds that the size of the proposed chancery was incompatible with the existing historic structure, and that the chancery would generate an adverse traffic impact. As a preliminary matter, the FM-BZA denied the motion to dismiss, finding that the application was properly before the board on the merits, pursuant to the authority of Section 5-1206(c)(1) (in 2001 this section was changed to 6-1306(c) (1))of the D.C. Code (Section 206(c)(1) of the Foreign Missions Act). Order Disapproving Application, Government of the District of Columbia, Board of Zoning Adjustment, BZA Application No. 15263, June 29, 1990.

*(2) Turkey*

In 1988, the Government of Turkey filed an application to the FM-BZA for permission to expand its chancery by demolishing the existing building and constructing a new one. The Board denied the application on the basis that the proposed chancery was not compatible with the prevailing scale of existing structures in the

area, a historic district. The Turkish Government then redesigned the structure to reduce its size, and reapplied for FM-BZA permission.

In September 1990, the FM-BZA referred the application to the District of Columbia Historic Preservation Review Board ("HPRB"), seeking its advice on certain historic preservation issues. The HPRB then scheduled a public hearing with respect to Turkey's application. The Department of State filed an objection with the HPRB, challenging its jurisdiction to conduct a public hearing or any other proceeding in the matter:

> Section 206(c)(3) of the [Foreign Missions Act ("FMA")] provides that a determination by the FM-BZA "shall not be subject to the administrative proceedings of any other agency or official except as provided in [the FMA]." The FMA makes no provision for the conduct of a hearing by the Historic Preservation Review Board.
>
> * * * *
>
> Additionally, section 206(d)(2) of the Foreign Missions Act specifically addresses the issue of historic preservation. It expressly states that the . . . factor of historic preservation shall be:
>
> . . . determined *by the Board of Zoning Adjustment* in carrying out this section; and in order to insure compatibility with historic landmarks and districts, substantial compliance with the District of Columbia and Federal regulations governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks. (Emphasis added.)
>
> Where, as here, several federal and District agencies, such as the HPRB, are vested with responsibility under law for the review of historic preservation applications under certain circumstances, the Congress made clear in section 206 that the FM-BZA is the exclusive agency to conduct proceedings addressing the historic preservation implications of an application made by a chancery.

* * * *

> Because decisions on chancery applications have a direct effect on our foreign relations and on the status of U.S. embassy projects abroad, the Congress created an approval procedure within the District that "is intended to insure an expeditious process which will avoid the extensive and overlapping proceedings which are required under existing law and regulations." H.R. Conf. Rep. No. 97-693, 97th Cong., 2d Sess. 41, *reprinted in* 1982 U.S. Code Cong. & Ad. News 691, at 700.

Objection of U.S. Department of State to Jurisdiction of the Historic Preservation Review Board to Conduct a Hearing, pp. 2–3, December 4, 1990, available at *www.state.gov/s/l*.

On December 21, 1990, the Director of the Office of Foreign Missions sent a letter to the FM-BZA expressing the views of the Department of State on the application, including his determination that the international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions would be met by approval of the application. The letter also pointed out that basic security principles were incorporated into the siting and design of the proposed structure, and that the new chancery would improve the State Department's ability to exercise its responsibilities to protect the mission. Finally, the Office of Foreign Missions pointed out the Turkish government's support for the United States in its efforts to acquire property in Turkey for U.S. missions, and that it was in the federal interest of the United States to reciprocate. On January 16, 1991, the FM-BZA approved the application, with minor changes. Government of the District of Columbia, Board of Zoning Adjustment, Application No. 15427, March 15. 1991.

### 3. Tax Exemptions

#### *a. Gasoline tax exemption*

On July 31, 1989, the Office of Diplomatic Law and Litigation, Office of the Legal Adviser, Department of State, responded to several letters from authorities in states of the United States

requesting information on the legal authority for exempting diplomatic and consular personnel from gasoline tax. In its replies, the Department stated:

> The Department's interpretation [of article 34 of the Vienna Convention on Diplomatic Relations and article 49 of the Vienna Convention on Consular Relations] is predicated upon the text of the provisions, negotiating history, and the custom and practice of signatory nations to the treaties cited above.
>
> [A]rticles 34 of the VCDR and 49 of the VCCR establish a general rule of tax exemption for diplomatic and consular personnel, with specified exemptions. Subsection (a) of the foregoing provisions excludes from the normal benefit of an exemption "indirect taxes of a kind normally incorporated in the price of goods or services." By their express terms, articles 34 and 49 do not limit enjoyment of the exemption to the party who is legally liable for the tax. They only limit enjoyment where the indirect tax is "normally incorporated in the price of goods or services." This language is in marked contrast to the real property tax exemption afforded to mission premises under article 23 of the VCDR and article 32 of the VCCR. The mission premises provisions limit enjoyment of the tax exemption to the party who is legally liable for the tax. It is clear, therefore, that under the express language of the treaties, the technical legal incidence of the gasoline tax on a party other than the consumer is not controlling. Rather, the determinative factor is whether the tax is "normally incorporated in the price of goods or services."
>
> The Department's interpretation of articles 34 and 49 is also based upon the negotiating history of the provisions. . . . [This source] indicates that, as originally drafted, the relevant tax provision in the diplomatic relations treaty would have excluded all indirect taxes from the exemption. The drafters believed that this exclusion was overbroad, however, and subsequently narrowed the exclusion so that the final treaty only excludes some indirect taxes, i.e., "normally incorporated" indirect taxes. . . . Normally

> incorporated indirect taxes were excluded from the normal benefit of an exemption for ease of administration. . . . It was thought by the drafters of the diplomatic relations treaty that the amount of tax at issue did not justify the administrative complications in providing an exemption . . . .
>
> We believe that the history and rationale of the tax provisions indicate that federal and state gasoline taxes are not of the kind intended to be excluded from the normal rule of exemption. First, the gasoline tax does not fall within the "normally incorporated" category: it is readily segregable from the price of petrol, and, indeed, is often separately identified on the gas pump. Second, an administrative burdensomeness justification has no relevance to federal and state gasoline tax exemption, which is currently being administered by the oil companies in numerous states without complication.
>
> The Department's position on gasoline tax is consistent with foreign State practice and understanding under the Vienna Conventions. About 140 nations provide a gasoline tax exemption to United States mission personnel, and these States rightly expect the United States to reciprocate their grant of an exemption. This right of reciprocity is enshrined in VCDR article 47 and VCCR article 72.

Letters of July 31, 1989, to authorities in Florida and Kentucky from Joan E. Donoghue, Director, Office of Diplomatic Law and Litigation, available at *www.state.gov/s/l*.

### *b. Utility tax*

On May 1, 1990, the Department responded to a letter from a state authority addressing exemption for diplomatic and consular personnel from state and city taxes imposed on the gross revenues of the electrical utility in Seattle, Washington, which by law are identified on the electric company billing.

In its reply, the Department of State explained the legal basis for exemption from utility tax:

Utility tax exemption for diplomatic and consular mission members derives from treaty obligations of the United States. Treaties to which the United States is a party are the law of the land and are binding on the several States under the federal supremacy clause (article VI of the Constitution). *See United States v. Arlington*, 702 F.2d 485 (4th Cir. 1983); *United States v. Arlington*, 669 F.2d 925 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982); *United States v. Glen Cove*, 322 F. Supp. 149 (E.D.N.Y. 1971), *aff'd per curiam*, 450 F.2d 884 (2d Cir. 1972). Compliance with [the] international treaty obligations [at issue] is not subject to the passage of enabling legislation by the States or localities. See H.R. Rep. No. 95-526, 95th Cong., 2d Sess. 2 ("Since the (Vienna Convention on Diplomatic Relations) is self-executing, no implementing legislation is needed.")

In each of the cases cited above, the court declared null and void real property tax assessments by local authorities on the ground of inconsistency with tax exemptions granted to governments by treaty. In *Glen Cove*, the court elaborated that "[m]uch less should a foreign government be deprived of a treaty benefit by the claim that a municipal government within the federal structure has power to postpone the realization of what the treaty promised. Treaties, after all, are part of the law of every state." 322 F.Supp. at 154–55.

State and city utility taxes imposed on the gross revenues of a utility company, like sales and gasoline taxes, are state and local levies from which foreign missions and their personnel are exempt under Article 34 of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, and Article 49 of the Vienna Convention on Consular Relations, 21 U.S.T. 77. . . . The Department is of the position that such state and local utility taxes are exempt because they are direct, that is, clearly identifiable and uniformly passed on to the consumer. The technical legal incidence of the tax on a party other than the consumer is not controlling. If the tax is readily segregable from the price of the product or service and the practical incidence of the tax devolves upon the consumer, it is exempt under the treaty provisions cited above.

> The Department's interpretation of Article 34 of the Vienna Diplomatic Convention and Article 49 of the Vienna Consular Convention is based upon the text of the treaties and their negotiating history. The language of the provisions does not exclude from exemption all "pass-along" taxes, but only those indirect taxes that are "normally incorporated into the price of goods or services," that is, hidden taxes. Where, however, as here, the tax is readily identifiable, an exception to the general rule of exemption has no relevance.
>
> Because the grant of utility tax exemption is a treaty obligation, United States Government interests and operations abroad could be affected by our failure to meet this obligation. Foreign governments rightly expect the United States to reciprocate their grant of an exemption.

Letter to Assistant City Attorney, Seattle, Washington, May 1, 1990, from Gilda Brancato, Attorney-Adviser, Office of Diplomatic Law and Litigation, available at *www.state.gov/s/l*.

### 4. Labor Issues

#### *a. Dependent employment in the United States*

On February 16, 1990, the Immigration and Naturalization Service ("INS") published a final rule revising INS regulations relating to employment authorization in the United States for dependents of certain foreign government and international organization officials. 55 Fed. Reg. 5,572 (Feb. 16, 1990), 8 C.F.R. §§ 214 and 274a. As stated in the rule's summary, the revisions were "taken in order to improve employment opportunities for dependents of United States officials stationed abroad by making bilateral agreements more attractive for dependents of foreign officials stationed in the United States and to conform the regulations with the provisions of the Immigration Reform and Control Act of 1986 (IRCA)."

An interim rule with request for comments had been published at 53 Fed. Reg. 46,850 (Nov. 21, 1988) and became effective on November 21, 1988. Eight comments had been received on the

interim rule, which were considered by the INS and the Department of State in the final rule's promulgation. Many of the comments addressed new or different rules for employment of dependents of G-1 principal aliens (employees of missions to international organizations) and G-4 principal aliens (employees of international organizations).

In particular, six entities disagreed with setting an age limit on eligibility for employment authorization for G-4 dependent children. In response, the INS stated:

> The age limits established for the non-spouse dependents of A-1, A-2, G-1 and G-4 principal aliens are reasonable and are based on a Department of State survey of international practices and agreements on this issue. . . . The prior regulations allowed unmarried children of any age to be considered dependents for employment purposes under de facto arrangements while they limited married children to a definite age under bilateral agreements. The ages under bilateral agreements are established by formal negotiations and, therefore, must be considered benchmarks. It follows that the ages for employment [under de facto arrangements] should not be more generous. . . . No convincing argument has been advanced why the son or daughter of an international organization employee deserves preferential employment opportunities when compared to the child of a diplomat whose government has entered into a bilateral agreement or de facto arrangement. . . .

55 Fed. Reg. 5,572 (Feb. 16, 1990).

Several parties argued that G-4s should receive more generous treatment because they are different from A-1s, A-2s, and G-1s in their loyalties and length of assignments. Other parties characterized the regulations as arbitrary, capricious or harsh when dealing with G-4 dependents. The INS responded:

> The argument that G-4s are more loyal to their employing organizations than to their home countries is conjecture and does not lead to the conclusion that their dependents have the right to employment in the host country. Arguments that the Service should differentiate G-4s

> from A-1, A-2, and G-1 aliens because G-4s are ". . . indistinguishable from United States citizens similarly employed" are not persuasive. They overlook the fact that some A-1, A-2, and G-1 aliens are posted to the United States for lengthy periods of time; in fact, some current diplomatic officials have been posted to duty in the United States for more than 15 years. The arguments also overlook the fact that G-4s are accorded preferential immigration inspection when they enter the United States as are A-1, A-2, and G-1 aliens. Furthermore, G-4 principal aliens have no federal income tax liability and many are free of state and local tax liabilities as well.
>
> * * * *
>
> The Service worked closely with the Department in all phases of developing these regulations. As part of the process, the Department of State surveyed the policy and practices of other countries. The resulting regulations reflect the application of a standard based on common international practice. If anything, the regulations are generous in dealing with the dependents of G-4 international organization employees. Not all host countries allow dependent employment to the same extent.

*Id.* at 5,573.

Finally, in response to a party who questioned the legality of regulating employment of dependents and argued that such regulation constituted a restriction on entry of its personnel, the INS stated:

> The Department of State has advised the Service that the United States does not have any international legal obligation with regard to the employment of dependents of representatives to or officials of international organizations. In the absence of such an obligation, the United States is free, pursuant to its domestic law and procedures, to determine the conditions under which these aliens in the United States may undertake employment in the private labor market.

*Id.*

### *b. Applicability of U. S. labor law*

On October 23, 1990, the Diplomatic Law and Litigation Office of the Office of the Legal Adviser provided guidance on the applicability of U.S. labor laws to foreign missions and their non-diplomatic personnel, in response to a request from a foreign embassy in the United States, available at *www.state. gov/s/l*. The letter included enumerated excerpts as follows from Department of State letters, telegrams and diplomatic notes. Following a reference to the letter of September 11, 1990, discussed in 4.c., the letter continued:

> 2. Unclassified telegram from the Department to U.S. missions abroad dated February 14, 1989; Subject: Tax collection from employees of diplomatic mission:
>
> "Accredited diplomatic agents and administrative and technical ("A & T") staff are exempt from taxation in host country under the Vienna Convention on Diplomatic Relations ("VCDR") to which both the U.S. and [host state] are parties. Article 33 of VCDR exempts diplomatic agents from host state social security provisions, Article 34 exempts diplomatic agents from other host state taxation, and Article 37 grants the same treatment to A & T staff. Thus, . . . diplomatic agents and A & T staff pay no taxes here, and VCDR requires that U.S. diplomatic agents and A & T staffers receive the same treatment.
>
> As for U.S. citizen and resident employees of diplomatic missions here, U.S. statutes explicitly exempt foreign governments, including diplomatic and consular missions, from the requirement to withhold income or social security taxes from paychecks, or to pay the employer contribution to the social security system. 26 U.S.C. section 340l(a)(5) states that, for purposes of calculating wages on which an employer must withhold income tax, the term "wages" "shall not include remuneration paid . . . for services by a citizen or resident of the United States for a foreign government or international organization. . . ." 26 U.S.C. section 312l(b)(11) excludes from the definition of "employment" which gives rise to an employer's obligation to withhold and pay social secu-

rity tax, "service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative). Under these statutes a foreign mission has no obligation to collect or pay tax obligations of its U.S. citizen or resident employees."

3. Unclassified telegram from [the] Department [of State] to U.S. missions abroad dated June 27, 1989; Subject: Litigation against U.S. Embassy:

"Under restrictive theory of sovereign immunity now prevailing in international law, states are not permitted to claim immunity in foreign courts with respect to commercial activities in that state. Employment of local nationals by diplomatic or consular missions is generally deemed to constitute commercial activity, at least to the extent that what is at issue in litigation is benefits provided under terms of employment or under local labor law. Department does take the position . . . that jurisdiction of local courts does not extend to ordering reinstatement of employees or other actions inconsistent with autonomy of mission as representative of sovereign government, but claims for labor benefits or breach of contract money damages can generally be adjudicated by local courts."

4. Letter dated September 24, 1990, to U.S. Department of Labor from the Office of the Legal Adviser, Diplomatic Law and Litigation Office:

"Per our conversation, following are excerpts from Department of State diplomatic notes to all embassies dated 1981 regarding treatment of private servants of diplomatic personnel:

"The Secretary of State [expresses] deep concern of the Department of State over the evidence that some members of diplomatic missions have seriously abused or exploited household servants who are in the United States under nonimmigrant A-3 visas.

"The Department is confident that all [embassies] are aware that promotion of the increased observance of internationally recognized human rights by all countries is stated by statute to be a principal goal of the foreign policy of the United States.

. . .

[Where a United States consular officer abroad is uncertain that a prospective domestic servant fully understands the salary and working conditions of the proffered employment, consular officers should require a written employment contract.] United States consular officers will carefully review such contracts prior to the issuance of a visa to ensure that the wages and other conditions of employment are reasonable in light of the work involved and the costs of living in this country. That contract must contain the following information:

1. A description of the duties to be performed by the alien;
2. The wages to be paid on an hourly or weekly basis;
3. Total hours of guaranteed employment per week, amount of overtime work which may be required of the employee, and conditions for overtime payment;
4. A statement that the employee will be free to leave the employer's premises at all times other than during regular or overtime working hours;
5. The total amount of money, if any, to be advanced by the employer, with details of specified items, such as air fare, and the terms for repayment of the advance;
6. Express provisions for any offsetting charges for room and board viewed as part of compensation;
7. A provision governing termination by either party to the contract; and
8. A statement that a duplicate of the contract has been furnished to the employee in a language he or she can understand.

### *c. Applicability of local workers compensation plans*

On September 11, 1990, the Office of Diplomatic Law and Litigation of the Office of the Legal Adviser responded to a letter from a foreign government regarding its intent to withdraw from California's workers compensation plan for the employees of its consulates located in California. Instead, the foreign government wished to apply its own workers compensation plan,

because, in its view, it was more generous and comprehensive and would ensure the same benefits for all its U.S. employees. The Department's letter recommended that, before terminating participation in the California plan, the foreign government consider the legal obligations of diplomatic and consular missions as employers in the United States, and potential liability to its employees or to California following termination.

The letter, available at *www.state.gov/s/l*, addressed these legal obligations in further detail, as follows:

> *1. Foreign Missions as Employers*
>
> Under international law, a sovereign state is not immune in the courts of another state from lawsuits arising out of its commercial acts. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 et seq., expressly incorporates this principle into U.S. law. See 28 U.S.C. 1605(a)(2). In any lawsuit involving a claim to which it is not immune, a foreign state, including its political subdivisions, agencies and instrumentalities, is liable to the same extent as a private individual under like circumstances. *Id*. section 1606.
>
> The courts of many countries have concluded that the employing of local residents is a commercial activity and that foreign sovereigns are therefore not immune to lawsuits arising out of these employment relationships. Moreover, under both the Vienna Convention on Diplomatic Relations (article 41) and the Vienna Convention on Consular Relations (article 55), the personnel of foreign missions are obliged to respect host state laws and regulations. Taken together, these provisions mean that, as employers in the United States, [foreign] missions are subject to relevant federal and state employment laws and regulations unless they are exempted from these rules by U.S. or international law.
>
> Certain U.S. statutes contain express exemptions for foreign governments as employers. See 26 U.S.C. 3401(a)(5) (foreign governments need not withhold income tax from the salaries of their foreign national employees); 26 U.S.C. 3121(b)(1) (foreign missions exempt from with-

holding Social Security taxes from their employees' salaries); and 26 U.S.C. 3306(a) and (c)(11) (foreign missions exempt from paying federal unemployment tax on the salaries of their employees). . . . At least one state has interpreted its laws as exempting foreign consulates from participating in a mandatory state-administered unemployment compensation scheme. [Citation omitted.] In addition, it is the U.S. position that international law precludes a host state from requiring a diplomatic or consular mission to employ any particular person. Thus, we regard foreign missions as exempt from any requirement to reinstate a former employee found to have a right under local law to reemployment—as, for example, following a successful action for wrongful discharge.

I am aware of no U.S. law, treaty provision, or rule of customary international law, however, that exempts a sending state from participating in a workers compensation plan if local law so requires [consistent with the Vienna Conventions on Diplomatic and Consular Relations]. [It is recommended that the Embassy] determine, through private counsel or in consultation with the [locality], (1) whether a foreign government is required to participate in such a plan and, if so, (2) what action by the State would be required to exempt [the foreign government] from this requirement.

*2. Potential Liability of [the Foreign Government]*

* * * *

***A. Liability to Employees***

Even if the benefits offered under the [foreign government's] plan are more generous than those under the California plan, an employee might assert rights under California law to the benefits of the local plan. . . . [I]t is not unforeseeable that some workers might try to "double dip" by collecting benefits under both . . . plans. It is possible that California law would require the [foreign]

government to compensate an employee as provided under the local plan regardless of benefits previously provided.

Perhaps more problematic for [the foreign government], it is also possible that an employee covered by [the foreign government's] plan could sue in tort on a cause of action that would have been precluded if [the foreign government] were participating in the California plan. Both the cost of litigating or settling such a suit, and the potential costs of jury verdicts favorable to plaintiffs, should be considered in determining whether it makes sense for your government to withdraw from the California plan. In my view it is essential that [the foreign government] obtain expert counsel in evaluating these issues.

### *B. Liability to the State of California*

Unless [the foreign government] is legally exempt from participating in the California plan, the State of California might take legal action to collect mandated employer payments. Such action could come either immediately after [the foreign government] announces its withdrawal or at a later date, possibly after California pays state-mandated workers' compensation to an employee who has attempted to "double dip," as described above. If [the foreign government] is not exempt from participating in the plan, liability to the State could become large as years pass. Thus, it is important to clarify [the foreign government's] liability and to ensure that withdrawal is consistent with California law.

**Cross reference**

*Applicability of civil cause of action for terrorist acts to foreign governments and officials*, **Chapter 3.B.1.c.**
*Protection of Lebanese Embassy*, **Chapter 9.A.3.**
*Immunity of U.S. naval vessels*, **Chapters 12.A.9. and 13.2.b.**

# CHAPTER 11

# Trade, Commercial Relations, Investment and Transportation

## A. TRANSPORTATION BY AIR

### Transition Agreement for U.S. Carriers in the Berlin Air Service

Following World War II, the four Allies (the United States, USSR, United Kingdom, and France) exercised control over Berlin aviation pursuant to their rights as occupying powers. This included the right of the three western Allied air carriers to provide exclusive air service between Berlin and West German cities, the so-called "Inner German Service," and international air service to and from the Western Sectors of Berlin. On September 12, 1990, the four Allies, the Federal Republic of Germany and the German Democratic Republic signed the Treaty on the Final Settlement with Respect to Germany, which provided, in Article 7, for termination of the rights and responsibilities of the four Allied Powers relating to Berlin and to Germany as a whole, including those relating to the aviation regime. A separate declaration on October 1, 1990, suspended the Allied rights and responsibilities pending the entry into force of the Treaty. *See* Ch.4.A.2., *supra*.

With the resumption of German sovereignty over Berlin airspace, the Berlin air service provided by the western Allied carriers lacked any legal basis because, absent special agreement, German law bars both "cabotage" (the carriage of passengers, goods or mail for remuneration by a foreign carrier between two domestic points) and "seventh freedom" services (service of a foreign carrier from a third country to a domestic point without a stop in the foreign carrier's country). Accordingly, the United States, United Kingdom, and France sought transitional arrange-

ments that would permit their carriers to seek commercial alternatives that would bring them into compliance with German law without suffering undue financial loss. On October 9, 1990, the United States and the other Western Allies each entered into an exchange of notes with the Federal Republic of Germany setting a transition period for Berlin air services by the carriers of the former Western Allies following German unification. Specifically, the agreement provided that the existing air services to and from Berlin provided by the Allied carriers could continue after German unification to operate intra-German scheduled services and international European scheduled and charter services for a transition period through the end of the summer traffic season of 1993 at gradually reduced levels.

## B. COMMUNICATIONS

### U.S. Radio and Television Broadcasting to Cuba

#### *a. U.S. law*

In 1983 Congress passed the Radio Broadcasting to Cuba Act, authorizing radio broadcasts to Cuba by the United States Information Agency ("USIA") to further the open communication of accurate information and ideas to the people of Cuba through radio broadcasts. Pub.L. No. 98-111; 97 Stat. 749; 22 U.S.C. §§ 1465, 1465a. In 1988, Congress authorized USIA to conduct a test of television broadcasting to Cuba for the same purposes. Title V of Pub.L. No. 100-459; 102 Stat. 2186, 2220 (1988). *See Cumulative Digest 1981–1988* at 786–789.

On February 16, 1990, Congress passed the Television Broadcasting to Cuba Act, which stated that USIA "shall provide for the open communication of information and ideas through the use of television broadcasting to Cuba. Television broadcasting to Cuba shall serve as a consistently reliable and authoritative source of accurate, objective, and comprehensible news." Section 243, Pub.L. No. 101-246; 104 Stat. 15, 22 U.S.C. § 1465bb. The specific findings and purposes of the Act were set forth in detail in section 242, 22 U.S.C. § 1465aa. The Act also provided that no appropriated funds may be obligated and expended until the

President determined that the test of television broadcasting to Cuba authorized by Pub. L. No. 100-459, 102 Stat. 2186 (1988), "has demonstrated television broadcasting to Cuba is feasible and will not cause objectionable interference with broadcasts of incumbent domestic licenses." *Id*., § 247(b)(1), 22 U.S.C. § 146 5ee (b)(1). Finally, the Act provided that the program authorized by this Act shall be designated the "USIA Television Marti Program." Section 243(c), 22 U.S.C. § 1465bb(c).

Test broadcasts of TV Marti began on March 27, 1990. On July 27, 1990, the President submitted a report to Congress on the results of the test broadcasts, as required by section 247(b)(2) of the Act, 22 U.S.C. § 1465ee(b)(2). The Report discussed, *inter alia*, TV Marti's technical feasibility, its audience in Cuba and the Cuban Government's reaction. In particular, the Report described legal considerations relating to the program:

> There is no legal basis for objection *per se* to radio and television broadcasts from one country to another. Article 19 of the Universal Declaration of Human Rights, a widely-cited but non-binding resolution adopted by the United Nations assembly in 1948, provides that:
>
> Everyone has the right of freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
>
> This concept is expressed in other international instruments including the International Covenant on Civil and Political Rights and the Helsinki Final Acts. While such provisions do not affirmatively grant governments the right to send radio or television programs into another country, the precedent is well established. Stations which operate across borders include the BBC External Service, Vatican Radio, Radio Berlin International (GDR), and until recently, Radio Moscow from Cuba in the English language. Initiatives undertaken by the United States in international broadcasting have further fostered the free flow of information. Radio Free Europe, Radio Liberty, and RIAS-TV (Radio-TV in the American Sector, Berlin)

have provided information to those otherwise unable to obtain it; they have continued despite protestations from affected governments relating to program content and national sovereignty.

Radio Marti and TV Marti continue this tradition of [Voice of America] VOA programming. The Government of Cuba, entities such as the Vatican, the Soviet Union, the United Kingdom, as well as other governments, have long engaged in the cross-frontier international broadcasting of information and ideas.

At the same time, however, there is an obligation not to cause harmful interference to another country's broadcasts. As the largest user of the electromagnetic spectrum, the United States actively supports the international legal regime which allocates the radio frequency spectrum and allows for the registration of radio frequency assignments in order to ensure orderly international use of the frequency spectrum and to avoid harmful interference between radio stations of different countries. Cuba and the United States are both party to the International Telecommunication Convention (Nairobi, 1982) and to the Radio Regulations (Geneva, 1979) which complement it. (The term "radio" encompasses all forms of broadcasting including "television.") The obligations described in these agreements relate to frequency use and are neutral with regard to program content of the signal.

The fundamental obligation regarding the use of radio (TV) frequencies as expressed in Article 35 of the International Telecommunication Convention is for radio transmissions to avoid harmful interference to frequencies used by other members:

> All stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Member. . . .

The Radio Regulations permit member countries wide latitude in their use of frequencies, notwithstanding other detailed provisions, so long as stations do not cause harmful interference.

> Administrations of the Members shall not assign to a station any frequency in derogation of either the Table of Frequency Allocations given in this Chapter or the other provisions of these Regulations, except on the express condition that harmful interference shall not be caused to services carried on by stations operating in accordance with the provisions of the Convention and of these Regulations.

Report to Congress on TV Marti Test Broadcasts to Cuba at 7–8, available at *www.state.gov/s/l*.

On August 26, 1990, the President issued a determination concluding that the test broadcast "has demonstrated television broadcasting to Cuba is feasible and will not cause objectionable interference with the broadcasts of incumbent domestic licenses." Presidential Determination No. 90-35, August 26, 1990, 55 Fed. Reg. 38,659 (1990). A statement by White House Press Secretary Marlin Fitzwater on August 27, 1990, explained:

> The President has determined that TV Marti broadcasts will continue in a manner which is consistent with our international obligations. TV Marti is an integral part of U.S. policy to provide free access to information for people who are denied that right. We regret the Cuban regime's decision to attempt to deny the free flow of information by jamming. But we recall the experience of Radio Free Europe and Radio Liberty in which the broadcasts were jammed for years, yet people were able to listen.

26 WEEKLY COMP. PRES. DOC. 1292, (Sept. 3, 1990).

### *b. Cuban objections and International Telecommunications Union*

At the Plenipotentiary Conference of the International Telecommunication Union ("ITU") in Nice in May and June, 1989, the Cuban government had raised objections to U.S. radio broadcasts to Cuba. In response to the Cuban objections, the United States Delegation issued the following written statement:

Contrary to the Cuban representative's erroneous allegation, U.S. Voice of America (VOA) medium frequency broadcasting to Cuba complies fully with the North American Regional Broadcasting Agreement (NARBA), the 1981 Region 2 MF Broadcasting Agreement, and the Radio Regulations of the ITU. The VOA Station broadcasting on 1180 KHz has been broadcasting for many decades and is registered with the International Frequency Registration Board (IFRB).

. . . All people who support the free flow of information must totally reject Cuban Government attempts to attack legitimate international broadcasting for "interfering in internal Cuban affairs." Indeed, the Cuban Government itself broadcasts to other countries in the MF broadcasting band. The program content of the VOA's "Radio Marti," the proposed "TV Marti," or any other station cannot be a matter for debate. As reflected in Article 19 of the United Nations Universal Declaration of Human Rights, all people enjoy the right to seek, receive, and impart information and ideas through any media, regardless of frontiers.

Licensed broadcasting from United States territory does not cause harmful interference to registered Cuban stations. While, from time to time, private individuals make extra-legal radio broadcasts to Cuba, my government continues to make every effort to enforce U.S. laws against such unauthorized transmissions. In just one example, on May 22 the U.S. Federal Communications Commission seized the equipment of an unlicensed Mobile station broadcasting to Cuba on 6666.6 KHz.

In sharp contrast to the United States fulfillment of its international treaty obligations, the Cuban Government-owned stations, whether unregistered with the IFRB, operating outside their registered parameters, or operating in violation of its previous obligations under a regional agreement, have been causing harmful interference to U.S. commercial medium wave broadcasting stations since 1959. . . .

Over the past two years we have repeatedly expressed our concern about harmful interference caused to legiti-

> mate U.S. broadcasting by Cuban stations not entered in the Master International Frequency Register and operating at excessive power, particularly those stations broadcasting on the 1040 and 1160 KHz frequencies. The Cuban Government has ignored our repeated oral and written protests and in recent months has purposely escalated its interference by adding a high-powered station on the 830 KHz frequency.
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> * * * *
>
> The United States insists that, as required by Articles 35 and 44 of the ITU Convention and Article 6 and Regulation No. 1416 of the Radio Regulations, unregistered Cuban stations cease transmission until such time as they can be operated in a manner that does not result in harmful interference to registered stations.

Statement of the U.S. Delegation, Plenipotentiary Conference of the International Telecommunication Union, June 1989.

At the close of the conference, the Cuban government made a reservation on signing the Final Act of the ITU Plenipotentiary Conference, denouncing U.S. radio and proposed TV broadcasts and "reserv[ing] the right to adopt any measures it considers necessary, including broadcasts to United States of America territory on the frequencies it considers most appropriate in order to safeguard its rights and respond adequately to the radio and television broadcasts aimed at Cuba from the United States of America." Final Acts of the Plenipotentiary Conference, Nice, 1989, p. 166 (Statement No. 62 of Cuba). In response, the United States issued a counter-declaration: "The United States of America . . . recalls its rights to broadcast to Cuba on appropriate frequencies free of jamming or other wrongful interference and reserves its rights with respect to existing interference and any future interference by Cuba with United States broadcasting." *Id.* at 187.

On May 13, 1989, the Cuban government wrote to the International Radio Frequency Board ("IFRB") of the ITU requesting the Board's review of a frequency assignment to the United States on the ground that it was causing harmful interference to

two Cuban stations. The Cuban government argued that this interference was in violation of Radio Regulation No. 2666 and requested that the IFRB include a note regarding the harmful interference next to the Cuban frequency assignments. Regulation No. 2666 states that in principle, except for certain frequency bands, broadcasting stations shall not employ power exceeding that necessary to maintain national service of good quality within the frontiers of the country concerned.

On June 26, 1989, the IFRB agreed to include such a note. On October 11, 1989, the IFRB requested the U.S. Government's views on the conformity of the U.S. frequency assignment with Radio Regulation No. 2666. IFRB telefax 30D(BC)/ 0.2364/89.

On February 27, 1990, the Acting U.S. Coordinator and Director, Bureau of International Communications and Information Policy, Kenneth W. Bleakley, responded to the IFRB's request. His letter stated that the assignment of the frequency was consistent with Radio Regulation No. 2666, and that IFRB review would be inappropriate for the following reasons:

> 1. No. 2666 is a general rule to which appropriate exceptions can be made, at the discretion of the administration operating the AM-broadcasting station and consistent with other relevant provisions of the Radio Regulations. The provision has existed for considerable time and a pattern of conduct has emerged over the years among ITU Members and the Board.
>
> 2. It is the practice of many ITU Members, including Cuba, to operate broadcasting stations in the MF-band for international and external service, as amply demonstrated in ITU plans and frequency lists (e.g., Rio Plan and the Regions 1 & 3 LF/MF Plan) and in widely used non-ITU publications, such as the Work Radio TV Handbook. Radio conferences of all three ITU Regions have accepted these stations (including Marathon) for inclusion in MF-broadcasting plans. This usage is particularly prevalent in Region 2.
>
> 3. It would be inappropriate for the IFRB to review a finding on a station assignment which has been operating for more than 25 years in accordance with a regional agree-

> ment to which both ITU Members involved in this matter were party, and one which the Board itself processed under a regional plan within the past ten years including a review of the assignment for conformity with the regulations other than with respect to harmful interference.
>
> 4. It would be inappropriate for the IFRB to review the finding on the basis of No. 1421b, i.e., on the grounds of actual harmful interference. This Administration has no record of any interference reports from Cuba on 1180 KHz and expects to receive none in light of the circumstances surrounding the bringing into use of this frequency.

Letter from Acting Director and Coordinator Bleakley to G.C. Brooks, Chairman, International Frequency Registration Board, International Telecommunication Union, February 27, 1990, available at *www.state.gov/s/l*.

On November 3, 1989, the Cuban government wrote to the ITU regarding the proposed U.S. television broadcasts to Cuba pursuant to the TV Marti program. The letter argued that the broadcasts would constitute "flagrant violations" of the ITU Convention and Radio Regulation No. 2666, as well as interference in the internal affairs of Cuba. The chairman of the IFRB forwarded the letter to the U.S. Government requesting additional technical information and comments. Letter from G.C. Brooks, Chairman, International Frequency Registration Board, January 12, 1990, available at *www.state.gov/s/l*.

On April 2, 1990, the IFRB notified the U.S. Government that it viewed the establishment of this television station as a violation of Radio Regulation No. 2666, and requested the United States to modify the station's technical characteristics to conform with the regulation and eliminate harmful interference.

In response, the U.S. Government reiterated its view that the IFRB had established no basis for its involvement in the matter, in pertinent part as follows:

> We have endeavored to determine the basis for your communication to us by reviewing the Board's "essential duties" listed in Article 10 of the International Telecommunication Convention (Nairobi, 1982) and the "func-

tions" set forth in Article 10 of the Radio Regulations (Geneva, 1979), instruments to which the United States and Cuba are party. The only applicable provisions appear to be those relating to advice and assistance to administrations, [found in No. 70 of the Nairobi Convention and No. 999 of the Radio Regulations].

* * * *

All other duties and functions of the IFRB relate to the orderly recording and registration of frequency assignments (including provisions 1438–1443 [relied on by the IFRB]), to radio conference preparations, and to other non-relevant matters. We conclude that your letter of April 2, initiated by a November 3, 1989, communication from Cuba to Secretary General Tarjanne, constitutes advice and assistance even though the Cuban letter from last November does not contain such a request. Given our understanding of the Board's actions, your letter to this Administration does not appear to be in keeping with normal IFRB or ITU procedures.

* * * *

With respect to the remaining substantive points of your letter, the Administration of the United States is pleased to submit the following comments:

— *Efficient use of the radio spectrum*—we do not agree with the Board's implication that the use of a high antenna cannot be an efficient use of the radio spectrum. Many factors are involved in the effective, efficient and economical use of spectrum. In fact, the system has been designed to take account of accepted international technical standards and to achieve a highly efficient use of the spectrum, including measures to minimize side lobe radiation which allows sharing with other broadcast stations and to use time sharing to avoid harmful interference;

— *No. 2666 of the Radio Regulations*—we do not share the Board's opinion regarding the intent and spirit of the provision . . . . There are many ITU members throughout the world that use the frequencies identified in No. 2666 for

> international broadcast services. These include stations of the BBC External Service (U.K.), Vatican Radio, Radio Berlin International (German Democratic Republic), All India Radio, and until several weeks ago, "Radio Moscow" from Cuba in the English language. We do concur with your description of the customary practice regarding No. 2666, [which] permits exceptions to full compliance with the provision and it is for Administrations to comply with (and interpret) the provision. The United States has determined that this customary practice is applicable to the frequency assignment at Cudjoe Key, Florida.
>
> — *Report of Harmful Interference*—with respect to paragraphs 5 and 6 relating to the recent Cuban report of harmful interference dated "27 Nov" [sic], the United States acknowledged the complaint by return telex on the same day (March 27). We are confident that the operation of the Cudjoe Key station is consistent with our obligations under the ITU Regulations and, to the best of our knowledge, is not causing harmful interference to Cuban stations. We note that "time sharing," as cited in provision 1944 of the Radio Regulations, is one method we have used to avoid interference.

Letter from Bradley P. Holmes, Coordinator and Director of the Bureau of International Communications and Information Policy, Department of State, to Gary C. Brooks, Chairman, International Frequency Registration Board, April 16, 1990, available at *www.state.gov/s/l*.

The United States rejected assertions by the IFRB in a May 8,1990 letter basing IFRB involvement on No. 80 of the Nairobi Convention and Nos. 1438 and 1442 of the Radio Regulations, stating:

> No. 80 of the Nairobi Convention deals with additional duties of the IFRB respecting conferences. The provision does not grant authority to the Board to assume whatever additional duties it deems appropriate based on its own interpretation of the Radio Regulations. We invite you to examine the derivation of this provision from its predecessor (No. 167) in the Montreux Convention (1965). The

phrase "in accordance with the procedure provided in the Radio Regulations" was added in the Malaga-Torremolinos Convention (1973) in No. 68. This addition was designed by the Members to ensure that the activities of the IFRB relating to conferences conform to the provisions of the Radio Regulations; it did not broaden the scope of the essential duties of the IFRB.

We are also concerned that your continued reference to Nos. 1438 and 1442 of the Regulations fails to take into account the context in which these provisions appear. The provisions appear in a section of Article 12, Notification and Recording in the Master International Frequency Register of Frequency Assignments to Terrestrial Radiocommunications Stations; they do *not* appear in Article 10, Section I (Functions of the Board). The timing of the Board's communications to the United States clearly indicates that these provisions could not be used by the Board to justify its actions since the notification process associated with the Cudjoe Key station has not advanced even to the stage where an appropriate entry has appeared in an IFRB Circular. . . .

* * * *

The United States also continued to object to other aspects of the IFRB's comments, stating:

We are particularly troubled by the Board's characterization of No. 2666. This provision establishes a general rule for frequency use to promote greater frequency sharing and to promote practices that minimize harmful interference and, as an integral part of the text, clearly indicates that exceptions to that rule are permissible. An exception to the general rule is, therefore, in *full compliance with the Regulation itself*. . . .

Additionally, we believe that any view the IFRB has expressed with regard to harmful interference on the basis of a Cuban registration is unsupportable. . . . The right to international protection afforded by No. 1416 is . . . not available to this Cuban assignment; protection from harmful interference must depend on its actual operation

> rather than on the projected hours notified to the IFRB. The United States, mindful of the international recognition obtained for the Cuban use of this frequency, conducted extensive monitoring in and around the city of Havana to determine the actual use of the frequency concerned and took this information into account in the submission of the notice form. At present the Cudjoe Key station commences operation at approximately 03:45 hours local time.
>
> No Cuban broadcasting exists at this time, as verified by daily monitoring. Within moments of the time Cudjoe Key begins its broadcast, Cuban stations begin to transmit jamming signals, which continue for the duration of the operation of the Cudjoe Key station. Cudjoe Key ceases operation at approximately 06:00 hours time, prior to the commencement of Cuban programming. In our view, satisfactory time-sharing of the frequency would be accomplished without the express agreement of the Cuban administration, absent the Cuban jamming transmissions.

Letter from Kenneth W. Bleakley, Acting Coordinator and Director of the Bureau of International Communications and Information Policy, Department of State, to Gary C. Brooks, Chairman, International Frequency Registration Board, July 9, 1990, available at *www.state.gov/s/l*.

On June 22, 1990, the U.S. councillor submitted a statement to the ITU Administrative Council regarding statements made by the Cuban representative regarding TV Marti. The U.S. statement explained the objectives of TV Marti in providing objective and accurate information to the Cuban people. Among other things, the statement rejected Cuban assertions that the broadcasts violated Cuban sovereignty, noting that "all ITU members, particularly that large majority which provides an international broadcasting service, recognize that radio and television signals do not constitute 'a threat or use of force against the territorial integrity or political independence' of another country, as defined under the U.N. Charter." Statement submitted by U.S. Councillor Earl Barbely to the Administrative Council of the ITU, June 22, 1990.

On September 3, 1990, the IFRB responded to the U.S. Government's July 10, 1990 letter. The IFRB discussed the issue regarding its authority as follows:

2. . . . [I]t is to be recalled that the Board derives its general authority from Article 10 of the Nairobi Convention and through No. 80 (Nairobi 1982), the provisions of the Radio Regulations, Resolutions of World Administrative Radio Conferences and, in some cases, instructions to the Board recorded in the minutes of Plenary Meetings of such conferences. With regard to the Radio Regulations, the functions of the Board are given in Article 10 and here RR 998 is particularly pertinent.

3. The Board considers that No. 80 and other provisions of Article 10 (Nairobi 1982) provide a direct link to the provisions of Article 10 of the Radio Regulations, consequently, to RR 998 and hence to Section VII of Article 12 of the Radio Regulations. Your contention that RR 1438 and RR 1442 solely refer to the notification and recording procedures is inconsistent with past practice adopted by your Administration. You will no doubt recall that in a letter dated 3 October 1985 the Board was requested by the U.S. Department of State to carry out a study under Section VII of Article 12 concerning harmful interference to your HF broadcasting transmission by stations under the jurisdiction of the USSR, Czechoslovakia and Poland. None of these stations had been notified to the IFRB. However, the operation of your HF broadcasting stations were governed by the provisions of Article 17 of the Radio Regulations. Despite this fact, it is clear that, at that time, your Administration recognized that Section VII of Article 12 was not limited to the notification process and had a wider scope to cover cases of harmful interference in respect of telecommunication services which were not subject to Article 12 procedure of notification and registration.

* * * *

5. You may wish to note that in accordance with RR 1240, the Board is required to examine each notice with respect to:

"(a) its conformity with the *Convention*, the Table of Frequency Allocations and the *other provisions of the Radio Regulations* with the exception of those provisions relating to the probability of harmful interference which are the subject of Nos. 1241 and 1242".

Regarding RR 2666, the Board considers in the frequency bands included in the provision, that as a general rule, stations are limited to providing a national service within the frontiers of the country concerned and not solely as you express ". . . to promote greater frequency sharing and to promote practices that minimize harmful interference . . ." which are largely covered by No. 158 (Nairobi 1982) and Article 6 of the Radio Regulations.

The Board agrees that exceptions to the general rule are permissible but cannot agree that "An exception to the general rule is, therefore, in full compliance with the regulation itself." Such a view would make RR 2666 meaningless. In the case of station Cudjoe Key, the characteristics of the station are such that it cannot be regarded as a legitimate exception to the general rule.

6. The international recognition of CD-De la Habana is for the hours 0000-2400 and information available from other sources has no bearing on the application of the Radio Regulations. Consequently, the Cuban station has the right to operate over the whole 24 hours. Additionally, the Board considers that it would be impracticable to apply RR 1431 generally except when the Board is informed that a station is operating *outside* the recorded hours of operation.

Letter from V.V. Kozlov, Acting Chairman, IFRB to the U.S. Coordinator and Director, Bureau of International Communications & Information Policy, Department of State, September 3, 1990(emphases in original), available at *www.state.gov/s/l*.

The letter concluded by stating the IFRB's unfavorable finding on the Cudjoe Key station with respect to Radio Regulation 1240. The difference in views between the U.S. Government and the IFRB regarding the interpretation of the radio regulations continued, and TV Marti has remained broadcasting during the early morning hours when no Cuban broadcasting occurs.

## C. OTHER TRADE AGREEMENTS AND RELATED ISSUES

### 1. Taxation

#### *a. Council of Europe and Organisation for Economic Co-operation and Development tax treaty*

On November 8, 1989, President George H.W. Bush transmitted the Council of Europe-OECD Convention on Mutual Administrative Assistance in Tax Matters, done at Strasbourg January 25, 1988, signed by the United States in Paris on June 28, 1989 ("the Convention"), to the Senate for advice and consent to ratification. S. Treaty Doc. No. 101-6 (1989).

The Convention was concluded by the member states of the Council of Europe ("COE") and the member countries of the Organisation for Economic Co-operation and Development ("OECD"), and is open to ratification, acceptance, or approval by any of the member States of the COE or the OECD. The Convention was the first multilateral tax treaty of its kind and was consistent with the U.S. Model Tax Treaty and with other tax treaties then in force for the United States. It entered into force on April 1, 1995.

The Secretary of State's report to the President that was included in the transmittal documents explained the U.S. views on the Convention as follows:

> Under the Convention, the Parties will exchange information for the assessment, recovery, and enforcement of tax(es) and tax claims, and to assist in the prosecution of a taxpayer. Like information exchange under the U.S. Model Treaty, information exchange under the Convention is not limited to cases of suspected tax evasion.
>
> The Convention applies, inter alia, to taxes on income or profits, taxes on capital gains, and taxes on net wealth imposed on behalf of a Party. Consistent with the U.S. Model Treaty, the United States will exchange information only on taxes imposed by the Federal government, and will not exchange information on state or local taxes.
>
> The taxpayer protections available under the Convention are at least as extensive as those available

under the U.S. Model Treaty. Information provided by the United States to another party may not be released to a third party without U.S. consent. Neither the OECD, the Council of Europe, nor any other international organization would have access to the taxpayer information.

Section II of the Convention provides for assistance in the recovery of taxes, but permits member States to reserve on these provisions. The United States intends to reserve on these provisions because the U.S. competent tax authority has not made use of the broad collection assistance provisions in four existing tax treaties which contain them.

Section III of the Convention provides for assistance in service of documents, but again permits States to reserve on this provision. The United States intends to do so on assistance in service of documents, as documents may be and are generally served by mail in the United States. No assistance by the United States is needed. The United States will, however, not reserve on Paragraph Three of this Section, which affirms access by any Party to the postal system of any other Party for the service of documents.

*Id*. at v–vi. *See also* 84 Am. J. Int'l L. 245 (1990).

### *b. Conventions on avoidance of double taxation*

#### *(1) U.S.-India*

On October 31, 1989, President Bush transmitted the Convention between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, together with a related Protocol, signed at New Delhi on September 12, 1989, to the Senate for its advice and consent to ratification. S. Treaty Doc. No. 101-5 (1989). The Convention, the first tax treaty between the United States and India, follows in general the pattern of the United States Model Tax Treaty with certain modifications reflecting the status of India as a developing country.

The Report of the Secretary of State to the President, dated October 24, 1989, submitting the Convention for transmittal to the Senate and included in the transmittal documents, describes the Convention as follows, in pertinent part:

> The Convention provides maximum rates-of-tax at source on payments of dividends, interest and royalties which, in each case, are higher than the rates specified in the United States Model. Dividends from a subsidiary to a parent corporation are taxable at a maximum rate of 15 percent; other dividends may be taxable at source at a 25 percent rate. Interest is, in general, taxable at source at a maximum rate of 15 percent, although interest received by a financial institution is taxable at a maximum rate of 10 percent, and interest received by either of the two Governments, by certain governmental financial institutions, and by residents of a Contracting State on certain Government approved loans, is exempt from tax at source.
>
> The royalty provisions contain several significant departures from standard United States tax treaty policy. In general, industrial and copyright royalties are taxable at source at a maximum rate of 20 percent for the first five years, dropping to 15 percent thereafter. Where the payor of the royalty is one of the Governments, a political subdivision or a public sector corporation, tax will be imposed from the date of entry into force of the treaty at a maximum rate of 15 percent. Payments for the use of, or the right to use, industrial, commercial or scientific equipment are treated as royalties, rather than as business profits, and are subject to a maximum rate of tax at source of 10 percent. The most significant departure from past policy in the royalty article is the fact that certain service fees, referred to in the Convention as "fees for included services," are treated in the same manner as royalties, and not, as would normally be the case, as business profits. Included services are defined as technical consultancy services which either: (i) are ancillary and subsidiary to the licensing of an intangible or the rental of tangible personal property, both of which give rise to royalty payments, or,

(ii) if not ancillary or subsidiary, make available to the payor of the service fee some technical knowledge, experience, skill, etc., or transfer to that person a technical plan or design. A detailed memorandum of understanding was developed by the negotiators to provide guidance as to the intended scope of the concept of "included services" and the effect of the memorandum is agreed to in an exchange of notes. These are included for information only. Fees for all other services are treated either as business profits or as independent personal services income. Although not reflected in the Convention, under Indian law, certain service fees related to defense contracts are exempt from Indian tax.

The Convention preserves for the United States the right to impose the branch profits tax. It preserves for both Contracting States their statutory taxing rights with respect to capital gains.

The Convention also contains rules for the taxation of business profits which, consistent with other United States tax treaties with developing countries, provide a broader range of circumstances under which one partner may tax the business profits of a resident of the other. The Convention defines a permanent establishment to include a construction site or a drilling rig where the site or activity continues for a period of 120 days in a year. This compares with a twelve-month threshold under the United States Model, and six months under the typical developing country tax treaty. In addition, the Convention contains reciprocal exemption at source for shipping and aircraft operating income, including income from the incidental leasing of ships, aircraft or containers (i.e., where the lessor is an operator of ships and aircraft). The Convention differs from the United States Model in that income from the non-incidental leasing of ships, aircraft or containers (i.e., where the lessor is not an operator of ships or aircraft) is not covered by the article. Income from such non-incidental leasing is treated as a royalty, taxable at source at a maximum rate of 10 percent.

The treatment under the Convention of various classes of personal service income is similar to that under other

United States tax treaties with developing countries.

The Convention contains provisions designed to prevent third-country residents from treaty shopping, i.e., from taking unwarranted advantage of the Convention by routing income from one Contracting State through an entity created in the other. These provisions, consistent with recent tax legislation, identify treaty shopping in terms both of third-country ownership of an entity, and of the substantial use of the entity's income to meet liabilities to third-country persons. Notwithstanding the presence of these factors, however, treaty benefits will be allowed if the income is incidental to or earned in connection with the active conduct of a trade or business in the State of residence, if the shares of the company earning the income are traded on a recognized stock exchange, or if the competent authority of the source State so determines.

As with all United States tax treaties, the Convention prohibits tax discrimination, creates a dispute resolution mechanism and provides for the exchange of otherwise confidential tax information between the tax authorities of the parties. The Convention authorizes access by the General Accounting Office and the tax writing committees of Congress to certain information exchanged under the Convention which is relevant to the functions of these bodies in overseeing the administration of United States laws.

In an exchange of notes, the United States and India agree that, although the Convention does not contain a tax sparing credit, if United States policy changes in this regard, the Convention will be promptly amended to incorporate a tax sparing provision. These notes are also included for information only.

*Id.* at iii–v. *See also* 84 Am. J. Intl L. 246 (1990).

### *(2) Other conventions*

During 1989 and 1990 other conventions for avoidance of double taxation transmitted to the Senate for its advice and consent to ratification included:

— Supplementary Protocol to the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income between the United States and Tunisia, S. Treaty Doc. No. 101-9 (1990). For the Senate Foreign Relations Committee Report on the Tax Convention with Tunisia and the Supplementary Protocol, *see* S. Exec. Rep No. 101-23 (1990).

— Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income between the United States and Finland, S. Treaty Doc. No. 101-11 (1990).

— Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income between the United States and Spain, S. Treaty Doc. No. 101-16 (1990).

### 2. Intellectual Property: International Registration of Audio-visual Works

On January 24, 1990, the President transmitted to the Senate for advice and consent to ratification the Treaty on the International Registration of Audiovisual Works, done at Geneva, April 20, 1989. The Treaty establishes a multilateral system to facilitate enforcement of rights, to increase legal security concerning audiovisual works in foreign countries, and to contribute to the fight against piracy. In his letter of transmittal, the President noted that the registration system established by the Treaty is voluntary, for use at the option of the producers (or "rightsholders") of audiovisual works. The President's letter of transmittal was accompanied by a report from the Department of State to the President on the Treaty and the regulations thereunder, dated December 22, 1989, which explained as follows:

> The purpose of the Treaty is to facilitate enforcement of rights and increase the legal security in transactions relating to audiovisual works and to contribute to the fight against piracy. The Treaty provides for the establishment of an international register for applications and related materials concerning the exercise of rights in audiovisual works such as motion pictures and television programs,

> including in particular rights relating to their exploitation. Statements recorded in the International Register are given prima facie effect in countries party to the Treaty. Public access to the elements entered into the international system will be facilitated by publication in a timely gazette. A comprehensive database of rights owners will also be maintained from which WIPO will be able to provide information electronically to interested parties. The International Bureau of the World Intellectual Property Organization will serve as the secretariat for the Treaty.
>
> Essentially, this Treaty is procedural in nature; it is not a substantive copyright treaty and explicitly provides that it shall not be interpreted as affecting national copyright laws. The International Register established by the Treaty is voluntary in the sense that it may be used at the option of the producers or rightsholders of audiovisual works. Further, there are to be no financial contributions from governments; rather the International Register is to be self-financing from the payment of fees for registration and other services, and the sale of publications such as the Gazette. The start-up costs are to be borne by the Government of Austria and the International Register will be located in Austria.

S. Treaty Doc. No. 101-8 at v–vi (1990).

Among the articles summarized in the Acting Secretary's Report are the following:

> Article 4 is the most important article in the Treaty in that it deals with the legal effects of statements recorded in the International Register. As a general rule each Contracting State undertakes to recognize that a statement recorded in the International Register shall be considered true until the contrary is proved. However, this principle is subject to two exceptions. Article 4(l)(i) makes an exception for cases where under a Contracting State's copyright or other intellectual property law the statement cannot be valid. The second exception, Article 4(l)(ii), applies in cases where the statement is contradicted by another statement

> recorded in the International Register. Article 4(2) is a safeguard clause that provides that the Treaty does not affect the copyright law, or other intellectual property law, of any Contracting State or any rights under the Berne Copyright Convention for the Protection of Literary and Artistic Works or any other treaty concerning intellectual property rights.
>
> Article 5 provides for an Assembly consisting of all the Contracting States and sets forth in detail the various "tasks" of that body, including the establishment of a consultative committee of representatives of non-governmental organizations with an interest and expertise in audiovisual works. This committee will have an important advisory role concerning registration fees and the Administrative Instructions which govern the administration of the Treaty and the Regulations.
>
> Pursuant to Article 5(7) most of the decisions of the Assembly will be taken by a simple majority vote except for amendments of the Regulations, which require a two-thirds vote, and amendments of certain articles regarding the Assembly itself and finances, which require a three-fourths vote.
>
> In order to encourage adherence to the Treaty, the expenses of one delegate to the Assembly from each Contracting State shall be paid from funds of the Union.

*Id. at vi.*

The report also summarized the regulations annexed to the Treaty and approved at the diplomatic conference. The regulations set out the definitions, requirements, and procedures for applications for registration under the treaty. Finally, the report noted that United States ratification would not require any amendments to U.S. copyright law, or any other implementing legislation and concluded:

> Ratification of the Treaty on the International Registration of Audio-visual Works is supported by the Copyright Office, as the principal substantive agency interested in the Treaty. In the private sector the American Film Marketing Association,

> a trade association representing 111 member companies who license the distribution rights of American independent films in the international market, strongly supports expeditious ratification. The Motion Picture Association of America has no official position on the Treaty.

*Id.* at viii. *See also* 84 Am. J. Int'l L. 738 (1990).

### 3. Investment

#### *a. International Court of Justice case against Italy*

On July 20, 1989, the International Court of Justice rejected a claim by the United States that the Government of Italy had interfered with the investment of a United States corporation in Italy, in violation of the Treaty of Friendship, Commerce, and Navigation signed February 2, 1948 (63 Stat, 2255, T.I.A.S. No. 1965). *Case Concerning Elettronica Sicula S.p.A (ELSI)*, 1989 I.C.J. Reports 15, *reprinted in* 28 I.L.M. 1109 (1989). The jurisdiction of the Court was based on article XXVI of the FCN Treaty, which permits either Party to submit to the ICJ any dispute regarding the interpretation *or* application of the treaty that the Parties "shall not satisfactorily adjust by diplomacy."

The application of the United States instituting the proceedings before the ICJ had been filed on February 6, 1987. After ascertaining the views of the Parties, the ICJ formed a Chamber of five judges to hear the case. Following the filing of written pleadings in 1987 and 1988, oral proceedings were held in The Hague from February 13 to March 3, 1989. For a discussion of the case, *see Cumulative Digest 1981–1988* at 3382–3387.

#### *b. Prohibition on foreign control of U.S. company*

On February 1, 1990, President George H.W. Bush prohibited the acquisition of control of MAMCO Manufacturing, Inc. ("MAMCO") by the China National Aero-Technology Import and Export Corporation ("CATIC") and ordered CATIC and its subsidiaries and affiliates to divest all of their interest in MAMCO by May 1, 1990. Order Pursuant to Section 721 of the Defense Production Act of 1950, 55 Fed. Reg. 3,935 (Feb. 1, 1990).

Section 721, known as the Exon-Florio provision, 50 U.S.C. App. § 2170, was added by section 5021 of the Omnibus Trade and Competitiveness Act of 1988 to permit the President to review certain mergers, acquisitions, and takeovers that "could result in foreign control of persons engaged in interstate commerce in the United States." Section 5021, Pub. L. No. 100-418, 102 Stat. 1425 (1988). Section 721(a) authorizes the President or his designee to investigate "to determine the effects on national security of mergers, acquisitions, and takeovers . . . by or with foreign persons" that could result in such foreign control.

Within 15 days of an investigation's completion, the President "may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States . . . by or with foreign persons so that such control will not threaten to impair the national security." Section 721(c). Section 721(d) requires the President to make specific findings concerning national security and other available provisions of law. *See* discussion in *Cumulative Digest 1981–1988* at 2637–2641.

The MAMCO/CATIC decision was the first time that the President exercised the authority to prohibit foreign control of a U.S. company under the Exon-Florio provision. Consistent with this statute, the President's February 1 order made the required findings and authorized certain measures as follows, in pertinent part:

> Section 1. Findings. I hereby make the following findings:
>
> (1) There is credible evidence that leads me to believe that, in exercising its control of MAMCO Manufacturing Inc. ("MAMCO"), a corporation incorporated under the laws of the State of Washington, the China National Aero Technology Import and Export Corporation ("CATIC") might take action that threatens to impair the national security of the United States of America; and
>
> (2) Provisions of law, other than section 721 and the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), do not in my judgment provide adequate and appropriate authority for me to protect the national security in this matter.

Section 2. Actions Ordered and Authorized. On the basis of the findings set forth in Section 1 of this Order, I hereby order that:

(1) CATIC's acquisition of control of MAMCO and its assets, whether directly or through subsidiaries or affiliates, is prohibited.

(2) CATIC and its subsidiaries and affiliates shall divest all of their interest in MAMCO and its assets by May 1, 1990, 3 months from the date of this Order, unless such date is extended for a period not to exceed 3 months, on such written conditions as the Committee on Foreign Investment in the United States ("CFIUS") may require. Immediately upon divestment, CATIC shall certify in writing to CFIUS that such divestment has been effected in accordance with this Order.

(3) Without limitation on the exercise of authority by any agency under any other provisions of law, and until such time as the divestment is completed, CFIUS is authorized to implement measures it deems necessary and appropriate to verify that operations of MAMCO are carried out in such a manner as to ensure the protection of the national security interests of the United States. Such measures may include but are not limited to the following: On reasonable notice to MAMCO, CATIC, or CATIC's subsidiaries or affiliates (collectively "the Parties"), employees of the United States Government, as designated by CFIUS, shall be permitted access to all facilities of the Parties located in the United States

(a) to inspect and copy any books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the Parties that concern any matter relating to this Order.

(b) to inspect any equipment, containers, packages, and technical data (including software) in the possession or under the control of the Parties; and

(c) to interview officers, employees, or agents of the Parties concerning any matter relating to this Order.

(4) The Attorney General is authorized to take any steps he deems necessary to enforce this Order.

Section 3. Reservation. I hereby reserve my authority, until such time as the divestment required by this Order has been completed, to issue further orders with respect to the Parties as shall in my judgment be necessary to protect the national security.

Order, 55 Fed. Reg. 3,935 (Feb. 1, 1990).

Section 721(f) requires the President to report to Congress whenever he decides to take action under section 721(c). The President's report to Congress on February 1, 1990, regarding his decision to order divestment of MAMCO by CATIC elaborated on the reasons for the decision and described the role of the Committee on Foreign Investment in the United States ("CFIUS"), an interagency committee chaired by the Secretary of the Treasury, as the President's designee in Section 721 investigations. The report provided, in pertinent part:

2. The United States welcomes foreign direct investment in this country; it provides foreign investors fair, equitable, and nondiscriminatory treatment. This Administration is committed to maintaining that policy. There are circumstances in which the United States maintains limited exceptions to such treatment. Generally these exceptions are necessary to protect national security. Of those foreign mergers, acquisitions, and takeovers which have been reviewed under the Exon-Florio provision to determine effects on national security, this is the first time I have invoked section 721 authority. My action in this case is in response to circumstances of this particular transaction. It does not change our open investment policy and is not a precedent for the future with regard to direct investment in the United States from the People's Republic of China or any other country.

* * * *

3. I have made the findings required by section 721. Specifically, confidential information available to me concerning some of CATIC's activities raises serious concerns

regarding CATIC's future actions. It is my determination that this information constitutes the "credible evidence" required by the statute. Moreover, I have determined that no law, other than section 721 and the International Emergency Economic Powers Act, provides adequate and appropriate authority to protect against the threat to the national security posed by this case.

4. MAMCO voluntarily notified the Committee on Foreign Investment in the United States ("CFIUS") of CATIC's intention to acquire MAMCO. CFIUS has been designated by Executive Order No. 12661 to receive notifications and to review and investigate to determine the effects on national security of foreign mergers, acquisitions, and takeovers. On November 30, 1989, CATIC purchased all of the voting securities of MAMCO. The acquisition was consummated while CFIUS review of the transaction was in progress, an action not prohibited by the statute.

CATIC is an export-import company of the Ministry of Aerospace Industry of the People's Republic of China. CATIC has business dealings with various companies in this country, in several sectors including commercial aircraft. The Ministry engages in research and development, design, and manufacture of military and commercial aircraft, missiles, and aircraft engines.

MAMCO machines and fabricates metal parts for aircraft. Much of MAMCO's production is sold to a single manufacturer for production of civilian aircraft. Some of its machinery is subject to U.S. export controls. It has no contracts with the United States Government involving classified information.

5. On December 4, 1989, CFIUS made a determination to undertake a formal investigation and so informed the parties to the transaction. CFIUS undertook the investigation in order to assess MAMCO's present and potential production and technological capabilities and the national security implications of CATIC's purchase of MAMCO.

6. During the investigation, CFIUS asked for and received information from MAMCO in addition to that

> provided in the initial filing. Officials of the Departments of Commerce and Defense, representing CFIUS, visited MAMCO to gather information to assist CFIUS in its assessment of MAMCO's current production and technological capabilities.
>
> 7. In its investigation, CFIUS also considered the adequacy of all laws, other than the Exon-Florio provision, to deal with the national security concerns posed by the transaction.
>
> 8. Because of the sensitive nature of the evidence in this investigation, CFIUS will be available, on request, to provide the appropriate committees, meeting in closed sessions, with a classified briefing.

Report of the President to Congress, White House, Office of the Press Secretary, February 1, 1990, 26 WEEKLY COMP. PRES. DOC. 164–165 (Feb. 12, 1990).

On March 19, 1990, Charles H. Dallara, Assistant Secretary of the Treasury for International Affairs, testified before the House Subcommittee on Commerce, Consumer Protection, and Competitiveness concerning implementation of section 721. Assistant Secretary Dallara reviewed the experience to date of CFIUS:

> It may come as no surprise to you that CFIUS has considered a wide range of transactions. They include foreign purchases of everything from lawn seed and tulip bulb companies to defense contractors, whose operations are classified.
>
> A few statistics might be appropriate to provide you an idea of the scope of CFIUS activity. Since the 1988 Trade Act became law in August 1988, CFIUS has reviewed over 280 transactions. During 1989, filings with CFIUS represented about 30 percent of the total annual number of foreign acquisitions of U.S. companies valued at more than $1 million. At the present time, notifications are coming to CFIUS at the rate of 350 a year. Some 350 filings annually would represent, we estimate, around 50 percent of annual acquisitions valued at more than $1 million.
>
> To date, CFIUS has undertaken a formal investigation only seven times. In two of those cases, notification was

> withdrawn with CFIUS permission. One investigation is in progress. Four cases have reached the President's desk for decision. In only one of the cases has the President exercised his statutory authority to prohibit a foreign acquisition. In order for the President to suspend or prohibit a foreign investment, he must meet two criteria. First, he must determine that the foreign interest might take action which threatens to impair national security. Second, he must find that existing laws are not adequate or appropriate to protect national security. These are strict standards, as is appropriate, since Exon-Florio authority should be used only in unusual circumstances. Such a case occurred last month when the President ordered the divestment of the China National Aero-Technology Import and Export Company's (CATIC) acquisition of MAMCO Manufacturing, Inc. (MAMCO).

*Foreign Acquisitions and National Security: Hearing before the House Comm. On Energy and Commerce*, 101st Cong. 8–34 (1990) (testimony of Charles H. Dallara, Assistant Secretary for International Affairs, Dept. of Treasury). Draft regulations for the implementation of the Exon-Florio provision were published in the Federal Register on July 14, 1989, 54 Fed. Reg. 29,744-01 (July 14, 1989). Final rules were published at 56 Fed. Reg. 58,774-01 (Nov. 21, 1991). For current regulations, *see* 59 Fed. Reg. 27,178 (May 25, 1994).

### Cross references

*Tax Convention with Indonesia*, **Chapter 12.A.8.b.**
*Patent issues in outer space activities*, **Chapter 12.B.**
*Tourism agreements*, **Chapter 14.**

# CHAPTER 12

# Territorial Regimes And Related Issues

## A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

### 1. UN Law of the Sea Resolution

On November 20, 1989, the United Nations General Assembly debated and adopted a resolution on the law of the sea setting forth a program for continued efforts to bring the 1982 Law of the Sea Convention into force and for implementation of its terms. UN Doc. A/RES/44/26 (1989). During the debate, the United States Permanent Representative to the United Nations, Ambassador Thomas R. Pickering, made the following points objecting to certain aspects of the resolution:

> The United States views the 1982 United Nations Convention on the Law of the Sea as a major accomplishment in the development of the international law of the oceans. The Convention has many positive aspects and the United States has actively supported and promoted observance of the vast majority of its provisions.
>
> Unfortunately, the Convention also contains provisions on deep-sea-bed mining that are fundamentally unacceptable to the United States. Our concerns were clearly stated in 1982, when we announced our decision not to sign the Convention. We have followed closely developments regarding sea-bed mining since 1982 and we are aware that there has been an evolution in the thinking of some other Governments. We are encouraged by the recognition of many States that re-evaluation of the

sea-bed regime is necessary and we have noted with interest the recent statement of the Chairmen of the Group of 77 expressing readiness for a dialogue and the Group's support for efficiency and cost-effectiveness in the sea-bed regime. The draft resolution removes thinly veiled criticisms of the United States contained in earlier resolutions. It welcomes the willingness of States to explore all possibilities of addressing outstanding issues and invites States to renew efforts to facilitate universal participation in the Convention.

* * * *

The United States shares the desire for a universally acceptable convention. We are concerned that, notwithstanding what appears to be a genuine desire for dialogue, many countries do not understand that from the United States perspective the sea-bed regime remains seriously flawed. We do not believe that a dialogue can succeed unless it is based on an understanding of this point. We therefore believe it would be premature now to consider negotiations. We believe that fundamental reform is a task that exceeds the capabilities of the Preparatory Commission and for this reason we do not participate in the Commission. Nevertheless, we continue to be willing to exchange views with any State in the interest of determining whether circumstances exist for a dialogue that will lead to a universally acceptable convention.

Notwithstanding the improvement in the draft resolution, the United States continues to object to certain aspects of it. In particular, we cannot join in the call for all States to consider early ratification of or accession to the Convention to allow entry into force of the sea-bed regime, when we have objections to that regime. In addition we continue to object to the funding of the Preparatory Commission from the general budget of the United Nations. We believe it should be funded by those States participating in it.

For these reasons, regrettably, we must oppose the draft resolution.

> Having expressed our concern regarding the sea-bed regime, I should like now to express my Government's support for the emphasis placed on efforts to encourage States to bring their national laws into conformity with international law, as reflected in the provisions of the Convention concerning traditional uses of the oceans. My Government has been active in supporting and promoting compliance with these provisions and discouraging claims that are inconsistent with international law. In particular we welcome the action by many States to revise their laws and regulations to ensure conformity with international law and encourage others to do likewise.
>
> I should like to take this opportunity to point out that the United States does not view the call upon all States to safeguard the unity of the Convention as a limitation on either the right or the duty of all States to act in accordance with those portions of the Convention which reflect customary international law.

U.N. Doc. A/44/PV.61, at 41–42.

## 2. Salvage at Sea

### *a. International Convention on Salvage*

On April 28, 1989,a diplomatic conference convened under the auspices of the International Maritime Organization ("IMO") adopted the International Convention on Salvage, IMO Doc. LEG/CONF.7/27 (May 2, 1989)("1989 Convention"). The 1989 Convention is intended to succeed the International Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea concluded at Brussels in 1910 ("1910 Convention"). No provision of that long-standing treaty specifically addresses the marine environment and the importance of salvage operations in protecting the environment from damage. In fact, the 1910 Convention, which entered into force for the United States in 1913, incorporates the traditional admiralty principles of "no-cure, no-pay" (*i.e.*, salvors receive no remuneration for salvage services unless their efforts are successful) and the limitation of the total salvage award to the maximum value of the

property salved. Thus, under the 1910 Convention, even in cases where failure to salvage carries a risk of serious environmental harm, salvors are dissuaded from undertaking salvage operations if success appears unlikely or if the projected value of the vessel and cargo salved are unlikely to cover expenses. The United States indicated that it does not intend to renounce the 1910 Convention, however, until all relevant parties to the 1910 Convention are parties to the new 1989 Convention.

The primary objectives of the 1989 Convention are to maintain a viable commercial salvage industry and promote salvage operations where the marine environment is threatened. The Convention offers increased protection for the marine environment in five principal ways:

1. The concept of "damage to the environment" is explicitly recognized as a significant consideration within the salvage context.
2. Reciprocal obligations are imposed upon both the vessel owner and the salvor to "exercise due care to prevent or minimize damage to the environment," and these duties may not be altered or negated by contract.
3. The "skill and efforts of the salvors in preventing or minimizing damage to the environment" has been added as a factor to be considered by salvage tribunals along with the traditional criteria in determining the amount of the basic salvage award.
4. In situations involving a threat of damage to the environment, a financial incentive has been provided to encourage salvors to undertake what would otherwise be commercially unattractive cases: specifically, the shipowner's guarantee of special compensation for salvage services rendered in such cases.
5. States Parties are urged to take into account the "need for cooperation between salvors, other interested parties and public authorities in order to ensure the efficient and successful . . . salvage operations for the purpose . . . of preventing damage to the environment. . . ."

The most controversial and significant issue in the negotiations was the question of how to allocate projected increases in salvage

costs under the new international regime among the commercial interests involved. The U.S. urged revision of the pre-existing allocation scheme to reflect more equitably the respective traditional responsibilities of ship and cargo owners in maritime ventures. Extensive negotiations resulted in the adoption of a compromise with two principal components: (1) an understanding that the total salved value need not be exhausted by the salvage award (payable by both shipowners and cargo owners in proportion to their respective salved values) before special compensation (a guarantee of expenses and a possible bonus in cases threatening environmental damage) is payable by shipowners (Common Understanding Concerning Articles 13 and 15 of the International Convention on Salvage, 1989, Attachment 1 to IMO Doc. LEG/CONF.7/27 (2 May 1989)); and (2) a resolution requesting amendment of the York-Antwerp Rules to ensure that the special compensation is not shifted to cargo owners through the general average process. Resolution Requesting the Amendment of the York-Antwerp Rules, 1974, Attachment 2 to IMO Doc. LEG/CONF.7/27 (May 2, 1989).

Other important issues of particular interest to the United States included adoption, with minor amendment, of a U.S. proposal to exclude certain offshore mineral platforms and drilling units from the scope of the convention (article 3); and adoption, with minor amendment, of U.S. proposals concerning application of the convention to state-owned vessels (article 4), state-owned cargoes (article 25), and certain humanitarian cargoes (article 26).

The 1989 Convention, as adopted by the conference, was generally consistent with existing U.S. law, with certain exceptions related to the new approach to salvage compensation set forth in articles 13 and 14. The Convention was opened for signature on July 1, 1989. In 1991 U.S. law was amended to add considerations of "preventing or minimizing damage to the environment." Pub. L. No. 102-241, § 40, 105 Stat. 2225, 46 App. § U.S.C. 729. The Convention entered into force, with the United States as a party, on July 14, 1996.

### *b. Sunken warships: The C.S.S. Alabama*

In 1984 French divers located the wreck of the C.S.S. *Alabama* seven miles off the coast of France. The C.S.S. *Alabama* was built

in England in 1862 for the Confederacy and had had a successful career as a destroyer of Union commerce until she was sunk in 1864 by the U.S.S. *Kearsage*. Both the United States and France claimed title to the wreck.

France claimed title to the C.S.S. *Alabama* because the wreck was located within the French territorial sea, even though at the time of its sinking the ship was beyond the then-claimed French territorial sea of three nautical miles.

On September 14, 1987, the U.S. Embassy in Paris delivered a note to the French Ministry of Foreign Affairs asserting title to the C.S.S. *Alabama:*

> The United States considers that the CSS Alabama and its associated artifacts constitute property title to which is vested in the U.S. Government. As the U.S. Government has never abandoned title thereto, the United States requests that the Government of France ensure that no salvage operation or any other activity is approved or undertaken to raise the vessel or its artifacts without the prior approval of the United States.

The French Ministry of Foreign Affairs replied in a note of January 5, 1988:

> There is no need to examine what the condition of the wreckage was at the time of the sinking of this privateer ship of the U.S. Southern Confederacy off the coast of Cherbourg by a Union warship on June 19, 1864, because the uncontested fact to be borne in mind is that the wreckage was discovered on October 30, 1984 in the public maritime domain of France on the bed of its territorial sea.
>
> * * * *
>
> The Embassy's note verbale of September 14, 1987 states that the United States "considers" the CSS Alabama to be the property of the United States yet fails to cite any legislative document governing the return of property of the Confederate States after the defeat.
>
> * * * *

Nevertheless, in accordance with our archeological legislation, no excavation, salvage, or refloating operation may be carried out without the consent of the Minister of Culture and Communication, who makes his decision on the advice of the Higher Council on Archeological Research.

Therefore, such an operation would only be conducted for the purposes of scientific research and with respect for the higher interests involved. The French authorities would have no objection to the idea of engaging in a U.S.-French cooperative effort by forming a binational team to which the operation could be assigned.

On February 26, 1988, the Department replied:

As stated in its note of September 14, 1987, the United States regards the remains of the CSS ALABAMA and its associated artifacts as property of the United States. This remains the position of the United States and the United States considers it inappropriate for another sovereign State to intrude into United States' domestic law on the question of Confederate States' property.

* * * *

In reaffirming the position of the United States, the United States in no way purports to dispute the fact that, although the CSS ALABAMA sank in 1864 on the high seas, the final resting place of the vessel is now within the territorial sea of France. The United States recognizes the legitimate interests of France resulting from the location of the CSS ALABAMA. However, this in no way extinguishes the ownership rights of the CSS ALABAMA.

In light of the location of the CSS ALABAMA, cooperation between France and the United States regarding any recovery of the CSS ALABAMA or its artifacts is a practical necessity. Thus the United States welcomes the suggestion of your Government regarding cooperation and would propose that the two Governments begin discussions toward this end.

The French Embassy in Washington replied in a note dated May 2, 1988:

> Pertinent provisions of French law exist controlling the issue of wrecks which are of archeologic, historic or artistic interest title to which is either unknown or cannot be found.
>
> The French authorities responsible for applying the decree of 26 December 1961 must be assured of the validity of titles to property which are presented to them.
>
> In this regard the French authorities are prepared to examine the documents which the Government of the United States may wish to provide them.
>
> Moreover, the Government of France would raise no objection to a proposal that experts of both States meet to discuss guidelines to regulate any cooperative French-U.S. undertaking to raise the wreck of the CSS Alabama. The French authorities would be able to take part in such talks at any time after 15 May 1988.

During a meeting in Paris on June 29, 1988, the United States provided to the French government, among other things, an August 24, 1962, letter from the Judge Advocate General stating that the Alabama was considered the property of the United States and that there was no record that it had ever been abandoned formally, and an October 29, 1969, letter from the acting admiralty counsel of the Navy to a British company stating that the *Alabama* was the property of the United States. On May 19, 1989, Mr. Richard de Warren, First Secretary of the Embassy of France in Washington, D.C., informed the Department of State that the French government had decided that title to the C.S.S. *Alabama* and its associated artifacts remained in the United States.

On October 3, 1989, France and the United States signed in Paris an executive agreement concerning protection and study of the wreck of the C.S.S. Alabama and its artifacts. 29 I.L.M. 941 (1990); 20 UNLOS Bull. 26 (March 1992). The agreement established a scientific committee "on a basis of equality," to be composed of two representatives from each government and of experts designated by each. The Director of Naval History, Department of the Navy, and the Chief Historian of the National Park Service

were appointed as the U.S. representatives. The Committee was required to review any measure related to scientific activities or any project concerning the wreck of the *Alabama*, and any decision required the agreement (i.e., consensus) of the representatives of both governments.

Article 3 of the agreement provided for protective measures as follows:

> The provisions adopted by the French Government to establish a zone of protection around the wreck of the CSS *Alabama* shall remain in force for the term of this agreement, unless the Parties decide otherwise. The competent French authorities may amend these provisions, as necessary. Neither Party shall take measures adversely affecting the wreck or its associated artifacts without the agreement of the other Party.
>
> If the conservation of the wreck is compromised, the competent French authorities may take, on their own authority or at the request of the United States authorities, the conservation measures necessitated by the situation. In the event such urgent action is taken by the French authorities, they will notify the United States authorities promptly of the full details regarding such action.

Among other things, article 4 of the agreement required proposals adopted by the Scientific Committee to be submitted to the French Minister of Culture for the necessary authorizations "with due regard for the procedures provided for by French law." *See* Act No. 89-874 of 1 December 1989 concerning Maritime Cultural Assets and Amending the Act of 27 September 194 Regulating Archaeological Excavations, 1 December 1989, *reprinted in* 16 UNLOS Bull. 12 (Dec. 1990). Article 8 authorized the Scientific Committee to agree, "as necessary," upon procedures to govern the United Kingdom's participation in the operations. The participation of the United Kingdom was based on the fact that a Tribunal of Arbitration established by the U.S.–U.K. Treaty of Amity, May 8, 1871, 17 Stat. 863, T.S. No. 133, 12 Bevans 170, awarded $15,500,00 in gold to the United States "on account of the depradations of the *Alabama* and cer-

tain other Confederate cruisers fitted out in British jurisdiction." 6 Moore, *DIGEST* § 1050 at 999 (1906); *see also* 1 Moore, *International Arbitration* at 653–59 (1898).

*See also* 85 Am. J. Int'l L. 381 (1991).

### 3. U.S.-USSR Maritime Boundary Agreement

On June 1, 1990, the United States and the Soviet Union reached agreement on a maritime boundary. Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary done at Washington, D.C., signed by James A. Baker III and Eduard A. Shevardnadze, June 1, 1990 ("the Treaty"). *See* S. Treaty Doc. No. 101-22 (1990). The preamble indicates that the treaty was intended to resolve issues concerning the maritime boundary of the two countries and to ensure that where coastal state jurisdiction could be exercised in the absence of a maritime boundary by either party in accordance with international law, such jurisdiction was exercised by either the United States or the Soviet Union.

On September 26, 1990, President George H.W. Bush transmitted the agreement to the Senate for advice and consent to its ratification. The President's letter stated, in pertinent part:

> I believe the agreement to be fully in the United States interest. It reflects the view of the United States that the maritime boundary should follow the 1867 Convention Line. The agreement resolves differences over where each Party has the right to manage fisheries and oil and gas exploration and development, as well as exercise other sovereign rights and jurisdiction, in these marine areas. Through its transfer of jurisdiction provisions, it also ensures that coastal state jurisdiction, in accordance with international law, is exercised by one or the other Party in all marine areas within 200 nautical miles of either or both coasts. Therefore, the agreement will permit more effective regulation of marine resource activities and other ocean uses and removes a significant potential source of dispute between the United States and the Soviet Union.

*Id.* at iii.

In transmitting the Treaty to the Senate, the President included the report of the Department of State, which described its terms as follows:

> Article 1 records the agreement of the Parties that the line described as the "western limit" in Article 1 of [the Convention Ceding Alaska, signed March 30, 1867] (the 1867 Convention Line), is the maritime boundary. It also describes the legal effect of the boundary, obligating each Party to respect the boundary as limiting the extent of its coastal state jurisdiction otherwise permitted by international law for any purpose. It thereby settles the issue of where each side may, consistent with international law, manage offshore resources (the fishery resources of the waters as well as the oil and gas and other resources of the seabed and subsoil) and other ocean uses in marine areas that both claimed or could have claimed.
>
> Article 2 describes the maritime boundary and indicates that it is defined by lines connecting geographic positions set forth in an Annex, which is an integral part of the Agreement.
>
> The maritime boundary proceeds north and south of the Bering Strait from the mid-point between Big Diomede Island (Soviet) and Little Diomede Island (U.S.). North of the Strait, the boundary extends due north along the meridian of this mid-point as far as permitted under international law. South of the Strait, the boundary generally extends from the same mid point southwestward to 167 degrees East Longitude (the end point of the Convention Line, as described in the 1867 Convention). This end point lies slightly beyond 200 nautical miles of the respective coasts of the United States and the Soviet Union.
>
> Article 3 makes clear that the exercise by either Party of sovereign rights and jurisdiction in the special areas [as defined in the Article] does not constitute unilateral extension of coastal state exclusive economic zone jurisdiction beyond 200 nautical miles of its coasts. The transfer of exclusive economic zone sovereign rights and jurisdiction

> in the special areas is possible because these areas lie within 200 nautical miles of the coast of one of the Parties and that Party has, through this Agreement, consented to the exercise by the other Party of such sovereign rights and jurisdiction in these areas. Each Party is obligated to ensure that any special area in which it exercises such rights and jurisdiction is characterized in its laws and legislation, and is represented on its charts, in a manner to distinguish it from the exclusive economic zone of that Party.
>
> * * * *
>
> Article 4 contains a disclaimer to make clear that the maritime boundary does not affect or prejudice either Party's position with respect to the rules of international law relating to the law of the sea.
>
> Article 5 defines coastal state jurisdiction as referring to sovereignty, sovereign rights, or any other form of jurisdiction with respect to the waters or seabed and subsoil that may be exercised by a coastal state in accordance with the international law of the sea. The Agreement does not affect the right of hot pursuit under the international law of the sea.
>
> Article 6 calls for any dispute over the interpretation of the Agreement to be resolved by negotiation or other peaceful means agreed by the Parties.
>
> Article 7 provides that the Agreement will enter into force on the date of exchange of instruments of ratification.

A White House Fact Sheet, dated June 1, 1990, explained that, under Article 3,

> The U.S.S.R. transfers to the United States jurisdiction in three "special areas" within 200 miles of the Soviet coast, beyond 200 miles of the U.S. coast, and on the U.S. side of the maritime boundary. The United States transfers to U.S.S.R. jurisdiction in one "special area" within 200 miles of the U.S. coast, beyond 200 miles of the Soviet coast, and on the Soviet side of the maritime boundary.

26 WEEKLY COMP. PRES. DOC. 868 (June 4, 1990).

By an exchange of notes on June 1, 1990, the parties agreed to apply the Agreement provisionally "as of June 15,1990, pending its entry into force." T.I.A.S. 11,451. The Senate provided advice and consent to the Treaty on September 16, 1991.

The text of the Agreement and an Annex defining the maritime boundary by means of geographic positions, the report of the Department of State, and an illustrative chart of the maritime boundary are included in S. Treaty Doc. No. 101-22. *See also*, 84 Am. J. Int'l L. 885 (1990); McNeill, *America's Maritime Boundary with the Soviet Union*, 44 Naval War College Review, No. 3 at 46 (1991), *reprinted in* Moore and Turner, *READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1978–1994* and Charney and Alexander, *International Maritime Boundaries* at 447.

### 4. Rights and Freedoms of International Community in Navigation

#### *a. Innocent passage: U.S.-USSR uniform interpretation*

On September 23, 1989, U.S. Secretary of State James A. Baker III and Soviet Foreign Minister Eduard A. Shevardnadze issued on behalf of their respective Governments a Uniform Interpretation of the Rules of International Law Governing Innocent Passage. The Uniform Interpretation recorded the two countries' common understanding of the legal regime for innocent passage by ships, including warships, through the territorial sea. The Uniform Interpretation provided as follows:

1. The relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea (Convention of 1982), particularly in Part II, Section 3.
2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance

with international law, for which neither prior notification nor authorization is required.

3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.
4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.
5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.
6. Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.
7. If a warship engages in conduct which violates such laws or regulations or renders its passage not innocent and does not take corrective action upon request, the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention of 1982. In such case the warship shall do so immediately.
8. Without prejudice to the exercise of rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.

Dep't St. Bull. (Nov. 1989), at 25–26.; 14 UNLOS Bull. 13 (Dec. 1989), 28 I.L.M. 144 (1989).

Secretary Baker and Foreign Minister Shevardnadze also issued a joint statement:

> Since 1986, representatives of the United States of America and the Union of Soviet Socialist Republics have been conducting friendly and constructive discussions of certain international legal aspects of traditional uses of the oceans, in particular, navigation.
>
> The Governments are guided by the provisions of the 1982 United Nations Convention on the Law of the Sea, which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interests of all States. They recognize the need to encourage all States to harmonize their internal laws, regulations and practices with those provisions.
>
> The Governments consider it useful to issue the attached Uniform Interpretation of the Rules of International Law Governing Innocent Passage. Both Governments have agreed to take the necessary steps to conform their internal laws, regulations and practices with this understanding of the rules.

Dep't. St. Bull., *supra*, at 26; 14 UNLOS Bull.12 (Dec. 1989).

United States warships had been exercising in the Black Sea to demonstrate that the United States did not accept the restrictions of a Soviet border regulation then in effect purporting to limit innocent passage of warships in Soviet territorial seas to specific sea lanes. None of the sea lanes were in the Black Sea. Rules for Navigation and Sojourn of Foreign Warships in the Territorial and Internal Waters and Ports of the U.S.S.R., Art. 12, *translated in* 24 I.L.M. 1715, 1717 (1985). The U.S. presence had led to a "bumping incident" in February 1988 between U.S. and Soviet warships in the Black Sea. For additional information, see Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, Naval War College Review (Spring 1993), *reprinted in* Moore and Turner, *READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW*, 1978–1994 at 243.

The Soviet regulation was subsequently altered consistent with the Uniform Interpretation, removing limitations on innocent passage of warships to designated sea lanes. Press guidance prepared in connection with the joint statement and Uniform Interpretation stated:

> Since the Soviet border regulations have been brought into conformity with the 1982 Convention on the Law of the Sea, we have assured the Soviet side that the United States has no reason to exercise in the Soviet territorial sea in the Black Sea its right of innocent passage under the U.S. Freedom of Navigation Program.
>
> The warships of either country, of course, retain the right to conduct innocent passage in the territorial sea of each other incident to normal navigation. The United States will continue to conduct routine operations in the Black Sea. . . . We retain our right to exercise innocent passage in any territorial sea in the world.

Telegram to all diplomatic and consular posts, September 28, 1989. *See also* 84 Am. J. Int'l L. 239 (1990).

### *b. Advance notice*

The U.S. Government made a number of diplomatic protests in 1989 and 1990 to foreign states regarding their requirements that other states provide advance notice or seek permission prior to passage through their territorial seas. Beginning in 1979, the United States has protected maritime rights of navigation and overflight guaranteed to all nations under international law through its Freedom of Navigation program. The program combines diplomatic action, including formal diplomatic protests addressing specific maritime claims that are inconsistent with international law, with the operational assertion by U.S. naval and air forces of internationally recognized rights and freedoms. GIST, December 1988.

As part of this effort, the U.S. protested a Republic of Djibouti law that required advance notice of entry into Djibouti's territorial waters by foreign vessels with nuclear propulsion or carrying radioactive substances. A telegram of March 31, 1989, made the following points:

— The United States respects coastal nation maritime claims which are consistent with customary international law, as reflected in the 1982 United Nations Convention on the Law of the Sea (LOS Convention), if the rights and freedoms of the United States and others are recognized in those areas.
— The United States intends to continue its exercise of navigation and overflight rights and freedoms consistent with the balance of interests reflected in the LOS convention.
— The United States will not acquiesce in restrictive unilateral acts of other coastal nations which purport to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.
— While the Government of Djibouti has signed the LOS Convention and the United States has not signed the Convention, those parts of the Convention which relate to traditional uses of the ocean, such as navigation and overflight, reflect customary international law and practice.
— Customary international law, as reflected in the LOS Convention, provides that all ships enjoy the right of innocent passage through the territorial sea. Neither warships, nor any other type of ship, regardless of means of propulsion or materials carried, may be required to give notice to, or obtain the permission of, the coastal nation before exercising the right of innocent passage through the territorial sea.
— The right of innocent passage is one of the most fundamental rights existing on the oceans and may not be impaired in any way. In support of the right of innocent passage, United States government policy is neither to recognize nor to respect in practice any nation's claim that vessels of any type must obtain another nation's permission, or provide prior notification, merely to pass through its territorial sea.

* * * *

— In its proclamation of December 27, 1988 extending the United States' territorial sea from 3 to 12 nautical

> miles, the United States emphasized that "within the territorial sea of the United States the ships of all countries enjoy the right of innocent passage" in accordance with international law.

Telegram from the Department of State to U.S. Embassy, Djibouti, March 31, 1989.

In June 1989 the U.S. Government protested a Sudanese law purporting to require prior permission for the passage of military vessels through Sudan's territorial waters. In addition to the points made in the protest to Djibouti, discussed above, the U.S. note also stated the following:

> At the eleventh session of the Third United Nations Conference on the Law of the Sea, formal amendments which would have afforded coastal states the right to require prior notification or authorization for the innocent passage of warships were withdrawn. The withdrawal was accompanied by a statement from the chair that clearly placed the security interests of coastal states within the context of articles 19 and 25 of the Convention. Neither of these articles permit the imposition of authorization requirements on ships exercising the right of innocent passage through the territorial sea.

Telegram from the Department of State to U.S. Embassy, Khartoum, June 2, 1989.

In the same month, the United States protested a Finnish decree requiring prior notification of warships and non-commercial ships entering Finland's territorial sea, prohibiting innocent passage through fortified or other areas declared to be of military importance, and requiring the use of pilot service and public sea lanes when navigating Finland's territorial sea. After repeating the legal bases for the right of innocent passage made in prior protests to other states, described above, the United States addressed Finland's limitation of innocent passage to non-military areas and its navigational requirements:

> The Government of the United States also wishes to recall to the Government of Finland that the right of inno-

> cent passage through the territorial sea extends to the whole of the territorial sea except as it may be suspended temporarily when such suspension is essential for the protection or security of the coastal state and is duly published. This limited right to suspend innocent passage is recognized in customary international law as reflected in Article 25 of the United Nations Convention on the Law of the Sea, as well as in the second paragraph of Article 9 of the Finnish decree.
>
> The Government of the United States also wishes to recall to the Government of Finland that there is no authority in international law to require compulsory pilotage of vessels entitled to sovereign immunity engaged in innocent passage through the Finnish territorial sea, as is asserted by Article 10 of the Finnish law.
>
> * * * *
>
> The Government of the United States also seeks the assurances of the Government of Finland that the provisions of article 10 and 12 regarding the public sea lanes in the Finnish territorial sea apply only to those sea lanes established as necessary for the safety of navigation after taking into account the relevant factors required by international law.

Telegram from the Department of State to U.S. Embassy Helsinki, June 2, 1989. The telegram also provided as follows concerning the background of the protest to Finland:

> — The claim . . . to deny any right of innocent passage through those portions of the Finnish territorial sea which are fortified areas or other areas declared by the Finnish government to be of military importance, and in Article 21 to limit arrival of government vessels in such areas only to the time between sunrise and sunset, are without foundation in international law. The national security interests which these provisions are apparently designed to protect would seem capable of adequate protection through the generally recognized provisions for temporary suspension of innocent passage set out in . . . [the decree].

— The United States is concerned that Article 21, limiting arrival of government vessels in such areas between sunrise and sunset, could be applied in a manner to restrict further the innocent passage of vessels. The United States seeks the assurances of the Government of Finland that Article 21 is not intended to impose restrictions on the right of all vessels to engage in innocent passage through such areas inconsistent with international law.

— While the United States has no objection to the Government of Finland offering pilotage services to United States warships and other government ships operated for non-commercial purposes and engaged in innocent passage through the territorial sea of Finland, the Government of the United States understands that, consistent with the immunities of those vessels, such services may be accepted or declined at the discretion of the flag state.

* * * *

— Customary international law, as reflected in article 22 of the Law of the Sea Convention, permits a coastal state to establish sea lanes in its territorial sea where needed for the safety of navigation; after taking into account the recommendations of the competent international organizations (i.e., the international maritime organization); any channels customarily used for international navigation, the special characteristics of particular ships and channels; and the density of traffic.

— Articles 10 and 20 of the Finnish law do not specify the criteria to be used by Finland in specially regulating sea lanes.

— Thus the U.S. seeks assurances of the Government of Finland that it will follow these generally recognized principles of international law in regulating any sea lanes in its territorial sea.

Telegram from the Department of State to U.S. Embassy Helsinki, June 2, 1989.

The United States also transmitted a diplomatic note to Albania through the French government protesting an Albanian requirement that warships obtain prior authorization before

engaging in innocent passage through its territorial sea, reiterating legal arguments made in prior protests to other states. In addition, the United States protested Albania's establishment of a 15 nautical mile territorial sea, noting that "as is well known, customary international law, as reflected in article 3 of the 1982 United Nations Convention on the Law of the Sea, recognizes a territorial sea breadth of up to a limit not exceeding twelve nautical miles, measured from baselines determined in accordance with the convention. That practice is followed by a vast majority of the coastal states." Telegram from the Department of State to U.S. Embassy, Paris, June 17, 1989. Albania enacted Decree No. 7366 to establish the width of its territorial sea at twelve miles on March 9, 1990. 16 UNLOS Bull. 2 (Dec. 1990).

In July 1989 the United States protested a Romanian decree requiring prior approval for military vessels Telegram to U.S. Embassy, Bucharest, July 11, 1989. The U.S. also protested a 1988 Haitian note verbale to the United Nations purporting to prohibit the entry of any vessel carrying hazardous wastes into the Haitian territorial sea or exclusive economic zone. Telegram from the Department of State to U.S. Embassy, Port au Prince, July 20, 1989. In background points the U.S. elaborated the legal bases for its protest of the Haitian hazardous waste prohibition:

> — The United States recognizes the right of states to control the entry into and passage through their land territory, ports and internal waters, of all types of conveyances carrying hazardous wastes
> — The United States strongly supported the recently concluded Basel Convention on the Transboundary Movement of Hazardous Wastes, which . . . includes a notice and consent regime for the transit of hazardous waste through a party's land territory and internal waters.
> — While under customary international law coastal states have certain rights to enact laws and regulations in the interest of preservation of the environment, that legislation must conform to international law as reflected in the LOS Convention, must not hamper innocent passage, and must give due regard to the high seas freedom of navigation in the EEZ guarantee to all states.

> — A restriction on innocent passage for environmental reasons could be cited as a precedent for limiting innocent passage of vessels in the future for other reasons.
> — During the [Basel] negotiations the United States vigorously opposed attempts to extend that notice and consent regime for passage of ships carrying hazardous wastes through the territorial sea and EEZ of a party.
> — The text of the Convention as adopted . . . did not change existing rights of innocent passage and freedom of navigation.

*Id.*

In the summer of 1990 Yugoslavia protested the innocent passage of the U.S.S. *Belknap* through the Yugoslav territorial sea that occurred on June 2, 1990, without advance notice as required by Yugoslav law. The U.S. response explained that its actions were wholly in accordance with customary international law on the right of innocent passage as reflected in the 1982 United Nations Convention on the Law of the Sea:

> In this connection the Embassy of the United States invites the attention of the Federal Secretariat to the Uniform Interpretation of the Rules of International Law Governing Innocent Passage attached to the joint statement issued by Soviet Foreign Minister Shevardnadze and Secretary of State Baker in Jackson Hole, Wyoming, USA on 23 September 1989. This statement noted that, with respect to traditional uses of the oceans, the provisions of the 1982 United Nations Convention on the Law of the Sea, which Yugoslavia has ratified, generally constitute international law and practice and balance fairly the interests of all states. The uniform interpretation states that all ships, including warships, regardless of cargo, armament or type of propulsion enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.
>
> Accordingly, the United States continues to find itself unable to accept the validity under international law of paragraph 3 of Article 17 of the law on the coastal sea

> and continental shelf of the SFR of Yugoslavia and would take this opportunity to encourage the Government of Yugoslavia to harmonize its laws with the provisions of the 1982 Law of the Sea Convention.

Telegram from the Department of State to U.S. Embassy, Belgrade, August 30,1990.

### *c. Flag state control*

#### *(1) U.S. jurisdiction over foreign-flagged vessels*

On February 10, 1990, two foreign-flagged vessels collided in international waters near the Cuban coast. One of the vessels was a passenger cruise ship registered in Liberia and carrying a large number of U.S. citizens. Upon this vessel's return to Miami, the National Transportation Safety Board ("NTSB") began an investigation of the accident. The Liberian government also conducted an investigation on behalf of Liberia, the flag state. The NTSB subpoenaed several of the ship's crew members for information concerning the collision. When the crew refused to comply, the NTSB sought a court order to compel compliance.

The district court declined to enforce the subpoenas. *National Transportation Safety Board v. Carnival Cruise Lines, Inc.*, 723 F. Supp. 1488 (S.D.Fla. 1989). First, the court found that Congress could authorize the NTSB to conduct investigations of accidents taking place outside U.S. territory where, as in this case, "the conduct . . . has a substantial, direct, and foreseeable effect in the territory of the United States." *Id.* at 1491.

Turning to the question of whether Congress had in fact authorized the NTSB to investigate an accident that occurred in international water between foreign-flagged vessels, the court observed:

> [I]n the "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963) (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147

> (1957)).[7] Thus, this court must apply the well-established rule of statutory construction that Congress, unless a contrary intent appears in the statute, is presumed to intend only territorial application of a statute. *Foley Bros. v. Filardo*, 338 U.S. 281 (1949).
>
> [7] Although the court assumes, without deciding, that legislation authorizing an investigation of this accident may be justified under these circumstances by relying upon the "effects doctrine," the court recognizes that this doctrine has been criticized abroad. *See* Kathleen Hixson, Extraterritorial Jurisdiction under the Third Restatement of Foreign Relations Law of the United States, 128 Fordham Int'l Law J. 127, 138–39 (1988). Thus, an exercise of jurisdiction on this basis may implicate sensitive issues of international law.

*Id.* at 1492. Using this standard, the court found that the NTSB did not have jurisdiction to investigate this accident, and that it had exceeded its authority in issuing the subpoenas.

### *(2) Maritime interdiction*

On September 15, 1990, the Department of State reviewed fundamental practices and terminology of maritime interdiction for several posts involved in maritime law enforcement. The Department's telegram described some of the most commonly employed practices and terminology:

> *Exclusive Jurisdiction:* A fundamental tenet of international law is that, with limited exceptions, vessels in international waters are subject to the exclusive jurisdiction of the flag state. Therefore, in most circumstances, no state may board a foreign flag vessel in international waters during times of peace without the permission of the flag state or the consent of the master.
>
> *Exceptions:* Piracy and slave trade are considered universal crimes subject to the jurisdiction of all states. In addition, vessels without nationality are subject to the jurisdiction of all states. Unauthorized broadcasting may subject the vessel to the jurisdiction of states other than the flag state. Therefore, boarding of foreign vessels sus-

pected of engaging in these activities in international waters is permitted without the permission of the flag state, or consent of the master, in the exercise of the right of visit. . . . However the international community does not now equate maritime drug trafficking with these exceptions. Boarding of such ships must be with the permission of the flag state or the consent of the master. In addition, foreign flag vessels could be boarded without the consent of the master or the permission of the flag state pursuant to the right of self defense or when authorized by the UN Security Council.

*Master's Consensual Boarding:* Consent by the master of a foreign flag vessel to boarding by law enforcement officials of another state in international waters, for the purpose of gathering information. The master determines the scope, conduct and duration of the boarding. Flag state authorities are not contacted prior to the boarding. No enforcement jurisdiction, such as arrest or seizure, may be exercised during a consensual boarding of a foreign flag vessel without the permission of the flag state (whether or not the master consents), even if evidence of illegal activity is discovered.

*Flag State-Authorized Non-Consensual Boarding:* Boarding by foreign law enforcement officials in international waters, following flag state grant of authority to board. Permission to board can, but may not, include authority to search and/or take enforcement action. If the grant of authority is given in a specific case, the process is also known as a special arrangement.

*Shipboarding agreement:* A bilateral agreement in which the flag state grants advance permission to foreign law enforcement officials to board in international waters its non-sovereign immune flag vessels for specified purposes, thereby mooting need for the master's consent. Such an agreement may include advance permission to exercise enforcement jurisdiction on behalf of either the flag state or the foreign state. Such an agreement renders case-by-case flag-state permission unnecessary. . . . A shipboarding agreement may also be reciprocal in its operation. . . .

*Article 17 Agreement:* A bilateral agreement that implements Article 17 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Article 17 sets forth the procedures for verifying registry of foreign vessels suspected of engaging in illicit trafficking and the procedures required for obtaining flag State permission to board the foreign vessel and take law enforcement action. See, for example, the US/Panama exchange of notes of 1 May 1990.

*Shiprider agreement:* A bilateral agreement authorizing a law enforcement official of a coastal state ("the rider") to ride aboard a law enforcement vessel of another country to assist the coastal state in enforcing its laws against its own vessels. The agreement may also include provisions for the law enforcement vessel to enter the coastal state's territorial sea, to enforce the other state's laws against its own and third nation vessels. Such an agreement may permit a law enforcement vessel to enter the coastal state's territorial sea without the shiprider if one is not readily available.

*Pursuit and Entry Agreement:* Allows foreign law enforcement vessels and aircraft to enter, on a case-by-case basis, the recognized territorial sea or sovereign airspace of a coastal state to investigate a suspect or to pursue a suspect fleeing from international waters. Such an agreement may incorporate coastal state enforcement authority with or without a shiprider.

*Internal Waters:* Waters landward of the baseline from which the breadth of the territorial sea is measured. The coastal state exercises the same sovereignty over internal waters as it does over its land territory.

*Territorial Sea:* A belt of sea adjacent to the land territory and internal waters of a coastal state over which the coastal state has sovereignty. The maximum breadth of the territorial sea is 12 nautical miles measured from baselines determined in accordance with international law.

*Territorial Waters:* Not a legal term. Often used to denote both territorial sea and internal waters together. Sometimes inaccurately used as a synonym for territorial sea.

*International Waters:* Those portions of the oceans seaward of the outer limit of the territorial sea. Not a legal term; see "EEZ" and "high seas."

*EEZ/Patrimonial Sea/Zone of Authority:* The exclusive economic zone (EEZ) is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in the 1982 Law of the Sea Convention, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the LOS Convention. The coastal state does not have sovereignty over its EEZ; however, the coastal state enjoys the right to exercise certain resource-related sovereign rights and jurisdiction in its EEZ. In the EEZ all states enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms. The EEZ derived from the concept of the "patrimonial sea."

The patrimonial sea concept was promoted in the 1950s and 1960s with variable content by some Latin American countries. Today it has no agreed legal meaning or content. Consequently, use of this term should be avoided, even though some Latin countries would like to use it as a means of converting the limited coastal state sovereign rights and jurisdiction in the EEZ into a 200 nautical mile territorial sea. The United States does not recognize any territorial sea broader than 12 nautical miles.

The term "zone of authority" has no agreed legal meaning, and its use should be avoided.

*High seas*. All parts of the sea that are not included in the exclusive economic zone, in the territorial sea, or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. (An archipelagic State is a State constituted wholly by one or more archipelagoes, i.e. group[s] of islands, meeting particular geographic and legal criteria set out in part IV of the 1982 LOS Convention. Archipelagic waters are the waters of an archipelagic State enclosed by baselines drawn in accordance with international law.)

*Right of visit*. The right of a warship, in peacetime, to verify, in accordance with international law reflected in

> article 110 of the 1982 LOS Convention, the registry of a foreign vessel encountered on the high seas which is reasonably suspected of falling within [certain] exceptions . . . . The warship may board the foreign vessel without either the consent of the master or the permission of the flag State.

Telegram from the Department of State, September 15, 1990.

*(3) Boarding and search on the high seas*

On January 30, 1990, the U.S. Coast Guard cutter *Chincoteague* intercepted a Panamanian registered coastal freighter, the M/V *Hermann*, in international waters of the Gulf of Mexico because it was suspected of carrying narcotics or other contraband. After the master of the vessel refused the Coast Guard's request to board, the United States Government received confirmation of the vessel's Panamanian registry and obtained permission from the Government of Panama to board and inspect the vessel in accordance with international maritime law and practice. *See* U.N. Doc. S/21127 Annex, February 5, 1990. Nevertheless, the M/V *Hermann*'s master refused to allow the boarding. The U.S. Coast Guard, after further consultation with U.S. and Panamanian authorities, advised the vessel that it would use necessary force to board it if it did not stop and permit the boarding that had been authorized by the flag state.

At this time, the Cuban government, which stated that it was in communication with the master of the vessel, informed the U.S. Interest Section in Havana that the crew was Cuban and that the vessel should be allowed to continue its voyage unimpeded. *See* Note dated 31 January 1990 from the Ministry of Foreign Affairs of Cuba to the Interests Section of the United States of America in the Embassy of Switzerland in Havana, UN Doc. S/21121 Annex II. U.S. authorities advised the Government of Cuba that it would defer the law-enforcement action for several hours so that the Government of Cuba could instruct the master and his crew to cooperate with the lawful exercise of authority pursuant to the instructions of the flag state. Cuban authorities, however, responded that they had ordered the master of the M/V *Hermann*

to resist any boarding attempts by the U.S. Coast Guard. *See* Letter dated 3 February 1990 from the Acting Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/21122.

The Coast Guard cutter *Chincoteague* followed the vessel throughout the night of January 30–31, 1990, in international waters and exercised graduated measures in an effort to stop it. These included attempting to hail the vessel by radio and loudhailer, flashing signal lights, spraying water across the vessel's decks and down its stack, firing warning shot across its bow, and firing small-caliber rounds at the vessel's engines in order to disable—but not sink—it. The M/V *Hermann* refused to stop and eventually entered the Mexican territorial sea. The Coast Guard cutter broke off pursuit prior to this point. On January 31, 1990, the United States protested the actions of the Government of Cuba in a note to the Cuban Interests Section of the Czechoslovak Embassy in Washington:

> By instructing the crew of the *Hermann* to resist an authorized boarding by Coast Guard officials, the Government of Cuba jeopardized the lives and safety of its citizens and demonstrated blatant disregard for legitimate law enforcement efforts to interdict illicit trafficking in the region. The Government of the United States is unable to understand the Government of Cuba's action in the face of repeated Cuban assurances that the Cuban Government seeks cooperation with the United States on combatting illegal drug trafficking.
>
> The Government of the United States holds the Government of Cuba responsible for having exposed the crews of both the "Hermann" and the involved Coast Guard vessel to unnecessary danger and calls upon the Government of Cuba to offer an explanation of its behavior in this incident.

The note is available at *www.state.gov/s/l*.

In its response Cuba claimed the United States was attempting to "extend the applicability of United States laws to other sovereign, independent countries" since "the vessel in question

had a Cuban crew and had been leased from the owners by a Cuban firm." Note from Cuban Ministry of Foreign Affairs to U.S. interests section, Swiss Embassy, Havana, February 1, 1990, U.N. Doc. S/21121 Annex I, February 3, 1990.

In a letter dated February 5, 1990, from the chargé d'affaires of the Permanent Mission of Panama to the United Nations Secretary-General, the Government of Panama confirmed its role in the *Hermann* incident:

> The vessel concerned flies the Panamanian flag, and the Government of Panama gave express permission for United States authorities to board and inspect it. In such cases, considering that the country taking the action does so for and on behalf of the sovereign country where the ship is registered, Panama accepts that all necessary measures may, even must, be taken including the use of force.

U.N. Doc. S/21127, February 5, 1990.

On February 9, 1990, the United Nations Security Council met in response to a request by the Government of Cuba to address the situation involving the M/V *Hermann*, U.N. Doc. S/21120. February 2, 1990. In his response to the representative of the Government of Cuba, the United States representative, Ambassador Alexander M. Watson, expressed the U.S. position on the jurisdiction of the flag state over vessels flying its flag:

> Even Fidel Castro in his 1 February speech regarding this incident admitted that Panamanian flag vessels with Cuban crews have submitted in the past to United States Coast Guard inspection during "normal times." Cuba cannot claim the right to override the sovereignty of the flag country—a sovereignty enshrined in centuries of maritime law. If the Government of Cuba wishes to exercise jurisdiction over a vessel, it should register the vessel under the Cuban flag. It is not difficult to imagine the chaos that would result if all Governments behaved as Cuba's did on this occasion.
>
> United States actions were taken with the authorization of the flag State and conducted in accordance with

customary international law and practice codified in article 6 of the [H]igh [S]eas Convention of 1958 and article 92 of the [L]aw of the [S]ea Convention of 1982, and most recently in article 17 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

* * * *

The procedures set out in article 17 of the Vienna narcotics trafficking convention were followed by the requesting State, the United States, and by the flag State, Panama, in this case. . . . Nowhere in international jurisprudence is the Government of the State of nationality of the master or any other crew member authorized to countermand the authority and sovereignty of the flag State.

If the authority to board and inspect could be frustrated by the refusal of a ship captain to honor such authority, the entire flag-State system of jurisdiction on the high seas would collapse. The fact that some or all of the crew may be of a nationality different from that of the flag State in no way diminishes the authority of the flag State. Again, if an inspecting vessel had to receive authority from each State with citizens serving as crewmen aboard or from whomever may have chartered the vessel, the entire flag-State system would be subverted.

* * * *

The incident is not a spat between the United States and Cuba. . . . The only States involved are the United States and Panama. Cuba has no standing to complain. The issue here is one of supporting international law. The Government of Cuba acted as if it had the right to frustrate a lawful inspection duly authorized by the flag State. That is a prescription for chaos at sea.

U.N. DOC. S/PV.2907, February 9, 1990, at 26–37.

The Security Council took no further action on the Cuban request. Shortly after this incident, in an address before the American Society of International Law and the American Bar

Association in Washington, D.C. on March 30, 1990, Under Secretary for Political Affairs Robert M. Kimmitt reiterated the importance of the procedures established to secure flag state consent to boarding:

> International maritime law, codified in the High Seas Convention of 1958 and the Law of the Sea Convention of 1982, provides important tools for maritime interdiction. In addition to thousands of inspections each year of U.S.-flagged vessels, the U.S. Coast Guard also inspects hundreds of foreign-flagged vessels, exercising the long-standing rights of approach and consensual boarding. Recognizing the exclusive jurisdiction of the flag state for nonconsensual boarding and law enforcement, we have established effective consultative processes with most maritime nations. We seek—and generally receive—prompt and effective cooperation to permit the Coast Guard to inspect vessels whose masters deny consent and to enforce laws against narcotics smugglers.

"International Law and the War on Narcotics," U.S. Department of State, Bureau of Public Affairs, Current Policy No. 1267, p. 2–3.

On May 1, 1990, long-standing practice on the exchange of information on ships registered in Panama and on authorizing or requesting cooperation by U.S. authorities with respect to vessels registered in Panama was confirmed by an exchange of notes signed by Secretary of State James A. Baker III and Foreign Minister Julio Linares of Panama. The notes are available at *www.state.gov/s/l*.

*(4) Responsibility in response to protest*

On November 30, 1989, the U.S. Embassy in The Hague, Netherlands, delivered a note to the Dutch government protesting activities at sea of two Dutch registered vessels that had hazarded navigation and jeopardized the safety of U.S. warships in 1988 and 1989. The note was prompted by the desire of the United States to avoid a repetition of these activities in conjunction with a U.S. Navy missile test from a submarine on the high seas scheduled for December 4, 1989. The note stated, in pertinent part:

The Government of the United States of America wishes to inform the Government of the Netherlands of dangerous maneuvers by M/V *Sirius* and M/V *Greenpeace* which have created clear and intentional hazards to navigation of United States Navy vessels and jeopardized safety at sea.

The Government of the United States of America wishes to recall that under customary international law, the flag state has certain duties with regard to ships of its registry, including the exercise of control and jurisdiction to ensure that master, officers, and crew observe international regulations concerning safety of life at sea and prevention of collisions.

Article 94(6) of the 1982 United Nations Convention of the Law of the Sea, which reflects customary international law on this point, states that "[A] state which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag state. Upon receiving such a report, the flag state shall investigate the matter and, if appropriate, take any action necessary to remedy the situation."

* * * *

The Government of the United States of America wishes to emphasize that we respect the right of Greenpeace and every other organization to express its opinions through peaceful demonstrations. However, all states are obligated to take appropriate action in accordance with international law against dangerous conduct which hazards navigation or jeopardizes safety at sea. States of registry have a special responsibility to enforce respect for applicable rules of the road and safety.

Accordingly, the Government of the United States of America requests that the Government of the Netherlands investigate the hazardous activities of M/V *Sirius* and M/V *Greenpeace*, ships under the Netherlands registry, and take the necessary and appropriate action to prevent repetitions. The Government of the United States would further request that the outcome of the investigation be provided to the Government of the United States.

Telegram from the Department of State to U.S. Embassy, The Hague, November 30, 1989.

In this telegram, the Department reviewed several further points to be raised with the Dutch government:

> — In recent years, certain Greenpeace vessels have adopted dangerous tactics and intentionally created hazardous situations at sea. Those tactics have included: using ships and small boats as a threat to safe navigation by crossing directly in front of other vessels; blocking channels in restricted waters; hazarding safe docking procedures; endangering harbor safety by cutting moorings; and other reckless maneuvers which violate international rules of the road and local laws.
> — The U.S. is sending diplomatic protests to flag states of offending vessels and requesting appropriate action to enforce respect for safety at sea.
>
> * * * *
>
> — The United States . . . urgently requests that the Government of the Netherlands take immediate steps to prevent M/V *Greenpeace* from interfering with the December 4 test, including, if necessary, deflagging the vessel.
> — The United States reserves, and will exercise, its right to protect its vessels and crews engaged in lawful high seas activities from interference or activities endangering its vessels and crews, including, if necessary, boarding vessels to prevent such interference.
> — Under international law, every state has a duty to effectively exercise control and jurisdiction over ships flying its flag.
>
> * * * *
>
> — The United States may also find it necessary to deny such vessels access to its ports, if the vessels continue to hazard the safety of life and navigation at sea of United States vessels.

*Id.*

On December 1, 1989, the Department of State sent two virtually identical notes to the Governments of Sweden and Finland,

protesting the hazardous activities of vessels registered under the flags of those states, again in anticipation of attempts to interfere with the U.S. Navy missile test on December 4, 1989. Telegram from the Department of State to U.S. Embassy, Stockholm, December 1, 1989; Telegram from the Department of State to U.S. Embassy, Helsinki, December 1, 1989. On December 4, 1989, the Department of State sent a similar note to the Government of the Federal Republic of Germany. Telegram from the Department of State to U.S. Embassy, Bonn, December 4, 1989.

### 5. Limits of the Territorial Sea: Drawing of Baselines

The U.S. Government also made a number of protests in 1989 and 1990 to foreign states regarding improperly drawn baselines for measuring the territorial sea, as part of the U.S. Freedom of Navigation Program. GIST, December 1988, noted *supra* in 4.b.

In a note protesting a Djibouti claim of straight baselines, the U.S. stated:

> The Government of the United States . . . maintains its view that, as recognized in customary international law and as reflected in the 1982 United Nations Convention on the Law of the Sea, unless exceptional circumstances exist, baselines are to conform to the low-water line along the coast as marked on a state's official large-scale charts. Straight baselines may only be employed in localities where the coastline is deeply indented and cut into, or where there is a fringe of islands along the immediate vicinity of the coast. It is the position of the Government of the United States that, in the case of Djibouti, the Seba islands are not fringing islands so as to permit the drawing of straight baselines, and, therefore, the baseline must be the low-water line along the coast of each island, and the mainland.

Telegram from the Department of State to U.S. Embassy, Djibouti, March 31, 1989. The telegram also explained that:

> Exceptions [to the low-water line baselines] are permitted where the coastline is deeply indented and cut into or

> where there is a fringe or islands along the immediate vicinity of the coast wherein a nation may employ straight baselines. Straight baselines where utilized, however, must not depart from the general direction of the coast and the sea areas enclosed must be clearly linked to the land domain. It is our position that the Seba Islands are not fringing islands. The [1982 Law of the Sea] Convention does not define the term "fringing island." The Department's Limits of the Sea Series, No. 106, (LIS-106), however, sets forth proposed tests for a determination of fringing islands, which are not met by the Seba Islands.

*Id.*

In June 1989 the United States protested Sudan's claim of certain areas as territorial waters. After stating the same general rules as to baselines made in the Djibouti protest, above, the United States continued:

> — . . . Straight baselines must not depart to any appreciable extent from the general direction of the coast. In addition, baselines cannot be drawn to or from shoal waters which are not low tide elevations that have a lighthouse or similar installation, permanently above sea lever, erected thereon;
> — A closing line of not more than 24 nautical miles in length may be used to close a juridical bay and the water area of the resultant bay must be greater than that of a semicircle whose diameter is the length of the line drawn across the mouth of the bay;
> — Archipelagic states do not include mainland states which possess non-coastal archipelagos. Therefore, baselines, including straight baselines, cannot be drawn around mainland nations' coastal archipelagos.

Telegram from the Department of State to U.S. Embassy, Khartoum, June 2, 1989.

In addition, background points provided to the embassy stated:

> — Excessive baselines are objectionable since baselines mark the demarcation between a nation's internal and territorial waters and serve as the line from which the breadth of a nation's territorial sea is measured. The United States does not itself utilize straight baselines, even in the exceptional circumstances in which they are permitted. Though the U.S. also has an island archipelago, it recognizes that, as a mainland nation, this archipelago is not eligible for archipelagic baseline treatment.

*Id.*

The United States protested Albania's claim of excessive straight baselines in a note transmitted through the Government of France in June 1989. In particular, the protest stated:

> — The United States wishes to point out that, for the most part, the Albanian coastline, being neither deeply indented and cut into, nor having a fringe of islands in its immediate vicinity, does not meet the geographic criteria required under international law for the establishment of straight baselines. Further the baselines segments from the Cape of Rodom (Muzhit) to the mouth of the Wjose River, and from the Cape of Gjuhe to the Cape of Sarande, enclose waters which are neither juridical bays nor historic waters.

Telegram from the Department of State to U.S. Embassy, Paris, June 17, 1989.

In August 1989 the United States protested a Mauritanian ordinance maintaining a straight baseline along a sector of Mauritania's coast, concluding that the "straight baseline drawn by the Government of Mauritania does not meet the criteria for a straight baseline as is recognized in customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea."

In December 1989, the United States protested a Costa Rican decree establishing straight baselines for sections of Costa Rica's Pacific coast. After repeating the basic rules governing baselines, the note added:

> Additionally, baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.
>
> While the Pacific coastline of Costa Rica contains two embayments, it is neither deeply indented and cut into, nor fringed with many islands, as those standards are employed and understood in international law. Furthermore, several segments which close off geographical bays are longer than twenty four nautical miles and therefore exceed the juridical bay closing line length that is permitted under international law.

Telegram from the Department of State to U.S. Embassy San Jose, December 13, 1989.

In January 1990 the United States protested through the United Nations the establishment of maritime boundaries by the Democratic People's Republic of Korea for several reasons, including the use of a straight baseline to measure the breadth of its territorial sea. The United States pointed out that the exceptional circumstances of a deeply indented coastline or a fringe of islands along the immediate vicinity of the coastline did not exist with regard to the Democratic People's Republic of Korea. The United States also protested an announcement by the Democratic People's Republic of Korea purporting to establish a maritime boundary of 50 nautical miles in the Sea of Japan and a military maritime boundary coincident with its claimed exclusive economic zone limit in the Yellow Sea, pointing out that "as recognized in customary international law and as reflected in the 1982 United Nations Convention on the Law of the Sea, the maximum breadth of the territorial sea is twelve nautical miles measured from properly drawn baselines." The United States transmitted its views on these issues to the United Nations for publication in the Law of the Sea Bulletin, published by the Office of the Special Representative of the Secretary-General for the Law of the Sea, making clear that the protest was "made without prejudice to the legal position of the Government of the United States of America which has not recognized the Government of the Democratic People's Republic of Korea." Law of the Sea Bulletin, No. 15 (May 1990), pp. 8–9.

### 6. Coastal State Economic Jurisdiction

In 1989 the United States made several protests of foreign states' assertions of rights in their exclusive economic zones ("EEZ") that were inconsistent with international law. These protests were also made as part of the U.S. Freedom of Navigation program, discussed above.

In March 1989, the United States protested a Djibouti law seeking to assert sovereign and exclusive rights over certain activities in the EEZ:

> Regarding Article XIII of Law No. 52/AN/78, relating to Djibouti's exclusive economic zone, the Government of the United States notes that the term "sovereign rights" is used with respect to matters over which international law affords coastal states only "jurisdiction" and that the wording of Article XIII in other respects deviates from the accepted international law formulations. The Government of the United States hopes that the Government of Djibouti intends to interpret and apply Article XIII consistently with international law as reflected in the 1982 United Nations Convention on the Law of the Sea, including Article 56 thereof. The Government of the United States is not prepared to recognize any claims in excess of those permitted under customary international law as reflected therein.

Telegram from the Department of State to U.S. Embassy, Djibouti, March 31, 1989. Background points provided as follows:

> — Customary international law, as reflected in Article 56 of the LOS Convention, provides that a nation has "jurisdiction" over the establishment and use of artificial islands, installations and structures, as well as marine scientific research within its exclusive economic zone. Article XIII of Djibouti's law No. 52/AN/78 asserts "sovereign and exclusive rights" as opposed to "jurisdiction" over such activities. The LOS Convention does not recognize any coastal nation's sovereignty in the EEZ, but does grant to coastal states "sovereign rights," inter alia, for economic

> exploitation and exploration of the natural resources of the EEZ.
>
> — International law as reflected in the LOS Convention grants to coastal states jurisdiction only over "marine scientific research" and not over the broader category of "scientific research." The United States does not consider activities such as hydrographic surveys, the purpose of which is to obtain information for the making of navigational charts, and the collection of information that, whether or not classified, is to be used for military purposes, to be marine scientific research and therefore they are not subject to coastal state jurisdiction.
>
> — The LOS Convention was drafted in such a manner as to enable a nation to incorporate its provisions directly into law. In any instance in which there is a deviation, questions will undoubtedly be raised about the intended differences.

*Id.*

In July 1989 the United States addressed certain questionable portions of a 1986 Romanian decree establishing an EEZ. In particular, the U.S. stated:

> The Government of the United States notes Romania's Decree No. 142 of April 25, 1986 concerning Romania's establishment of its exclusive economic zone. In particular, Article 3 states that in its exclusive economic zone, Romania shall exercise sovereign rights for the purpose of exploring and exploiting, conserving and managing living and non-living national resources "and other resources" on the sea-bed, in its subsoil, and in the superadjacent water column. Articles 3 and 9 of Decree No. 142 further state that Romania shall exercise jurisdiction in the exclusive economic zone with regard to the establishment and use of artificial islands, installations, and structures; marine scientific research; and the protection and conservation of the marine environment, including the right to exercise control in order to prevent infractions and other violations of customs, fiscal, health, and immigration regulations, without limiting the exercise of this

> jurisdiction to that provided for in the generally recognized norms of international law reflected in the relevant provisions of the 1982 United Nations Law of the Sea Convention. The United States Government seeks assurances that the aforementioned sections of Articles 3 and 9 are intended to comport with articles 56, 60, and 246 of the 1982 United Nations Convention on the Law of the Sea.
>
> The Government of the United States also notes that Article 11 of Romania's Decree No. 142 purports to authorize rules relating to the safety of navigation in Romania's exclusive economic zone and seeks assurances that the aforementioned article 11 is intended to comport with articles 60 and 211.1 of the 1982 United Nations Convention on the Law of the Sea.

Telegram from the Department of State to U.S. Embassy, Bucharest, July 11, 1989.

As noted in 4.b., *supra*, the United States also protested a 1989 Haitian note to the UN purporting to prohibit the entry into Haiti's territorial sea and EEZ by any vessel transporting hazardous waste.

### 7. State Authority over the Contiguous Zone

The U.S. Government made a number of diplomatic protests in 1989 and 1990 to foreign states regarding their assertions of authority over areas beyond the limits of the territorial sea, also as part of the Freedom of Navigation Program noted in 4.b., *supra*.

In June 1989 the U.S. Government protested a Sudanese law purporting to establish a zone of six nautical miles beyond its territorial sea to prevent infringement of security laws. The United States noted that "the right of a coastal state to enforce its laws for security purposes does not extend beyond the limits of its territorial sea." Telegram from the Department of State to U.S. Embassy, Khartoum, June 2, 1989.

The telegram elaborated further on the security zone issue in points provided for background use by the embassy:

— Customary international law, as reflected in the LOS Convention, does not recognize the right of coastal nations to enforce security laws or otherwise restrict the exercise of freedoms of navigation and overflight beyond the territorial sea. The law enforcement jurisdiction permitted in a contiguous zone adjacent to the territorial sea is limited to enforcement of its custom, fiscal, immigration and sanitary laws. Accordingly, the United States does not recognize any claimed right of a coastal state to enforce its security laws seaward of the territorial sea or otherwise restrict or regulate the high seas freedoms of navigation and overflight.

*Id.*

Also in June 1989 the United States made an inquiry concerning a Venezuelan law asserting its authority to establish, for the purposes of maritime vigilance and police, and for the security of Venezuela, a three-nautical-mile contiguous zone. The United States raised the following points with Venezuelan officials:

— Both the United States Government and the Government of Venezuela are parties to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone which states that the maximum breadth of the territorial sea and contiguous zone is twelve nautical miles measured from the baseline.
— In ratifying the 1958 Geneva Convention, the Government of Venezuela reserved the right to assert a contiguous zone wider than twelve nautical miles in the Gulf of Paria and adjacent zones, in the area between the coast of Venezuela and the island of Aruba, and the Gulf of Venezuela, which reservation the United States found not acceptable in 1962.
— While neither the Government of Venezuela nor the United States Government has signed the 1982 LOS Convention, we understand the Government of Venezuela accepts, as does the Government of the United States, those parts of the 1982 LOS Convention which relate to traditional uses of the ocean, such as navigation and overflight, as reflective of customary international law and practice.

— Customary international law now recognizes that the maximum breadth of a contiguous zone is twenty-four nautical miles measured from the baseline from which the territorial sea is measured, and the maximum breadth of the territorial sea is twelve nautical miles measured from the same baseline.
— Customary international law, as reflected in both the 1958 Territorial Sea Convention and the 1982 LOS Convention, does not recognize the right of coastal states to assert powers or rights for security purposes in peacetime that would restrict the exercise of the high seas freedoms of navigation and overflight beyond the territorial sea.
— Article 3 of Venezuela's territorial waters, continental shelf, conservation of fisheries and airspace law, of July 2, 1956, seems to establish, for purposes of maritime vigilance and police, and for the security of Venezuela, a zone equivalent to three nautical miles, contiguous to its territorial sea.
— We assume that the Government of Venezuela would now implement such a zone consistent with article 33 of the LOS Convention.
— In the event that Venezuela intends to implement or revise Article 3 of that 1956 law consistent with article 33 of the LOS Convention, which reflects customary law and fairly balances the legitimate interests of coastal states and maritime nations alike, the United States would be prepared to withdraw its objection to Venezuela's reservation to paragraph 2 of article 24 of the 1958 Geneva Convention on the territorial sea and the contiguous zone.

Telegram from the Dept. of State to U.S. Embassy, Caracas, June 18, 1989.

The United States protested, on the same grounds, a 1988 Haitian decree seeking to assert jurisdiction over its contiguous zone for security reasons (Telegram from the Department of State to U.S. Embassy, Port au Prince, July 20, 1989) and Syrian laws claiming a six-nautical-mile security zone beyond its territorial sea (Telegram from the Department of State to U.S. Embassy Damascus, October 20, 1989).

In December 1989 the Government of Oman established a temporary naval protection zone encompassing portions of the high seas off Oman for a 15 day period, in order to enhance Oman's ability to provide security during a meeting in Oman of the heads of state of the Gulf Cooperation Council. According to the Omani notice to mariners, all shipping should avoid entering the zone, or be liable to being stopped and searched. The United States protested the Omani action:

> The Government of the United States wishes to bring to the attention of the Government of Oman that, while customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea permits a coastal state to suspend temporarily the right of innocent passage in specified areas of its territorial sea when such suspension is essential for the protection of its security, the international law of the sea does not recognize the right of coastal states to assert powers or rights for security purposes which would restrict the exercise of high seas freedom of navigation beyond the territorial sea.
>
> The Government of the United States therefore objects to the claim made by the Government of Oman contained in Notice to Mariners No. 6/89, which is inconsistent with international law and reserves its rights and those of its nationals in regard to this and other maritime claims made by the Government of Oman which are inconsistent with international law.

Telegram from the Dept. of State to U.S. Embassy, Muscat, December 6, 1989.

In background information provided to the embassy, the United States provided the following information:

> — Customary international law provides that, except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to sovereign immunity, is not justified in boarding the ship unless in hot pursuit from the territorial sea, or there is reasonable ground for suspecting that the ship is engaged in piracy, the slave

> trade or unauthorized broadcasting, or is without nationality, or if of the same nationality as the warship though flying a foreign flag or refusing to show its flag.
> — Customary international law, as reflected in the LOS Convention, therefore does not permit a warship to stop and search any vessel on the high seas in peacetime in the circumstances contemplated by this notice to mariners.

*Id.*

In January 1990 the United States protested in a note to the United Nations an announcement by the Democratic People's Republic of Korea purporting to establish a 50-nautical-mile military maritime boundary in the sea of Japan, and a military maritime boundary coincident with the claimed exclusive economic zone limit in the Yellow Sea. In particular, the United States stated:

> The Government of the United States wishes . . . to recall that customary international law, as reflected in the 1982 United Nations Convention of the Law of the Sea, does not recognize the right of coastal States to assert powers or rights for security purposes in peacetime which would restrict the exercise of the high seas freedoms of navigation and acknowledges that, in 1953, the Supreme Commander of the Korean People's Army signed an armistice agreement which is still in effect. The military boundary, however, was not promulgated until 1977, twenty-three years following the armistice, and therefore the armistice agreement cannot be deemed to justify the security zones. In that connection, the United States notes that the United Nations command has told the Korean People's Army that the armistice agreement has no provision for either side to unilaterally extend its rights or privileges into international waters.

15 UNLOS Bull. 8 (May 1990). The note made clear that the objections were "made without prejudice to the legal position of the Government of the United States of America which has not recognized the Government of the Democratic People's Republic of Korea."

In December 1990 the United States protested a provision in Namibian law claiming authority to establish control within the full extent of Namibia's 200-nautical-mile exclusive economic zone to prevent infringement of its fiscal, customs, immigration, and health laws. The U.S. note stated, in pertinent part:

> As recognized in customary international law and as reflected in articles 33 and 56 of the 1982 United Nations Convention on the Law of the Sea, the right of a coastal state to prevent infringement of its fiscal, customs, immigration, and health laws within its territory or territorial sea does not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. The Government of the United States notes that Namibia has ratified the 1982 United Nations Convention on the Law of the Sea which, in its relevant articles, reflects the above described customary international law and fairly balances the legitimate interests of coastal and maritime states alike. The Government of the United States would hope that Namibia will harmonize its domestic law with that international law. In that connection, the Government of Namibia may wish to consider establishing a contiguous zone consistent with international law, in which those powers may lawfully be exercised.

Telegram from the Dept. of State to U.S. Embassy, Windhoek, December 13, 1990. Namibia amended its law along the lines suggested in 1991. Territorial Sea and Exclusive Economic Zone of Namibia Amendment Act, 1991, *reprinted in* 21 UNLOS Bull. 64 (Aug. 1992).

## 8. Straits and Archipelagos

### *a. Cuban ship reporting system and traffic separation scheme*

On September 1, 1989, the Government of Cuba implemented a traffic separation scheme in the Old Bahama Channel, which had been adopted by the International Maritime Organization ('IMO') at the forty-eighth session of the Maritime Safety Committee.

IMO Document MSC 48/25, paragraph 12.3.3. In conjunction with the separation scheme, Cuba established at the same time a mandatory ship reporting system to control vessel movement in the Old Bahama Channel, which took effect before it could be considered by the IMO. The United States recognized the Cuban traffic separation scheme as consistent with international law and IMO requirements and procedures, but objected to the ship reporting scheme. The United States notified the IMO of its objection, providing the following views:

> 2. Although the proposed system is similar to several previously approved by the Organization, it appears that the reporting requirement in the Old Bahama Channel would be mandatory rather than voluntary as are all other previously approved ship reporting systems. Consistent with customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea, the Government of the United States of America will not recognize a mandatory ship reporting system through an international strait which would have the practical effect of hampering the right of transit passage.
>
> 3. In addition, the Government of the United States of America objects strongly to any unilateral action which is nominally an International Maritime Organization measure being implemented prior to consideration by the Organization.
>
> 4. While the Government of the United States of America shares the desire of the Government of Cuba, as expressed in SN/Cir. 141, that the risk of collisions, strandings, and other marine casualties be reduced to the minimum, it believes that the voluntary ship reporting system approved by the International Maritime Organization will be more effective in achieving this objective. Such a system would be consistent with international standards and would enjoy the broad support of maritime nations. The Government of the United States of America is prepared to support appropriate voluntary ship reporting systems submitted for International Maritime Organization approval by Member Governments.

Annex to IMO Document NAV 36/18/1, September 14, 1989.

### *b. Archipelagos*

#### *(1) Indonesia*

On April 4, 1989, in response to an inquiry from a lecturer at the Faculty of Law, University of Sydney, Australia, David H. Small, Assistant Legal Adviser for Oceans and International Environmental and Scientific Affairs, provided the views of the United States on the reported closure in 1988 of the Straits of Sunda and Lombok by the Republic of Indonesia, as follows:

> Prior to the Third United Nations Conference on the Law of the Sea, international law did not permit archipelagic claims. Although the 1982 Law of the Sea Convention is not yet in force, the archipelagic provisions reflect customary international law and codify the only rules by which a nation can now rightfully assert an archipelagic claim. Recognition of Indonesia's archipelagic claim by the United States in 1986 and reaffirmed in 1988 was conditioned on Indonesia's commitment that its claim was then and would be in the future applied toward other States and their nationals in full conformity with international law. . . . They include copies of two letters initialed by the two governments on May 2, 1986 and extracts from U.S. Senate Treaty Document 100–22, [Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and Related Protocol and Exchange of Notes, July 11, 1988, United States-Indonesia], August 5, 1988, reprinting the side letters dated July 11, 1988 and the explanation of the Secretary of State regarding them. While Indonesia recently ratified this treaty, the U.S. Senate has not yet given its advice and consent to accession.
>
> The United States was not notified by Indonesia of the closure of the Straits of Lombok and Sunda but, on learning that Indonesia may have ordered its Navy to close those straits for naval exercises and might be conducting naval exercises in a manner that hampered international transit rights, expressed its concern to the appropriate Indonesian governmental officials.

The United States is of the view that interference with the right of straits transit passage or archipelagic sea lanes passage would violate international law as reflected in the 1982 Law of the Sea Convention and the commitments Indonesia made that its practice regarding the archipelagic claim was now fully consistent therewith, on which basis the United States was able in 1986 to be the first maritime nation to recognize Indonesia's archipelagic claim.

Indonesian archipelagic sea lanes and air routes have not been proposed by Indonesia, acted upon by the competent international organizations or designated by Indonesia in accordance with the procedures described in article 53 of the LOS Convention. All normal international passage routes through the archipelago are subject to the regime of archipelagic sea lanes passage in any event. The fundamental rules for archipelagic sea lanes passage and transit passage are the same. No nation may, consistent with international law, prohibit passage of foreign vessels or aircraft or act in a manner that interferes with straits transit or archipelagic sea lanes passage. See articles 44 and 54 of the 1982 Law of the Sea Convention which reflect the customary international law on point.

Applying the objective criteria set forth in Parts III and IV of the LOS Convention, it is clear that Lombok, Sunda and Malacca are unquestionably "straits used for international navigation" and, therefore, are subject to the straits transit regime, while Lombok and Sunda also qualify as "normal passage routes used for international navigation or overflight" and thus are subject to the regime of archipelagic sea lanes passage.

The United States cannot accept either express closure of the straits or conduct that has the effect of denying navigation and overflight rights. While it is perfectly reasonable for an archipelagic state to conduct naval exercises in its straits, it may not carry out those exercises in a way that closes the straits, either expressly or constructively, that creates a threat to the safety of users of the straits, or that hampers the right of navigation and overflight through the straits or archipelagic sea lane.

The tax convention referred to in Assistant Legal Adviser Small's letter was transmitted by the President to the Senate on August 5, 1988, for advice and consent to ratification. Included in the transmittal was the report of the Department of State submitting the Treaty to the President, which explained the territorial issues involved in that treaty as follows:

> The Convention was to have been signed in April 1974. How ever, signature of the convention was postponed pending agreement on a territorial definition of "Indonesia" in Article 3, para- graph 1(a). This problem was finally resolved by means of an agreed interpretation of Article 3(1)(a), in an exchange of notes, confirming the understanding that the United States recognizes the Indonesian archipelago and Indonesia respects international transit rights therein.

S. Treaty Doc. No. 100-22 (1988) at 3. Article 3(l)(a) of the Convention provides that, for purposes of the Tax Convention only, unless otherwise required by the context, the term " 'Indonesia' comprises the territory of the Republic of Indonesia and the adjacent seas which (*sic*) the Republic of Indonesia has sovereignty, sovereign rights or jurisdictions in accordance with the provisions of the 1982 United Nations Convention on the Law of the Sea." The exchange of notes set forth the agreed interpretation as follows:

> The United States recognizes the archipelagic States principles as applied by Indonesia on the understanding that they are applied in accordance with the provisions of Part IV of the 1982 United Nations Convention on the Law of the Sea and that Indonesia respects international rights and obligations pertaining to transit of the Indonesian archipelagic waters in accordance with international law as reflected in that Part.

*Id.* at 21–22.

On November 30, 1990, the United States and Indonesia exchanged instruments of ratification of the Tax Treaty, which affirmed the exchange of notes on the agreed interpretation of

Article 3(1)(a) of the Convention. *See also* 83 Am. J. Int'l L. 559 (1989).

*(2) Cape Verde*

In June 1989 the United States raised a number of maritime issues with Cape Verde, including a proposal that the United States recognize Cape Verde's claim to archipelagic rights, as long as the claim would be defined consistently with international law and would respect the rights of other states. In particular, the United States had concerns regarding a Cape Verde law that recognized innocent passage only along established navigation routes and regarding Cape Verde's declaration at the time it ratified the Law of the Sea Convention asserting that coastal states have the right to adopt measures relating to innocent passage to safeguard security interests. Points addressing these concerns that were raised with the Cape Verde government included those made in prior protests to other states and the following:

> — While the United States Government has neither signed nor ratified the LOS Convention, it considers those parts of the convention which relate to all traditional uses of the ocean, such as navigation and overflight and the archipelagic regime, to reflect present international law and practice.
> — The United States has, on that basis, exchanged letters with Indonesia which makes the United States the first maritime state to recognize Indonesia's archipelagic claim;
> — The United States would be prepared to consider taking the same step with Cape Verde provided adequate assurances are made regarding our concerns.
>
> * * * *
>
> — We would regard it as satisfactory were the [Cape Verde] Article [on navigation rights] revised to provide for the navigation rights recognized under international law, i.e., innocent passage through archipelagic waters and territorial seas and transit passage or archipelagic sea lanes passage through and over straits used for international navigation.

Telegram from the Department of State to U.S. Embassy, Praia, June 18, 1989.

### 9. Brazilian Port Visit of U.S. Nuclear Submarine

In late October 1990 several United States Navy ships, including the nuclear-powered attack submarine U.S.S. *Greenling*, visited three Brazilian ports while participating with Brazil in a naval exercise. Prior to the visit the U.S. Government requested Brazilian government approval, which was granted only after requesting and receiving from the U.S. Government a statement on the operation of, and safety measures adopted by, U.S. nuclear-powered warships in foreign ports.

On October 30, 1990, a Brazilian group, the Associacao Pernambucana, de Defensa da Natureza, ("ASPAN"), sought a ruling from a Brazilian federal court in Recife, Brazil to require the Brazilian government to order the immediate departure of the U.S.S. *Greenling* from Brazilian territorial waters. The judge denied the request. The next day, which was a national holiday, ASPAN requested reconsideration. The judge on duty overruled the original judge, ordering the U.S.S. *Greenling* to leave Brazilian territorial waters immediately and setting a fine of ten million cruzeiros a day should the submarine remain within "the 200 mile Brazilian territorial waters." At the time the order was issued, the U.S.S. *Greenling* had already left Recife.

On November 12, 1990, the U.S. Embassy in Brasilia delivered a note of protest to the chief of the Environment Department of the Brazilian Foreign Ministry. In pertinent part, the note stated:

> The United States Government views with serious concern the recent ruling by Recife federal judge Roberto Wanderley, and the press coverage that implies that the U.S.S. *Greenling* was ordered to leave Recife and barred from operating in Brazilian territorial seas. As the Brazilian Government is aware, it is a widely accepted principle of international law that warships are sovereign representatives of nations and visits to the other's ports are based on government-to-government arrangements. We believe that they are not subject to local judicial jurisdiction, as

portrayed by Judge Wanderley's ruling. Any attempt to subject a sovereign warship to such jurisdiction would clearly contravene longstanding international practice that is crucial to relations among all nations. Additionally, the impression left by Judge Wanderley's ruling that the U.S.S. *Greenling* presented a public hazard during the port visit is baseless—and inconsistent with the proven safety record of U.S. nuclear powered warships. U.S. nuclear powered warships have visited Brazilian ports for over 20 years in complete safety.

It should be noted that: (A) the Government of the United States requested approval from the Government of Brazil for the U.S.S. *Greenling* to make operational visits to the above mentioned Brazilian ports and that such approval was granted; (B) the Government of the United States assumed all commitments regarding safety measures for the U.S.S. *Greenling* to stay in Brazilian waters as requested by the Government of Brazil; (C) the U.S.S. *Greenling*'s captain was never notified of Judge Wanderley's decision; and (D) that we cannot be certain when or if the U.S.S. *Greenling* left Brazilian waters because when a submarine is submerged it is difficult to establish communications with it.

In order to resolve this issue and to avoid future problems the Government of the United States hereby requests that the Government of Brazil adopt the judicial measures it may deem appropriate to attempt to reverse the decision by Judge Wanderley which overruled the decision by Judge Francisco Alves Dos Santos Jr. and determined that the Government of Brazil order the U.S.S. Greenling to leave Brazilian territorial waters.

Telegram from U.S. Embassy Brasilia to the Department of State, November 9, 1990.

### 10. Marine Scientific Research: U.S. Policy

In a February 28, 1989, telegram to its overseas posts, the United States clarified United States policy on marine scientific research

by foreign scientists in its territorial sea following extension of the U.S. territorial sea from three to 12 nautical miles by Presidential proclamation in December 1988:

> [I]n accordance with customary international law, as reflected in the 1982 United Nations Convention on the Law of the Sea, the United States will now control access to conduct marine scientific research by foreign scientists in the extended twelve mile territorial sea. Permission to conduct such research may be obtained by contacting the Department of State. . . . The United States continues to support and encourage the conduct of marine scientific research off its coasts and will expeditiously process requests from foreign governments or private citizens.

Telegram from the Department of State, February 28, 1989.

In response to requests from several posts for further information concerning U.S. policy on marine scientific research, the Department sent a further telegram elaborating on U.S. policy as follows:

> Research vessels of the United States continuously conduct scientific research in the world's oceans, frequently in the waters off the coasts of foreign states. Such research is generally referred to as marine scientific research, or MSR. . . .
>
> U.S. Policy: The policy of the United States is to encourage freedom of marine scientific research. President Reagan in his March 10, 1983 statement accompanying the U.S. exclusive economic zone (EEZ) proclamation, stated that the U.S. had chosen not to exercise its right to assert jurisdiction over marine scientific research in our EEZ, but that we would recognize the right of other coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts if that jurisdiction is exercised reasonably in a manner consistent with international law, as reflected in the 1982 U.N. Law of the Sea Convention.
>
> The President's statement and accompanying fact sheet on U.S. oceans policy made clear that the reason the U.S.

was declining to assert jurisdiction was because of the U.S. interest in encouraging MSR and promoting its maximum freedom while avoiding unnecessary burdens. The fact sheet noted further that the Department of State will take steps to facilitate access by U.S. scientists to foreign EEZ's under reasonable conditions.

A result of the President's ocean policy statement is that the U.S. now requests permission through diplomatic channels for U.S. research vessels to conduct MSR within 200 nautical miles of a state asserting such jurisdiction. The U.S. also recognizes coastal state jurisdiction over marine scientific research on the continental shelf.

The telegram also provided the following definitional information:

Marine Scientific Research: MSR is the general term most often used to describe those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment. MSR includes oceanography, marine biology, fisheries research, scientific ocean drilling, geological/geophysical scientific surveying, as well as other activities with a scientific purpose. MSR is not defined in the Law of the Sea Convention because a widely accepted definition could not be developed. When activities are conducted similar to those mentioned above for commercial resources purposes, most governments, including the U.S., do not treat them as MSR. The U.S. does not claim jurisdiction over fisheries research except when it involves commercial gear or commercial quantities of fish, and even then it may qualify as scientific research. The U.S. does claim jurisdiction over marine mammal research.

Activities such as hydrographic surveys, the purpose of which is to obtain information for the making of navigational charts, and the collection of information that whether or not classified is to be used for military purposes, are in most instances considered by the U.S. not to be MSR and not subject to coastal state jurisdiction. As such, it is extremely important that these activities in the EEZ not be treated as MSR . . . . However, if these activities are to be conducted within the coastal state's

territorial sea, which may extend to 12 nautical miles, then coastal state permission is required.

Telegram from the Department of State, April 19, 1989.

### 11. Maritime Search and Rescue: U.S.-Mexico Agreement

On August 7, 1989, Secretary of State James A. Baker III and Mexican Foreign Minister Fernando Solana signed an Agreement on Maritime Search and Rescue setting forth guidelines for cooperation between the two States' authorities, the U.S. Coast Guard and the Mexican navy, "in responding to or coordinating the response to distress cases in which life or property is threatened at sea" (article I). In particular, the agreement included provisions for:

— Exchanging information to increase effectiveness of maritime search and rescue (article IIIA);
— Facilitating cooperation in search and rescue, including developing common search and rescue procedures, providing prompt permission for entry of search and rescue units into the territorial sea of the other State, and establishing means of communication for joint search and rescue operations (article IIIB);
— Establishing liaison relationships between the two States' authorities (article IIIC); and
— Creating maritime search and rescue regions to ensure that efficient and coordinated search and rescue coverage is provided for defined areas (article IV).

The agreement provides that it is not intended to amend applicable national laws and regulations, nor to affect in any way Mexican and U.S. rights and duties based on treaties and other international agreements and understandings.

The Agreement entered into force in June 1990. The text of the Agreement is available at *www.state.gov/s/l*.

## B. OUTER SPACE

### 1. Commercial Launch Services: United States-People's Republic of China

On January 26, 1989, the Governments of the United States of America and of the People's Republic of China signed a Memorandum of Agreement Regarding International Trade in Commercial Launch Services. This agreement was the last of three required by President Reagan's decision, announced September 9, 1988, to issue export licenses enabling certain United States-made communications satellites to use Chinese space launch services. On December 17, 1988, two other implementing agreements, one on satellite technology safeguards and one on liability for satellite launches, were signed by the Government of the United States of America and the Government of the People's Republic of China. Texts of the three agreements are available at 28 I.L.M. 598 (1989).

Two of the satellites would be built by Hughes Aircraft for an Australian entity, AUSSAT, and the third, a Hughes-built satellite (formerly known as Westar 6 and salvaged from orbit by the space shuttle in November 1984), would be overhauled for ASI-ASAT, a Hong Kong-based consortium composed of companies from the United Kingdom, Hong Kong, and the People's Republic of China.

On January 30, 1989, Acting U.S. Trade Representative Alan V. Holmer issued guidelines for U.S. implementation of the Memorandum of Agreement, effective upon its entry into force. 54 Fed. Reg. 4,931 (Jan. 31, 1989). The three agreements entered into force on March 16, 1989. Licenses were issued and the Government of the People's Republic of China was notified on the same day. *See also* 83 Am. J. Int'l L. 561 (1989).

### 2. Application of U.S. Patent Law to Outer Space Activities

On September 21, 1989, Susan Biniaz, Attorney-Adviser in the Office of the Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs, Department of State,

testified before the Subcommittee on Space Science and Applications of the Committee on Science, Space, and Technology of the House of Representatives regarding legislation to apply U.S. patent law to certain activities in outer space. In particular, the testimony discussed the importance of the legislation for the Space Station Agreement and the legislation's clarification that U.S. patent law will only apply to foreign-registered space objects if the foreign state of registry agrees. The testimony, in pertinent part, provided as follows:

> The Department of State supports the proposed legislation, which would codify the applicability of U.S. patent law to certain activities in outer space and provide appropriate flexibility for variations contained in international agreements. The proposed legislation, if enacted, will enable the United States to enter into force the Space Station Intergovernmental Agreement, which was signed by the United States, nine members of the European Space Agency, Japan, and Canada on September 29, 1988. The Space Station Agreement contains provisions on intellectual property that cannot fully be implemented by the United States without legislation such as H.R. 2946. Thus, State supports early enactment of the proposed legislation.
>
> The Department of State supports . . . the clarification contained in H.R. 2946 to the effect that U.S. patent law will not apply to foreign-registered space objects unless the foreign state of registry so agrees.
>
> Under the Outer Space Treaty and Registration Convention, the state that registers a space object retains jurisdiction and control over it. We therefore want to ensure (as does the European Space Agency and Canada) that, in the absence of the agreement of the registering state, U.S. patent law does not apply to space objects registered by a foreign state, even if such space objects are "under the jurisdiction or control" of the United States.
>
> . . . [The proposed legislation] makes clear that the legislation will operate in a manner that is fully consistent with the Outer Space Treaty and the Registration Convention.

> Finally, we also support the element of H.R. 2946 that provides additional flexibility to enable the United States and a foreign state to agree to the application of U.S. patent law to space objects registered by that foreign state, whether or not such objects are under the "jurisdiction or control" of the United States.

The testimony is available at *www.state.gov/s/l*.

The Patents in Space Act was approved effective November 15, 1990, Pub. L. No. 101-580, 104 Stat. 2863, 35 U.S.C. § 105.

### Cross reference

*U.S. sovereignty over the exclusive economic zone surrounding the Commonwealth of the Northern Marian Islands*, **Chapter 5.B.2.**

*Applicability of Foreign Sovereign Immunities Act to foreign naval vessel*, **Chapter 10.A.2.**

*Marine Environment and Conservation*, **Chapter 13.**

# CHAPTER 13

# Environment and Other Transnational Scientific Issues

## ENVIRONMENT

### 1. Marine Conservation

#### *a. Intergovernmental Resolution on Dolphin Conservation*

In September 1990, the United States participated in meetings held in Costa Rica of both the Inter-American Tropical Tuna Commission ("IATTC") and the governments of all relevant coastal and fishing nations to pursue negotiation of a new international program for the conservation and protection of dolphins incidentally killed in the Eastern Tropical Pacific Ocean purse seine fishery for yellowfin tuna.

On September 19, 1990, the intergovernmental meeting adopted a resolution committing the governments to the establishment of such an international program on dolphins. In pertinent part, the intergovernmental resolution recorded agreement of the governments as follows:

> The governments participating in the intergovernmental meeting in San Jose, Costa Rica, on September 18 and 19, 1990, have agreed on the following:
>
> (1) To establish an international program for the reduction of incidental mortality of dolphins caught in association with tuna in the purse seine fishery of the Eastern Tropical Pacific Ocean.
>
> (2) The objectives of the program will be:

A. In the short term, to achieve a significant reduction of this mortality.
B. Over the long term, to make every effort to reduce dolphin mortality to insignificant levels approaching zero. It is the goal of the governments to achieve such a reduction while maintaining optimum utilization and conservation of the tuna resource.

(3) The international program will include the following elements:

A. Limits on dolphin mortality;
B. 100 per cent observer coverage;
C. Research programs to improve existing fishing gear and techniques, to assess the dynamics of the fishery, and to develop alternative fishing methods and study the tuna-dolphin association with the goal of further reducing and, if possible, eliminating dolphin mortality;
D. Training programs to achieve, among other things, the highest standard of performance throughout the international fleet and the development of national research and other capabilities.

(4) The international program should be funded by all available sources, including, among others, industry, governments, international organizations, and non-governmental organizations.

(5) Responsibility for the program will rest with the states with coastlines bordering the Eastern Pacific Ocean and states whose vessels fish for tuna in the Eastern Tropical Pacific Ocean with purse seines. In carrying out the program, the governments shall seek support from other entities, including international organizations, non-governmental organizations, and others with relevant expertise. The Inter-American Tropical Tuna Commission has been identified as the entity most appropriate to coordinate the technical aspects of the program.

Telegram from the Department of State, September 27, 1990.

### *b. U.S.-USSR Joint Statement on Bering Sea Fisheries Conservation*

On June 4, 1990, the United States and the Soviet Union issued a joint statement committing the two countries to work together to resolve the increasing problem of overfishing in an area known as the "Donut Hole." The Donut Hole is an area of the high seas in the Bering Sea that is surrounded by the 200 nautical mile zones of the United States and the Soviet Union (now Russia). The Joint Statement is as follows:

> In the course of the state visit by the President of the Union of Soviet Socialist Republics to the United States of America, the sides reviewed problems posed by the development of an unregulated multi-national fishery for pollock in the central Bering Sea. In light of the magnitude of that fishery, which accounts for more than one-third of the total annual catch of pollock in the Bering Sea, the situation is of serious environmental concern. In particular, there is a danger to the stocks from overfishing. This may result in significant harm to the ecological balance in the Bering Sea and to those U.S. and USSR coastal communities whose livelihoods depend on the living marine resources of the Bering Sea.
>
> The sides agreed that urgent conservation measures should be taken with regard to this unregulated fishery. The sides noted that, in accordance with international law as reflected in the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, all concerned states, including coastal states and fishing states, should cooperate to ensure the conservation of these living resources. To this end, both sides noted that they would welcome cooperative efforts towards the development of an international regime for the conservation and management of the living marine resources in the central Bering Sea.

The Statement is available at *www.state.gov/s/l*.

Following the Joint Statement, the U.S. and the USSR entered into discussions with four countries whose vessels fish in the Donut Hole (Japan, the Republic of Korea, Poland and the People's Republic of China) with the aim of creating a mechanism to regulate this fishery.

### *c. U.S.-Canada Agreement on Fisheries Enforcement*

On September 26, 1990, the United States and Canada signed at Ottawa an agreement on fisheries enforcement. Article I of the agreement requires each party to take certain measures to enforce the fisheries laws of the other against its own nationals and vessels, as follows:

> Each Party shall take appropriate measures consistent with international law to ensure that its nationals, residents and vessels do not violate, within the waters and zones of the other Party, the national fisheries laws and regulations of the other Party. Such measures shall include prohibitions on violating the fisheries laws and regulations of the other Party respecting gear stowage, fishing without authorization, and interfering with, resisting, or obstructing in any manner, efforts to enforce such laws and regulations; and may include such other prohibitions as each Party deems appropriate.

H.R. Doc. No. 102-22, at 3 (1990). Article III provides that "each Party shall endeavour to inform persons conducting fishing operations in the vicinity of maritime boundaries about the expected fisheries law enforcement practices of the other Party." *Id*. On January 4, 1991, President Bush transmitted the agreement to Congress under provisions of the Magnuson Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. § 1801–1883, which established procedures for Congressional review of Governing International Fishery Agreements ("GIFAs"). Although the Fisheries Enforcement Agreement was not in fact a GIFA, it entered into force on December 17, 1991, pursuant to

procedures usually reserved for GIFAs, as provided by a recent amendment to the Magnuson Act. Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, 104 Stat. 4437.

### 2. Marine Environment

#### *a. U.S.-USSR Agreement on Pollution in Bering and Chukchi Seas*

As a result of the potential for oil development in the Bering and Chukchi Seas, and tanker traffic associated with such development, the United States proposed the establishment of a joint U.S.-USSR procedure to deal with marine pollution incidents in October 1986. As a first step, the two sides established points of contact for reporting pollution incidents. On May 11, 1989, Secretary of State James A. Baker III and Soviet Foreign Minister Eduard A. Shevardnadze signed at Moscow the Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Concerning Cooperation in Combatting Pollution in the Bering and Chukchi Seas in Emergency Situations, which entered into force on August 17, 1989, T.I.A.S. No. 11,446.

Under Article I of the Agreement, the parties undertake to render assistance to each other in combating pollution incidents that may affect their respective areas of responsibility, regardless of where the incidents may occur. Assistance is to be rendered consistent with the provisions of the Agreement, and to that end, their competent authorities are to develop a joint Contingency Plan against Pollution in the Bering and Chukchi Seas ("the Plan").

Article II defines key terms in the Agreement. A "pollution incident" is defined as

> a discharge or an imminent threat of discharge of oil or other hazardous substance from any source of such a magnitude or significance as to require an immediate response to prevent such a discharge or to contain, clean up or dispose of the substance to eliminate the threat to or to minimize its harmful effects on living resources and marine life, public health or welfare.

The "competent authority" with respect to the United States is the U.S. Coast Guard, and with respect to the Union of Soviet Socialist Republics, the Marine Pollution Control and Salvage Administration attached to the Soviet Ministry of Merchant Marine. The "area of responsibility of a Party" is defined as

> the waters within the Bering and Chukchi Seas which are the respective Party's internal waters or territorial sea, and the sea area beyond the territorial sea in which that Party exercises its sovereign rights and jurisdiction in accordance with international law. Areas of responsibility of the Parties where they are adjacent will be separated by the maritime boundary between the two countries.

Under article III the United States and the USSR "consistent with their means, commit themselves to the development of national systems that permit detection and prompt notification of the existence or the imminent possibility of pollution incidents, as well as providing adequate means within their power to eliminate the threat posed by such incidents and to minimize the adverse effects to the marine environment and the public health and welfare." Article IV provides for the exchange of up-to-date information, and consultation to guarantee adequate cooperation between the Parties' competent authorities in regard to activities pertaining to the Agreement and to the Plan. Under article VII, the Plan may be invoked "whenever a pollution incident occurs that affects or threatens to affect the areas of responsibility of both Parties or, although only directly affecting the area of responsibility of one Party, is of such a magnitude as to justify a request for the other Party's assistance." Article XIV provides (1) that nothing in the Agreement shall affect the rights and obligations of either Party resulting from other bilateral and multilateral international agreements; and (2) that the Parties will implement the Agreement in accordance with rules and principles of general international law and their respective laws and regulations. *See also* 84 Am. J. Int'l L. 242 (1990).

### *b. South Pacific Regional Environmental Convention*

On September 25, 1990, President George H. W. Bush transmitted the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, with Annex, and the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping, with Annexes, done at Noumea, New Caledonia, on November 24, 1986 to the Senate for advice and consent to ratification. The transmittal included a second Protocol, the Protocol Concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region. This Protocol was an executive agreement and was transmitted for the information of the Senate. In urging favorable Senate action on the Convention and first Protocol, the transmittal letter explained:

> The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region will create general legal obligations designed to protect the marine environment of the region from a variety of sources of marine pollution. In so doing, the Convention provides new environmental protection for American Samoa, Guam and the Northern Mariana Islands, as well as for the Convention area generally.
>
> The Convention and its Protocols on dumping and pollution emergencies entered into force on August 22, 1990. Ten countries have ratified or acceded to the Convention. These are: France, Australia, New Zealand, Papua New Guinea, Solomon Islands, Fiji, the Marshall Islands, the Federated States of Micronesia, Western Samoa, and the Cook Islands. Expeditious U.S. ratification of the Convention and Protocol would demonstrate not only our commitment to the protection of the marine environment of the South Pacific but our continuing political commitment to the region as well. It would also allow the United States to participate fully at the first meeting of Parties, which will likely establish the financial and institutional arrangements for implementing the Convention.

S. Treaty Doc. No. 101-21 (1990).

The report of the Secretary of State to the President submitting the Convention for transmittal to the Senate provided the following further information, in pertinent part:

> The Convention area encompasses the 200-nautical-mile zones of twenty-four states and territories located in the South Pacific region and the areas of high seas beyond 200 miles that are entirely enclosed by those zones. Any Party may add to the Convention area those areas under its jurisdiction which fall within specified coordinates in the Pacific region if no other Party objects. The Convention area does not include internal or archipelagic waters except as may otherwise be provided in a protocol.
>
> The Convention does not prohibit nuclear testing, although that was an objective of virtually all the island states. Instead, it obligates Parties to take all appropriate measures to prevent, reduce and control pollution in the Convention area which might result from the testing of nuclear devices. The Convention includes a ban on the dumping of radioactive waste in the Convention area. There is no ban on the dumping of low-level radioactive waste in the 1972 Convention on the Prevention of Marine Pollution By Dumping of Wastes and Other Matter ("London Dumping Convention") to which the United States is a Party. The Convention will promote harmony in the South Pacific region, an area with unique geographic circumstances which preliminary scientific evidence indicated at the time of signing, was not particularly well-suited for dumping low-level radioactive waste. The United States was neither engaging in nor had any plans to engage in the dumping of low-level radioactive waste in the Convention area at the time of signing, nor does it now have any plans to do so.
>
> The United States does not regard our agreement to the Convention as a precedent for such provisions in other regional agreements or under the London Dumping Convention. On a related point, it was the Parties' intent that the prohibition on storage of radioactive waste in the

> Convention area does not apply to storage either on a vessel operating in the Convention area, or offloading or loading in port, or to storage on dry land.
>
> The Convention represents the culmination of work related to the Action Plan for the South Pacific Regional Environment Program (SPREP), adopted by the Ministerial-Level Conference on the Human Environment in the South Pacific, held in Rarotonga, Cook Islands, in March 1982. Thus this treaty is referred to as the SPREP Convention. The final text was negotiated at two meetings in November 1986, at Noumea, New Caledonia, and has been signed by thirteen nations, including the United States. Also adopted at that time were two Protocols, one on dumping, submitted herein, and the Protocol Concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region, which is appropriately treated as an executive agreement. This agreement calls for the establishment of reporting requirements, response measures and mutual assistance in combating pollution emergencies, and it designates the Organization to carry out additional administrative functions. The United States will implement the Pollution Emergencies Protocol under existing statutory authority which, among other things, defines the hazardous substances as to which the United States may take action. A copy of the Pollution Emergencies Protocol is included for the information of the Senate.
>
> The Convention and Protocols are considered a major step forward both with regard to protecting the environment of the South Pacific and to U.S relations with the states concerned. The Convention bridges differences between the island states, which have expressed concern over environmental issues, particularly nuclear issues, and the other states with strategic interest in the region. It is designed to reduce tensions by creating a legal framework and institutional arrangements for mutual assistance and cooperation, scientific projects, and information exchange.

*Id.* at 49–50.

Major provisions of the Convention outlined in the State Department's Report included the following:

Article 2 defines various Convention terms, including the Convention area and "pollution." The definition of "dumping" is substantially the same as that of the 1972 London Dumping Convention. In addition, several wastes are listed which are not to be considered radioactive and thus not subject to the prohibitions of Article 10. To dispel any ambiguity that may be raised by the definition of non-radioactive substances in Article 2(d), I recommend that the United States include the following understanding at the time of deposit of its instrument of ratification:

In ratifying the Convention, the United States understands that wastes and other matter which would be recommended for exemption from regulatory control as radioactive waste by the relevant recommendations, standards, and guidelines of the International Atomic Energy Agency shall be treated as non-radioactive for the purposes of the Convention.

* * * *

Article 4 encourages Parties to conclude bilateral or multilateral agreements, including regional or subregional agreements, to further the objectives of the Convention. Such agreements must be consistent with the Convention and in accordance with international law. The subject matter of the Convention and its Protocols shall be construed in accordance with international law. The Convention does not increase rights of States against vessels on the high seas. Nothing in the Convention and its Protocols shall prejudice the present or future claims and legal views of any Party concerning the nature and extent of maritime jurisdiction, or affect the sovereign rights of States to exploit and develop their own natural resources in a manner consistent with the duty to protect the environment. The general provisions of Article 4 are implemented in subsequent articles. Article 4 was not intended to create any independent obligation beyond those specifically established in other provisions.

* * * *

Article 10 provides an obligation to take appropriate measures to prevent, reduce, and control pollution caused by dumping from vessels, aircraft or man-made structures at sea, including the effective application of relevant international rules and procedures (understood to be those promulgated under the 1972 London Dumping Convention). The Parties agree to prohibit the dumping of radioactive wastes or other radioactive matter in the Convention area. With regard to dumping of radioactive wastes, the Convention is more restrictive than the London Dumping Convention. It is the view of the concerned departments and agencies that no additional implementing legislation is needed with regard to ocean dumping of radioactive waste. Under U.S. law, 33 U.S.C. § 1412(a), dumping of high-level radioactive waste is absolutely prohibited. With regard to low-level radioactive waste, while U.S. law establishes a permitting process, no applications for such permits have been received and no permits have been granted. In fact, the United States has not ocean-dumped any low-level radioactive waste since 1970. U.S. law, 33 U.S.C. § 1414, requires that any permit for the ocean dumping of low-level radioactive waste be issued only by the Administrator of the Environmental Protection Agency, after certain environmental safety and procedural requirements have been met, and approval by a joint resolution of Congress.

The Parties also agree to prohibit the disposal into the seabed and subsoil of radioactive wastes or other radioactive matter, without prejudice to the issue of whether such disposal is "dumping." These prohibitions also apply to the continental shelves of Parties, defined in accordance with international law, which extend beyond the Convention area.

Article 11 provides an obligation to take all appropriate measures to prevent, reduce and control pollution in the Convention area resulting from the storage of toxic and hazardous material. It also obligates Parties to prohibit the storage of radioactive wastes or other radioactive matter in the Convention area. The United States

agreed to this prohibition on the understanding (confirmed in the Report of the High Level Conference) that it does not apply to vessels or aircraft navigating the Convention area, in port, or to storage on dry land.

* * * *

The SPREP Convention does not apply to military ships and aircraft. Article 4 states that the Convention and its Protocols shall be construed in accordance with international law. Customary international law recognizes the sovereign immunity of such ships and aircraft. However, since the Convention is not explicit in this regard, I recommend that the United States include the following understanding at the time of deposit of its instrument of ratification:

It is the understanding of the United States that as the Convention does 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 and therefore entitled to sovereign immunity under international law, 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.

The Protocol for the Prevention of Pollution of the South Pacific Region by Dumping, with Annexes, regulates within the Convention area the deliberate disposal at sea ("dumping") of wastes and other matter. It conforms very closely to the London Dumping Convention. Annex I lists those substances which may not be dumped because of their potential to harm the marine environment, such as organohalogens, mercury, cadmium, oil, and persistent plastics, with the addition of organophosphorous compounds. No additional implementing legislation is needed with respect to organophosphorous compounds.

> These compounds include chemical warfare agents, insecticides, and other materials. Under U.S. law, 33 U.S.C. § III 2(a), no dumping permits may be issued for chemical warfare agents. With respect to industrial waste the category into which most organophosphorous compounds would fall—U.S. law prohibits ocean dumping by December 31, 1991 and effectively prohibits dumping in the interim, 33 U.S.C. §1414b(a). Annex II identifies wastes which may be dumped so long as a prior special permit has been obtained, to ensure that special care is taken with regard to such factors as site selection, monitoring, and disposal methods. Annex III contains environmental protection criteria for the issuance of a general dumping permit for the dumping of all wastes and other matter not listed in Annexes I and II.

*Id*. At 50–54.

The Convention entered into force for the United States on July 10, 1991. *See also* 85 Am. J. Int'l L. 155 (1991).

### Cross reference

*Exclusion of aliens with AIDS*, **Chapter 1.C.1.**
*Environmental issues in salvage at sea*, **Chapter 12.A.2.**

# CHAPTER 14

# Educational and Cultural Issues

## TOURISM AGREEMENTS

On July 12, 1989, the United States and Hungary signed an Agreement on the Development and Facilitation of Tourism, available at *www.state.gov/s/l*. The purpose of the Agreement, as set forth in the preamble, was to encourage the growth of tourism-related investment and trade between the two countries. Article I described the procedures for establishment of official, governmental tourism promotion offices on a non-profit basis. These offices would not sell services or otherwise compete with private-sector travel agents or tour operators of the host country.

Article II of the Agreement obligated the parties to consult on efforts to reduce or eliminate barriers to travel and tourism between the two countries, and to endeavor to simplify travel formalities. Articles III, IV and V provided for exchanges of information on tourism, including laws, regulations, statistics, training and education, information on new opportunities for trade in tourism-related products and for joint ventures in hotel and tourism facilities. Article III also encouraged discussion of tourism and tourism-related matters during sessions of the U.S.-Hungarian Joint Economic and Commercial Committee and the Hungarian-U.S. Business Council.

# CHAPTER 15

# Private International Law

## INTER-AMERICAN ARBITRATION CONVENTION

The Inter-American Convention on International Commercial Arbitration ("Convention"), entered into force for the United States on October 27, 1990. The Convention was adopted on January 30, 1975, at an Organization of American States conference in Panama and was signed by the United States on June 9, 1978. The Convention provides a treaty basis for courts in Contracting States to enforce agreements to arbitrate disputes arising out of international commerce and to enforce the resulting arbitral awards. The Convention was modeled after the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517; T.I.A.S. 6997 (entered into force for the United States, Dec. 29, 1970). As explained in a 1986 report of the Senate Foreign Relations Committee recommending that the Senate give advice and consent to ratification, S. Exec. Rep. 99-24 (1986), the Convention "simply extend[s] to a significant number of countries in Latin America the relationship which the United States already has, through the New York Convention, with over 65 countries around the world. U.S. ratification will strengthen the foundation on which improved commercial ties with countries in the region can be built."

The Senate gave advice and consent to ratification in 1986, subject to the understanding that ratification would not be effected until implementing legislation was enacted. It also made its advice and consent subject to the following reservations, which were in turn included in the United States Instrument of

Ratification, as deposited with the Organization of American States September 27, 1990:

> 1. Unless there is an express agreement among the parties to an arbitration agreement to the contrary, where the requirements for application of both the Inter-American Convention on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards are met, if a majority of such parties are citizens of a state or states that have ratified or acceded to the Inter-American Convention and are member states of the Organization of American States, the Inter-American Convention shall apply. In all other cases, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall apply.
>
> 2. The United States of America will apply the rules of procedure of the Inter-American Commercial Arbitration Commission which are in effect on the date that the United States of America deposits its instrument of ratification, unless the United States of America makes a later official determination to adopt and apply subsequent amendments to such rules.
>
> 3. The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

132 CONG.REC. S15,767 (1986).

On August 15, 1990, Pub.L.No. 101-369, 104 Stat. 448, was signed into law, incorporating these reservations. 9 U.S.C. §§ 304–306.

For a full discussion of the Convention and the implementing legislation, see *Cumulative Digest 1981–1988* at 3709–3715.

### Cross reference

*International Adoption*, **Chapter 2.B.**

# CHAPTER 16

# Sanctions

## A. IMPOSITION OF SANCTIONS

### 1. Missile Technology

#### *a. U.S. legislation*

On November 5, 1990, President George H. W. Bush signed the National Defense Authorization Act for FY 1991, Pub. L. No. 101-510, 104 Stat. 1485 (1990), which amended provisions of the Arms Export Control Act and Export Administration Act and enacted mandatory sanctions on foreign persons that contribute to missile technology proliferation. Shortly thereafter, the Department of State sent a telegram to all diplomatic posts enclosing a summary outline of the legislation, as follows:

> *U.S. Nonproliferation Policy*
>
> The centerpiece of [U.S. Government] nonproliferation policy in the area of missile delivery systems is the Missile Technology Control Regime ("MTCR"). US nonproliferation efforts also encompass bilateral dialogue with countries not associated with the MTCR, as well as other initiatives.
>
> *The MTCR*
>
> In 1987, the U.S. and six other countries created the MTCR to restrict proliferation of missiles and related

technology. The "Partners," as MTCR members are called, now number 15 and make all decisions by consensus. In essence, the MTCR is a set of export guidelines that each partner implements according to its national legislation. The guidelines restrict transfers of missiles and missile-related technology capable of delivering a minimum 500 kg payload a distance of 300 km. Complete missile systems and major subsystems, included in MTCR Category I, are rarely licensed for export. Other items (listed in Category II) can be licensed if the transfer does not contribute to development of a missile of MTCR range and payload. All nations, whether or not MTCR partners, are encouraged to implement the guidelines.

*Summary of Missile Sanctions Legislation*

Prior to its adjournment, the 101st Congress of the United States approved a new title to the defense authorization bill which provides for sanctions against domestic and foreign persons who engage after Nov. 5, 1990, in transfers of missiles, missile technology, and components on the MTCR Export Guidelines Annex with countries that do not participate in or associate with the MTCR. The major provisions are detailed below:

*U.S. Firms*

Sanctions must be imposed on U.S. "persons" (defined as "a natural person as well as a corporation, business association, partnership, society, trust, any nongovernmental entity, organization or group, and any governmental entity operating as a business enterprise, and any successor of any such entity") who knowingly export, conspire to export, or facilitate the export of Missile Technology Control Regime (MTCR) Annex items in violation of U.S. law (Export Administration Act or Arms Export Control Act). For exports of Category II items, the sanction is a 2-year ban on export licenses for and USG procurement of MTCR Annex items. For exports of Category I items, the sanction is a minimum 2-year ban

on all dual-use and munitions licenses and all USG procurement.

*Foreign Firms*

Sanctions must be imposed on "foreign persons" (which are defined as any "person" other than a U.S. person, and which can include governmental entities) who knowingly transfer, conspire to export, or facilitate the export of MTCR Annex items that contribute to missile development in a non-MTCR country and that would be subject to U.S. jurisdiction if they were U.S. origin, or who conspire or attempt to engage in such export, who facilitate such export or who "otherwise engage in the trade" of MTCR items. For Category II transfers, the sanction is a 2-year ban of export licenses and USG procurement for MTCR Annex items. For Category I transfers, the sanction is a minimum 2-year ban on all dual-use and munitions licenses and USG procurement. In addition, a transfer that "substantially" contributes to missile development in a non-MTCR country requires an import ban. . . .

*Exemption*

Sanctions on foreign companies do not apply to transfers licensed by an MTCR adherent or intended for an end-user in an MTCR country, or if an MTCR government is taking enforcement or judicial action against the company. There are several minor exemptions to the import ban on foreign companies including exceptions for products deemed essential to national security.

*Waiver*

Sanctions on foreign companies may be waived if the President determines that such waiver is "essential" to U.S. national security. A waiver is also available for products essential to national security whose sole supplier is the offending company.

### *b. Missile Technology Control Regime guidelines*

During 1989 and 1990, the U.S. Government applied guidelines promulgated on April 16, 1987, by the Missile Technology Control Regime ("MTCR"). The MTCR was established in 1987 to limit the proliferation of missiles capable of delivering weapons of mass destruction and related equipment and technology. The MTCR guidelines set forth a common export-control policy of controlled items. These export controls are implemented by each of the thirty-three partners (members) in accordance with its national legislation. Although the MTCR is not legally binding, the United States, as an MTCR partner, acts in accordance with the guidelines when considering the transfer of equipment and technology related to missiles.

> GUIDELINES FOR SENSITIVE MISSILE-RELEVANT TRANSFERS
>
> 1. The purpose of these Guidelines is to limit the risks of nuclear proliferation by controlling transfers that could make a contribution to nuclear weapons delivery systems other than manned aircraft. 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 nuclear weapons delivery systems. These Guidelines, including the attached Annex, form the basis for controlling transfers to any destination beyond the Government's jurisdiction or control 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, 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. Nuclear proliferation concerns;
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 nuclear weapons delivery systems other than manned aircraft;
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. The transfer of design and production technology directly associated with any items in the Annex will be subject to as great a degree of scrutiny and control as will the equipment itself, to the extent permitted by national legislation.

5. Where the transfer could contribute to a nuclear weapons delivery system, the Government will authorize transfers of items in the Annex only on receipt of appro-

priate assurances from the government of the recipient state that:

A. The items will be used only for the purpose stated and that Such use will not be modified nor the items modified or replicated without the prior consent of the United States Government;
B. Neither the items nor replicas nor derivatives thereof will be re-transferred without the consent of the United States Government.

6. In furtherance of the effective operation of the Guidelines, the United States Government will, as necessary and appropriate, exchange relevant information with other governments applying the same Guidelines.

7. The adherence of all States to these Guidelines in the interest of international peace and security would be welcome.

### 2. Chemical and Biological Weapons

#### *a. Veto of legislation*

On November 16, 1990, President George H. W. Bush vetoed the Omnibus Export Amendments Act of 1990, H.R. 4653, 101st Cong. (1990), on the basis that it would unduly constrain presidential authority in carrying out foreign policy through, among other things, mandatory imposition of unilateral sanctions related to chemical and biological weapons. As discussed in 2.b. below, the President determined at the same time to issue an executive order exercising his discretion to impose sanctions. The President's memorandum of disapproval commented on the legislation, as follows:

I agree with the principal goals of this bill, which include improved export controls for, and sanctions against the use of, chemical and biological weapons; sanctions on Iraq; missile technology sanctions; and reauthorization of the Export Administration Act. Indeed, I have recently

signed into law provisions on missile technology sanctions and sanctions against Iraq comparable to those contained in this bill. [*See* discussion of Pub. L. No. 101-510, *supra*.] H.R. 4653, however, contains elements that I believe would undermine these objectives and our ability to act quickly, decisively, and multilaterally at a time when we must be able to do so. These provisions unduly interfere with the President's constitutional responsibilities for carrying out foreign policy. Rather than signing the bill, I am directing action under existing authorities to accomplish the bill's principal goals.

I am pleased that the Congress endorses my goal of stemming the dangerous proliferation of chemical and biological weapons. The Administration has worked closely with the Congress to design appropriate and effective legislation to improve our ability to impose sanctions on the nations that use such weapons and any companies that contribute to their spread. Throughout discussions with the Congress, my Administration insisted that any such legislation should not harm cooperation with our partners and should respect the President's constitutional responsibilities. Unfortunately, as reported from conference, H.R. 4653 does not safeguard those responsibilities, nor does it meet our broader foreign policy goals.

The major flaw in H.R. 4653 is not the requirement of sanctions, but the rigid way in which they are imposed. The mandatory imposition of unilateral sanctions as provided in this bill would harm U.S. economic interests and provoke friendly countries who are essential to our efforts to resist Iraqi aggression. If there is one lesson we have all learned in Operation Desert Shield, it is that multilateral support enhances the effectiveness of sanctions.

Because of my deep concern about the serious threat posed by chemical and biological weapons, I have signed an Executive Order directing the imposition of the sanctions contained in this bill and implementing new chemical and biological weapon export controls. This Executive order goes beyond H.R. 4653 in some respects. It sets forth a clear set of stringent sanctions, while encouraging nego-

tiations with our friends and allies. It imposes an economic penalty on companies that contribute to the spread of these weapons and on countries that actually use such weapons or are making preparations to do so. At the same time, it allows the President necessary flexibility in implementing these sanctions and penalties. Furthermore, the Executive order reaffirms my determination to achieve early conclusion of a verifiable global convention to prevent the production and use of chemical weapons.

The Executive order also directs the establishment of enhanced proliferation controls, carefully targeted on exports, projects, and countries of concern. On this issue, as well as with other important export control matters, my goal is to pursue effective, multilateral export controls that send the clear message that the United States will not tolerate violations of international law.

I am also concerned that other features of H.R. 4653 would hamper our efforts to improve the effectiveness of export controls. In the rapidly changing situation in Eastern Europe, and in bilateral relationships with the Soviet Union, we have demonstrated the ability to adjust, in cooperation with our allies, export controls on high technology to reflect the new strategic relationships. Last May I asked our allies to liberalize dramatically our multilateral export controls. Negotiations designed to liberalize trade to encourage democratic institutions and open market economies will continue. Our multilateral export controls have contributed significantly to the positive changes brought about in West-East relations. The micromanagement of export controls mandated by H.R. 4653 can only damage these ongoing efforts.

In other areas, H.R. 4653 would be harmful to closely linked U.S. economic and foreign policy interests. For example, under section 128 of the bill there would be extraterritorial application of U.S. law that could force foreign subsidiaries of U.S. firms to choose between violating U.S. or host country laws.

Other sections of H.R. 4653 contain useful provisions that will be implemented as soon as possible. However,

additional legal authority is not required to make our export control system reflect the economic and national security realities of today's world. In response to recent world events, I am directing Executive departments and agencies to implement the following changes:

— By June 1, 1991, the United States will eliminate all dual-use export licenses under section 5 of the Export Administration Act to members of the export control group known as CoCom, consistent with multilateral arrangements. In addition, all re-export licenses under section 5 to and from CoCom will be eliminated, consistent with multilateral arrangements.

— By June 1, 1991, the United States will remove from the U.S. munitions list all items contained on the CoCom dual-use list unless significant U.S. national security interests would be jeopardized.

— By January 1, 1991, U.S. review of export licenses subject to CoCom Favorable Consideration and National Discretion procedures will be reduced to 30 and 15 days, respectively.

— By January 1, 1991, new interagency procedures will be instituted to make dual-use export license decisions more predictable and timely.

— By January 1, 1991, the Secretary of State will initiate negotiations to ensure that supercomputer export controls are multilateral in nature and not undermined by the policies of other supplier countries. By June 1, 1991, in consultation with industry, we will devise and publish a method to index supercomputer license conditions to reflect rapid advances in the industry and changes in strategic concerns.

— By January 1, 1991, we will significantly increase the threshold for Distribution Licenses to free world destinations and ensure that at least annually these thresholds are adjusted to reflect changes in technology and are consistent with international relationships, including changing requirements to stem the proliferation of missile technology and nuclear, chemical and biological weapons.

In summary, H.R. 4653 contains serious and unacceptable flaws that would hamper our efforts to prevent

> the proliferation of weapons of mass destruction and to ease restrictions on the legitimate sale of dual-use goods to acceptable users. Rather than sign this bill, I have chosen to take a series of steps under existing authorities to ensure that mutually shared objectives are met in a timely and efficient manner. I will work with the Congress, upon its return, to enact an appropriate extension of the Export Administration Act.

Memorandum of Disapproval for the Omnibus Export Amendments Act of 1990. 26 WEEKLY COMP. PRES. DOCS, 1839–40, (Nov. 19, 1990). On December 4, 1991, President Bush signed into law H.R. 1724, Miscellaneous Foreign Affairs, Pub. L. No. 102-182, 105 Stat. 1233, that included the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 that established sanctions against foreign persons and countries involved in the spread or use of chemical and biological weapons.

### *b. Executive order*

The executive order cited in the President's memorandum of disapproval in his veto of the Omnibus Export Amendments Act of 1990, cited above, was signed by President Bush on November 16, 1990. Exec. Order No. 12,735, 55; Fed. Reg. 48,587 (Nov. 16, 1990). The order declared a national emergency under U.S. law to deal with the threat of proliferation of biological and chemical weapons and provided as follows, in pertinent part:

> 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*.), and section 301 of title 3 of the United States Code,
>
> I, George Bush, President of the United States of America, find that proliferation of chemical and biological weapons constitutes 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.

Accordingly, I hereby order:

*Section 1. International Negotiations*. It is the policy of the United States to lead and seek multilaterally coordinated efforts with other countries to control the proliferation of chemical and biological weapons. The Secretary of State shall accordingly ensure that the early achievement of a comprehensive global convention to prohibit the production and stockpiling of chemical weapons with adequate provisions for verification, shall be a top priority of the foreign policy of the United States, and the Secretary of State shall cooperate in and lead multilateral efforts to stop the proliferation of chemical weapons.

*Sec. 2. Imposition of Controls*. As provided herein, the Secretary of State and the Secretary of Commerce shall use their authorities, including the Arms Export Control Act and Executive Order no. 12730, respectively, to control any exports that either Secretary determines would assist a country in acquiring the capability to develop, produce, stockpile, deliver, or use chemical or biological weapons. The Secretary of State shall pursue early negotiations with foreign governments to adopt effective measures comparable to those imposed under this order.

*Sec. 3. Department of Commerce Controls*. (a) The Secretary of Commerce shall prohibit the export of any goods, technology, or service subject to his export jurisdiction that the Secretary of Commerce and the Secretary of State determine, in accordance with regulations issued pursuant to this order, would assist a foreign country in acquiring the capability to develop, produce, stockpile, deliver, or use chemical or biological weapons. The Secretary of Commerce and the Secretary of State shall develop an initial list of such goods, technology, and services within 90 days of this order. The Secretary of State shall pursue early negotiations with foreign governments to adopt effective measures comparable to those imposed under this section.

(b) Subsection (a) will not apply to exports if their destination is a country with whose government the United

States has entered into a bilateral or multilateral arrangement for the control of chemical or biological weapons-related goods (including delivery systems) and technology, or maintains domestic export control comparable to controls that are imposed by the United States with respect to such goods and technology or that are otherwise deemed adequate by the Secretary of State.

(c) The Secretary of Commerce shall require validated licenses to implement this order and shall coordinate any license applications with the Secretary of State and the Secretary of Defense.

*Sec. 4. Sanctions Against Foreign Persons.* (a) Sanctions shall be imposed on foreign persons with respect to chemical and biological weapons proliferation, as specified in subsections (b)(1) through (b)(5).

(b)(1) Sanctions shall be imposed on a foreign person if the Secretary of State determines that the foreign person on or after the effective date of this order knowingly and materially contributed to the efforts of a foreign country referred to in subsection (2) to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons.

(2) The countries referred to in subsection (1) are those that the Secretary of State determines have either used chemical or biological weapons in violation of international law or have made substantial preparations to do so on or after the effective date of this order.

(3) No department or agency of the United States Government may procure, or enter into any contract for the procurement of, any goods or service from any foreign person referred to in subsection (1). The Secretary of the Treasury shall prohibit the importation into the United States of products produced by that foreign person.

(4) Sanctions imposed pursuant to this section may be terminated or not imposed against foreign persons if the Secretary of State determines that there is reasonable evidence that the foreign person concerned has ceased all activities referred to in subsection (1).

(5) The Secretary of State and the Secretary of the Treasury may provide appropriate exemptions for pro-

curement contracts necessary to meet U.S. operational military requirements or requirement under defense production agreements, sole source suppliers, spare parts, components, routine servicing and maintenance of products, and medical and humanitarian items. They may provide exemptions for contracts in existence on the date of this order under appropriate circumstances.

*Sec. 5. Sanctions Against Foreign Countries.* (a) Sanctions shall be imposed on foreign countries with respect to chemical and biological weapons proliferation, as specified in subsections (b) and (c).

(b) The Secretary of State shall determine whether any foreign country has, on or after the effective date of this order, (1) used chemical or biological weapons in violation of international law; or (2) made substantial preparations to use chemical or biological weapons in violation of international law; or (3) developed, produced, or stockpiled chemical or biological weapons in violation of international law.

(c) The following sanctions shall be imposed on any foreign country identified in subsection (b)(1) unless the Secretary of State determines that any individual sanction should not be applied due to significant foreign policy or national security reasons. The sanctions specified in this section may be made applicable to the countries identified in subsections (b)(2) or (b)(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 (c)(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 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.

(2) *Multilateral Development Bank Assistance.* The United States shall oppose any loan or financial or technical assistance to that country by international financial institutions in accordance with section 701 of the International

Financial Institutions Act (22 U.S.C. 262d).

(3) *Denial of Credit or Other Financial Assistance*. The United States shall deny to that country any credit or financial assistance by any department, agency, or instrumentality of the United States Government.

(4) *Prohibition on Arms Sales*. The United States Government shall not, under the Arms Export Control Act, sell to that country any defense articles or defense services or issue any license for the export of items on the United States Munitions List.

(5) *Exports of National Security-Sensitive Goods and Technology*. No exports shall be permitted of any goods or technologies controlled for national security reasons under Export Administration Regulations.

(6) *Further Export Restrictions*. The Secretary of Commerce shall prohibit or otherwise substantially restrict exports to that country of goods, technology, and services (excluding agricultural commodities and products otherwise subject to control).

(7) *Import Restrictions*. Restrictions shall be imposed on the importation into the United States of articles (which may include petroleum or any petroleum product) that are the growth, product, or manufacture of that country.

(8) *Landing Rights*. At the earliest practicable date, the Secretary of State shall terminate, in a manner consistent with international law, the authority of any air carrier that is controlled in fact by the government of that country to engage in air transportation (as defined in section 101(10) of the Federal Aviation Act of 1958 (49 U.S.C. App. 1301(10)).

*Sec. 6. Duration*. Any sanctions imposed pursuant to sections 4 or 5 shall remain in force until the Secretary of State determines that lifting any sanction is in the foreign policy or national security interests of the United States or, as to sanctions under section 4, until the Secretary has made the determination under section 4(b)(4).

*Id*. This Executive Order was revoked by Executive Order No. 12938 (Nov. 14, 1994), amended by E.O. 13094 (July 28, 1998).

## B. LIFTING OF SANCTIONS

### Removal of Restrictions on Foreign Assistance

Section 620(f) of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2370(f)) prohibits assistance under that Act to Communist countries. Under subsection (2) of that provision, the President may remove a Communist country from ineligibility to receive such assistance if he determines and reports to Congress that removal is important to the national interest of the United States. The President's authority to make this determination was delegated to the Secretary of State in section 1-201(a)(10) of Executive Order No. 12163 of September 29, 1979, as amended. Secretary of State James A. Baker III exercised this authority with regard to four countries during 1989 and 1990: Hungary, Poland, Czechoslovakia, and the German Democratic Republic.

#### *a. Hungary*

On September 7, 1989, Secretary of State Baker determined that it was important to the national interest to remove Hungary from ineligibility to receive assistance under the Act for an indefinite period. A memorandum of justification provided to Congress in support of that determination made the following points:

> Hungary is pursuing a program of significant, Western-oriented political and economic reforms, in an effort to provide a more legitimate political base and address the country's serious social and financial problems. The ruling Hungarian Socialist Workers' Party last year swept out its old leaders and chose new ones, some of whom are strong supporters of reform.
>
> On the economic front, the Government of Hungary has injected new blood into its reform program, known as the "New Economic Mechanism," which combines strict austerity measures, market-oriented reforms, and support of private initiatives. Key to this effort is the "Company Law" that went into effect January 1 of this year. It increases the number of employees a private firm

> may have from 30 to 500 persons, allows 100 percent foreign ownership of enterprises, and provides for the conversion of state-owned firms to joint stock companies. Other recent reforms have provided for the development of commercial banks and liberalized the granting of foreign trading rights.
>
> Encouraging continued political and economic reform in Hungary is important to the national interest of the United States. The package of initiatives which the President announced during his recent visit to Budapest represents support for economic recovery, political liberalization and free market solutions. The President's initiatives include funding in support of a Hungarian-American Enterprise Fund to support the development of the growing private sector in Hungary, support for appropriate economic and political liberalization initiatives, concerted action by the Government of the United States, West European countries and Japan in support of Hungarian economic reform, and the establishment of a regional environmental center in Budapest.

Justification for the President's Determination to Remove the Prohibition of Foreign Assistance for Hungary. The determination and justification are available at *www.state.gov/s/l*.

### *b. Poland*

On September 6, 1989, Secretary of State Baker determined that it was important to the national interest to remove Poland from ineligibility to receive assistance under the Foreign Assistance Act of 1961 for an indefinite period. The Secretary's justification included the following points:

> The elections, the legalization of Solidarity, the establishment of a free press, and the decision to allow Solidarity to form the new government are solid evidence that the political reform process is well underway in Poland.
>
> Poland has also taken the first steps necessary to reform its troubled economy. It joined the International

Monetary Fund and World Bank in 1986 and has held discussions with the IMF regarding the outlines of a prospective adjustment program. Also in 1986, Poland opened the door to joint venture participation by foreign companies; a more liberal law that allows 100 percent foreign ownership of investments went into effect on January 1, 1989. Periodic devaluations of the zloty since February 1987 have made Polish exports more competitive. Other reforms are aimed at increasing reliance on market mechanisms and reducing bureaucratic control over the economy.

Encouraging continued political and economic reform in Poland is important to the national interest of the United States. The package of initiatives President Bush announced during his recent visit to Poland represents support for economic recovery, political liberalization and free market solutions. The President's initiatives include support for a Polish-American Enterprise Fund to assist private entrepreneurs in Poland, support for other appropriate economic and political liberalization initiatives, concerted action by the U.S., West European and Japanese governments in support of Polish economic reform, and a generous and early debt rescheduling for Poland in the Paris Club.

It is worth noting that Poland has for many years been a beneficiary of other U.S. assistance programs not subject to the Foreign Assistance Act's prohibition. We understand that similar proposals for additional assistance are now under consideration in the Congress. Taken together, these considerations warrant concrete encouragement by the United States Government to the reform processes underway within Poland. Removal of Poland, for an indefinite period, from the application of Section 620(f) of the Foreign Assistance Act is intended to acknowledge and further encourage such reforms.

Justification for the President's Determination to Remove the Prohibition of Foreign Assistance for Poland, available at *www.state.gov/s/l*.

### *c. Czechoslovakia*

On May 13, 1990, Secretary of State Baker exercised his authority pursuant to section 620(f) of the Foreign Assistance Act to remove Czechoslovakia from its application for an indefinite period. 55 Fed.Reg. 24,335 (June 15, 1990). In his justification in support of the determination, the Secretary noted the following factors:

> On June 8 and 9, the Czech and Slovak Federal Republic is expected to complete its transition to democracy by holding free and open parliamentary elections. The elections will cap a six-month period that began with the toppling of the communist government late in 1989 and has seen the implementation of broad political reform.
>
> The Czech and Slovak Federal Republic has . . . taken the first steps necessary to institute market-oriented economic reforms. It has applied to rejoin the International Monetary Fund and World Bank and has held discussions with the IMF regarding the outlines of a prospective adjustment program. The Czech and Slovak Federal Republic is also rewriting its investment laws, which would provide for liberal joint venture regulations suitable to Western investors. Parliament has passed a budget that slashes subsidies to industry and the army, and cuts artificial supports for foodstuffs. The crown has been devalued by nearly 20 percent this year. These and other reforms will increase reliance on market mechanism and reduce bureaucratic control over the economy.
>
> Encouraging continued political and economic reform in the Czech and Slovak Federal Republic is important to the national interest of the United States. President Bush welcomed President Havel to Washington in February by expressing his support for economic reform, political liberalization and free market solutions. The President has pursued bilateral and multilateral support for reform in the Czech and Slovak Federal Republic, and is anxious to further integrate the Czech and Slovak Federal Republic into the West, both politically and economically. He has

> encouraged investment in the Czech and Slovak Federal Republic, called for expanded exchanges, and granted a waiver of the Jackson-Vanik restrictions that has led to the achievement of most-favored-nation status by the Czechoslovaks.
>
> Removal of the Czech and Slovak Federal Republic, for an indefinite period, from the application of Section 620(f) of the Foreign Assistance Act is intended to acknowledge and encourage further such reforms, which serve important national interests of the United States.

Justification for the Presidential Determination to Remove the Section 620(f) Prohibition of Foreign Assistance for the Czech and Slovak Federal Republic, available at *www.state. gov/s/l.*

### *d. German Democratic Republic*

On July 12, 1990, Secretary of State Baker exercised his authority pursuant to section 620(f) of the Foreign Assistance Act to remove the German Democratic Republic from its application for an indefinite period. 55 F.R. 33,996 (Aug. 20, 1990). In his justification in support of the determination, the Secretary made the following points:

> In the past several months, the German Democratic Republic has undergone a peaceful revolution in which it has ceased to have the attributes of a Communist country. On March 18, the GDR held its first free and fair parliamentary elections, which resulted in the government of Premier Lothar de Maiziere, a Christian Democrat. . . .
>
> The GDR has taken steps to move away from a centrally-controlled economy toward free market mechanisms. It has instituted a new joint venture law allowing foreign investment and ownership of East German enterprises. The GDR has passed a new labor law and taken initial steps to reduce government subsidies. This process will become even more pronounced now that the economic and monetary union has been instituted, and the GDR has effectively adopted the FRG's economic system.

> Encouraging continued political and economic reform in the GDR is important to the national interest of the United States. Although German unification is proceeding rapidly, and the GDR will cease to be a separate political entity at some point in the future, it is important to the U.S. to take steps which acknowledge the reforms which have been accomplished, and also to expand our political, cultural and business contacts with the East German populations. We underscore our intention that any programs will be non-military in nature.
>
> Removal of the GDR, for an indefinite period, from the application of Section 620(f) of the Foreign Assistance Act is intended to acknowledge and further encourage such reforms.

Justification for a Determination Removing the German Democratic Republic From the Application of Section 620(f) of the Foreign Assistance Act of 1961, available at *www.state. gov/s/l.*

### 2. Lifting of Sanctions against Namibia

As discussed in Chapter 7.A., *supra*, Namibia gained its independence in March 1990. At that time, the Office of Foreign Assets Control, U.S. Department of Treasury, issued an amendment to the South African Transaction Regulations, to lift U.S. economic sanctions that had been imposed on Namibia under the Comprehensive Anti-Apartheid Act of 1986, Pub. Law No. 99-440 ("the Act"). 55 Fed. Reg. 10,618 (Mar. 22, 1990). The action was explained in the Federal Register notice as follows:

> Namibia, under the illegal administration of South Africa, has been subject to the sanctions imposed against South Africa under the Act. The Act defines "South Africa" to include "any territory under the administration, legal or illegal, of South Africa." 22 U.S.C. 5001(6)(B). Implementing the Act, the [South African Transaction] Regulations define the terms "South Africa" and "Government of South Africa" (or "South African Government") to include Namibia. 31 CFR 545.306 and 545.312.

> Namibia will gain independence from South Africa on March 21, 1990. In view of this event, and the State Department's determination that Namibia will no longer be illegally administered by South Africa, the Office of Foreign Assets Control is amending the Regulations to lift the Act's sanctions from Namibia.

Regulations implementing required fair labor standards by U.S. firms in Namibia were also amended to reflect Namibia's independence. 55 Fed. Reg. 9,722 (Mar. 15, 1990). The Federal Register notice provided:

> Section 2 of Executive Order 12532 of September 9, 1985 (50 FR 36861) deals with labor practices of U.S. nationals and their firms in South Africa. On November 8, 1985 the Department of State published draft implementing regulations as a proposed rule for public comment (50 FR 46455). The final rule was published on December 31, 1985 (50 FR 53308).
>
> The Comprehensive Anti-Apartheid Act of 1986 (Pub. L. 99-440) ("the Act") codified the measures required under the September 9, 1985 Executive Order. The Act contains a Code of Conduct (section 208) which codifies the fair labor standards specified in Executive Order 12532. It also contained several provisions relating to the fair labor standards to be implemented by U.S. firms. These provisions were implemented by the final rule that was published by the Department of State on October 30, 1986 (51 FR 39655).
>
> In addition, section 3(6) of the Act defined South Africa for purposes of the Act as including any territory under the administration, legal or illegal, of South Africa. Namibia (a non-self governing territory under the U.N. Charter) was at the time of the enactment of the Act under such administration. Accordingly, the regulations in parts 60–65 were extended to U.S. nationals employing more than 25 individuals in Namibia. A new § 62.4 was added to the regulations to require such firms to register with the Department of State not later than November 30, 1986.

> The Department of State has determined that effective upon its independence on March 21, 1990, Namibia will no longer be administered by South Africa within the meaning of section 3(6) of the Act and will be instead an independent state. Any territory in fact administered by South Africa, notwithstanding any claim as to sovereignty by Namibia, will continue to be considered by the Department of State as included in South Africa for purposes of the Act, without prejudice to either South Africa's or Namibia's claims under international law.

In June 1990 the Department of State wrote to each of the governors of the states of the United States, urging them to remove any sanctions against Namibia that might still be in effect under state law.

# CHAPTER 17

# International Conflict Resolution and Avoidance

## A. CAMBODIA AND VIETNAM

### 1. Proposed Vesting of Vietnamese Assets

On November 17, 1989, the Subcommittees on Asian and Pacific Affairs and on International Economic Policy and Trade of the House Committee on Foreign Affairs heard testimony on H.R. 2166, entitled Payment of Claims of Nations of the United States against Vietnam. The proposed legislation would have amended title VII of the International Claims Settlement Act of 1949, as amended (22 U.S.C. § 1645), to provide for the vesting of Vietnamese assets, which had been frozen (blocked) under regulations of the Office of Foreign Assets Control, Department of the Treasury, effective April 30, 1975. The vested assets were to be used to pay claims of United States nationals on which awards had been made by the Foreign Claims Settlement Commission under Public Law No. 96-606 (the Vietnam Claims Program), approved December 28, 1980. 94 Stat. 3534 (22 U.S.C. §§ 1645–1645o (1982).

Deputy Assistant Secretary of State David F. Lambertson summarized the policy of the Administration with regard to the Socialist Republic of Vietnam ("SRV") and the proposed legislation:

> We fully understand and support the need to satisfy our nationals' claims against Vietnam. Nevertheless, we oppose H.R. 2166, which would vest Vietnamese assets blocked in this country in order to reimburse U.S. claimants. Our opposition to vesting is based upon: (1) the need for sustained

> SRV cooperation on bilateral humanitarian issues; (2) our policy and legal interests in resolving such claims by negotiation (in the context of normalization) rather than unilateral action; and (3) the failure of the proposed vesting legislation to account for U.S. Government claims against Vietnam . . . .

*Issues Affecting the Question of U.S. Relations with Vietnam: Hearing Before the Subcomm. on Asian and Pacific Affairs and the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 101st Cong. 57–171 (1989) (testimony of David F. Lamberston, Deputy Assistant Secretary of State for East Asian and Pacific Affairs, Dept. of State) ("Hearing") at 63–64 .

In his testimony, Mr. Lambertson also explained the opposition to negotiating a claims settlement with Vietnam while the process of negotiations on Cambodia was ongoing:

> In view of Vietnam's lack of cooperation in efforts to achieve a settlement at the Paris Conference [the International Conference on Cambodia, held at Paris, July 30–Aug. 30, 1989], we also believe that any bilateral approach to Vietnam to negotiate a claims settlement would be inappropriate at this time. We know that Vietnam's leaders are keenly aware of this issue. They have previously expressed interest in discussing claims settlement; we have declined to enter into such discussions since this is primarily a financial issue. Claims settlement in this context would be widely seen as a step toward 'normalization.'

*Id*. at 64–65.

For a full discussion of the Administration's opposition to vesting of the Vietnamese assets, including testimony by Michael L. Young, Deputy Legal Adviser of the Department of State and R. Richard Newcomb, Director, Office of Foreign Assets Control, Department of the Treasury, on legal aspects of such vesting, *see Cumulative Digest 1981–1988* at 2743– 2751. *See also* 84 Am. J. Int'l L. 539. The legislation was not adopted.

### 2. Cambodian Settlement

In his testimony of November 17, 1989, Mr. Lambertson noted that it had been "U.S. policy since the early 1980's that normalization of relations with Vietnam can and should be considered only in connection with the Cambodian situation." *Hearing* at 61. A resolution of the Cambodian conflict, he stated, "must be a genuinely comprehensive settlement which provides for effective international verification of the Vietnamese withdrawal, incorporates formidable obstacles against a Khmer Rouge return to power, and allows for the exercise of genuine self-determination by the Cambodian people." *Id.* at 62. He reviewed efforts as of that time to reach a Cambodian settlement:

> Last spring, the prospect of a political approach through an international conference in Paris to resolve the Cambodian situation began to take shape. As that conference approached, the interest of the Cambodian factions in testing their capabilities on the battlefield after the Vietnamese withdrawal made prospects for a successful political resolution problematic. We were not certain that sufficient political will existed among the key parties to permit a reasonable chance of success for such an ambitious undertaking.
>
> We were impressed, however, by the determination of the French and Indonesian co-presidents to undertake what they, too, recognized was a problematic effort, and by the willingness of the ASEAN states and others to join in. Finally, Vietnam's statement that it would withdraw its forces by the end of September raised the specter of escalating violence among the Cambodia factions—making a concerted attempt to resolve the conflict by negotiations both timely and worthwhile. We therefore participated energetically, and with a clear interest in nurturing a political process of national reconciliation, in the effort to forge a settlement in Paris.
>
> The initial sessions of the Conference were promising. Substantial progress was made on the issues of peacekeeping, international guarantees, and reconstruction and

> repatriation of Cambodians on the Thai border. However, the most difficult task was for the parties to reach agreement on the creation of a provisional authority to provide the basis for a fair and equal electoral test of who should govern Cambodia.
>
> Despite serious proposals from the French and from Prince Sihanouk, and encouraging indications of flexibility from the Chinese, Hanoi and the Phnom Penh regime did not respond and consequently no real negotiations on power-sharing took place . . . .

*Id.* at 59–60.

Representatives of the United States and the other four permanent members of the UN Security Council began meeting regularly in Paris and New York in January 1990. On January 15 and 16, 1990, the representatives met in Paris for consultations on a comprehensive political settlement to the Cambodian conflict. At this meeting, they agreed on the following principles as a guide to resolution of the Cambodian problem:

> No acceptable solution can be achieved by force of arms.
>
> An enduring peace can only be achieved through a comprehensive political settlement, including the verified withdrawal of foreign forces, a ceasefire and the cessation of outside military assistance.
>
> — The goal should be self-determination for the Cambodian people through free, fair and democratic elections.
>
> — All accept an enhanced UN role in the resolution of the Cambodian problem.
>
> — There is an urgent need to speed up diplomatic efforts to achieve a settlement.
>
> — The complete withdrawal of foreign forces must be verified by the UN.
>
> — The Five would welcome an early resumption of a constructive dialogue among the Cambodian factions which is essential to facilitating the transition process, which should not be dominated by any one of them.
>
> — An effective UN presence will be required during the transition period in order to assure internal security.

— A Special Representative of the UN Secretary General is needed in Cambodia to supervise the UN activities during a transition period culminating in the inauguration of a democratically elected government.
— The scale of the UN operation should be *consistent with* the successful implementation of a Cambodian settlement and its planning and execution should take account of the heavy financial burden that may be placed on member States.
— Free and fair elections must be conducted under direct UN administration.
— The elections must be conducted in a neutral political environment in which no party would be advantaged.
— The Five Permanent Members commit themselves to honoring the results of free and fair elections.
— All Cambodians should enjoy the same rights, freedoms and opportunities to participate in the election process.
— A Supreme National Council might be the repository of Cambodian sovereignty during the transition process.
— Questions involving Cambodian sovereignty should be resolved with the agreement of the Cambodian parties.

Summary of Conclusions of the Meeting of the Five Permanent Members of the Security Council on the Cambodian Problem, January 15–16, 1990, pp. 1–2, available at *www.state.gov/s/l*.

Following a second session in February, the Five met in Paris for a third session on March 12 and 13, 1990. The March consultations focussed on three areas, set forth below:

*Organisation of Elections*

The United Nations should be responsible for the organisation and conduct of free and fair elections on the basis of genuine and verified voter registration lists of Cambodian citizens. Eligibility to vote, including provisions regarding the conditions of residence in Cambodia, will be established in the electoral law. Special electoral arrangements would be agreed to guarantee the right to vote of Cambodian refugees and displaced persons.

The electoral process should therefore be guided by the following principles:
— the system and procedures adopted should be, and be seen to be, absolutely impartial while the arrangements should be administratively simple and efficient as possible;
— all Cambodian participants in the elections should have the same rights, freedoms and opportunities to take part in the election process; and
— all parties should commit themselves to honouring the results.

The duration of the electoral process should be consistent with the above and as short as possible. It should lead to a single election of a constituent assembly which should approve a Constitution and transform itself into a legislative assembly.

*Supreme National Council*

Bearing in mind the principle according to which the Cambodian parties should be consulted on questions relating to Cambodian sovereignty, the Five invited the four Cambodian parties to agree that a Supreme National Council should be established as the unique legitimate body and source of authority in which, throughout the period of transition, national sovereignty and unity should be enshrined.

Its composition should be decided by the Cambodian parties themselves and could include representatives of all shades of opinion among the people of Cambodia. From its creation, it will delegate to a United Nations Transitional Authority in Cambodia (UNTAC) all necessary powers including those to conduct fair and free elections. It will interface with the United Nations Transitional Authority and be consulted on, and give advice relevant to, the functions of civil administration and electoral organization.

As the enshrinement of Cambodian sovereignty, the Supreme National Council would occupy the seat of

Cambodia at the United Nations and its specialised agencies, and at other international bodies and conferences.

*Creation of a United Nations Transitional Authority in Cambodia (UNTAC)*

Given the need for a neutral administration in Cambodia during the transitional period and the need to create a neutral environment in which free and fair elections could take place, the creation of a United Nations Transitional Authority in Cambodia is necessary.

The United Nations Transitional Authority will be established by the UN Security Council under the direct responsibility of the United Nations Secretary-General who may appoint a Special Representative. It should exercise all powers necessary over Cambodian territory in its entirety in order to:

— assure the Cambodian people of freedom from intimidation and the threat of force and corruption;

— provide them with protection from economic and social discrimination; and

— guarantee human and civil rights for all.

Summary of Discussions, March 13, 1990, available at *www.state.gov/s/l*.

On July 20, 1990, Assistant Secretary of State for East Asian and Pacific Affairs Richard H. Solomon testified before the East Asian and Pacific Affairs Subcommittee of the Senate Foreign Relations Committee about U.S. policy on Cambodia and progress made on a political settlement to the Cambodian conflict. Mr. Solomon began by reviewing U.S. goals in Cambodia:

We seek to do all that we can to ensure that the Cambodian people have the right of self-determination through free and fair elections, are at last freed from the burden of foreign invasion and civil warfare, and especially that they never again fall subject to rule by the murderous Khmer Rouge. U.S. national interests in Cambodia focus on our moral concerns. Beyond our commitment to the security

> of our allies and friends in ASEAN, we seek only an opportunity for the Cambodian people to choose their own government through free and fair elections, and to have a future of security and national independent. Our efforts over the past year have been shaped by the judgment that the best way to achieve our objectives is through a negotiated, comprehensive settlement which would bring to bear the concern and commitment of the international community through the United Nations. To that end, we have been working to achieve:
>
> > the verified withdrawal of all foreign forces; the creation of a neutral political process culminating in free and fair elections centered around a role for the United Nations; the preservation of a viable non-Communist alternative for the Cambodian people which can be present at the negotiating table and at the polls; and, above all, a settlement that has reliable guarantees that the Khmer Rouge will not again impose its violent rule on the Cambodian people.

*Cambodian Peace Negotiations: Prospects for a Settlement:* Hearings Before the Subcomm. On East Asian and Pacific Affairs of the Senate Foreign Relations Committee, 101st Cong. 36–79 (1990) (testimony of Richard H. Solomon, Assistant Secretary of State for East Asian and Pacific Affairs, Dept. of State).

Mr. Solomon then reviewed the results of the meeting of July 16 and 17, 1990, of the Permanent Five in Paris:

> [T]he Permanent Five representatives were able to make . . . significant progress on two of the most difficult elements of a political settlement process: transitional arrangements regarding the administration of Cambodia during the pre-election period; and military arrangements after an agreement, and a cease-fire, go into effect. All five representatives were able to agree on the need for establishment of a United Nations Transitional Authority in Cambodia (UNTAC) with a military as well as civilian component. We agreed upon a role for UNTAC in verifying the withdrawal of all foreign forces from Cambodia,

> the regrouping of all Cambodian forces with weapons stored under UN supervision, and a phased program of arms reduction. UNTAC will also have as its mission ensuring the cessation of all outside military assistance to Cambodia. . . .
>
> The negotiation also achieved significant progress on the political structure that would exist in the period leading up to free elections. A Supreme National Council (SNC) should be established and composed of individuals representing "all shades of opinion among the people of Cambodia." The Perm Five approach envisages an important role for UNTAC on the civil side, and will provide for UN supervision or control of existing administrative structures in order to ensure a neutral political environment conducive to free and fair general elections.

*Id*. at 42.

Next, Mr. Solomon described the U.S. position on assistance to Cambodia:

> Let me stress our conviction that the United States has an important and continuing role to play in this diplomatic effort. And our ability to do so—to be a credible player, and to provide the Cambodian people the alternative of an election with other than Communist options—is critically dependent on our continuing to provide non-lethal assistance to the non-Communist groups. These people have, against great odds, struggled to maintain a non-Communist alternative for the Cambodian people. We would totally undercut their position, and our own credibility, were we to cut off aid abruptly to the only groups in Cambodia with which we share important basic values. It would be especially self-defeating now that the diplomatic process is gaining momentum. Let me speak directly to the question that has been on the minds of many regarding our assistance. . . . We continuously review this situation and find no evidence that a diversion of our material assistance has occurred or that there is systematic battlefield cooperation such that our assistance enhances the combat capacity of the Khmer Rouge. . . . I want to assure

> you that the Administration will immediately cease its material support for any non-communist resistance organization if reliable intelligence demonstrates that the law has been broken.

*Id.* Mr. Solomon then addressed the revisions in U.S. policy on Cambodia:

> We have attained our strategic objective in the withdrawal from Cambodia of the bulk of Vietnamese military forces. . . . We now need to convince Hanoi and Phnom Penh that participation in a comprehensive political settlement holds the key to the future. We want to encourage both Vietnam and China to use their considerable influence with their clients to accept the procedures that are being developed by the Perm Five.
>
> We thus decided upon a number of new steps, including an enhancement of our dialogue with Hanoi about Cambodia. This will complement efforts underway with the Vietnamese on POW/MIA and other humanitarian issues. We are also considering contacts with the Phnom Penh regime, although we would do so only if it would advance our goal of free and fair elections. We will also be looking carefully at additional humanitarian programs for Vietnam and Cambodia that would both help these suffering people as well as express our openness to a new relationship once the Cambodia is resolved. And we will implement a new program designed to aid Cambodian children—both those within the country as well as in camps along the Thai-Cambodian border.
>
> We will no longer support the CDGK coalition as the holder of Cambodia's U.N. seat. We want the seat to be occupied by a freely elected government—and, pending that development, by Cambodians firmly committed to the holding of free and fair elections. This latter adjustment is designed to make it crystal clear that we will do nothing, even indirectly, which seems to give legitimacy to the Khmer Rouge as an organization.

*Id*. at 43.

On August 27 and 28, 1990, the Permanent Five representatives met in New York for a sixth series of consultations on political settlement of the Cambodian conflict. At the end of this meeting the Five adopted a framework document setting forth the requirements for political settlement. U.N.Doc. A/45/472, U.N. Doc. S/21689, (1990).

The framework agreement was endorsed on September 20, 1990, by the UN Security Council in Resolution 668 and by acclamation of the General Assembly on October 15, 1990. In addition, Resolution 668 welcomed "the agreement reached by all Cambodian parties . . . to form a Supreme National Council as the unique legitimate body and source of authority in which, through the transitional period, the independence, national sovereignty and unity of Cambodia is embodied;" and noted "that the Supreme National Council will therefore represent Cambodia externally and it is to designate its representatives to occupy the seat of Cambodia at the United Nations." U.N. Security Council Resolution 668 (1990).

On November 23 through 26, 1990, the Five met in Paris to work with the co-chairmen of the Paris Conference on Cambodia ("PCC") on developing a comprehensive political settlement in that country. At this meeting the two co-chairmen and the Five reached consensus on a draft comprehensive political settlement developed from the August framework agreement. As summarized in the communique, the draft comprehensive political settlement included:

> [A] draft agreement covering the major aspects of the settlement with annexes dealing respectively with: the proposed mandate for UNTAC; withdrawal, cease-fire and related measures; elections; repatriation of Cambodian refugees and displaced persons; and principles for a new constitution for Cambodia. A draft agreement concerning the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia and a draft declaration on rehabilitation and reconstruction of Cambodia were also elaborated.

Communique, November 26, 1990, p.1, available at *www.state.gov/s/l*.

The communique then noted that in agreeing on the draft settlement, the parties had fulfilled the first necessary condition for the successful reconvening of the PCC. In addition, the communique stated:

> 4. In the light of the positive results achieved at the present meeting, it is now urgent that the Cambodians themselves make their contribution to this process through the [Supreme Natural Council ("SNC")]. The Co-Chairmen and the Five strongly urge the Cambodians to ensure that the SNC is fully functioning so that the Conference can be reconvened.
>
> * * * *
>
> 6. The two Co-Chairmen and the Five believe that it is now urgent to resolve the problem of the leadership of the SNC. The Five reaffirmed their view that shouold Prince Shianouk be elected Chairman, they would welcome this decision. They consider that related questions including the possible expansion of the SNC and the vice-chairmanship should be decided by the Cambodians themselves through consultations, flexibly and in a spirit of national reconciliation. They would expect that should Prince Sihanouk be elected Chairman, he and other members of the SNC would approach these matters in such a spirit.

*Id*. at 2.

On December 21 to 23, 1990, the co-chairmen of the Paris Conference on Cambodia met in Paris with the 12 members of the SNC and formally presented the draft agreements on comprehensive political settlement to them. Following the meeting, these draft agreements and the meeting's final statement were circulated as UN documents. In particular, the final statement noted that "the members of the SNC reiterated their acceptance of the Framework document formulated by the five permanent members of the Security Council in its entirety as the basis for settling the Cambodian conflict. As regards the draft agreements of 26

November, there was concurrence on most of the fundamental points." U.N. Doc. A/46/61, S/22059, January 11, 1990, p. 2 (Annex 1, Final statement). The draft agreements, including the agreements on a comprehensive political settlement of the Cambodian conflict, and concerning the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia, may be found at U.N. Doc. A/46/61, S/22059, January 11, 1991. This document also includes, at Annex 3, an informal explanatory note describing the role of the United Nations, especially UNTAC, in the draft agreement.

## B. UNITED STATES-CHILE: INVOCATION OF DISPUTES TREATY

On January 12, 1989, the United States invoked the 1914 Treaty for the Peaceful Settlement of Disputes that May Occur Between the United States and Chile in order to resolve differences with Chile related to responsibility for the 1976 deaths of former Chilean Ambassador to the United States Orlando Letelier and an American, Ronni K. Moffitt. Treaty for the Settlement of Disputes that May Occur Between the United States of America and Chile, July 24, 1914, 39 Stat. 1645, T.S. No. 621. The two were killed, and Michael Moffitt, Ronni Moffitt's husband, was injured when a bomb attached to Mr. Letleier's car exploded in Washington, D.C., on September 21, 1976. A Federal grand jury in the District of Columbia had indicted three ex-officials of the Chilean Directorate of National Intelligence in 1978, but Chile had refused to extradite them to the United States. The background of this case and measures taken by the United States in response to the failure of Chile to extradite, prosecute, or seriously investigate the three are set forth in *Digest 1978* at 851–55; *Digest 1979* at 50–52, 51457–58; and *Digest 1980* at 33–35. *See also* 83 Am. J. Intl. L. 352 (1989).

The United States invoked the treaty after receiving a negative response to its 1988 note informing the government of Chile that the United States had espoused claims of its citizens and demanding compensation for losses of the U.S. Government. In doing so, it requested that a standing international commission, constituted in accordance with the treaty, investigate and report upon the deaths in question, including the involvement in those

deaths of Chilean government officials, as well as upon subsequent investigations into the matter by that government. The commission consisted of one U.S. citizen, one noncitizen appointed by the United States, one Chilean citizen, one noncitizen appointed by Chile, and a fifth, neutral member chosen by agreement between the two governments to serve as president. (If the parties were unable to agree on the fifth member, that member was to be appointed by the president of the Swiss Confederation.) Dept. of State daily press briefing, DPC No. 14, January 14, 1989, pp. 9–11.

On June 11, 1990, the United States and Chile signed an agreement regarding the settlement of the Letelier dispute by the international commission established under the 1914 Treaty. The agreement provided that the commission would only consider the question of the amount of compensation to be paid by Chile to the families of the victims as an *ex gratia* payment. Although it would not consider the issue of liability, compensation would be calculated as if liability had been established. The agreement follows:

1. The Governments of the United States of America and the Republic of Chile agree that a dispute exists between their States concerning responsibility for the deaths of Orlando Letelier and Ronni Moffitt in Washington, D.C. on September 21, 1976.
2. On January 12, 1989 the United States invoked the Treaty for the Settlement of Disputes that May Occur Between the United States and Chile, which entered into force on January 19, 1916, to investigate and report upon the facts surrounding the deaths of Orlando Letelier and Ronni Moffitt in Washington, D.C. on September 21, 1976.
3. The United States has sought compensation from Chile on behalf of the families of Letelier and Moffitt, on the ground that the United States considers the State of Chile is legally responsible under international law for the deaths of Orlando Letelier and Ronni Moffitt and the personal injuries to Michael Moffitt. Without admitting liability, the Government of Chile, in order to facilitate the normalization of relations, is willing

to make an *ex gratia* payment, subject to the provisions of Paragraph 5, to the Government of the United States of America, to be received on behalf of the families of the victims.

4. The Governments of the United States and Chile agree that the amount of the *ex gratia* payment should be equal to that which would be due if liability were established, and should be determined by the Commission established by the 1914 Treaty, in accordance with the Compromis which constitutes the annex to this Agreement. The Governments agree that, notwithstanding the invocation of the 1914 Treaty by the United States on January 12, 1989, in light of the understandings set forth herein, the amount of the compensation to be paid shall be the sole question to be determined by the Commission.
5. The Government of Chile agrees to pay to the Government of the United States, as its *ex gratia* payment in this matter, the amount of compensation as determined by the Commission. The Government of Chile undertakes to make the aforesaid payment as soon as possible and after the necessary legal requirements have been fulfilled following the determination by the Commission.
6. Upon receipt of the *ex gratia* payment referred to in Paragraph 5 above, the Government of the United States will regard as satisfied the claim espoused in its Diplomatic Note to the Government of Chile of April 18, 1988, and any other possible civil claim of the United States Government in this matter.
7. This Agreement shall enter into force upon notification to the Government of the United States by the Government of Chile that it has completed the proceedings necessary under Chilean law to bring this agreement into force.

The agreement and attached compromis establishing the Commission are available at *www.state.gov/s/l*.

On November 30, 1990, Secretary of State James A. Baker III signed a certification to Congress lifting prohibitions on security assistance and arms sales to Chile under the Kennedy-Harkin amendment (section 726(b) of the International Security and Development Cooperation Act of 1981). 56 Fed. Reg. 4,886 (Feb. 6, 1991). These prohibitions had barred furnishing most forms of security assistance, U.S. Government sales of defense articles or services, and licensing of commercial exports of defense articles or services to Chile unless the President certified:

> (A) that the Government of Chile has made significant progress in complying with internationally recognized principles of human rights;
> (B) that the provision of such assistance, articles or services is in the national interest of the United States; and
> (C) that the Government of Chile is not aiding or abetting international terrorism and has taken appropriate steps to cooperate to bring to justice by all legal means available in the United States or Chile those indicted by a United States grand jury in connection with the murders of Orlando Letelier and Ronni Moffitt.

Section 726(c), International Security and Development Cooperation Act of 1981, 22 U.S.C. § 2370 note. The authority to make the certification had been delegated to the Secretary of State in Executive Order 12163 of September 12, 1979, as amended, section 201(a)(20).

The justification for the certification transmitted to Congress made the following comments about the Letelier case:

> With respect to the Letelier case, the Government of Chile has taken appropriate steps to cooperate to bring to justice by all legal means available in the United States or Chile those indicted by a United States grand jury in connection with the murder of Orlando Letelier and Ronni Moffitt. Since taking office, the Aylwin Government has committed itself to a strategy to pursue criminal proceedings against those Chileans alleged to have participated in the 1976 car bomb assassination. Under this plan, the Government of Chile introduced a package of judicial

> reform laws that would, *inter alia*," transfer jurisdiction of the Letelier/Moffitt case from military to civilian courts. That portion of the law was approved by the Chamber of Deputies on September 28 and by the Senate on November 15. . . .
>
> The Government of Chile has also committed itself to request the Supreme Court's appointment of a special investigating judge ("ministro an visita") to try the case as soon as President Aylwin signs the bill allowing transfer of jurisdiction over the case. Under Chile's civil law system, the judge will have broad powers to gather evidence and question those with relevant information.
>
> In addition, the Ministry of Foreign Affairs has taken other action related to the Letelier case by conducting an administrative investigation into the matter of issuance of falsified passports during the previous government. The results have already been turned over to a civilian court for further investigation.
>
> Although Section 726(b) solely addresses the criminal aspect of the Letelier/Moffitt case, the Government of Chile has also agreed to consider the question of civil compensation for the families of the victims. In June 1990, the United States Government and the Government of Chile signed an agreement to create an international commission that would determine the amount of compensation the Government of Chile would award the families on an *ex gratia* basis.

The Justification is available at *www.state.gov/s/l*. The Bryan Commission convened in January 1992. The Chilean government agreed to pay the families $2.6 million.

## C. ECONOMIC ASSISTANCE TO EASTERN EUROPE

### 1. Support for East European Democracy Act

On November 28, 1989, Congress enacted the Support for East European Democracy ("SEED") Act of 1989, Pub. L. No. 101-179, 103 Stat. 1298, 22 U.S.C. § 5401–5495, establishing a SEED

Program "comprised of diverse undertakings designed to provide cost-effective assistance to those countries of Eastern Europe that have taken substantive steps toward institutionalizing political democracy and economic pluralism." Section 2(a). In signing the legislation, President Bush noted that "[w]e are nearing the end of a year that future generations will remember as a watershed, a year when the human spirit was lifted and spurred on by the bold and courageous actions of two great peoples—the people of Poland and Hungary." He explained that "[t]o help further the cause of political and economic freedom in Poland and Hungary," the legislation "authorizes various programs to help promote reform in these countries, including economic stabilization, trade liberalization, Enterprise Funds to nurture private sector development, labor market reforms, and enhanced environmental protection." 25 WEEKLY COMP. PRES. DOC. 1893 (Nov. 28, 1989).

Section 2(b) of the Act sets forth the objectives of the assistance to be provided:

> (1) to contribute to the development of democratic institutions and political pluralism characterized by—
>
> (A) the establishment of fully democratic and representative political systems based on free and fair elections,
>
> (B) effective recognition of fundamental liberties and individual freedoms, including freedom of speech, religion and association,
>
> (C) termination of all laws and regulations which impede the operation of a free press and the formation of political parties,
>
> (D) creation of an independent judiciary, and
>
> (E) establishment of non-partisan military, security, and police forces;
>
> (2) to promote the development of a free market economic system characterized by—
>
> (A) privatization of economic entities,
>
> (B) establishment of full rights to acquire and hold private property, including land and the benefits of contractual relations,

(C) simplification of regulatory control regarding the establishment and operation of businesses,
(D) dismantlement of all wage and price controls,
(E) removal of trade restrictions, including on both imports and exports,
(F) liberalization of investment and capital, including the repatriation of profits by foreign investors;
(G) tax policies which provide incentives for economic activity and investment,
(H) establishment of rights to own and operate private banks and other financial service firms, as well as unrestricted access to private sources of credit, and
(I) access to a market for stocks, bonds, and other instruments through which individuals may invest in the private sector; and

(3) not to contribute any substantial benefit—
(A) to Communist or other political parties or organizations which are not committed to respect for the democratic process, or
(B) to the defense or security forces of any member country of the Warsaw Pact.

Section 2(c) of the Act lists examples of assistance and other activities contemplated under the SEED Program, including initiatives relating to assistance from multilateral development banks, the International Monetary Fund and other multilateral programs, debt reduction and rescheduling, promotion of trade and investment, scholarships and educational and cultural exchanges, Peace Corps, environmental, medical and agricultural assistance, among others.

Although Hungary and Poland are the only countries named in the Act, section 3(a) authorizes the President to conduct activities for other Eastern European countries "that are similar to any activity authorized by this Act to be conducted in Poland and Hungary [with certain exceptions] if such similar activities would effectively promote a transition to market-oriented democracy."

Section 801 then provides that the President should suspend all assistance to an Eastern European country if he determines and reports to Congress that:

> (1) that country is engaged in international activities directly and fundamentally contrary to United States national security interests; (2) the president or any other government official of that country initiates martial law or a state of emergency for reasons other than to respond to a natural disaster or a foreign invasion; or (3) any member who was elected to that country's parliament has been removed from that office or arrested through extraconstitutional processes.

Congress appropriated $369,675,000 for SEED activities in Eastern Europe for Fiscal Year 1991. Foreign Operations, Export Financing and Related Programs Appropriations Act, Fiscal Year 1991, Pub. L. No. 101-513, 104 Stat. 1979 (1990). *See also*, Executive Order 12,703 of February 20, 1990, 26 WEEKLY COMP. PRES. DOC. 280 (Feb. 26, 1990), delegating certain functions conferred on the President by the Act to the SEED Program Coordinator, the United States Agency for International Development, the Department of Commerce and the Department of the Treasury.

### 2. U.S. Assistance Policy

On September 21, 1990, Kenneth I. Juster, the Senior Adviser to the Deputy Secretary of State, spoke on U.S. assistance policy to Eastern Europe before a conference on supporting East European democracy and free markets. His remarks included the following summary of U.S. interests and policy:

> A successful transition to democracy and free markets in Eastern Europe would serve U.S. national interests in important ways: It would mean that the turn away from communism has become irreversible, and it would help ensure that the region will attain some stability and not once again become a power vacuum or an unstable theater of tension and rivalries. We, therefore, have every incentive to assist the Central and East European nations in their time of need—and we are doing just that.
>
> U.S. assistance policy in Central and Eastern Europe is based on the concept of a "new democratic differenti-

ation." This term was chosen to contrast with our long-standing policy of expanding contact with communist governments in Eastern Europe to the extent that their foreign policies differed from that of the Soviet Union. We now have adopted a new policy standard—that is, the United States will tailor its assistance to the specific needs of each East European country as it moves positively toward four objectives:

*First*, progress toward political pluralism, based on free and fair elections and an end to the monopoly of the communist party;

*Second*, progress toward economic reform, based on the emergence of a market-oriented economy with a substantial private sector;

*Third*, enhanced respect for internationally recognized human rights, including the right to emigrate, and to speak and travel freely; and

*Fourth*, a willingness on the part of each of these countries to build a friendly relationship with the United States.

One of our priorities is to assist in developing democratic institutions and the rule of law. Our initiatives in this area are concentrated in four areas.

*Rule of Law and Human Rights*. The United States will assist democratic governments of Central and Eastern Europe to establish laws and legal systems based on the rule of the majority and protection of the rights of individuals and minorities.

*Political Process*. The United States will help new legislatures, political parties, and civic organizations develop into effective, stable democratic institutions.

*Social Process and Cultural Pluralism*. Through, among other things, support for educational curriculum reform, training of teachers, and support for trade unions and other non-governmental organizations, the United States will assist in strengthening the principles and practices of democratic pluralism within the societies of Central and Eastern Europe.

*Support for Independent Media*. The United States will assist in establishing independent radio and television stations, publishing independent newspapers, and training

> journalists. Indeed, we have already launched an Independent Media Fund designed to advance these programs on a regional basis.

Focus on Central and Eastern Europe, No. 26 at 1–2 (Oct. 19, 1990).

### 3. U.S.-Poland Joint Commission on Humanitarian Assistance

The American Aid to Poland Act of 1988, Pub. L. No. 100-418, §§ 2221–2227, 102 Stat. 1107, 7 U.S.C. § 1431 note, provided for U.S. donations of surplus agricultural commodities to Poland for sale by the Polish government and makes available nonconvertible excess Polish currency. These funds were then to be used for the purpose of certain activities "that would improve the quality of life of the Polish people and would strengthen and support the activities of governmental or private, nongovernmental independent institutions in Poland." Section 416(b)(7)(D)(ii) of the Agricultural Act of 1949, 7 U.S.C. § 1431, as amended by § 4(a) of Pub. L. No. 100-277, 102 Stat. 67. Under the Agricultural Act, eligible activities were to be chosen by a joint commission, to be established by agreement between the United States and Poland, and nongovernmental agencies operating in Poland, and to be composed of representatives of each of those entities. Section 416(b)(7)(D)(ii), 7 U.S.C. § 1431, and section 2226 of the American Aid to Poland Act. Pub. L. No. 100-418, 102 Stat. 1107. In July 1989, the United States and Poland signed the Agreement to Establish a Joint Commission on Humanitarian Assistance to carry out the purposes of the Act, available at *www.state.gov/s/l*.

The Commission was required to be composed of three representatives from each government, and one representative from any non-governmental agencies, such as non-profit voluntary agencies, cooperatives, intergovernmental agencies and other multilateral organizations, that agree to participate in the Commission and be bound by its applicable terms and conditions. The responsibilities of the Commission included identification, review, and approval of projects to fund with proceeds of the sale of donated commodities and the nonconvertible excess Polish currency.

The Agreement provided that the Commission was to monitor all projects, including the preparation of an evaluation upon each project's completion, and that it had the authority to change or terminate funding at any time. Finally, the Commission was required to file with the Agency for International Development periodic reports on its activities and the projects that it funded.

### Cross references

*Issues Relating to Namibian Independence*, **Chapter 7.A.**
*Status of Jerusalem*, **Chapter 9.A.4.**
*Removal of restrictions on U.S. foreign assistance*, **Chapter 16.B.**

# CHAPTER 18

# Use of Force and Arms Control

## A. USE OF FORCE

### 1. U.S.-USSR Agreement on Prevention of Dangerous Military Activities

On June 12, 1989, representatives of the United States and the Soviet Union signed an agreement at Moscow, intended to reduce the risk of accidental conflict when personnel and equipment of the armed forces of the parties are operating in proximity to one another during peacetime. Agreement on the Prevention of Dangerous Military Activities, 28 I.L.M 877 (1989).

In the agreement, signed by Admiral William J. Crowe, Jr., Chairman of the Joint Chiefs of Staff of the United States, and by General Mikhail Moiseyev, Chief of the General Staff of the Armed Forces of the USSR, the two governments recognized the necessity to prevent certain dangerous military activities, and they committed themselves to resolve "expeditiously and peacefully" any incident between their armed forces that may arise as a result of such activities.

The provisions of the agreement apply to all personnel and equipment of the armed forces of the parties, including ships, ground equipment, and aircraft. Article II(l) obligates each party to take necessary measures toward preventing its personnel and equipment from engaging in four specific types of military activities while they are in proximity to personnel and equipment of the other party. These four types of military activities, known collectively as dangerous military activities, are: (1) entries into the territory of a party owing to circumstances brought about by

*force majeure* or as a result of unintentional actions; (2) use of a laser in a manner that could cause harm; (3) hampering the activities of the armed forces of a party in a mutually designated Special Caution Area; and (4) interference with the command and control networks in a manner which could cause harm to the armed forces of the other party.

In resolving incidents arising out of these activities, Article II (2) requires that the parties not resort to the threat or use of force. Paragraph 3 states that additional provisions concerning prevention of dangerous military activities and resolution of the incidents arising therefrom are contained in the following four articles and in the annexes.

Article III(l) obligates the armed forces of a party to exercise caution and prudence while operating near the national territory of the other party. Article III(2) states that if an entry occurs owing to circumstances brought about by *force majeure* or as a result of unintentional actions, the parties shall adhere to the procedures in the annexes, including the early establishment of communications to determine the reasons for the entry.

Article IV addresses the use of lasers by armed forces of the parties. Under Article IV(l), where the armed forces of a party intend to use a laser in proximity to armed forces of the other party, the armed forces intending to use the laser shall notify the relevant armed forces of the other party. In addition, parties using lasers shall follow appropriate safety standards. Article IV(2) provides that where armed forces of a party believe the other armed forces are using a laser in a harmful manner, they shall immediately attempt to establish communications and seek termination of that use. Upon notification, if the armed forces are in fact using a laser, they shall investigate the circumstances, and if the use could harm the armed forces of the other party, they shall terminate it.

Article V relates to activities in a Special Caution Area. This area is defined in Article I as a mutually designated region where the armed forces of the two parties are present and, due to the circumstances in the region, special procedural measures are undertaken. Article V(l) states that each party may propose a region to be a Special Caution Area. The other party has the right to accept

or decline that proposal, and either party may request a meeting of the joint military commission, which is described in Article IX, to discuss the proposal. If a Special Caution Area is designated, the armed forces of the parties are to establish communications and agree on additional procedures designed to prevent dangerous military activities there. The arrangement may be terminated on timely notice by either party, pursuant to Article IX(3).

Article VI provides that if a party's armed forces detect interference with the command and control network that could harm their personnel or equipment, they may inform the relevant personnel of the other party's armed forces if they believe these personnel are the source of the interference. Should the notified personnel be the cause, they are to take expeditious measures to terminate the interference.

Article VII(l) obligates the parties to establish and maintain communications, in accordance with procedures set out in annex 1, in order to prevent dangerous military activities and to resolve incidents arising out of such activities. Article VII(2) requires the parties to exchange information regarding the occurrence of such activities and any incidents arising from them.

Article VIII establishes that the agreement does not affect the rights and obligations of the parties under other international agreements in force between the parties. It also states that the agreement does not affect the rights of individual or collective self-defense or of navigation and overflight. An agreed statement confirms that the agreement does not affect the parties' navigational rights under international law, including the rights of their warships to exercise innocent passage. Finally, Article VIII also makes explicit that where an incident encompassed by the agreement occurs in the territory of an ally, that ally may be consulted as to appropriate measures to be taken.

A joint military commission, established under Article IX, is to consider compliance questions, ways of ensuring a higher level of safety, and other measures necessary to improve the viability and effectiveness of the agreement. *See also* 83 Am. J. Int'l L. 917 (1989).

### 2. Panama

#### *a. Deployment of U.S. forces to Panama*

On December 20, 1989, President George H. W. Bush announced that he had ordered U.S. military forces to Panama during the night. 25 WEEKLY COMP. PRES. DOC. 1974–75 (Dec. 25, 1989). The President stated that for nearly two years the United States and nations of Latin America and the Caribbean had worked together to resolve the crisis in Panama. The goals of the United States had been to safeguard the lives of Americans, to defend democracy in Panama, to combat drug trafficking, and to protect the integrity of the Panama Canal Treaty. Many attempts had been made to resolve the crisis through diplomacy and negotiations, and all had been rejected by General Manuel Noriega, an indicted drug trafficker. Two United States grand juries in Florida had indicted Noriega on February 4, 1988, on charges of cocaine and marijuana trafficking. *United States v. Noriega*, No. 88-0079 CR (S.D. Fla. Filed Feb. 4, 1988); *United States v. Noriega*, No. 88-28 CR-T (M.D. Fla. Filed Feb. 4, 1988).

On December 15, Noriega had declared his military dictatorship to be in a state of war with the United States, and had publicly threatened the lives of Americans in Panama. The next day, President Bush continued, forces under Noriega's command (the Panama Defense Forces) shot and killed an unarmed American serviceman and wounded another, arrested and brutally beat a third American serviceman, and then "brutally" interrogated the serviceman's wife, threatening her with sexual abuse. The President declared:

> General Noriega's reckless threats and attacks upon Americans in Panama created an imminent danger to the 35,000 American citizens in Panama. As President, I have no higher obligation than to safeguard the lives of American citizens. And that is why I directed our Armed Forces to protect the lives of American citizens in Panama and to bring General Noriega to justice in the United States. I contacted the bipartisan leadership of Congress last night and informed them of this decision, and after

> taking this action, I also talked with leaders in Latin America, the Caribbean, and those of other U.S. allies.
>
> I have today directed the Secretary of the Treasury and the Secretary of State to lift the economic sanctions with respect to the democratically elected government of Panama and, in cooperation with that government, to take steps to effect an orderly unblocking of Panamanian Government assets in the United States. I'm fully committed to implement the Panama Canal treaties and turn over the Canal to Panama in the year 2000. The actions we have taken and the cooperation of a new, democratic government in Panama will permit us to honor these commitments. As soon as the new government recommends a qualified candidate, Panamanian, to be Administrator of the Canal, as called for in the treaties, I will submit this nominee to the Senate for expedited consideration.

25 WEEKLY COMP. PRES. DOC. 1974–75. *See also Id.* at 1977. *See Cumulative Digest 1981–1988* at 316–322, 2985–2991, for a discussion of the background and economic sanctions imposed.

On December 20 President Bush also issued a memorandum for the Secretary of Defense, directing and authorizing the units and members of the United States armed forces to apprehend General Manuel Noriega and any other persons in Panama currently under indictment in the United States for drug-related offenses. The memorandum directed that any persons so apprehended were to be turned over to civil law enforcement officials of the United States as soon as practicable. 25 WEEKLY COMP. PRES. DOC. 1984 at 1976. On January 3, 1990, Noriega turned himself in to U.S. authorities in Panama with the full knowledge of the Panamanian government, and was flown to Howard Air Force Base in Panama, where U.S. Drug Enforcement Administration officials arrested him. He was arraigned on January 4, 1990, in the U.S. district court in Miami on charges stemming from his earlier indictment for drug trafficking and was convicted in 1992.

On December 21, 1989, the President provided Congress with a report regarding the deployment of U.S. armed forces to Panama. 25 WEEKLY COMP. PRES. DOC. 1984, 1985 (Dec. 25,

1989). The President stated that he was doing so because of his desire to keep Congress fully informed, consistent with the War Powers Resolution. The President stated that the legal authority for the deployment included the Constitution of the United States, Article 51 of the United Nations Charter, as well as the Panama Canal Treaty.

The international legal justification for the use of armed force in Panama was addressed in full in a telegram sent to all overseas posts in January 1990. The telegram provided as follows, in pertinent part:

> On December 20, 1989 military operations were initiated by the United States against the armed forces of Manuel Antonio Noriega in Panama. These actions were in accordance with international law, including the Charters of the United Nations and the Organization of American States. They did not constitute intervention in the internal affairs of Panama, nor were they directed against the territorial integrity or political independence of Panama. On the contrary, they were welcomed by the legitimate democratically elected government of Panama led by President Endara and undertaken with his support and cooperation. They were a lawful exercise of the right of self-defense by the United States of its armed forces and nationals, and of the right and responsibility of the United States under the Panama Canal Treaty to protect and defend the operation of the Panama Canal.
>
> The United States believes, and the practice of nations reflects, that the legality of any use of force must be evaluated by taking into account all the relevant facts and circumstances surrounding the event, including the effect of the action on the objectives sought to be served by the applicable international rules. In this case, an evaluation of the legality of U.S. actions in Panama must include a careful consideration of: the behavior of Manual Noriega, including his declaration of a state of war with the U.S., his attacks upon U.S. personnel lawfully engaged in the protection and defense of the Panama Canal, and continuing use of force to usurp the powers of legitimate gov-

ernmental authorities in Panama; the provisions of the UN and OAS Charters, and the Panama Canal Treaties; and the support and cooperation extended to the U.S. by President Endara. These factors, taken together, establish the propriety of the necessary but exceptional measures to which the U.S. was compelled to resort.

*A. U.S. actions were a legitimate exercise of the right of self-defense.*

Noriega's hostility toward the U.S. is of legal relevance because of the extreme forms it had taken prior to the U.S. actions, and because of the likelihood of even more damaging actions in the immediate future. For a number of months prior to December 1989, the Noriega regime has engaged in a calculated and escalating program of forcible actions against U.S. armed forces and U.S. nationals who were lawfully present in Panama pursuant to the Panama Canal Treaty. This included armed penetrations of U.S. bases, hostile acts against U.S. forces, and violent harassment of U.S. personnel. The substantive and procedural rights of U.S. military forces were violated in literally hundreds of incidents. Efforts to bring about a cessation of such attacks on U.S. facilities and personnel through peaceful procedures were unavailing.

On 15 December the Noriega regime declared that a state of war existed between the United States and Panama, and Manuel Noriega gave a highly inflammatory address which openly suggested the use of force against Americans. Although the U.S. made immediate efforts to downplay these provocative statements, and thus to reduce the potential for violence, a series of brutal acts by forces under Noriega's control against U.S. personnel and dependents occurred during the next few days. Specifically, on 16 December a U.S. Marine officer was killed without justification by Panama Defense Forces (PDF) personnel. Other PDF elements severely beat a U.S. naval officer and unlawfully detained, physically abused and threatened his wife. These were clearly not isolated incidents, but part

of a deliberate and escalating pattern of forcible actions against U.S. personnel which were likely to recur and become more serious if not dealt with immediately.

Accordingly, the United States was entitled to exercise its inherent right of self-defense recognized by Article 51 of the UN Charter and Article 21 of the OAS Charter. This right encompasses measures taken to deal with the threat or use of force against the territory of a state, its armed forces, or its nationals. The measures taken by such a state must be necessary and proportionate to the threat.

The U.S. operations in Panama which began on 20 December were a legitimate exercise of this right of self-defense. For many months the United States had attempted to deal with this situation through peaceful means. The United States had made repeated protests of actions by the Noriega regime, had engaged in bilateral negotiation with Noriega, had encouraged and supported efforts by the OAS to deal with the situation, and had taken peaceful measures involving economic and political sanctions. The decision to deploy U.S. forces was taken only after the exhaustion of all peaceful avenues. Under these circumstances, the United States clearly had the right to use force in self-defense to protect its forces and the 35,000 U.S. nationals in Panama from further attack.

The actions taken by the United States on and after 20 December were limited to what was necessary and proportionate, and were specifically designed to minimize (to the extent possible) injury and loss to civilians and civilian property. U.S. forces were instructed to conduct their operations in accordance with the laws of armed conflict, and the U.S. chose to provide all captured PDF members with the protections given to prisoners of war. U.S. actions were directed only against PDF elements and Noriega's paramilitary "dignity battalions," which posed a direct and immediate threat to U.S. nationals and personnel.

*B. U.S. Actions were an Exercise of Rights Granted under the Panama Canal Treaty.*

The strategic and economic interests of the United States are not merely substantial, they are incorporated

into the Canal Treaty. The United States, in exchange for the rights we had under previous treaties, including the right to exercise sovereign powers in the former canal zone in perpetuity, and to take military action elsewhere in Panama as necessary to defend the canal, received continuous treaty rights to operate, maintain, protect and defend the canal, including extraordinary rights to conduct military activities in Panama. These rights were seriously jeopardized by Noriega's hostility toward and attacks on canal personnel and interests. Under these unique treaty provisions, the United States had the right to take necessary measures to prevent compromise of its ability efficiently to operate and protect the canal from further aggressive actions.

Specifically, the United States has not only the right but the obligation, under the 1977 Panama Canal Treaty, to protect the operation of the canal. To this end, the Treaty grants the United States the right to station armed forces in Panama, together with rights of free and unimpeded movement, exercises, maintenance of various installations, and defense of the canal (and personnel and facilities vital to its operation) against threats from any source.

Article I of the treaty provides that Panama grants to the United States: ". . . the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the canal. . . . In view of the special relationship established by this treaty, the United States of America and the Republic of Panama shall cooperate to assure the uninterrupted and efficient operation of the Panama Canal."

Article III grants to the United States "the rights to manage, operate, and maintain the Panama Canal" and complementary installations, including the maintenance of the work force necessary to continue canal operations on an efficient basis. Article IV(2) of the treaty provides that: ". . . the United States of America shall have primary responsibility to protect and defend the canal. The right of the United States of America to station, train, and move military forces within the Republic of Panama are described

in the agreement in implementation of this article. . . .

The agreement in implementation of Article IV grants various rights to the U.S. In this connection, Article XV(l) provides that vessels, aircraft, vehicles and equipment of U.S. forces "may move freely" through Panamanian territory, air space and waters when in performance of official duties, without charge or "any other impediment."

During the months preceding the current U.S. military operations, both members of U.S. forces and members of the canal workforce came under increasing pressure and intimidation from the Noriega regime. As indicated above, in the days immediately preceding 20 December, U.S. servicemen were unlawfully detained, brutally mistreated and (in one instance) killed without justification. Noriega deliberately raised the level of animosity against the U.S. presence and effectively invited violence against U.S. nationals and those cooperating with them. These threats were obviously escalating and were making the efficient operation and defense of the canal increasingly difficult. As Secretary of State Baker has noted, intelligence reports indicated that acts of sabotage against the canal were contemplated. Under these circumstances, the United States had the right to take proportionate measures to ensure the continued safe and efficient operation of the canal.

Such measures do not constitute a violation of the prohibition, contained in Article V of the treaty and Article 11 of the agreement in implementation of Article IV, against intervention in the internal affairs of Panama. This was made clear in a U.S. reservation to which Panama agreed at the time of ratification, which states that "any action taken by the United States of America in the exercise of its rights to assure that the Panama Canal shall remain open, neutral, secure, and accessible . . . shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity." In any event, under international law, neither the exercise of the right of self-defense in accordance with the UN and OAS Charters, nor action taken with the consent of the legitimate government of Panama, nor the

exercise of treaty rights freely granted by the government of Panama, could constitute unlawful intervention into Panamanian internal affairs.

*C. U.S. Actions were taken with the Support and Cooperation of the Legitimate Government of Panama.*

Another unique and important fact given substantial weight by the United States was the position of President Endara. According to all international observers—as well as the Panamanian electoral tribunal, all members of which were appointed by Noriega—Endara won the national elections held in May 1989 by a substantial margin. Manuel Noriega, an unelected official, purported to annul the election results, including by physically threatening the members of the tribunal, and "appointed" his own "government"—through which he intended to continue to rule Panama. Noriega's "dignity battalions"—a private army created apart from the military institution of Panama—viciously and publicly assaulted Endara and other opposition candidates, and violently suppressed all dissent. During the months that followed, Noriega ignored the attempts of the OAS and many western hemisphere governments to encourage the restoration of democratic government and civil liberties to Panama. For its part, the United States consistently had refused to accept the Noriega regime as the legitimate government of Panama, and kept in constant contact and cooperation with President Endara and his subordinates with respect to U.S. obligations toward Panama.

The U.S. charge in Panama advised President Endara of impending U.S. plans for military action. Endara and his two vice presidents welcomed these plans, and immediately began to cooperate fully in their implementation. On 20 December, Endara was sworn into the office to which he was legally elected, and began exercising all the functions of office and appointing officials to assume direction over the components of the Panamanian government. Since 20 December, his government has progressively reasserted its lawful control over the entirety of Panamanian

territory in close cooperation with U.S. authorities. Under the circumstances, it is clear that U.S. military operations in Panama have been undertaken with the complete support and cooperation of the legitimate government of Panama.

The fact that Endara had been unable to exercise the powers of his office prior to the U.S. action is relevant, but it does not deprive his support and cooperation with U.S. actions of legal weight. He was chosen as president by the people of Panama, and his prompt and widespread acceptance by them after the U.S. action and the official proclamation of the electoral results by the electoral tribunal (once freed of Noriega's intimidation) reflected his continuing legitimacy. To have obtained his approval at an earlier point, or with greater formality, would have exposed him to unjustifiable risk under the circumstances.

Article 2(4) of the United Nations Charter provides that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with purposes of the United Nations." The U.S. military operations since 20 December did not violate this basic principle. On the contrary, as indicated above, the United States acted with the full support and cooperation of the legitimate government of Panama. Such operations, with the support and cooperation of the legitimate government of the country in which the operations occur, do not violate the principle stated in Article 2(4) of the UN Charter. The United States has never sought to compromise the territorial integrity or political independence of Panama; its actions have in no way resulted in the detachment of Panamanian territory or the usurpation of Panamanian sovereignty. Rather, its actions are directed at supporting the government chosen by the Panamanian people. Current U.S. military operations will terminate as soon as the legitimate Panamanian authorities are ready to assume responsibility for security in Panama, and the United States fully intends to carry out its obligations under the Panama Canal Treaty. Accordingly,

U.S. actions are not in violation of Article 2(4) of the UN Charter, but rather are strongly supportive of the political independence and territorial integrity of Panama.

Finally, the U.S. action is consistent with the purposes of the UN and the OAS Charters. The Panamanian people's rights to self-determination, civil liberty, and human rights have been advanced. The end of Noriega's unlawful and forcible usurpation of authority reduced Panama's involvement in drug trafficking, moreover, and has also ended whatever plans he may have had with respect to the massive private arsenal he had accumulated. Panama's sovereignty is intact; U.S. forces have begun withdrawing, and their activities are restricted to functions requested by the Panamanian Government. The Panama Canal Treaties, on the verge of being undermined by Noriega's conduct, have been saved. Presidents Reagan and Bush acted with great restraint during months of frustration and danger and military action was undertaken only after: Noriega's illegitimacy had become established for all to see by his refusal to abide by the will of the Panamanian people and the OAS, and by his violation of international narcotics conventions; his regime's hostility toward the U.S. crossed the line from harassment to homicide, and reached the point of a declaration of war; U.S. treaty rights were on the verge of being lost; and all measures short of the use of force had been invoked without success. The duly elected president of Panama supported and cooperated with the U.S. action. In pursuing this action, moreover, the U.S. sought to achieve the objectives with as few casualties as possible.

Telegram from the Dept. of State to all diplomatic and consular posts, January 30, 1990. *See also* 84 Am. J. Int'l Law 545 (1990).

### *b. Prisoners of war*

On January 31, 1990, the Legal Adviser of the State Department, Abraham D. Sofaer, responded to an inquiry from Attorney General Richard L. Thornburgh regarding the applicability of the

Geneva Convention Relative to the Protection of Prisoners of War (Geneva Convention III) (Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364) to members of the Panama Defense Forces (PDF) who fell into U.S. hands during the hostilities. The letter noted that the general counsel of the Department of Defense concurred with the State Department's views. The Legal Adviser's letter stated the following:

> On December 20, 1989, the Department of State and the Department of Defense, including the Joint Chiefs of Staff, agreed that all individuals captured during the hostilities would be provided the protections normally accorded to prisoners of war until their precise status could be determined. The same Departments subsequently decided that these protections should be provided to any members of the PDF who fell into U.S. hands until their final release and repatriation even if they might not be entitled to these protections under the terms of Article 4 of Geneva Convention III.
>
> It should be emphasized that the decision to extend basic prisoner of war protections to such persons was based on strong policy considerations, and was not necessarily based on any conclusion that the United States was obligated to do so as a matter of law. Historically, many countries have sought to avoid applying provisions of the Geneva Convention of 1949 and their predecessors based on various grounds, including spurious claims that the protections of the Conventions were not applicable. For example, members of the U.S. Armed Forces have suffered brutal treatment while in the hands of belligerents that have refused to extend them prisoner of war status based on fabricated allegations that they were guilty of war crimes.
>
> As a nation, we have a strong desire to promote respect for the laws of armed conflict and to secure maximum legal protection for captured members of the U.S. Armed Forces. Consequently, the United States has a policy of applying the Geneva Conventions of 1949 whenever armed hostilities occur with regular foreign armed forces, even if arguments could be made that the threshold stan-

dards for the applicability of the Conventions contained in common Article 2 are not met. In this respect, we share the views of the International Committee of the Red Cross that Article 2 of the Conventions should be construed liberally. *See* III International Committee of the Red Cross, *Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War* 22 (Pictet ed. 1960).

It bears emphasis that, although the Geneva Conventions of 1949 have been deemed not to be self-executing in certain contexts, it is the responsibility of the Executive Branch, in fulfillment of the nation's international obligations, to ensure that the Conventions are respected. Any alleged violations of Geneva Convention III could be the subject of formal complaints by a prisoner of war's State or a neutral country or organization, such as the International Committee of the Red Cross, which in many circumstances acts as a Protecting Power under the Convention.

Against this background, we would like to explain some of the key aspects of Geneva Convention III.

Prisoner of war status is generally sought by capture individuals because persons entitled to such status may not be prosecuted for legitimate acts of war. Thus, under international law, prisoners of war may not be prosecuted for the lawful killing of enemy combatants on the field of battle. However, neither the laws of war nor Geneva Convention III were ever intended to provide any kind of immunity for common crimes committed against the Detaining Power outside of military hostilities. Geneva Convention III is unambiguous in this regard. Articles 84 and 99, among other provisions, clearly recognize that prisoners of war may be tried for pre-capture offenses in civilian courts if members of the armed forces of the Detaining Power can be tried for similar offenses in those courts. (U.S. military personnel can, of course, be tried for offenses against U.S. law in federal district courts.) As stated in the authoritative commentary to Geneva Convention II prepared by the International Committee of the Red Cross, this includes prosecution for acts committed before the initiation of hostilities. See Pictet, *supra*, at 417–418.**

Moreover, Article 119 of Geneva Convention III recognizes that prisoners of war against whom criminal proceedings for an indictable offense are pending may be detained until the end of the proceedings and, if necessary, until the completion of any sentence levied upon them.

Last, nothing in Geneva Convention III requires that all PDF members being treated as prisoners of war be detained in Panama. The provisions of Geneva Convention III relating to internment prohibit a Detaining Power from placing members of the armed forces of one Nation with members of the armed forces of another Nation, or segregating prisoners of war of any one Nation according to impermissible criteria, such as religion or ethnicity. There is no requirement in Geneva Convention III, however, that a Detaining Power intern prisoners of war in the country where they were captured, or house members of the armed forces of one Nation in a single prisoner of war facility. Such a rule would be wholly impractical, and the practice of States has been to have as many prisoner of war camps as may be deemed appropriate.

In sum, consistent with Geneva Convention III, any PDF members charged with violations of U.S. law (whether prior to the conflict or not) may be held and tried for such offenses in federal district courts in the United States.

** This view is also supported by the consistent practice of Nations. For example, an official Department of State publication on international law refers to the conviction by a civilian court of a German naval officer, while being held as a prisoner of war, for an offense committed before the commencement of the war. 6 G. Hackworth, *Digest of International Law* 288 (1943) (citing a relevant Dec. 13, 1918 opinion in the Digest of Opinions of the Judge Advocate General of the Department of the Army, 1912–1940, at 16 (1942)). *See also* H. Fooks, *Prisoners of War* 196 (1924) (describing the prosecution of prisoners of war for acts "committed before the war").

Letter from Legal Adviser Abraham D. Sofaer to Attorney General Richard L. Thornburgh, January 31, 1990.

### 3. Measures of Self-Defense

On November 2, 1989, the Office of the Judge Advocate General of the Department of the Army issued a memorandum of law on Executive Order 12333 and assassination. Paragraph 2.11 of Executive Order 12333, 46 Fed Reg. 59,941, Dec. 8, 1981, provides that "no person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in assassination." The executive order was promulgated on December 4, 1981, and replaced a series of earlier executive orders renouncing assassination, beginning on February 18, 1976. The memorandum stated that its purpose was "to explore 'assassination' in the context of national and international law to provide guidance in the revision of U.S. Army Field Manual 27–10, The Law of Land Warfare, consistent with Executive Order 12333." The memorandum is provided in *Cumulative Digest 1981–1988* at 3411–3421.

## B. ARMS CONTROL

### 1. U.S.-USSR Agreement on Principles of Implementing Trial Verification and Stability Measures

On September 23, 1989, at Jackson Hole, Wyoming, the United States and the Soviet Union signed the Agreement on Principles of Implementing Trial Verification and Stability Measures that would be carried out pending the conclusion of the U.S.-Soviet Treaty on the Reduction and Limitation of Strategic Offensive Arms (the START treaty). The agreement may be found at 89 Dep't St. Bull. Nov. 1989 at 18.

The agreement was concluded in order to expedite effective verification procedures for the START treaty, and to ensure that these measures will be both practical and sufficient for effective verification. Accordingly, paragraph I of the agreement provides that the parties will "develop verification and stability measures to be implemented pending the conclusion of the [START Treaty]." Paragraph 2 provides that the trial verification and stability measures will involve agreed kinds of strategic offensive arms, and, pursuant to paragraph 3, will be selected to examine, refine and try out agreed

on-site inspection and continuous monitoring procedures. The agreement entered into force upon signature.

Pursuant to this agreement, during 1989 and 1990 the United States and the Soviet Union conducted trials of reentry vehicle on-site inspection procedures, early exhibitions of heavy bombers, and demonstrations of proposed tagging techniques.

### 2. U.S.–USSR Agreement on Reciprocal Advance Notification of Major Strategic Exercises

On September 23, 1989, at Jackson Hole, Wyoming, the U.S. and the Soviet Union entered into the Agreement on Reciprocal Advance Notification of Major Strategic Exercises. *See* 89 Dep't St. Bull. Nov.1989 at 20. It provides that each party will give the other advance notification of one major strategic forces exercise that includes the participation of heavy bomber aircraft to be held during each calendar year. The agreement entered into force on January 1, 1990, and is of unlimited duration.

Under Article III of the agreement, the parties agree to hold consultations to consider questions relating to the implementation of the agreement's provisions, and to discuss possible amendments aimed at furthering the implementation of the agreement's objectives. Consultations on major strategic exercises were held during the Strategic Arms Reduction Talks (START). The resulting Treaty on the Reduction and Limitation of Strategic Offensive Arms, signed in July 1991, included a provision (Article XIII(2)) setting forth a variety of conditions that apply to exercises notified pursuant to the 1989 agreement.

### 3. Soviet Compliance with Arms Control Agreements

#### *a. U.S. report for 1989*

On February 23, 1990, President George H. W. Bush submitted to Congress the fifth Report on Soviet Noncompliance with Arms Control Agreements to Congress, pursuant to section 1002 of Pub. L. No. 99-145, 99 Stat. 705, 22 U.S.C. 2592a (repealed Dec. 17, 1993, Pub. L. No. 103-199, 107 Stat. 2325). This law requires the President to submit an annual report "with respect to the com-

pliance of the Soviet Union with its arms control commitments, the findings of the President and any additional information necessary to keep Congress currently informed."

The unclassified version of the report addressed issues of Soviet failure to comply with existing arms control agreements during 1989, including the 1987 Intermediate Range Nuclear Forces Treaty (INF), the 1972 Anti-Ballistic Missile Treaty (ABM), the 1974 Threshold Test Ban Treaty (TTBT), the 1963 Limited Test Ban Treaty (LTBT), the Biological and Toxin Weapons Convention (BWC) and the Geneva Protocol on Chemical Weapons.

At the outset, the United States stated its views on compliance and arms control:

> Without exception, the United States expects meticulous fulfillment of all existing and future arms control agreements and all obligations that they entail. Otherwise, the arms control process cannot benefit U.S. national security, nor can treaties be ratified. I am committed to ensuring that there is scrupulous compliance with all arms control agreements and related undertakings. We cannot and will not accept any lesser standard. Put simply, arms control commitments must be precisely defined and scrupulously observed. Nothing less will do.

Soviet Noncompliance with Arms Control Agreements, p. 1

*(1) ABM Treaty*

Since the fall of 1983, the United States had raised the issue of a Soviet radar at Krasnoyarsk with the Soviet government. The ABM Treaty limited deployment of radars for early warning of ballistic missile attack to locations along the periphery of the national territory of each party and required that the radars be oriented outward. The Treaty permitted deployment of large phased-array radars ("LPARs") for the purpose of tracking objects in outer space or for use as national technical means of verification of compliance of arms-control agreements. Because of its location and direction, the United States had determined that the Krasnoyarsk radar was designed for ballistic missile detection and

tracking, in violation of the ABM Treaty, and demanded its removal. In 1989 the Soviet Union agreed to eliminate the radar, and admitted that it violated the ABM Treaty, as described in the report as follows:

> At the U.S.–Soviet Ministerial meeting, held at Jackson Hole, Wyoming on 22–23 September . . . the Soviets stated that they would eliminate the Krasnoyarsk radar, without preconditions. Although the Soviets have not yet begun dismantlement of this radar, preparations for a dismantlement may have begun. And on October 23, 1989, in a speech to a plenary session of the USSR Supreme Soviet, Soviet Foreign Minister Shevardnadze acknowledged that the radar was a violation of the ABM Treaty.
>
> The U.S. believes that a satisfactory solution to the Krasnoyarsk radar violation must reestablish the lead time acceptable to the United States that was the purpose of the LPAR provisions of the ABM Treaty; must verifiably remove all treaty- prohibited radar capability; should add no new obligations, requirements, or definitions to the ABM Treaty such as on-site inspections; and should not prejudice the sides' positions in the Defense and Space negotiations.

*Id*. at 13.

The report also noted other areas of concern about Soviet ABM and ABM-related activities, as follows:

> The construction of new LPARs on the periphery of the Soviet Union and the upgrade of the Moscow ABM system, the only deployed system for the defense against strategic ballistic missiles in the world, appear to be consistent with the ABM Treaty. LPARs, however, have always been considered to be the long lead-time element of a possible territorial defense. Krasnoyarsk is only one of a network of nine such radars. Because they have an inherent capability to track large numbers of objects accurately, these radars, depending on location and orientation, have the inherent technical potential to contribute to ABM battle management.

The report addressed several other U.S. concerns, including:

> The development and testing of components required for a mobile ABM system;
> The concurrent operation of air defense components and ABM components;
> The development of modern air defense systems that may have some ABM capabilities;
> The totality of Soviet ABM and ABM-related activities which suggest that the USSR may be preparing a defense of its national territory.

*Id*. at 5. The specific concerns listed are treated in further detail in the findings section of the report, *id*. at 13–18.

*(2) INF Treaty*

One issue arose for which the United States had made a noncompliance finding in the implementation of the 1987 Intermediate Range Nuclear Forces Treaty [INF Treaty]:

> *Transit of Missiles on Launchers at Lebedin*. Beginning in December 1988, Soviet SS-20 missiles on launchers transited between Lebedin missile operating base and Lebedin missile/ launcher repair facility, in violation of paragraph 8 of Article VIII of the INF Treaty. The Soviets notified the U.S. of the transits in accordance with the Treaty, and stated in the notification that the route was entirely within the boundary of the deployment area. After a U.S. demarche, the Soviets admitted that there had been a technical error in determining the actual boundaries of the deployment area by local officials, and that the error had been corrected. Since then, no further instances of missiles on launchers outside of the deployment areas and missile support facilities have been noted.
>
> Questions about compliance also arose, but did not result in conclusions of noncompliance. These include the SS-20 launch canister near Moscow and the welded SS-23 transporter-erector-launchers (TELs). The above

> noncompliance finding and compliance-related questions are addressed in greater detail in the findings below.
>
> A generic cause for concern is the implementation of the "lookalike/count-alike" principle. On two occasions the Soviets restored to original outward configurations equipment eliminated either under terms of the Elimination Protocol or prior to Treaty entry into force. Whether or not restoration permits use of the items for purposes inconsistent with the Treaty, such activity complicates national technical means (NTM) monitoring of Treaty limitations on the items. These two incidents involved an SS-20 launch canister near Moscow, and SS-23 launchers at Stan'kovo. In both cases the Soviets responded to U.S. concerns by displaying to U.S. NTM or inspectors the equipment in a configuration that removed questions about the status of these items.

Id. at 4. These concerns are treated in further detail in the findings section of the report, *id*., at 9–12.

*(3) Chemical, Biological, and Toxic Weapons Convention*

The report provided the following information regarding Soviet compliance with agreements in these areas:

> The U.S. judges that the Soviets continue to be in violation of the 1972 Biological and Toxic Weapons Convention. As documented in previous Reports, the U.S. found that the Soviets had violated the 1925 Geneva Protocol and related rules of customary international law; we found no basis for amending the previous conclusion that the Soviet Union had been involved in the production, transfer, and use of trichothecene mycotoxins for hostile purposes in Laos, Cambodia, and Afghanistan in violation of its legal obligation under international law as codified in the Geneva Protocol of 1925 and the Biological Weapons Convention of 1972. These violations, together with ongoing Soviet activities in these areas, remain a cause for serious concern. Since the January 1984 Report, we have had no confirmed evidence of use of lethal agents.

> The U.S. has determined that contrary to Soviet claims, the Soviet Union has maintained an active offensive biological warfare (BW) program and capability in violation of the 1972 Biological and Toxin Weapons Convention. We judge that Soviet capability may include advance biological and toxin agents of which we have little or no knowledge, and against which the U.S. has no defense.
>
> As a result of the 1986 BWC Conference, States party to the Convention agreed to exchange information on facilities built for high-risk (high-containment) biological experiments and facilities engaged in other activities relating to the Convention. While the Soviet submissions of date have been welcomed, the U.S. believes that activities continue at facilities which we believe to be associated with the offensive Soviet program, not all of which were contained in the Soviet declaration.
>
> On September 23, 1989, the U.S. and Soviet Union signed a Memorandum of Understanding (MOU) regarding a bilateral verification experiment and data exchange on chemical weapons. . . . On December 29, 1989, the Soviets provided data pursuant to this agreement. These data are presently being studied; preliminary indications are that these data differ in a number of respects from our understanding.

*Id*. at 5–6.

There were no new findings of noncompliance with the Limited Test Ban Treaty or the Threshold Test Ban Treaty. General discussion of these treaties may be found in the report *id*., at 7–8.

### *b. U.S. report for 1990*

On February 15, 1991, President Bush submitted the sixth Report on Soviet Noncompliance with Arms Control Agreements. This report was the first to fall under an amendment to section 1002 set forth in section 905(a) of the National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, 102 Stat. 1918, 2032. Pursuant to this legislation, the report was required to include, *inter alia*, a summary of the current status of arms control

agreements in effect between the U.S. and the USSR, and an assessment of all Soviet violations of these agreements. Section 1002(b)(1) and (b)(3).

*(1) ABM Treaty*

The report noted that the USSR had begun to dismantle the Krasnoyarsk radar, "a significant admitted violation of the ABM Treaty," but pointed out that "the Soviet Union, thus far, has not dismantled the radar as rapidly as they had promised. The United States will continue to monitor the Soviet Union's progress in eliminating the radar and will press the Soviet Union to fulfill its commitment to dismantle it completely by the end of 1991." Soviet Noncompliance with Arms Control Agreements, p. 4

The 1990 report then repeated the same concerns about Soviet ABM activity stated in the 1989 report, which are discussed above. These concerns are treated in further detail in the findings section of the report, *id*. at 16–22.

*(2) INF Treaty*

The 1990 report discussed a number of new issues that arose during 1990 concerning the 1987 Intermediate Range Nuclear Forces Treaty ("INF Treaty") as follows:

> The most serious concern related to implementation of the INF Treaty is the presence of SS-23 missiles and launchers in Bulgaria, Czechoslovakia, and Germany.
>
> In early 1990, the United States became aware for the first time of the existence of SS-23 missiles in three Eastern European countries. The Soviet Union has stated they transferred SS-23s to the GDR, Czechoslovakia, and Bulgaria, prior to entry into force of the INF Treaty. None of these three countries are parties to the INF Treaty. In addition, a Soviet document provided to the United Nations, cited a number of SS-23 missiles produced in excess of those declared by the Soviet Union in the INF Treaty or claimed by any of the Eastern European countries. Questions addressed are:

(1) were the SS-23 missiles Soviet "possessed" at any time since November 1, 1987;
(2) are there other SS-23 missiles beyond those the United States now knows to exist;
(3) did Soviet failure to inform the United States of the existence of these missiles constitute fraud, misrepresentation, or error?

From March 1 to March 10, 1990, the Soviet Union refused to permit the United States to use the newly operational Cargoscan nondamaging image producing equipment to image three Soviet missile canisters exiting Votkinsk. The fact that since late March the United States has been permitted to exercise this right does not excuse the Soviet refusal, on three occasions, to permit the United States to exercise its rights under the INF Treaty.

To enhance observation by national technical means of verification, the INF Treaty provides the United States the right to request the implementation of cooperative measures at certain ground launched ballistic missile deployment bases which are not former SS-20 bases. Paragraph 3(a) of Article XII requires that all missiles on launchers be removed completely from their fixed structures and displayed in the open "without using concealment measures." The United States has examined the question of whether certain Soviet practices during these cooperative measures violate this provision.

During 1990 the United States became aware of several SS-4 launch stands and missile transporter vehicles (MTVs) located at facilities not declared under the INF Treaty. The United States raised the issue of these undeclared items with the Soviet Union and sought specific actions to resolve the issue. Some, but not all, of the necessary steps towards resolution have been taken. The Report addresses the issue of whether these undeclared items constitute a violation of the INF Treaty.

The United States also became aware of several SS-5 missile transporter vehicles (MTVs) at facilities not declared in the INF Treaty. The SS-5 missile is a type limited by the INF Treaty. The Soviet Union clearly stated in

> the negotiations that no SS-5 support equipment existed. Some of these transporter vehicles have now been destroyed. The Report addresses the issue of whether undeclared SS-5 MTVs which were located at nondeclared INF locations were Treaty-limited items (TLI) under the Treaty, and, if so, whether the Soviet Union's failure to declare this equipment and failure to provide notification of elimination of the MTVs constitutes a violation of the INF Treaty.

*Id.* at 3–4. These concerns are treated in further detail in pages 11–16 of the report.

*(3) Chemical, biological, and toxic weapons*

The 1990 report repeated the concerns expressed in the 1989 report, *supra*.

*(4) Limited Test Ban Treaty*

The 1990 report provided the following discussion regarding Soviet compliance with this agreement:

> The Soviet Union conducted only one underground nuclear test in 1990. The test was conducted on October 24, 1990, at the Soviet test site at Novaya Zemlya. Following this test, nuclear debris was detected outside the Soviet Union, but the United States has not completed its analysis of this test.
>
> Since the Limited Test Ban Treaty (LTBT) came into force over 20 years ago, the Soviet Union has conducted its nuclear weapons test program in a manner incompatible with the terms of the Treaty. Since publication of the December 1988 Report, that conduct has continued and still results in the release of nuclear debris into the atmosphere beyond the borders of the USSR. Even though the material from these Soviet tests does not pose calculable health, safety or environmental risks, and the infractions have no apparent military significance, in response to our repeated attempts to discuss these occurrences with Soviet authorities, they have only denied that these events have occurred.

*Id.* at 5–6.

*(5) Ballistic Missile Launch Notification Agreement*

This agreement, which entered into force on May 31, 1988, required the Unite States and the USSR to provide 24-hour advance notification of the planned date, launch area, and area of impact for any launch of an intercontinental ballistic missile (ICBM) or submarine-launched ballistic missile (SLBM). The 1990 Report stated that the USSR had not provided the proper notification of ICBM launches and that the United States had raised the issue with the USSR, requesting information to explain why these launches had not been notified under the agreement. A Soviet response had not been received by the date of the report. *Id*. at 7–8.

*(6) Assessment of national security risks of Soviet violations*

As required by the 1989 National Defense Authorization Act, the final part of the 1990 Report assessed the military risks associated with the Soviet treaty violations and compliance concerns raised in the report as "minor to none," with one exception—the Soviet chemical, biological and toxin research and production—which the report stated "may provide the Soviet Union a militarily significant advantage." Id. at 8 and 9.

The conclusion of this section of the 1990 report stated:

> Military risk is only part of national security considerations and it is judged that the political significance of the overall Soviet behavior outweighs the existing military risks and thus gives rise to concerns.
>
> In one sense all Soviet violations are equally important. As violations of legal obligations or political commitments, they cause concern regarding Soviet commitment to arms control. In another sense all Soviet violations are not of equal importance. While some individual violations are of little apparent military significance in their own right, such violations can acquire importance if left unaddressed and are permitted to become precedents for future more threatening violations. Moreover, some issues that individually have little military significance could conceivably become significant when taken in their aggregate.

> In this context, the United States views the violations, the instances of bad faith, the inattention to scrupulous compliance, and the less than forthcoming responses to U.S. concerns described in this report to be matters of serious concern. These potentially undermine U.S. confidence in Soviet compliance with existing agreements and threaten the future viability of the arms control process, a process which relies on the willingness of treaty partners to comply.

*Id.* at 9.

### 4. Conference on Prohibition of Chemical Weapons

On January 7–11, 1989, the Conference on the Prohibition of Chemical Weapons was held in Paris, attended by the representatives of 145 nations. In an address to the conference on January 7, Secretary of State George Shultz outlined steps to be taken to eradicate the threat of chemical weapons, as follows:

> — Every nation must undertake the political commitment to comply with the international norms relating to chemical weapons use.
> — Nations which have not done so should accede to the 1925 Geneva protocol.
> — The UN Secretary General's ability to investigate promptly allegations of illegal use of chemical weapons in armed conflict should be reinforced and enhanced.
>
> We should consider procedures for humanitarian assistance to victims of chemical weapons attack. We need to bolster support for the measures embodied in the UN Charter should there be any future illegal use of chemical weapons—and here I have Chapter 7 sanctions expressly in mind.
>
> There is an urgent need for steps to achieve greater international restraint in the export of chemical weapons-related technologies, chemicals, and weaponry. Since 1985 the United States has cooperated with 18 other nations to

coordinate efforts to control international trade in chemical weapons-related commerce. We should explore possibilities for more effective means to control the transfer of chemical weapons precursors, technology, and weapons without impeding legitimate commerce and peaceful pursuits that will benefit mankind.

Finally, I also urge you to join me in committing our governments not only to prevent the use of chemical weapons in armed conflict but also to prevent the spread of chemical weapons to terrorist groups.

The problem of chemical weapons proliferation is as difficult as it is dangerous. The challenge it poses to world security is so urgent that international efforts in this area should not be made contingent on other difficult arms control issues, such as nuclear proliferation. And if we are to deal with the chemical weapons threat effectively in all its respects, we must see the problem for what it is.

Chemical weapons proliferation is *not* an issue between the developed and the developing world. It is *not* a matter of some nations trying to maintain a monopoly on chemical weapons by making it impossible for other nations to obtain them. All countries have everything to gain by keeping their focus on the real issue: preventing these weapons from spreading and being used, even as we devote ourselves to ridding the world of those which already exist.

For our part, the United States has participated actively in negotiations at the Conference on Disarmament since 1971. We are committed to success in these negotiations, and we will stay at the table for however long it takes. We will abide by the 1925 Geneva protocol and all other provisions of international law related to use of chemical weapons, including the 1949 Geneva conventions. We urge every country here—indeed, every country in the world—to make a similar pledge.

89 Dep't St. Bull., Mar. 1989 at 6.

On January 11 the conference issued a final declaration. On the same day, Ambassador William F. Burns, head of the U.S. delegation and Director of the Arms Control and Disarmament

Agency, made a statement commenting on the final declaration as follows:

> We are pleased that the final declaration includes the following important elements.
> — The conference condemned the use of chemical weapons in violation of international law and existing norms.
> — All participants stressed the importance and continuing validity of the Geneva protocol of 1925. States party to the protocol reaffirmed their commitments. This fully preserves the terms on which each party has ratified the protocol, including their reservations.
> — Ten states heeded the conference's call to become parties to the protocol.
> — Participants expressed grave concern over the spread of chemical weapons and called on all to exercise restraint and act responsibly. For our part, we will continue to exercise export controls and urge others to do the same.
> — The conference reinforced the role of the Secretary General in investigating reports of chemical weapons use and expressed support for appropriate and effective actions under the UN Charter. This includes consideration of international sanctions under Chapter VII of the UN Charter.

*Id.* at. 10.

### 5. Treaty on Conventional Armed Forces in Europe

On November 19, 1990, in Paris, the United States and twenty-one other states signed the Treaty on Conventional Armed Forces in Europe (CFE). 1990 U.S.T. Lexis 227, S. Treaty Doc. No. 102-8 (1990) . The geographic area to which the treaty applies is the entire land territory of the states parties in Europe, from the Atlantic Ocean to the Ural Mountains (ATTU), including all European island territories of the states parties and specified portions of the Soviet Union and Turkey.

Within this area of application, the treaty establishes numerical limits on five categories of conventional armaments and equip-

ment: battle tanks, armored combat vehicles, artillery, combat aircraft, and attack helicopters. It requires the states parties to reduce their holdings of these materials to the extent necessary to meet those limits. There are related geographical limits on battle tanks, armored combat vehicles and artillery. The treaty also establishes a wide-ranging verification system, including on-site inspections, to confirm mutual compliance.

For a discussion of the treaty, *see Cumulative Digest 1981–1988* at 3587–3594. *See also* 85 Am. J. Int'l L. 548 (1991).

### Cross references

*Sanctions related to arms control and non-proliferation*, **Chapter 16.A.**
*German unification treaty*, **Chapter 4.A.2.**

# Table of Cases



* An asterisk denotes cases in courts and for a, including the International Court of Justice, other than U.S. federal and state courts.

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