Digest of United States Practice in International Law

2008

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Elizabeth R. Wilcox
Editor

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Preface

I am pleased to introduce this latest edition of the *Digest of United States Practice in International Law* for the calendar year 2008. This is the eleventh edition of the *Digest* published by the International Law Institute, and the fifth edition co-published with Oxford University Press. We are very pleased with our co-publishing relationship with them, and look forward to helping them make the *Digest* even more widely available in the future.

It is my hope that practitioners and scholars will find this new edition of the *Digest*, tracking the most important developments in the state practice of the United States during 2008, to be useful.

As always, the Institute is also very pleased to work with the Office of the Legal Adviser to make the *Digest* available for the use of the international legal community, and we express our greatest appreciation for their commitment to the *Digest*.

Don Wallace, Jr.
Chairman
International Law Institute

Introduction

I am pleased to introduce the annual edition of the *Digest of United States Practice in International Law* for 2008. This volume provides a historical record of developments occurring during the period when my predecessor, John B. Bellinger, III, served as Legal Adviser. For the first time, this edition is fully available not just in print, but also on the State Department's website (*www.state.gov/s/l*); earlier volumes are being posted on that site as well. By posting the *Digest* on-line, we seek to ensure that U.S. views of international law are readily accessible to our counterparts in other governments and international organizations, judges, practitioners, legal scholars, students, and other users, both within the United States and around the world.

Significant legal developments occurred throughout 2008, including ones relating to international terrorism and piracy, conflict resolution, nonproliferation of nuclear weapons, and international human rights and humanitarian law. For example, the UN Security Council, with U.S. leadership, adopted resolutions authorizing the use of force to repress piracy off the Somali coast, a resolution maintaining and strengthening the Somali arms embargo, and a resolution reauthorizing the African Union peacekeeping mission to Somalia. The United States concluded a strategic framework agreement and a status of forces agreement with Iraq, an agreement for nuclear cooperation with India, and a comprehensive claims settlement agreement with Libya. In the area of human rights, the United States made its first appearance before the Committee on the Rights of the Child, which met to consider the initial U.S. reports on U.S. implementation of the two optional protocols to the Convention on the Rights of the Child: (1) the Protocol on the Sale of Children, Child Prostitution and Child Pornography and (2) the Protocol on the Involvement of Children in Armed Conflict.

In 2008, by negotiating and concluding treaties, pursuing other diplomatic initiatives, and participating in arbitration and litigation, the United States also remained actively engaged in the development of international law. For example, in 2008 the U.S. Senate provided advice and consent to 82 treaties. The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the International Convention against Doping in Sport entered into force for the United States, for example, and the United States took the final steps to enable several other multilateral conventions also to enter into force for the United States. The U.S. Supreme Court issued a decision relating to detainees at Guantanamo Bay (*Boumediene v. Bush*) and a decision concerning two U.S. citizens held by the Multinational Force in Iraq (*Munaf v. Geren* and *Geren v. Omar*). The Court also held that the International Court of Justice's 2004 judgment in the *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*) did not preempt contrary state law. The United States made several submissions to the International Court of Justice concerning Mexico's attempt to seek an interpretation of the Court's *Avena* decision.

The *Digest* continues to reflect the sustained, collaborative effort of many dedicated members of the Office of the Legal Adviser. For 2008, I want especially to thank former editor Sally Cummins for drafting significant portions of Chapters 5, 10, 12, and 18, as well as parts of Chapters 1, 4, and 8, and for reviewing and editing drafts of the rest of the publication. This volume reflects her invaluable contributions and commitment over the years to ensuring the high quality of the *Digest*. Her extraordinary expertise ensured a smooth transition for the new editor, Elizabeth Wilcox. Among the many volunteers whose significant contributions to the current volume should be acknowledged is Ash Roach, who retired in January 2009 after serving in the Office of the Legal Adviser for 20 years, following a distinguished career in the U.S. Navy. Once again, I express very special thanks to Joan Sherer, the Department's Senior Reference Librarian, Legal, for her invaluable technical assistance.

We continue to prize our rewarding collaboration with the International Law Institute and Oxford University Press as

co-publishers. We particularly appreciate their willingness to work with us to accommodate our desire to provide the *Digest* on the State Department's website. The Institute's Director, Professor Don Wallace, and editor William Mays again have our sincere thanks for their superb support and guidance.

Now well into its third century, the United States practice of international law continues to evolve; it is our hope that it should be the subject of continuous examination, dialogue, and debate around the world. For that reason, comments and suggestions from readers are always most welcome.

Harold Hongju Koh
The Legal Adviser
Department of State

Note from the Editor

Publication of the *Digest of United States Practice in International Law* for calendar year 2008, both in print and for the first time on the State Department's website, brings the new *Digest* series current for the period 1989–2008. I thank first of all Sally Cummins, my predecessor, whose assistance and guidance has been essential in producing this volume. I would also like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible. I am also grateful for the many lawyers in other governments, practitioners, and law librarians who provided views on ways to make the *Digest* as widely accessible as possible and helped shape our approach to making the *Digest* fully and freely available online for the first time this year. Finally, I would like to express appreciation to the International Law Institute and Oxford University Press for their valuable contributions in publishing the *Digest*.

The 2008 volume continues the general organization and approach adopted in 2000. In order to provide broad coverage of significant developments during the covered year, we rely on the text of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Entries in each annual *Digest* pertain to material from the relevant year, leaving it to the reader to check for updates. As in other volumes, however, we note the release of several U.S. Supreme Court decisions in 2009; relevant aspects of the decisions will be discussed in *Digest 2009*. This year's volume also notes some other federal appellate court and arbitral decisions issued before the *Digest* went to press and includes footnotes providing updates concerning certain other developments that occurred in 2009. *Digest 2009* will discuss relevant aspects of these decisions and developments. This volume

also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to assure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific Internet cite in the text. We realize that Internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily available elsewhere, we have placed them on the State Department website, at *www.state.gov/s/l/c8183.htm*.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System is available to the public without charge for UN-related documents of all types at *http://documents.un.org/*. The UN's home page at *www.un.org* also remains a valuable source.

The U.S. Government Printing Office provides access to government publications at *www.gpoaccess.gov*, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws, and Statutes at Large; and Public Papers of the President and the Weekly Compilation of Presidential Documents.

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and consent, with related materials), available at *www.gpoaccess.gov/serialset/cdocuments/index.html*, and Senate Executive Reports (for the Senate Committee on Foreign Relations reports of treaties to the Senate for vote on advice and consent), available at *www.gpoaccess.gov/serialset/creports/index.html*. In addition, the Office of the Legal Adviser now provides a wide range of current treaty information at *www.state.gov/s/l/treaty/* and the Library of Congress provides extensive treaty and other legislative resources at *http://thomas.loc.gov*.

The U.S. government's official web portal is *www.firstgov.gov*, with links to government agencies and other sites; the State Department's home page is *www.state.gov*.

While court opinions are most readily available through commercial online services and bound volumes, some materials are available through links to individual federal court websites provided at *www.uscourts.gov/links.html*. The official Supreme Court website is maintained at *www.supremecourtus.gov*. The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at *www.usdoj.gov/osg*.

Selections of material in this volume were made based on judgments as to 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.

As always, we welcome suggestions from those who use these volumes.

Elizabeth R. Wilcox

Chapter 1

Nationality, Citizenship, and Immigration

A. NATIONALITY AND CITIZENSHIP

1. Non-citizen Nationals: Taiwan Claimants

On March 18, 2008, the U.S. District Court for the District of Columbia granted a U.S. motion to dismiss a case brought by individuals residing on Taiwan who sought a declaratory judgment that they were U.S. nationals and asserted that the United States was exercising sovereignty over Taiwan. *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.C. 2008). *See* Chapter 9.A.2 for discussion of the district court's decision. After the plaintiffs appealed to the U.S. Court of Appeals for the District of Columbia Circuit, the United States filed its brief in support of affirmance of the district court's decision. *Lin v. United States*, D.C. Cir. Civil Action No. 08-5078. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. At the end of 2008, the appeal was pending.*

2. New Rules on Loss and Restoration of U.S. Citizenship

On August 6, 2008, the Department of State published revisions to the Foreign Affairs Manual rule concerning loss and

* Editor's note: On April 9, 2009, the D.C. Circuit affirmed the district court's judgment of dismissal. *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009). The Supreme Court denied certiorari on October 5, 2009. 2009 U.S. LEXIS 6061.

restoration of citizenship (7 FAM 1200). The new rule is available at *www.state.gov/documents/organization/109065.pdf*. In a February 8, 2008, cable to U.S. posts abroad, excerpted below, the Department of State provided an overview of the rule change.

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* * * *

The basic principles regarding loss of nationality have not changed. . . . Four elements must be established before a finding of loss may be made:

(a) The person is in fact a U.S. citizen/national;
(b) The person committed an act that is potentially expatriating under 8 U.S.C. 1481(a) (INA 349(a)).
(c) The person committed the act voluntarily. A person who commits a potentially expatriating act is presumed to have done so voluntarily, but the presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily. (8 U.S.C. 1481(b), INA 349(b))
(d) The person intended to relinquish the rights and privileges of United States citizenship. The U.S. Supreme Court has spoken (Vance v. Terrazas, 444 U.S. 252 (1980)): retention of citizenship is a constitutional right, and a person cannot lose U.S. nationality unless he/she intends to relinquish that status.

In light of the U.S. Supreme Court decisions in Vance v. Terrazas (1980) and Afroyim v. Rusk (1967) (summarized in 7 FAM 1200 Appendix B), in order to expedite the resolution of cases, the Department adopted in 1990 the administrative presumption found in 22 CFR 50.40 that a U.S. citizen/noncitizen national intends to retain U.S. nationality when he/she commits certain expatriating acts.

That administrative presumption is in the process of being revised in 22 CFR Part 50, and under the revised 7 FAM 1222[, the presumption] applies when a U.S. citizen:

(a) Is naturalized in a foreign state (INA 349(a)(1)); or
(b) Takes an oath of allegiance to a foreign state (INA 349(a)(2)); or
(c) Serves in the armed services of a foreign state as a commissioned or non-commissioned officer of a foreign state, not engaged in hostilities against the United States (INA 349(a)(3)); or
(d) Accepts non-policy level employment with a foreign government and is either a dual national of the state of employment or has taken an oath or affirmation in connection with the position (INA 349(a)(4)).

Unless such a person affirmatively, explicitly, and unequivocally asserts that one of the above acts was performed with an intent to relinquish U.S. nationality or the person has engaged in other conduct which is inconsistent with retention of U.S. citizenship (see 7 FAM 1270 and 7 FAM 1280), he/she will retain U.S. nationality.

* * * *

The presumption stated in revised 7 FAM 1222(a) that a person intends to retain U.S. citizenship is not applicable when the individual:

(a) Formally renounces U.S. citizenship before a consular officer (INA 349(a)(5)) (7 FAM 1260);
(b) Serves in the armed forces of a foreign state engaged in hostilities against the United States (whether or not an officer) (INA 349(a)(3)) (7 FAM 1270); or
(c) Takes a policy level position in a foreign state and is either a dual national of the state of employment or has taken an oath or affirmation in connection with the position (INA 349(a)(4) (7 FAM 1280);

(d) Is convicted of treason (INA 349(a)(7)).

* * * *

3. Review of Determinations Relating to Loss of Citizenship

On October 20, 2008, the Department of State published a final rule eliminating the Department's Board of Appellate Review ("L/BAR") and authorizing an alternative process for reviewing determinations relating to loss of citizenship. 73 Fed. Reg. 62,196 (Oct. 20, 2008). On July 18, 2008, the Department published an interim final rule, with a request for public comment. Excerpts below from the Supplementary Information section of the July notice explain the change. 73 Fed. Reg. 41,256 (July 18, 2008).

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* * * *

Elimination of Board of Appellate Review (L/BAR)

The Board of Appellate Review, which is . . . referred to by the acronym "L/BAR," was established to provide a mechanism for appeal of certain administrative decisions of the Department of State. However, as described below, its jurisdiction has been superseded or made obsolete for several years, replaced in large part by review of loss of citizenship and passport matters by the Bureau of Consular Affairs. This rule accordingly reflects current departmental practice and organization related to review of loss of citizenship.

As a result of consolidations through subsequent regulations, 22 CFR 7.3 currently provides that L/BAR is responsible for appeals from: (1) Administrative decisions of loss of nationality or expatriation; (2) administrative decisions denying, revoking, restricting or invalidating a passport under certain provisions . . . and, (5) administrative decisions in such other cases and under such terms of reference as the Secretary [of State] authorizes.

Amendments to Federal statutes and regulations other than 22 CFR part 7 have significantly narrowed L/BAR authorities,

and thus very few or no appeals are brought to it. Although 22 CFR 7.3(b) gave L/BAR jurisdiction over certain passport denial, revocation, and restriction cases, subsequent changes to 22 CFR part 51 superseded that provision, most recently revisions effective February 1, 2008 to 22 CFR 51.70–51.74 (formerly 22 CFR 51.80 *et seq.*), 72 *Federal Register* 222 (November 19, 2007), p. 64939. With respect to § 7.3(a), persons determined to have lost U.S. nationality typically seek reconsideration from the Bureau of Consular Affairs, which provides for a less cumbersome and more timely procedure. Moreover, the Consular Affairs Bureau will consider a request for such review without time limitation, while L/BAR sets a one-year time limit for appeals. Very few of those who appeal do so within one year. Consequently, the number of appeals to L/BAR in recent years has dramatically diminished.

* * * *

Appeals From Determinations of Loss of Nationality

The elimination of L/BAR means there will no longer be a formal administrative appeal of loss-of-nationality determinations by the Department. Revisions to 22 CFR 50.51 delete references to an appeal to L/BAR.

Importantly, the Department expects to continue its current discretionary practice of reviewing prior findings of loss of nationality at the request of an affected individual who believes the finding should be reversed in light of subsequent legal developments (for example, an intervening Supreme Court decision) or when substantial new facts become available relevant to involuntariness or absence of intent at the time of the expatriating act. The revisions to 22 CFR 50.51 codify this discretionary practice, which is now partially codified in 22 CFR 7.2(b). In addition, the Bureau of Consular Affairs has modified its procedures for such reviews to provide that each case submitted for reconsideration will be examined by an officer who was not involved in the original determination using specified criteria.

Revisions to 22 CFR 50.51 also clarify that requesting reconsideration by the Department of a finding of loss of nationality is neither a mandatory procedure prior to resort to judicial processes nor a formal "procedure for administrative appeal" for

purposes of section 358 of the INA (8 U.S.C. 1501). Accordingly, the issuance of a Certificate of Loss of Nationality constitutes the "final administrative determination" and "final administrative denial" for purposes of INA §§ 358 and 360 (8 U.S.C. 1501 & 1503), respectively. This means that the five-year statute of limitations for bringing an action in federal court under INA § 360 (8 U.S.C. 1503) to overturn a determination of loss of nationality begins to run when the Certificate of Loss of Nationality is issued. The Department imposes no time limit for requesting its discretionary reconsideration by the Bureau of Consular Affairs of a finding of loss, and as such this review is not intended to serve as a formal "appeal procedure" that may affect the running of the statutory statute of limitations contained in 8 U.S.C. 1503.

* * * *

B. PASSPORTS

1. Passport Regulations

a. Western Hemisphere Travel Initiative: Documents required for travelers departing or arriving by sea and land

On April 3, 2008, the Department of Homeland Security ("DHS") and the Department of State published a final rule, effective June 1, 2009, to implement a statutory requirement that U.S. citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States at sea and land ports-of-entry from Western Hemisphere countries must present passports or other documents approved by the Secretary of Homeland Security to establish identity and citizenship. 73 Fed. Reg. 18,384 (Apr. 3, 2008). The proposed rule, published for public comment on June 26, 2007, is discussed in *Digest 2007* at 8–16. The rule finalized the second phase of a joint DHS/Department of State plan to implement the Western Hemisphere Travel Initiative, discussed in *Digest 2007* at 8–16.

As explained in a media note issued by the Department of State's Office of the Spokesman on March 27, 2008:

> This announcement comes two months after January 31, 2008, when DHS ended acceptance of oral declarations alone as evidence of identity and citizenship at the land borders. Since that time U.S. and Canadian citizens ages 19 and older have been asked to present proof of identity and citizenship. Children ages 18 and under are currently asked only to present proof of citizenship, such as a birth certificate.

The full text of the media note is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/mar/102748.htm*.

Excerpts below from the April 2008 Federal Register publication provide background on the statutory framework for the new rule and explain why the rule does not deny U.S. or non-U.S. citizens the ability to travel to and from the United States. (Footnotes are omitted.)

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* * * *

B. Statutory and Regulatory History

This final rule sets forth the second phase of a joint Department of Homeland Security (DHS) and Department of State (DOS) plan, known as the Western Hemisphere Travel Initiative (WHTI), to implement section 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004, as amended (IRTPA) on June 1, 2009. . . .

1. Intelligence Reform and Terrorism Prevention Act

On December 17, 2004, the President signed IRTPA into law. IRTPA mandates that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan to require travelers for whom the President had waived the passport requirement to present a passport or other document, or combination of documents, that are "deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship" when entering the United States. WHTI thus requires

U.S. citizens and nonimmigrant aliens from Canada, Mexico, and Bermuda to comply with the new documentation requirements.

* * * *

Comment: One commenter stated that the Land and Sea NPRM would be contrary to U.S. obligations under international human rights law, free trade agreements, and U.S. statutes, including the International Covenant on Civil and Political Rights, the Charter of the Organization of American States, the North American Free Trade Agreement (NAFTA), and the NAFTA Implementation Act because the rules restrict free movement of people in the Western Hemisphere.

Response: DHS and DOS are not denying U.S. or non-U.S. citizens the ability to travel to and from the United States by requiring an appropriate document for admission. Pursuant to 8 U.S.C. 1182(a)(7)(A) and 1185, DHS and DOS have authority to require sufficient proof of identity and citizenship via presentation of a passport or alternative document when seeking entry to the United States. By requiring a valid passport or other alternative document for entry to the United States from within the Western Hemisphere, DHS and DOS are eliminating a historical exemption of the requirement that all U.S. citizens and other travelers must posses[s] a passport to enter the country.

* * * *

b. Card format passports

On February 1, 2008, a new Department of State rule on card format passports took effect. 72 Fed. Reg. 74,169 (Dec. 31, 2007); *see also Digest 2007* at 11–12, 16. The proposed rule, published for public comment on October 17, 2006, 71 Fed. Reg. 60,928 (Oct. 17, 2006), is discussed in *Digest 2006* at 11–13. A Department of State media note issued on December 11, 2008, excerpted below, provided additional information on the passport card. The full text of the media note is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/dec/113151.htm.*

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* * * *

The U.S. Passport Card is a wallet-sized document designed specifically for new systems being installed at land border crossings to facilitate inspections. . . .

The Passport Card is valid only for entry to the United States at land border crossings and sea ports of entry when traveling from Mexico, Canada, the Caribbean region, and Bermuda. It is not valid for international air travel. The U.S. Passport Card is designed for the specific needs of the northern and southern border resident communities. It is not a globally interoperable travel document like the traditional U.S. Passport book.

The Passport Card incorporates vicinity-read radio frequency identification (RFID) technology. With this technology, U.S. Customs and Border Protection officers are able to access photographs and other biographical information stored in secure government databases. For privacy protection, no personal information is stored on the electronic chip itself. The Department of State uses laser engraving and state-of-the-art security features to prevent counterfeiting and forgery. Additionally, the passport card is issued with a protective sleeve that prevents it from being read when not in use, reducing the possibility of its being tracked.

The Passport Card has been in production since July 2008. As of November 2008, more than 650,000 have been issued. . . .

* * * *

c. New global passport regulations

On February 1, 2008, the Department of State's new global passport regulations, which were published on November 19, 2007, took effect. *See* 72 Fed. Reg. 64,930 (Nov. 19, 2007); *Digest 2007* at 16–18 for details. In a cable providing guidance on the new regulations to U.S. posts abroad, dated January 29, 2008, the Department of State explained the changes concerning passport issuance to minors, as excerpted below.

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* * * *

. . . The new regulations raise the age for required two parent consent from under 14 to under 16. Parents are required to submit a certified copy of the child's birth certificate when they apply for a first-time passport in order to establish a citizenship claim. Proof of parentage for subsequent passport applications may be established by submitting a photocopy of the child's birth certificate, or the post may verify parentage from the previous passport record in the Passport Issuance Electronic Record System (PIERS).

Minors age 14 and 15 may no longer sign their own passport applications. The redesign of the DS-11 [passport application form] requires the signature of the parent(s) on the application. Minors age 16 and 17 may sign their own passport applications, but see 7 FAM 1354 and 7 FAM 1355 regarding runaways. As specified in 7 FAM 1320 and 7 FAM 1350, proof of identity of the parent includes a U.S. passport, a foreign passport, a driver's license, a state-issued non-driver's I.D., or a foreign government issued identity card. If a minor under the age of 16 already possesses a U.S. passport and is applying for a passport card, the two-parent consent requirement must be met in order to be issued the passport card. . . .

* * * *

In another cable to U.S. posts abroad dated January 29, 2008, the Department of State explained the regulatory changes concerning passport issuance to persons who are the subject of certain warrants, as excerpted below.

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* * * *

. . . The final rule revises provisions on denial, revocation, and restriction of passports to permit (but not require) the Department to deny a passport to applicants who are the subject of an outstanding state or local warrant of arrest for a felony. The rule also permits (but does not require) the Department to deny a passport to applicants when we have been informed by an appropriate foreign government authority or international organization that the applicant is the subject of a foreign warrant of arrest for a felony. . . .

. . . [The State Department Bureau of Consular Affairs] will apply the same general procedures and criteria for possible denial of a passport on the basis of a state or local felony warrant as it does for a U.S. federal felony warrant. . . .

. . . Before [the State Department's Bureau of Consular Affairs] can approve denial of a U.S. passport on the basis of a foreign warrant for arrest on a felony, [it] would need to review the foreign warrant on a case by case basis. . . . As a preliminary screening criterion, the Department will consider requests from countries with which the United States has extradition or mutual legal assistance in criminal matters (MLAT) treaties because, prior to ratifying such treaties, the United States assesses the due process mechanisms in such countries. This is not to say that the United States would automatically refuse to deny a passport on the basis of a request predicated on a foreign warrant of arrest for a felony from a country with which the United States does not have such a law enforcement treaty; rather the request would be subject to case-by-case scrutiny.

* * * *

2. Executive Branch Authority over Passport Issuance

a. Claimed entitlement to passport

On July 15, 2008, the U.S. District Court for the District of Minnesota granted a U.S. motion to dismiss a petition for a writ of mandamus, declaratory judgment, and injunctive relief and a motion for a temporary restraining order. In this case, the petitioner alleged that she was entitled to derivative U.S. citizenship, a passport, and a Social Security card. The petitioner entered the United States in 2001 on a B-2 non-immigrant visa and sought to extend her stay by filing a Form I-539 (application to change/extend non-immigrant status) in December 2002. Before that request was adjudicated, her mother filed a Form I-130 (petition for alien relative seeking to immigrate), at which point the petitioner's status changed

to that of an alien who intended to stay permanently in the United States, or an "intending immigrant." The petitioner's mother became a naturalized citizen in February 2008. When the petitioner applied for a passport and Social Security card, she did not provide any of the documents necessary to establish her eligibility for either one. While admitting that she had not complied with the statutory requirements for derivative citizenship, the petitioner argued that Congress intended for a person in her situation to receive a passport and citizenship.

On June 13, 2008, the United States filed its motion to dismiss. Excerpts from the U.S. motion, explaining the statutory requirements for a claim to derivative citizenship and the Secretary of State's discretionary authority to grant passports, follow. The text of the U.S. motion to dismiss is available at *www.state.gov/s/l/c8183.htm*.*

* * * *

[A.] The Child Citizenship Act ("CCA") grants automatic citizenship to children born outside this country when all the statutory requirements are fulfilled. *Bitterman v. Ashcroft*, 106 Fed.Appx. 699, 2004 WL 1790035 (10th Cir., August 11, 2004). To qualify for such derivative citizenship, a child, born abroad to a later-naturalized parent, must be a lawful permanent resident ("LPR") alien, under 18 years old, and "residing in the United States in the legal and physical custody of a citizen parent" (or in the custody of a parent at the time the parent becomes naturalized). See *Bagot v. Ashcroft*, 398 F.3d 252 (3rd Cir. 2005) (decided under 8 U.S.C. § 1432(a) (1999). All three statutory conditions must be met for an alien to acquire citizenship derivatively. See *Gomez-Diaz v. Ashcroft*, 324 F.3d 913, 915 (7th Cir. 2003).

* * * *

* Editor's note: To protect the petitioner's privacy, names and the case citation have been redacted from the U.S. motion.

[C. 1. a.] . . . Congress plainly requires that an individual born abroad who wishes to employ the CCA to become a citizen must comply with certain requirements. Those requirements cannot be ignored. *Mustanich* [*v. Mukasey*], 518 F.3d [1084,] 1088 [(9th Cir. 2008)], citing 8 U.S.C. § 1421(d) ("A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise."). Although petitioner claims derivative citizenship through her naturalized mother, she fails to present evidence of compliance with the derivative citizenship requirements of 8 U.S.C. § 1431(a) and, accordingly, this Court must reject her petition.

* * * *

Petitioner apparently takes the position that § 1431(a) requires only that she was *lawfully admitted* to the United States when she arrived in July, 2001, as a non-immigrant visitor for pleasure, rather than that she have "*lawful admission for permanent residence*," as required by the CCA. See 8 U.S.C. § 1431(a)(3) (setting forth the requirement that the child reside in the custody of the citizen parent pursuant to a lawful admission for permanent residence). The term "lawful permanent residence" is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20).

Petitioner admits that she lacks permanent resident status. The Petition exhibits confirm that she is no longer in legal status as her B-2 visitor for pleasure visa has not been extended now that she is an intending alien. Petitioner's assertion that legal admission is sufficient to confer citizenship under the CCA is clearly incorrect. . . .

* * * *

(a) Passport

A passport "is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer." *Haig v. Agee*, 453 U.S. 280, 292 (1981). It is a travel document showing the bearer's origin, identity,

and nationality. 8 U.S.C. § 1101(a)(30). During its period of validity, a passport has the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship. 22 U.S.C. § 2705(1). The issuance of a passport is not a mandatory duty owed by the State Department to those who apply. Instead, it is a discretionary function authorized to the Secretary of State. *Haig*, 453 U.S. at 293. If a duty is discretionary, it is not owed. *Perkins v. Elg*, 307 U.S. 325 (1939).

* * * *

Passport statutes and regulations require evidence of citizenship. See 22 U.S.C. §§ 212 and 213; 22 C.F.R. § 51.2 and 51.40. Title 22, United States Code, § 212, limits a passport to person[s] "owing allegiance to the United States," and 22 U.S.C. § 213 requires that, before a passport can be issued, an applicant must submit a written application containing true recitals of every fact required by law or regulation. The statutory requirement is more than a mere formality. It is necessary to the exercise of the Secretary of State's discretion.

Because of the legal significance of a passport, an applicant bears the burden of showing that she is entitled to a passport. To meet her burden, an applicant must establish her nationality and identity. See 22 C.F.R. §§ 51.40; 51.23. Here, rather than comply with the repeated requests that petitioner supply such evidence, petitioner is "attempting to sidestep the regulations which are binding on all citizens applying for passports." See *Lee v. Dulles*, 155 F. Supp. 708, 710 (D. Hawaii, 1957).

* * * *

Like the plaintiff in *Lee*, petitioner here has made no showing that she is being denied a passport (or a Social Security card) *on the ground that she is not a citizen*. In fact, she has made no real attempt to show entitlement to a passport, according to the record before the Court. She provides no evidence that she has responded to the numerous requests for citizenship proof as required of all citizens requesting a passport. Her attempt to sidestep the passport statutes and regulations by asking the Court to order that a passport be issued without proof of citizenship must be denied.

She has not established that her right to the relief sought is so clear and indisputable that mandamus is appropriate.

* * * *

b. Designation of birthplace on passport

Litigation continued in 2008 in a lawsuit brought on behalf of a U.S. citizen child born in Jerusalem to compel the Department to record "Israel" (rather than "Jerusalem") as the child's birthplace in his passport and Consular Report of Birth Abroad. *Zivotofsky v. Sec'y of State*, D.C. Cir. No. 07-5347. The brief the United States filed with the U.S. Court of Appeals for the District of Columbia Circuit on April 4, 2008, available at *www.state.gov/s/l/c8183.htm*, is discussed in Chapter 9.B. For prior history in the case, *see Digest 2007* at 437–43; *Digest 2006* at 530–47; *Digest 2004* at 452–54; and *Digest 2003* at 485–501.The litigation was pending at the end of 2008.*

C. IMMIGRATION AND VISAS

1. Special Immigrant Visas for Iraqis

The Refugee Crisis in Iraq Act of 2007, Subtitle C of Title XII of the Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 395, was signed into law on January 28, 2008. Section 1244 of the legislation, "Special Immigrant Status for Certain Iraqis," as amended by § 1 of Public Law 110-242, enacted on June 3, 2008, created a new category of "Special Immigrant Visa" ("SIV") under § 101(a)(27) of the Immigration and Nationality Act ("INA") (8 U.S.C. § 1101(a)(27)) for certain Iraqi citizens or nationals. To be eligible for the new SIV, an Iraqi national must have provided "faithful and valuable service" to the U.S. government while employed by or on behalf of the U.S. government in Iraq, for not less

* Editor's note: On July 6, 2009, the D.C. Circuit affirmed the district court's judgment of dismissal. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227 (D.C. Cir. 2009). *Digest 2009* will discuss relevant aspects of the decision.

than one year after March 20, 2003, and have experienced or be experiencing "an ongoing serious threat as a consequence" of that employment. Spouses and children of eligible Iraqis also may receive the SIVs. Section 1244 authorized the Secretary of Homeland Security or the Secretary of State, in consultation with the Secretary of Homeland Security, to provide special immigrant status to 5,000 individuals annually for fiscal years 2008 through 2012. For additional background *see http://travel.state.gov/visa/immigrants/info/info_4172.html*.

The new program is in addition to another program, established in 2006, which authorizes SIVs for certain Iraqi and Afghan translators/interpreters working for the U.S. government. Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3443, authorized up to 50 SIVs in each U.S. fiscal year for eligible Iraqi and Afghan translators working for the U.S. military. Public Law 110-36, 122 Stat. 227, which was signed into law on June 15, 2007, amended § 1059 to provide up to 500 SIVs annually in fiscal years 2007 and 2008 for Iraqi and Afghan translators and interpreters who have worked directly with U.S. Armed Forces or under Chief of Mission authority. Public Law 110-242, 122 Stat. 1567, made any person who filed a petition under § 1059 before September 30, 2008 eligible for a SIV under § 1244 if that person's § 1059 petition had been approved but an SIV was not immediately available because the 500 limit had been exceeded. For additional background *see http://travel.state.gov/visa/immigrants/info/info_3738.html*; *see also* Interoffice Memorandum, USCIS Acting Associate Director, Domestic Operations, available at *www.uscis.gov/files/nativedocuments/AD08-17.pdf*.*

* Editor's note: On March 11, 2009, the Afghan Allies Protection Act of 2009 was signed into law as Title VI of Division F of the Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 807. The new law establishes an additional program to grant up to 1,500 SIVs for fiscal years 2009 through 2013 to Afghans. *Digest 2009* will provide relevant details on the new legislation.

2. Visas and Temporary Admission for Certain Nonimmigrant Aliens Infected with HIV

On July 30, 2008, President George W. Bush signed into law the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, 122 Stat. 2918. Section 305 of the legislation amended § 212(a)(1)(A)(i) of the INA (8 U.S.C. § 1182(a)(1)(A)(i)) to eliminate the reference to "infection with the etiologic agent for acquired immune deficiency syndrome" as a disease for which an alien is inadmissible to the United States.

On October 6, 2008, the Department of Homeland Security published a final rule, authorizing issuance of certain short-term nonimmigrant visas and temporary admission for aliens who are inadmissible due solely to their infection with HIV. 73 Fed. Reg. 58,023 (Oct. 6, 2008). The proposed rule, published for public comment on November 6, 2007, 72 Fed. Reg. 62,593 (Nov. 6, 2007), is discussed in *Digest 2007* at 26–30. Excerpts below explain the final rule and modifications that DHS made in light of public comments on the proposed rule (footnotes omitted). *See also* DHS press release and fact sheet at *www.dhs.gov/xnews/releases/pr_1222705590290.shtm*.

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* * * *

Section 212 of the Immigration and Nationality Act (INA) makes ineligible for admission into the United States any nonimmigrant 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." *See* INA section 212(a)(1)(A)(i); 8 U.S.C. 1182(a)(1)(A)(i); 42 CFR 34.2. The Secretary of Homeland Security may authorize visa issuance and temporary admission of such nonimmigrants despite existing grounds of inadmissibility, subject to conditions prescribed by the Secretary. *See* INA section 212(d)(3)(A); 8 U.S.C. 1182(d)(3)(A).

On December 1, 2006, the President directed the Secretaries of State and Homeland Security to initiate a rulemaking action to propose a categorical authorization to allow HIV-positive nonimmigrant aliens to enter the United States through a streamlined process. . . .

. . . Under the final rule, DHS will allow aliens who are HIV-positive to enter the United States as visitors (for business or pleasure) for a temporary period not to exceed 30 days, without being required to seek such admission under the current, more complex (individualized, case-by-case) process provided under the current DHS procedures.

The current process requires the Department of State (DOS) to make individual recommendations to DHS, which must make a case-by-case evaluation and decision to authorize the issuance of the visa and the applicant's temporary admission. . . . This final rule streamlines this process and will make visa authorization and issuance available to many aliens who are HIV-positive on the same day as their interview with the consular officer.

II. The Final Rule

. . . [T]he process established in this final rule would authorize a consular officer or the Secretary of State to categorically grant a nonimmigrant visa and authorize the applicant to apply for admission into the United States, notwithstanding an applicant's inadmissibility due to HIV infection, if the applicant meets applicable requirements and conditions, without the additional step of seeking review and decision by DHS prior to the granting of the nonimmigrant visa. This categorical authorization provides a more streamlined and rapid process for obtaining temporary admission under INA section 212(d)(3)(A)(i), 8 U.S.C. 1182(d)(3)(A)(i).

* * * *

. . . Nonimmigrant aliens who are HIV-positive who do not meet the specific circumstances of these clarifying instructions or who do not wish to consent to the conditions imposed by this rule may still elect a case-by-case determination of their eligibility for issuance of nonimmigrant visas and admission.

* * * *

This final rule is consistent with Congress' humanitarian purpose in enacting the limited waiver of INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), and complies with the statute regarding aliens inadmissible due to health reasons by prescribing "conditions * * * to control and regulate the admission and return of inadmissible aliens applying for temporary admission." INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A). Thus, under the final rule, an HIV-positive applicant for a nonimmigrant visitor visa would be required to satisfy criteria designed to ensure that the risk to the public health is minimized to the greatest reasonable extent and that no cost will be imposed on any level of government in the United States (local, State, or Federal). The short duration of admission under the amended regulation, and the various conditions designed to control the alien's temporary stay and ensure his or her return (departure from the United States), minimize the risk of disease transmission in the United States, as well as the risk of increased burden on our public health resources. HIV-positive aliens not meeting the criteria under the amended regulation would still be able to seek individualized (case-by-case) consideration for admission pursuant to INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), under current DHS policy. *See* 8 CFR 212.4(a) or (b).

* * * *

III. Discussion of Comments

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. . . Although Public Law 110–293 eliminates the requirement that HIV be included in the list of communicable diseases of public health significance (as defined at 42 CFR 34.2), HIV remains on that list until HHS [Department of Health and Human Services] amends its regulation. *See* 42 CFR 34.2. HHS has indicated its intention to do so by rulemaking; pending such action, any alien who is HIV-positive is still inadmissible to the United States.

This regulation will permit short-term admission while HHS completes a rulemaking to remove HIV from the list of communicable diseases of public health significance. 42 CFR 34.2.

* * * *

DHS agrees that asylees obtain a special status under INA section 208, 8 U.S.C. 1158, that, where possible, should be recognized consistently. Therefore, DHS has modified the adjustment of status waiver in the final rule to clarify that applicants for the categorical authorization will not be required to waive the opportunity to apply for adjustment of status should they be granted asylum after entering the United States via the categorical process. The final rule will retain the required waivers relating to change of nonimmigrant status, extension of stay, and adjustment of status other than through the asylum process. Any alien who is unwilling to agree to these waivers may apply for temporary admission under the existing process of 8 CFR 212.4(a) which is not conditioned on the making of these waivers. . . . These visas are not available for aliens who intend to stay permanently in the United States as immigrants. . . .

* * * *

3. Exempting the African National Congress and Certain Associated Individuals from INA Terrorism-related Provisions

On July 1, 2008, the President signed into law H.R. 5690, establishing that the African National Congress shall not be treated as an undesignated terrorist organization and authorizing the Departments of State and Homeland Security to determine that provisions in the INA that make aliens inadmissible due to terrorist or criminal activities would not apply with respect to activities undertaken in association with the African National Congress in opposition to apartheid rule in South Africa. Pub. L. No. 110-257, 122 Stat. 2426.

4. Visa Waiver Program

In 2008 the Department of Homeland Security ("DHS") and the Department of State took steps to strengthen the security of the Visa Waiver Program ("VWP") and expand membership to eligible countries, consistent with § 711 of the

Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53, 121 Stat. 266. *See Digest 2007* at 32–36. In general, travelers from VWP countries may apply for entry to the United States without a visa for up to 90 days for tourism or business. On November 17, 2008, DHS added seven countries—the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, and the Republic of Korea—to the VWP. 73 Fed. Reg. 67,711 (Nov. 17, 2008). DHS designated Malta as a VWP country on December 30, 2008. 73 Fed. Reg. 79,595 (Dec. 30, 2008).

Excerpts below from the November Federal Register publication discuss the statutory criteria for admission to the VWP, which the Secretary of Homeland Security determined these countries had satisfied after consultation with the Department of State. *See* Chapter 3.A.2.e. for a discussion of the information-sharing agreements the United States concluded with each of these eight countries as a condition for its entry to the program.

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* * * *

Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security (the Secretary), in consultation with the Secretary of State, may designate certain countries as Visa Waiver Program (VWP) countries if certain requirements are met. Those requirements include, without limitation, (i) meeting the statutory rate of nonimmigrant visa refusal for nationals of the country, (ii) a government certification that it has a program to issue machine readable, tamper-resistant passports that comply with International Civil Aviation Organization (ICAO) standards, (iii) a U.S. government determination that the country's designation would not negatively affect U.S. law enforcement and security interests, (iv) government agreement to report, or make available to the U.S. government information about the theft or loss of passports, (v) the government accepts for repatriation any citizen, former citizen, or national not later than three weeks after the issuance of a final order of removal,

and (vi) the government enters into an agreement with the United States to share information regarding whether citizens or nationals of that country represent a threat to the security or welfare of the United States or its citizens.

Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law No. 110-53, 121 Stat. 266, 338 (Aug. 3, 2007) (the 9/11 Act), authorizes the Secretary to expand the VWP to additional countries by waiving the low nonimmigrant visa refusal rate requirement. *See* 8 U.S.C. 1187(c)(8). To waive the low nonimmigrant visa refusal rate requirement, the Secretary of Homeland Security must certify to Congress that: (i) The Electronic System for Travel Authorization (ESTA) is "fully operational," and (ii) an air exit system is in place that can verify the departure of not less than ninety-seven percent of foreign nationals who exit through U.S. airports. Those certifications have been made. To qualify for a waiver under 8 U.S.C. 1187(c)(8), a country must: (i) Meet all of the security requirements of the statute; (ii) the Secretary of Homeland Security determines that the totality of the country's security risk mitigation measures provide assurance that the country's participation in the VWP would not compromise the law enforcement, security or immigration enforcement interests of the United States; (iii) there has been a sustained reduction in the rate of refusals for nonimmigrant visas for nationals of the country and conditions exist to continue such reduction; (iv) the country cooperated with the U.S. government on counterterrorism initiatives, information sharing and preventing terrorist travel before the date of its designation as a program country and the Secretaries of Homeland Security and State determine that such cooperation will continue; and (v) the rate of refusals for nonimmigrant visitor visas during the previous full fiscal year was not more than ten percent or the visa overstay rate for the previous full fiscal year does not exceed the maximum visa overstay rate, once such rate is established. *See* 8 U.S.C. 1187(c)(8)(B).

* * * *

5. Electronic System for Travel Authorization

On June 9, 2008, DHS published an interim final rule establishing the Electronic System for Travel Authorization ("ESTA"). 73 Fed. Reg. 32,440 (June 9, 2008). As noted in the Federal Register publication:

> . . . Section 711 of the 9/11 Act requires that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a fully automated electronic travel authorization system which will collect such biographical and other information as the Secretary determines necessary to evaluate, in advance of travel, the eligibility of the alien to travel to the United States, and whether such travel poses a law enforcement or security risk. ESTA is intended to fulfill the statutory requirements as described in Section 711 of the 9/11 Act. . . .

Further excerpts below from the Background section of the Federal Register publication provide additional details on the program.

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* * * *

D. Electronic System for Travel Authorization

To satisfy the requirements of section 711 of the 9/11 Act, this interim final rule establishes ESTA to allow VWP travelers to obtain authorization to travel to the United States by air or sea prior to embarking on such travel. Under ESTA, CBP also will be able to screen travelers seeking to enter the United States under VWP prior to their arrival in the United States. Aliens intending to travel under the VWP will be able to obtain travel authorization in advance of travel to the United States. DHS notes that an authorization to travel to the United States under ESTA is not a determination that the alien ultimately is admissible to the United States. That determination is made by a CBP Officer only after an applicant for admission is inspected by the CBP officer at a U.S. port of entry.

In addition, ESTA is not a visa or a process that acts in lieu of any visa issuance determination made by the Department of State. Travel authorization under ESTA allows a VWP participant to travel to the United States, and does not confer admissibility to the United States. ESTA, therefore, allows DHS to identify potential grounds of ineligibility for admission before the VWP traveler embarks on a carrier destined for the United States.

ESTA will reduce the number of travelers who are determined to be inadmissible to the United States during inspection at a port of entry, thereby saving, among other things, the cost of return travel to the carrier, inspection time, and delays and inconvenience for the traveler. ESTA also will enable the U.S. government to better allocate existing resources towards screening passengers at U.S. ports of entry, thereby facilitating legitimate travel. ESTA increases the amount of information available to DHS regarding VWP travelers before such travelers arrive at U.S. ports of entry; and, by recommending that travelers submit such information a minimum of 72 hours in advance of departure, provides DHS with additional time to screen VWP travelers destined for the United States, thus enhancing security.

* * * *

On November 13, 2008, DHS announced that, beginning on January 12, 2009, it would require all nonimmigrants from VWP countries traveling to the United States under the VWP to obtain travel authorization through ESTA before embarking on a land or sea carrier for the United States. 73 Fed. Reg. 67,354 (Nov. 13, 2008).

6. US-VISIT Program

On December 19, 2008, DHS issued a final rule, expanding the categories of non-U.S. citizens required to provide biometrics—digital fingerprints and a photograph—upon entry or re-entry to the United States through the U.S. Visitor and Immigrant Status Indicator Technology ("US-VISIT") Program, effective January 18, 2009. 73 Fed. Reg. 77,473 (Dec. 19, 2008), as corrected by 74 Fed. Reg. 2837 (Jan. 16, 2009).

US-VISIT provides biometric identification services to federal, state, and local government agencies. Since 2004 DHS and the Department of State have used US-VISIT's services to verify the identities of non-U.S. citizens when they apply for visas and when they arrived in the United States. US-VISIT biometric procedures include checking non-U.S. citizens' biometrics against US-VISIT's watchlist of criminals, violators of U.S. immigration laws, and known or suspected terrorists. *See Digest 2003* at 15–19 and *Digest 2004* at 27–29.

7. Expulsion of Aliens

On October 31, 2008, Mark Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixtieth session. Mr. Simonoff's comments on the ILC's draft articles addressing the expulsion of aliens are excerpted below. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2008/2008report.htm*.

* * * *

As the scope of the draft articles is becoming clearer, we continue to be concerned that this topic requires careful examination. "Expulsion of Aliens" is a complex topic that implicates the formulation and enforcement of a State's immigration laws as well as national security. The Commission should bear in mind that each State faces legal and political issues that are delicate and unique. Additionally, the sovereign rights of each State to control admission to its territory should be recognized and respected. . . .

. . . [W]e agree with the Special Rapporteur that certain issues, including non-admission, rendition and other transfers, fall outside the scope of the topic. We also believe that issues that are governed by specialized bodies of international law should be

excluded from the topic, such as extraditions and expulsion of aliens in situations of armed conflict. Otherwise, this process may sow confusion with respect to issues that are already well-covered in existing law (e.g., concerning expulsions in the context of military occupation) and could be seen as articulating new or alternative rules that are not well-settled in international law and practice, and that may present an obstacle to broad support for this project.

We will be looking carefully at the draft articles to ensure that they recognize the rights of States to control admission to their borders and to enforce their immigration laws. We note that the distinction between aliens who are lawfully present and those who are not should be clearly observed (and in particular that it should be recognized that aliens not lawfully present can be expelled for that reason alone). For these reasons, we will carefully scrutinize in particular, the extent to which these draft articles concern the treatment of aliens unlawfully present within a State's territory, where different removal procedures from those regarding aliens lawfully present may apply.

. . . [I]n addition to our general concerns above, we have some preliminary comments on the text of the draft articles . . . .

We are concerned that draft Article 1, which describes the scope of the draft articles, does not recognize that there are many issues that should be excluded from the scope of the draft articles, including those identified by the Special Rapporteur as falling outside of the topic. . . . We encourage the ILC to find a way to more clearly exclude such issues (and others that are not properly within the scope of this project) from the application of the draft articles. Along these lines, we also believe that extraditions should be explicitly recognized as falling outside the scope of the topic. Among our reasons are that extradition is not expulsion, but the transfer of an individual for a specific law enforcement purpose; that it is subject to a separate international legal regime, governed by bilateral and multilateral extradition agreements as well as State practice that in some cases has gone back centuries; and that extradition is not limited to aliens, but rather also applies to nationals. Indeed, draft Article 4 would be entirely inconsistent with international law and practice on extradition.

Additionally, we continue to believe that matters regulated by the law of armed conflict should be excluded from the topic.

The definitions contained in Article 2 require careful scrutiny as they will be critical to defining the scope of the draft articles. One of our initial concerns relates to the definition of "territory" contained in draft Article 2. Defining "territory" as "the domain in which the State exercises all the powers deriving from its sovereignty," is vague and could be interpreted in an over-expansive manner.

Regarding draft Article 4, we understand that at the 60th session the ILC approved the conclusion of a Working Group, established during the session, that the commentary to the draft articles should 1) indicate that, for the purposes of the draft articles, the principle of the non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities, and 2) make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals. While the U.S. agrees as a general matter with these conclusions, these are complex issues and a careful review of the actual wording to be used in the commentary will be necessary. We note, however, that we do not agree with the view, expressed in the fourth report of the Special Rapporteur and discussed at the 60th session, that States have an obligation not to denationalize a citizen who does not have any other nationality and that nationality cannot effectively be lost unless the person concerned has effectively adopted another nationality.

Regarding draft Article 5 on the non-expulsion of refugees, we agree with others who have expressed the view that the language should more consistently track the provisions on non-expulsion of refugees set forth in the 1951 Convention relating to the Status of Refugees. We note that Article 32 of the Refugee Convention concerns refugees lawfully in the territory and provides greater protections to such persons, while Article 33's narrower protections are not limited to refugees lawfully in the territory. Moreover, as there are various definitions of "refugee" reflected in international instruments, we encourage the ILC to clarify that the term

"refugee" shall be defined in accordance with each country's existing obligations.

Regarding draft Article 6 on the non-expulsion of stateless persons, we are concerned at the inclusion of this language as this concept derives from the Convention Relating to the Status of Stateless Persons, which is not widely ratified by States, including the United States, and thus does not reflect a well-established and widely accepted principle of international law.

8. Suspension of Entry

a. Burma

As discussed in Chapter 16.A.1.b., the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 ("JADE Act"), Pub. L. No. 110-286, 122 Stat. 2632, imposed travel restrictions on certain Burmese nationals associated with the Burmese regime. On September 30, 2008, the Department of State published a final rule pursuant to § 5(f)(2)(A) and (C) of the JADE Act, which allowed the Department of State to exempt certain Burmese diplomats and officials from the travel restrictions. 73 Fed. Reg. 56,729 (Sept. 30, 2008). As the Federal Register notice explained:

> On July 29, 2008, the President signed into law the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008, Public Law 110-286, authorizing a broad range of new measures against the Burmese regime. Among these measures is a new category of visa inadmissibility, detailed in Section 5(a) of the Act. However, the Act permits the Secretary of State to issue, by regulation, exceptions to Section 5(a), in order for the United States and Burma to operate their diplomatic missions, to allow United States citizens to visit Burma, to permit authorized Burmese to conduct business at the United Nations, or as required by other applicable international agreements. Since diplomatic travel must often be approved in a short time frame, it would be

impractical to issue a new regulation for each instance of Burmese diplomatic travel. This rule, then, will allow the Secretary to comply with the regulatory requirement set out in Section 5(f)(2) of the Act while making exceptions to Section 5(a) in accordance with Department of State regulations.

b. Mauritania

As discussed in Chapter 16.A.5., during 2008 Secretary of State Condoleezza Rice imposed travel restrictions relating to the military coup in Mauritania.

D. REFUGEES

1. Material Support Exemption

Section 691 of Division J of the Consolidated Appropriations Act, 2008 ("CAA"), "Relief for Iraqi, Montagnards, Hmong and Other Refugees Who Do Not Pose a Threat to the United States," Pub. L. No. 110-161, 121 Stat. 2364, amended the Immigration and Nationality Act ("INA") to expand the authority of the Secretaries of State and Homeland Security to exempt an alien or a group from certain terrorism-related provisions in the INA. As amended, the statute provides for the exemption of aliens from most terrorism-related bars to admission and for the exemption of groups that otherwise meet the definition from treatment as undesignated terrorist organizations, subject to certain limited exceptions. Section 691(b) provides that certain ethnic Burmese organizations,*

* Editor's note: The ethnic Burmese organizations named in the act are the Karen National Union/Karen Liberation Army ("KNU/KNLA"), the Chin National Front/Chin National Army ("CNF/CNA"), the Chin National League for Democracy ("CNLD"), the Kayan New Land Party ("KNLP"), the Arakan Liberation Party ("ALP"), and the Karenni National Progressive Party.

the Tibetan Mustangs, the Cuban Alzados Resistance Fighters, and "appropriate groups affiliated with the Hmong and the Montagnards shall not be considered to be a terrorist organization on the basis of any act or event occurring before the date of enactment of this section."

On June 3, 2008, Secretary of State Rice and Secretary of Homeland Security Michael Chertoff exercised their discretion in accordance with their respective authorities under § 212(d)(3)(B)(i) of the INA, 8 U.S.C. § 1182(d)(3)(B)(i), as amended by § 691(a) of the CAA, to conclude that most of the terrorism-related bars to admission under the INA would not apply to certain aliens not otherwise covered by § 691(b) for any activity or association relating to the same groups listed in § 691 (*see supra*). 73 Fed. Reg. 34,770–76 (June 18, 2008). The ten Federal Register notices announcing the determinations concerning each organization set forth the criteria that U.S. Immigration and Customs Enforcement ("ICE") or U.S. consular officers, as applicable, would apply in ascertaining whether a particular alien is eligible for the exemption. Excerpts below from the first such notice provide the applicable statutory framework and criteria for determining an alien's eligibility for the exemption. The same or virtually identical language appeared in each of the ten notices.

The Secretary of Homeland Security and the Secretary of State, following consultations with the Attorney General, hereby conclude, as a matter of discretion in accordance with our respective authorities under section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(d)(3)(B)(i), as amended by the Consolidated Appropriations Act, 2008 (CAA), Public Law 110-161, Div. J, section 691(a), 121 Stat. 1844, 2364 (December 26, 2007), as well as the foreign policy and national security interests deemed relevant in these consultations, that section 212(a)(3)(B) of the INA, excluding subclause (i)(II), shall not apply with respect to an alien not otherwise covered by the automatic relief provisions of section 691(b) of the CAA, for any activity or association relating to appropriate groups affiliated with the

Montagnards, provided that there is no reason to believe that the relevant terrorist activities of the alien or the recipients were targeted against noncombatant persons, and further provided that the alien satisfies the relevant agency authority that the alien:

(a) Is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;
(b) has undergone and passed relevant background and security checks;
(c) has fully disclosed, in all relevant applications and interviews with U.S. government representatives and agents, the nature and circumstances of each activity or association falling within the scope of section 212(a)(3)(B) of the INA;
(d) poses no danger to the safety and security of the United States; and
(e) is warranted to be exempted from the relevant inadmissibility provision by the totality of the circumstances.

Implementation of this determination will be made by U.S. Citizenship and Immigration Services (USCIS), in consultation with U.S. Immigration and Customs Enforcement (ICE), or by U.S. consular officers, as applicable, who shall ascertain, to their satisfaction, and in their discretion, that the particular applicant meets the criteria set forth above.

This exercise of authority may be revoked as a matter of discretion and without notice at any time with respect to any and all persons subject to it. Any determination made under this exercise of authority as set out above shall apply to any subsequent benefit or protection application, unless such exercise of authority has been revoked.

* * * *

2. Iraqi Refugees

"The Refugee Crisis in Iraq Act of 2007," Subtitle C of Title XII of the Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 395, was signed into law on January 28,

2008. Section 1242 requires the Secretary of State, in consultation with the Secretary of Homeland Security, to "establish or use existing refugee processing mechanisms in Iraq and in countries, where appropriate, in the region" in which eligible Iraqis could apply for admission to the United States as refugees and for special immigrant visas. Section 1243 classifies the following categories of Iraqis as "[r]efugees of special humanitarian concern" eligible to apply directly to the United States for settlement as refugees:

> (1) Iraqis who were or are employed by the United States Government in Iraq;
>
> (2) Iraqis who establish to the satisfaction of the Secretary that they are or were employed in Iraq by—
>
> > (A) a media or nongovernmental organization headquartered in the United States; or
> >
> > (B) an organization or entity closely associated with the United States mission in Iraq that has received United States Government funding through an official and documented contract, award, grant, or cooperative agreement; and
>
> (3) spouses, children, and parents whether or not accompanying or following to join, and sons, daughters, and siblings of aliens described in paragraph (1), paragraph (2), or section 1244(b)(1);* and
>
> (4) Iraqis who are members of a religious or minority community, have been identified by the Secretary of State, or the designee of the Secretary, as a persecuted group, and have close family members (as described in section 201(b)(2)(A)(i) or 203(a) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i) and 1153(a)))** in the United States.

* Editor's note: *See* C.1. *supra* for the categories of aliens covered by § 1244(b).

** Editor's note: 8 U.S.C. § 1151(b)(2)(A)(i) defines "immediate relatives" to mean "children, spouses, and parents of a citizen of the United States" in certain circumstances.

Among other things, § 1245 requires the Secretary of State to designate a Senior Coordinator for Iraqi Refugees and Internally Displaced Persons in the U.S. Embassy in Baghdad, with responsibility for "the oversight of processing for the resettlement in the United States of refugees of special humanitarian concern, special immigrant visa programs in Iraq, and the development and implementation of other appropriate policies and programs concerning Iraqi refugees and internally displaced persons. . . ."

On September 12, 2008, Ambassador James B. Foley, Senior Coordinator for Iraqi Refugee Issues, and Lori Scialabba, Senior Adviser to the Secretary of Homeland Security for Iraqi Refugees, briefed the press on developments in the Iraqi Refugee Admissions and Assistance Programs, as excerpted below. The full text of the press briefing is available at *http://2001-2009.state.gov/p/nea/rls/rm/109568.htm*.

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* * * *

MS. SCIALABBA:

* * * *

During fiscal year 2008, USCIS [U.S. Citizenship and Immigration Services] has worked closely with the State Department and other programs to interview Iraqi refugee applicants. Together, we overcame a number of challenges to develop a robust resettlement program for Iraqi refugees throughout the region. As a result of this collaboration, you've just heard, the U.S. refugee admissions program successfully accomplished our primary goal to admit 12,000 Iraqi refugees.

This very significant increase is over the 1,600 Iraqis that were admitted last year. This achievement reflects an extraordinary commitment on our part, the Department of Homeland Security. USCIS deployed over 150 staff to the region to conduct 29 circuit rides, interviewing over 23,000 Iraqis during fiscal year 2008. We implemented a rigorous security check process that is fast and effective. We reviewed and approved material support exemptions

for over 900 people who had provided material support under duress.

We launched an in-country program by sending USCIS officers to conduct interviews in Baghdad, in addition to processing in Jordan, Syria, Lebanon, Egypt, Turkey and elsewhere in the region. Most importantly, we were able to offer protection to thousands of refugees who were at risk due to the support of the U.S.-led mission in Iraq, their minority status or sectarian violence. USCIS is committed to continuing these efforts in FY09. We will work hard, along with State Department, United Nations High Commissioner for Refugees, and the NGO community to enhance our processing capacity and to offer more protection to Iraqi refugees in FY09.

* * * *

Cross References

International Covenant on Civil and Political Rights, **Chapter 6.A.2.a.-c. and D.6.**
Refugee and asylum claims from children in the context of child soldiers, **Chapter 6.C.1.b.(2)**
U.S. legislation on child soldiers, **Chapter 6.C.1.b.(3)(i) and (ii)**
Protection of migrants, **Chapter 6.D.6.**
Role of diplomatic assurances in implementing obligations under Convention Against Torture, **Chapter 6.F.2.**
OFAC regulations concerning educational travel to Cuba, **Chapter 16.B.2.**
U.S. position in Uighur litigation, **Chapter 18.A.4.a.(2)(ii)**
Discussion of Department of Homeland Security authority to parole and/or admit aliens into the United States in Guantanamo Bay litigation, **Chapter 18.A.4.a.(2)(ii)**

Chapter 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Implementation of ICJ decision: *Medellín v. Texas*

On March 25, 2008, the U.S. Supreme Court ruled that the judgment of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 ("*Avena*"), did not preempt contrary state law. *Medellín v. Texas*, 128 S. Ct. 1346 (2008). In *Avena* the ICJ required the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences" of 51 Mexican nationals as a remedy for the failure of the competent U.S. authorities to comply with Article 36 of the Vienna Convention on Consular Relations ("VCCR" or "Vienna Convention") regarding consular notification and access. In response, Mexico filed a new proceeding with the International Court of Justice for interpretation of *Avena*, arguing that the United States did not share its view that *Avena* imposed an "obligation of result" on the United States and requesting provisional measures to prevent the execution of five Mexican nationals covered "unless and until [they] receive review and reconsideration" consistent with *Avena*. Developments on these issues during 2008 related to the separation of powers under the U.S. Constitution and the jurisdiction of the ICJ are discussed in Chapter 5.A.1.

2. Private Right of Action for Money Damages or Other Relief

a. Mora v. New York

On April 24, 2008, the U.S. Court of Appeals for the Second Circuit affirmed a lower court's dismissal of a Dominican national's suit seeking damages for alleged violations of Article 36 of the Vienna Convention. *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008). For prior history in the case, including discussion of the *amicus curiae* and letter briefs the United States filed in 2007, *see Digest 2007* at 77, 80–81, 200–06. The texts of the U.S. briefs are available as documents 9 and 22, respectively, for *Digest 2007* at *www.state.gov/s/l/c8183.htm*.

Excerpts follow from the court's analysis in concluding that "the obligation of detaining authorities to inform an alien of the consular notification and access requirements set forth in Article 36(1)(b)(third) of the Vienna Convention does not authorize an individual to vindicate in an action for damages a violation of Article 36(1)(b)(third) pursuant to [42 U.S.C.] § 1983, ATS [Alien Tort Statute], or directly under the Convention."* (Footnotes and citations to other submissions are omitted.) The Supreme Court denied certiorari on October 14, 2008. 129 S. Ct. 397 (2008).

* * * *

The text of Article 36 certainly requires that the authorities of a "receiving State" (that is, the detaining State) take certain actions

* Editor's note: 42 U.S.C. § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

with respect to the nationals of a "sending State" (that is, the detainee's home State). For example, paragraph 1(b) of Article 36 provides that if a detained individual of foreign citizenship so requests, the detaining authorities must alert the individual's home consulate of the detention, *see* Art. 36(1)(b)(first); moreover, the authorities must inform the detained individual that he can contact his home consulate, *see* Art. 36(1)(b)(third). 21 U.S.T. at 101. And at least some of these requirements are explicitly referred to as "rights" of the individual foreign nationals. . . .

It is notable, however, that the critical requirement at issue in the instant case—a receiving State's obligation to inform a detained foreign national of his "rights" under paragraph 1(b)—is never itself expressly referred to as a "right." Moreover, the text of the Convention is entirely silent as to whether private individuals can seek redress for violations of this obligation—or any other obligation set forth in Article 36—in the domestic courts of States-parties. . . . [W]e think that the lack of *any* mention in the text of Article 36(1)(b) as to whether or how detained foreign nationals might vindicate their asserted rights at least suggests that the drafters of the Convention did not intend to confer rights directly upon individuals. The language of Article 36 is set forth in a document that "is *primarily* a compact between independent nations," although it "*may* also contain provisions which confer certain rights upon" individuals, *Head Money Cases*, 112 U.S. [580,] 598 [(1884)] (emphasis added). But "[n]othing in [the treaty's] text explicitly provides for judicial enforcement of [its] consular access provisions at the behest of private litigants," [*United States v.*] *Li*, 206 F.3d [56,] 66 [1st Cir. 2000)] (Selya & Boudin, JJ., concurring), or, for that matter, creates a right to be informed of the prospect of consular access and notification that can be privately vindicated directly under the Vienna Convention or pursuant to § 1983.

. . . [T]he isolated language of Article 36(1)(b) is at most ambiguous as to the existence of rights that can be privately vindicated in court in the manner sought by plaintiff. Thus, . . . we conclude that the requirement that an alien be informed of consular notification and access in Article 36(1)(b)(third), even taken in conjunction with the several references to "rights," does not

establish a right in the alien that can be vindicated in a damages action for failure to inform the alien of the obligation. *See* [*United States v.*] *Emuegbunam*, 268 F.3d [377,] 391–94 [(6th Cir. 2001)]; [*United States v.*] *Jimenez-Nava*, 243 F.3d [192,] 196–98 [(5th Cir. 2001)]; *Li*, 206 F.3d at 66–68 (Selya & Boudin, JJ., concurring).

Several additional textual and contextual considerations militate against construing Article 36's obligation to inform an alien of the prospect of consular notification and access as creating individual rights that, when violated, can be vindicated through private litigation brought directly under the Convention or pursuant to § 1983. For example, the first clause of paragraph 1 of Article 36 begins with the following statement of purpose: "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." 21 U.S.T. at 100. . . . [T]he introductory language of Article 36 emphasizes the exercise of these functions, rather than an individual's ability to benefit from these functions—giving rise to ambiguity as to whether the provisions that follow create entirely independent individual rights that may be vindicated by lawsuits in our courts.

The Preamble to the Convention also favors defendants' position. It bears underscoring that a preamble is not without meaning under international law. It provides valuable context for understanding the terms of a treaty. *See* Vienna Convention on the Law of Treaties, art. 31(2), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340 (providing that "[t]he context for . . . purpose[s] of . . . interpret[ing] . . . a treaty shall comprise . . . the text, *including its preamble* and annexes," as well as other related agreements (emphasis added)). . . .

The parties focus on the language in paragraph five of the Preamble stating 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." Defendants and *amicus* the United States argue that this language is evidence that the Convention is not meant to confer rights on individuals. . . .

Even if the Preamble cannot be read as explicitly or categorically rejecting the creation of rights in private individuals,

it certainly reflects the broader principle that the Convention is concerned primarily, if not exclusively, with establishing relationships and rights as between States and State officials. . . . These passages suggest that the rights created by the Convention similarly belong to, and should generally be enforced by, the States-parties to the Convention and their official representatives.

The Optional Protocol likewise reinforces the view that Article 36(1)(b)(third) does not create rights in an individual that can be vindicated through an action for damages. Although expressly designed to implement the terms of the Convention, it makes no mention of private actions by detained individuals. . . .

* * * *

2. The Presumption Against Conferral of Individual Rights by International Treaties Requires a Clear Statement of the Treaty Drafters' Intent

"Even when treaties are self-executing . . . the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellín*, 552 U.S. at __ n.3, 128 S. Ct. at 1357 n.3 (citation and quotation marks omitted). We have recognized that international treaties establish rights and obligations between States-parties—and generally not between states and individuals, notwithstanding the fact that individuals may benefit because of a treaty's existence. This is so because a treaty is an agreement between states forged in the diplomatic realm and similarly reliant on diplomacy (or coercion) for enforcement. *Medellín*, 552 U.S. at __, 128 S. Ct. at 1357. . . . The mechanisms for establishing and enforcing international treaties—namely, the nation's powers over foreign affairs—have been delegated by the Constitution to the Executive and Legislative branches of government. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("[T]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments."). . . . Indeed, the Supreme Court has specifically instructed courts to exercise "great caution" when considering private remedies for international law violations because of the risk of "impinging on

the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727–28 (2004). For these reasons, when interpreting treaties, we generally look for a clear statement of the intent of treaty drafters. . . .

* * * *

If contracting States-parties wish to impose upon themselves legal obligations that extend not only to each other, but to all individual foreign nationals, we would ordinarily expect expression of these obligations to be unambiguous. . . .

We do not, of course, require "robotic incantations" or "talismanic invocations" by treaty drafters in order to create individual rights, any more than we do of Congress, district judges, or administrative agencies in a variety of spheres. *See, e.g.*, *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 336 n.17 (2d Cir. 2006) (reviewing an immigration judge's credibility finding); *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006) (reviewing a district court's consideration of the sentencing set out in 18 U.S.C. § 3553(a)); *Riegel Textile Corp. v. Celanese Corp.*, 649 F.2d 894, 900 (2d Cir. 1981) (considering whether Congress created a statutory private right of action). . . .

In sum, there are a number of ways in which the drafters of the Vienna Convention, had they intended to provide for an individual right to be informed about consular access and notification that is enforceable through a damages action, could have signaled their intentions to do so. . . . That they chose not to signal any such intent counsels against our recognizing an individual right that can be vindicated here in a damages action.

3. The Views of the United States Are Entitled to Substantial Deference

The views of *amicus* the United States constitute another "very powerful reason" for concluding that private individuals do not have rights that can be vindicated in a damages suit for failure to be informed about consular notification and access. *Li*, 206 F.3d at 67 (Selya & Boudin, JJ., concurring). We place "great weight" on the interpretation of a treaty by the Executive of our federal

government. *See Medellín*, 552 U.S. at __, 128 S. Ct. at 1349; *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). In the instant case, two federal agencies—the Department of State and the Department of Justice—have jointly submitted an *amicus* brief to our Court on behalf of the United States in support of defendants' position regarding the existence *vel non* of individual rights that can be vindicated privately in courts. *Cf. id.* at 184–85 & n.10 (stating that the interpretation of a treaty set forth in an *amicus* brief by the Department of State was entitled to "great weight"). . . .

* * * *

B. Plaintiff's Claims Cannot Support a Cause of Action Pursuant to the ATS

. . . We conclude that plaintiff has not shown that his detention without being informed of the availability of consular notification and access amounts to a tort in violation of customary international law cognizable under the ATS, 28 U.S.C. § 1350. . . . To provide a cause of action under the ATS, a customary international law tort must meet a "high bar" for recognizing new causes of action: it must be both specific and well-accepted. [*Sosa*, 542 U.S. at 725.] We conclude that plaintiffs' ATS claim fails the second criterion.

To form the basis of a ATS suit, the alleged tort must be "defined with a specificity comparable to the features of the 18th-century paradigms" of torts in violation of the law of nations—violations of safe conducts, offenses against ambassadors, and piracy. *Sosa,* 542 U.S. at 725 . . . . These paradigmatic examples involve offenses "principally incident to whole states or nations and not individuals seeking relief in court." *Id.* at 720 (citations and internal quotation marks omitted). Plaintiff has pointed to no sources which evince support for the specific customary international law tort proposed here—detention without being informed of the availability of consular notification and access. *Cf. Vietnam Ass'n* [*for Victims of Agent Orange v. Dow Chemical Co.*], 517 F.3d [104,] 119–23 [(2d Cir. 2008)] (concluding that plaintiffs

had failed to describe a relevant norm of customary international law with the requisite specificity). To the contrary, it appears that none of the States-parties to the Convention, "[w]ith one possible exception," recognize such a tort in their domestic law. Thus, it cannot be said that the tort proposed has "attained the status of a binding customary norm," *Sosa*, 542 U.S. at 737; *see also Flores* [*v. S. Peru Copper Corp.*], 414 F.3d [233,] 248 [(2d Cir. 2003)] ("[C]ustomary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."). Nor can it be said that imprisonment in violation of Article 36(1)(b)(third) is "so bad that those [who engage in this conduct] become enemies of the human race." *Sosa*, 542 U.S. at 737.

We also note that this inquiry "involve[s] an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732–33. This consideration weighs against recognition of plaintiff's proposed cause of action. A customary international law tort for imprisonment in violation of Article 36(1)(b)(third) suffers from the same infirmities as the tort proposed in *Sosa*: "the label [enemy of the human race] would never fit the reckless policeman who botches his [notice of the availability of consular notification and access], even though that same officer might pay damages [for violating any applicable] municipal law." *Sosa*, 542 U.S. at 737. . . .

b. Gandara v. Bennett

On May 22, 2008, the U.S. Court of Appeals for the Eleventh Circuit held that "a foreigner who has been arrested and detained in this country and alleges a violation of the consular notification provisions of the Vienna Convention on Consular Relations" cannot bring suit under 42 U.S.C. § 1983 because the treaty does not provide individually enforceable rights. *Gandara v. Bennett*, 528 F.3d 823 (11th Cir. 2008). The appellant in the case, Hector Gandara, a national of Uruguay, was convicted in state court on charges of false imprisonment. He later alleged that prison authorities failed to inform

him of his right to consular assistance and brought suit seeking a declaratory judgment and compensatory and punitive damages. Excerpts below from the decision provide the court's analysis in reaching this conclusion (footnotes omitted). For prior history in the case, including discussion of the *amicus curiae* brief the United States filed in 2007, *see Digest 2007* at 80–81. The text of the U.S. brief is available as document 10 for *Digest 2007* at *www.state.gov/s/l/c8183.htm*.

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* * * *

. . . [T]he "context" of a treaty includes its preamble, Vienna Convention on the Law of Treaties art. 31(2), May 23, 1969, 1155 U.N.T.S. 331, and we rely on it to provide context for the terms of Article 36(1)(b) because "a treaty must be interpreted as a whole in light of its object and purpose, including the preamble." *Cornejo* [*v. County of San Diego*], 504 F.3d [853,] 861 n.13 [(9th Cir. 2007)] (citing Vienna Convention on the Law of Treaties art. 31(2); Restatement (Third) of Foreign Relations Law § 325(1) (1987)). The preamble to the Vienna Convention is clear that the drafters did not intend to create individual rights. . . .

Second, we find the majority opinion in *Cornejo* very persuasive. As stated there:

> Article 36 does not create judicially enforceable rights. Article 36 confers legal rights and obligations on *States* in order to facilitate and promote consular functions. Consular functions include protecting the interests of detained nationals, and for that purpose detainees have the right (if they want) for the consular post to be notified of their situation. In this sense, detained foreign nationals benefit from Article 36's provisions. But the right to protect nationals belongs to *States* party to the Convention; no private right is unambiguously conferred on individual detainees such that they may pursue it through § 1983. *Cornejo*, 504 F.3d at 855.

* * * *

Third, the Vienna Convention does not expressly provide for private damage actions. Instead, "the plain words of the Treaty provide that the notification right 'shall be exercised,' not that failure to notify should be compensated." *Cornejo*, 504 F.3d at 861 n.14. Therefore, we conclude that the Treaty does not contemplate private damage actions, "and it would not be sound judicial policy to conjure legal theory that would expose individual officers to liability for breaches of international treaties." *Id.*

Moreover, the position of the United States Department of State, which is entitled to "great weight," also reinforces this view. The Department of State has repeatedly affirmed that "the only remedies for failures of consular notification under the Vienna Convention are diplomatic, political, or exist between the states under international law . . . [t]he right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals[.]" *Cornejo*, 504 F.3d at 862 (quoting *U.S. v. Li*, 206 F.3d 56, 63 (1st Cir. 2000)).

In addition, the *travaux préparatoires* of the Vienna Convention supports the State Department's position: "[T]here is no indication that States intended the enforcement of a 'right' to consular notification in the courts of the receiving State." *Cornejo*, 504 F.3d at 863. Even if the *travaux préparatoires* were susceptible to different interpretations, it would be imprudent under domestic law to create a privately enforceable right that is not explicitly found in the text.

And lastly, but certainly not least, is our court's prior panel rule. This rule is simply that "we are bound by the holdings of earlier panels unless and until they are clearly overruled *en banc* or by the Supreme Court." *Swann v. S. Health Partners, Inc.*, 388 F.3d 834, 837 (11th Cir. 2004). . . .

c. Osagiede v. United States

On September 9, 2008, the U.S. Court of Appeals for the Seventh Circuit vacated a district court's decision dismissing

a petition for a writ of habeas corpus without an evidentiary hearing and remanded for further proceedings consistent with its opinion. *Osagiede v. United States*, 543 F.3d 399 (7th Cir. 2008). In this case, a Nigerian national had been convicted and sentenced for distributing heroin on the basis of a guilty plea. He petitioned for a writ of habeas corpus, alleging that his attorney's failure to seek a remedy for the detaining authorities' failure to notify him of his right to consular assistance under Article 36 of the Vienna Convention had denied him effective counsel in violation of the Sixth Amendment of the U.S. Constitution. In dismissing the petition, the district court concluded that the attorney was not ineffective for failing to seek a remedy for the Article 36 violation because any attempt to do so would have been futile.

On appeal, the Seventh Circuit applied the two-prong test established by *Strickland v. Washington*, 466 U.S. 668, 687–96 (1984), for analyzing ineffectiveness of counsel claims for relief under the Sixth Amendment. "While Osagiede's Sixth Amendment claim centers on his lawyer's failure to raise an Article 36 violation," the court stated, "we must bear in mind that he is seeking relief under the Constitution—not under the Convention." Accordingly, the court considered whether the petitioner had shown that "(1) his counsel's performance fell below an objective standard of reasonableness when measured against 'prevailing professional norms,' and (2) but for the deficient performance, there was a reasonable probability that the outcome of the proceeding would have been different." As the court noted:

> [W]hether rights and remedies are available under Article 36 of the Vienna Convention is relevant only to the extent that it helps prove or disprove one of these elements. As we know, the distinction between rights and remedies is often a slippery one. For simplicity's sake, we will discuss the question of individual rights under the deficient performance prong and the question of remedies under the prejudice prong. As we shall explain, we have always assumed that Article 36 confers individual rights, even in

> the criminal setting . . . . Further, we believe that there was a viable (and simple) remedy for the Article 36 violation alleged in this case: counsel could have informed Osagiede of his right to consular assistance and the violation could have been raised with the judge presiding at trial.
>
> As excerpted below (footnotes omitted), the Seventh Circuit remanded to the district court, concluding that it could not say that the record "conclusively shows" that the petitioner was not entitled to relief on his Sixth Amendment claim.

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* * * *

[IV.]A.

Effective performance by counsel representing a foreign national in a criminal proceeding is reasonable performance "under prevailing professional norms." *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052. . . .

* * * *

. . . [T]he Vienna Convention was the "Law of the Land" at the time, and 28 C.F.R. § 50.5 required federal agents to comply with it. Professional guidelines instructed lawyers to inform their clients of Article 36 rights. There were hundreds of cases in which courts *had* addressed those rights, even in a criminal setting . . . . Indeed, the district in which Osagiede's case was being heard had just ruled that foreign nationals had individual rights under Article 36. In this climate, we believe that Illinois criminal defense attorneys representing a foreign national in 2003 should have known to advise their clients of the right to consular access and to raise the issue with the presiding judge.

* * * *

B.

We turn to the prejudice prong. . . .

* * * *

. . . [T]he *trial court judge* is in a unique position to remedy an Article 36 violation before prejudice has occurred. . . . Osagiede's lawyer could have taken a simple action to remedy the Government's violation of his Article 36 rights: she could have informed the foreign national of his rights and raised the violation with the presiding judge. . . . The record makes clear that Osagiede's counsel failed to seek this modest remedy. This failure precluded Osagiede from exercising his right to consular assistance and may well have been prejudicial.

If Article 36 has been violated and counsel has failed to remedy the violation, the question becomes whether Osagiede is entitled to an evidentiary hearing to determine whether he has been prejudiced by the failure to invoke the Convention. Two of the major issues to be determined by an evidentiary hearing would be whether the Nigerian consulate *could have* assisted Osagiede with his case and whether it *would have* done so. In order to merit an evidentiary hearing, Osagiede must indicate how he proposes to show a realistic prospect of consular assistance and provide some credible indication of facts reasonably available to him to support his claim. The district court, based in major part on these indications, may then exercise its discretion to conduct a hearing.

To show that concrete prejudice flowed from the deprivation of his right to notification, Osagiede must explain the nature of the assistance he might have received had he been alerted to his Article 36 rights. The record does reveal that Osagiede had a special need for services typically within the power of the consulate. . . . Osagiede has gone a long way toward showing that he deserves an evidentiary hearing.

Osagiede, however, faces another obstacle: having shown that the Nigerian consulate *could* have assisted him, he must also show that the Nigerian consulate *would* have assisted him. The decision to render assistance to a foreign detainee, which gives significance to the obligations imposed by the Convention, rests in the discretion of the Nigerian consulate. . . . Osagiede must provide the district judge with a credible indication that the Nigerian consulate was in fact ready to render assistance in his case. . . . [A] credible assertion of the assistance the consulate would have provided would entitle the petitioner to an evidentiary hearing.

* * * *

B. CHILDREN

1. Adoption

a. Entry into force

On April 1, 2008, the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Adoption Convention") entered into force for the United States. As a Department of State media note issued on that date explained:

> . . . The provisions of the Hague Convention now govern both incoming and outgoing intercountry adoptions between the United States and other Convention countries.
>
> The Hague Convention establishes international norms and procedures for processing intercountry adoption cases involving more than 70 Convention member countries. It mandates safeguards to protect the interests of children, birth parents, and adoptive parents. It also provides that member nations recognize adoptions that take place within other Convention countries.

The full text of the note is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/apr/102855.htm*. For background, *see Digest 2007* at 82–90, *Digest 2006* at 89–98, *Digest 2003* at 108–18, and *Digest 2000* at 141–50.

b. Department of State implementation guidance

In April 2008 the Department of State published several manuals providing guidance on the Hague Adoption Convention, including "A Guide to Outgoing Cases from the United States," and "A Web-Guide for State Authorities on Outgoing Adoption Cases from the United States to Another

Convention Country." The guides are available at *http://adoption.state.gov* and are updated regularly.

2. Abduction

a. New rule on procedures for abduction cases

Effective October 30, 2008, the Department of State issued regulations concerning procedures for handling incoming parental abduction cases pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670 ("Hague Abduction Convention"). 73 Fed. Reg. 64,539 (Oct. 30, 2008); 22 C.F.R. Part 94. The new regulations apply to cases in which children are abducted to the United States from their homes in foreign countries. The Supplementary Information section of the Federal Register publication, excerpted below, provided information on the new regulation.

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Since 1988, the Department of State has served as the United States Central Authority (USCA) under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention). The Office of Children's Issues (CI) in the Department's Bureau of Consular Affairs serves as the primary point of contact for abduction cases and is responsible for processing all Hague Convention applications seeking the return of children wrongfully removed or retained in the United States from any other Hague Convention contracting state. In addition, CI is responsible for facilitating access rights under the Hague Convention. . . .

The processing of incoming Hague Convention applications requires case officers to communicate with foreign Central Authorities about incoming cases, to determine the whereabouts of children wrongfully taken to the United States, to attempt to

promote the voluntary return of abducted children, and to facilitate the initiation of judicial proceedings with a view toward securing the return of abducted children. Many of the case officer functions involve extensive contact with local law enforcement officials, social service agencies, legal aid organizations and local bar associations.

22 CFR Part 94 is being amended to reflect the fact that CI will resume case officer functions for Hague Convention cases where a child has been abducted to or retained in the United States, or will select an entity to assist the Central Authority to carry out these obligations. Since 1996, these functions have been carried out by the National Center for Missing and Exploited Children (NCMEC). . . .

b. 2008 Hague Abduction Convention Compliance Report

In May 2008 the Department of State forwarded to Congress the Report on Compliance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction for Fiscal Year 2007. The report, as required by § 2803 of Public Law 105-277, as amended, 42 U.S.C. § 11611, evaluated each of the countries with which the United States has a treaty relationship for effectiveness in implementing the Hague Abduction Convention with respect to applications for return of or access to children on behalf of parents in the United States. The 2008 report, covering the period October 1, 2006 through September 30, 2007, identified Honduras as "not compliant" with the convention and cited "patterns of noncompliance" in Brazil, Bulgaria, Chile, Ecuador, Germany, Greece, Mexico, Poland, and Venezuela.

The report included a new addendum providing statistics for nontreaty partner countries in order to present a fuller picture of international child abduction, as well as the application of the Hague Abduction Convention. The report is available at *http://travel.state.gov/pdf/2008HagueAbductionConventionComplianceReport.pdf*.

C. PRISONER TRANSFER

In an exchange of notes dated March 3, 2008, and March 18, 2008, respectively, the United States of America and the United Mexican States agreed to continue performing the transfer of convicts between both countries in accordance with the terms and conditions of the Treaty Between the United States of America and the United Mexican States on the Execution of Penal Sentences ("bilateral treaty"), signed in Mexico City on November 25, 1976. The United States and the United Mexican States are parties to two multilateral prisoner transfer treaties that do not exclude the application of the terms of separate bilateral prisoner transfer treaties between two states parties to the multilaterals. The U.S. diplomatic note proposing the arrangement is excerpted below.

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The Department of State refers to the ongoing prisoner transfer relationship between the Governments of the United States and Mexico. This relationship has been a strong one for thirty years. During this period, all prisoner transfers have been conducted pursuant to the terms and conditions of the Treaty Between the United States of America and the United Mexican States on the Execution of Penal Sentences ("bilateral treaty") . . . . Although the Inter-American Convention on Serving Criminal Sentences Abroad ("OAS Convention") has been in force between the United States and Mexico since 2001, Mexico and the United States have continued to use the bilateral treaty as an appropriate and efficient mechanism for the transfer of prisoners.

In this vein, and in light of recent Mexican accession to the Council of Europe Convention on the Transfer of Sentenced Persons ("COE Convention"), the United States expresses its satisfaction with continuing the current arrangement whereby prisoners are considered for transfer to the other country provided that each prisoner satisfies the terms and conditions for transfer contained in the bilateral prisoner transfer treaty. Nothing in either

the COE Convention or the OAS Convention restricts the right of a country to elect to conduct prisoner transfers pursuant to another treaty governing the same matter. Indeed, Article 22(2) of the COE Convention expressly provides that a country is entitled to apply the terms of such a treaty in lieu of the COE Convention.

Cross References

Alien Tort Statute litigation, **Chapters 5.A.2. and 8.D.**
Enforcement of family support obligations, **Chapter 15.B.**

Chapter 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. Extradition and Related Issues

a. U.S.–EU Extradition Agreement

(1) Hearing before Senate Committee on Foreign Relations

On May 20, 2008, Susan Biniaz, Deputy Legal Adviser, Department of State, and Bruce Swartz, Deputy Assistant Attorney General, Criminal Division, Department of Justice, testified in support of the Agreement on Extradition between the United States of America and the European Union, signed at Washington on June 25, 2003, with a related explanatory note (S. Treaty Doc. No. 109-14) ("U.S.–EU Extradition Agreement"), as well as 27 bilateral instruments with each of the 27 EU member states, concluded pursuant to the U.S.–EU Extradition Agreement. As Ms. Biniaz noted:

> Among the most important features of the U.S.–EU Extradition Agreement is a provision replacing outdated "lists" of extraditable offenses with the "dual criminality" approach. . . . It allows extradition for a broader range of offenses, and also will encompass newer ones, e.g. cybercrime, as they develop, without the need to amend the underlying treaties. The Extradition Agreement additionally contains a series of significant improvements to expedite the extradition process . . . .

Ms. Biniaz also explained that 22 of the 27 bilateral agreements amended existing bilateral extradition treaties to incorporate the modifications contained in the U.S.–EU Extradition Agreement (S. Treaty Doc. No. 109-14). The treaties with Latvia (S. Treaty Doc. No. 109-15), Estonia (S. Treaty Doc. No. 109-16), Malta (S. Treaty Doc. No. 109-17), Romania (S. Treaty Doc. No. 110-11), and Bulgaria (S. Treaty Doc. No. 110-12) were comprehensive new extradition treaties that replaced the outdated U.S. extradition treaties with these countries. The text of the hearing is available at S. Rep. No. 110-12, at 21–41 (2008). For additional background, *see Digest 2006* at 127–39.

(2) Questions for the record

On June 13 and 19, 2008, the Department of State and the Department of Justice respectively submitted responses to additional questions from senators arising from the May 2008 hearing. Excerpts below address questions from Senator Joseph R. Biden concerning procedures for provisionally arresting individuals pending receipt of an extradition request. The full texts of all questions and answers related to the hearing are available at S. Rep. No. 110-12, at 41–47 (2008); *see also Digest 2006* at 120–21.

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Answer to 6a. The U.S.–EU Extradition Agreement does not contain an article regulating the standard of proof an EU Member State must satisfy in order to obtain the provisional arrest of a fugitive in the United States pending transmission of the full extradition request. As a result, the bilateral instruments implementing the U.S.–EU Extradition Agreement apply the standard set forth in the extradition treaty currently in force with the Member State concerned. The language in these treaties describing the information to be submitted in support of a request for provisional arrest varies. However, irrespective of the particular language of the treaty, it remains the case that the fourth amendment of the Constitution does apply.

Exactly what categories and quantum of information are sufficient to meet fourth amendment requirements in the context of provisional arrest pending extradition is not well settled, and in particular, U.S. jurisprudence has articulated no uniform response to the question of whether probable cause that the person committed the offense must be provided at the provisional arrest stage. The law, however, is well established in holding that a standard of probable cause must be met at the subsequent stage of the extradition hearing, where the formal extradition request and the certified documents in support of the request are submitted. At the formal extradition hearing, in a case where the fugitive is sought for prosecution, the U.S. court must be satisfied, among other things, that there is sufficient evidence to find there is probable cause to believe the fugitive committed the crime at issue before the judge may certify that the fugitive is extraditable. *Hoxha v. Levi*, 465 F.3d 554, 561 (3d Cir. 2006); *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980). However, if the person has been convicted at a trial at which he was present, proof of the conviction itself satisfies the probable cause requirement and an independent review of the evidence of criminality is not required. See, e.g., *Spatola v. United States*, 925 F.2d 615, 618 (2d Cir. 1991).

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Answer to 6c. Prior to and during treaty negotiations, the executive branch examines a number of questions, including the process by which our negotiating partner issues arrest orders. Our experience has shown that the U.S. probable cause standard is a unique outgrowth of the fourth amendment and the body of jurisprudence interpreting it. While some foreign legal systems come closer to considering the same factors than others, no foreign system adopts the same standard. Therefore, to ensure that there is sufficient indicia of a person's involvement in the crimes alleged prior to being extradited for trial from the United States, our treaties require that the Requesting State's extradition request include a description of the evidence that provides a reasonable basis to believe that he or she committed the offense for which extradition is sought, in addition to a copy of the arrest warrant. The phrase "reasonable basis" is commonly used in our modern treaties

and is more easily understood by foreign prosecutors and judges, but it is meant to be the equivalent of the U.S. "probable cause" standard and is understood as such by our courts.

Senator Biden also asked questions concerning the length of detentions pursuant to provisional arrest warrants.

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Answer to 7c. The Department of Justice takes the position that it is appropriate to hold persons in accordance with the provisions of the particular treaty; and the maximum length of detention depends on the provisions of the particular treaty. Rarely does this time period exceed 60 days, although a few treaties do specify slightly longer periods. In such cases, the longer time period is intended to make special accommodation for translation of potentially voluminous extradition documents into the language of the arresting country; which must be accomplished, together with certification and transmission, within the time specified by the treaty. Whether it is appropriate to exceed the treaty specified maximum would depend on whether the treaty envisions a discretionary extension of that time and the circumstances in a particular case. For example, if the formal extradition documents have been transmitted but unavoidably delayed and it appears that they will be presented within a short period of time (days), then a court might conclude that extension of the person's detention for a few days is appropriate when balanced against the fact that re-arrest may be sought when the documents arrive and there is a significant risk that the fugitive would flee in the interim. However, it is worth restating that missed treaty deadlines are relatively rare and persons are rarely held beyond the treaty prescribed time periods.

(3) Senate advice and consent

On September 23, 2008, the Senate provided its advice and consent to ratification of the U.S.–EU Extradition Agreement. 154 Cong. Rec. S9329 (2008). The resolution of advice and consent contained one declaration stating that the treaty

"is self-executing." It also contained one condition, requiring the Attorney General, in coordination with the Secretary of State, to submit a report to the Committee on Foreign Relations and the Committee on the Judiciary of the Senate containing the following information:

(1) The number of provisional arrests made by the United States during the previous calendar year under each bilateral extradition treaty with a Member State of the European Union, and a summary description of the alleged conduct for which provisional arrest was sought;
(2) The number of individuals who were provisionally arrested by the United States under each such treaty who were still in custody at the end of the previous calendar year, and a summary description of the alleged conduct for which provisional arrest was sought;
(3) The length of time between each provisional arrest listed under paragraph (1) and the receipt by the United States of a formal request for extradition; and
(4) The length of time that each individual listed under paragraph (1) was held by the United States or an indication that they are still in custody if that is the case.

The report is due no later than February 1, 2010, and every February 1 for the next four years.

On September 23 the Senate provided its advice and consent as well to ratification of the 27 bilateral extradition instruments with all of the EU member states. The Senate conditioned its advice and consent to ratification of each on a declaration that it "is self-executing." 154 Cong. Rec. S9329–S9331 (2008).

b. Extradition of fugitives alleging fear of torture

(1) Trinidad y Garcia v. Benov

On January 23, 2008, in litigation before the U.S. District Court for the Central District of California arising from a

magistrate judge's order certifying the extraditability of Hedelito Trinidad y Garcia ("Trinidad") to the Philippines, the United States filed a declaration explaining the process for extraditing fugitives from the United States to a foreign country, particularly where fugitives allege fear of torture in the state requesting extradition. *Trinidad y Garcia v. Benov*, Case No. CV 07-06387 MMM (C.D. Cal.).

On October 15, 2007, Trinidad filed a petition for writ of habeas corpus, challenging the magistrate judge's order certifying his extraditability. Trinidad's challenge included the claim that his extradition to the Philippines would violate Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). Article 3 prohibits a Party from extraditing a person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The United States provided a formal, written Understanding in its instrument of ratification for the CAT, stating the U.S. interpretation of the phrase in Article 3 of the CAT to mean "if it is more likely than not that he would be tortured." The CAT entered into force for the United States on November 20, 1994, and the United States enacted implementing legislation as part of the Foreign Affairs Reform and Restructuring Act, which is codified at 8 U.S.C. § 1231 note ("FARR Act"). Pursuant to the FARR Act, the State Department adopted regulations, 22 C.F.R. Part 95, to implement Article 3 of the CAT. On December 20, 2007, Trinidad filed a motion to stay the habeas proceeding while the Secretary of State reviewed his CAT claim.

The declaration of Clifton M. Johnson, Assistant Legal Adviser, Law Enforcement and Intelligence ("L/LEI"), Department of State, excerpted below, stated the U.S. view that the Secretary of State's extradition decision is in all cases, including those in which a claim of torture is raised, an exercise of discretion not subject to judicial review. The full text of Mr. Johnson's declaration and the U.S. brief it accompanied are available at *www.state.gov/s/l/c8183.htm*. Chapter 6.F.2.

discusses the U.S. practice of seeking and obtaining diplomatic assurances that a state requesting extradition will not torture a fugitive who has raised torture-related challenges to extradition.

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2. Extradition requests made to the United States begin when a formal extradition request is presented to the State Department by a diplomatic note from the requesting State's embassy in Washington, or through a similar diplomatic communication. Upon receiving the request with properly certified supporting documents, an attorney within L/LEI reviews 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 treaty; and (c) whether, on the face of the supporting documents, there is no clearly-evident defense to extradition under the treaty . . . . If the attorney is satisfied that the extradition request facially satisfies these requirements, L/LEI transmits the request and documents to the Department of Justice for further review and, if appropriate, the commencement of extradition proceedings before a United States magistrate judge or a United States district judge.

3. The extradition judge conducts a hearing to examine whether extradition would be lawful under the terms of the treaty and the relevant provisions of United States law, 18 U.S.C. §§ 3181–3196, including determining whether there is sufficient evidence to sustain the charge(s) against the fugitive. If he or she finds that a fugitive is extraditable on any or all of the charges for which extradition is sought, the extradition judge certifies the fugitive's extraditability to the Secretary of State, who is the U.S. official responsible for determining ultimately whether to surrender the fugitive to the requesting State. *See* 18 U.S.C. §§ 3184, 3186. . . . [U]nder the long-established "rule of inquiry," consideration of the likely treatment of the fugitive if he or she were to be returned to the country requesting extradition should not be a part of the decision to

certify extraditability. Instead, such issues are considered by the Secretary of State in making the final extradition decision.[1]

4. The extradition judge's certification is not directly appealable, but can be challenged on certain grounds through a petition for a writ of habeas corpus. Once the judicial process is complete—either because the fugitive is not pursuing a habeas corpus petition or because such a petition has been denied—the second phase of the extradition process begins, wherein the Secretary must decide whether a fugitive who has been found extraditable by a court should actually be extradited to a requesting State. In determining whether a fugitive should be extradited, the Secretary may consider *de novo* any and all issues properly raised before the extradition court (or a habeas court), as well as any other considerations for or against surrender. Among these other considerations are humanitarian issues and matters historically arising under the rule of non-inquiry, including whether the extradition request was politically motivated, whether the fugitive is likely to be persecuted or denied a fair trial or humane treatment upon his or her return, and, since the entry into force for the United States of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention") in 1994, specifically whether it is more likely than not that the fugitive would face torture in the requesting State.

5. The United States has undertaken the obligation under Article 3 of the Torture Convention not to extradite a person to a country where "there are substantial grounds for believing that he would be in danger of being subjected to torture." A formal, written Understanding included in the United States' instrument of ratification of the treaty establishes that the United States interprets this phrase to mean "if it is more likely than not that he would be

[1] The Secretary's authority has been delegated and may be exercised by the Deputy Secretary of State and, in cases not involving allegations of torture, by the Under Secretary of State for Political Affairs. The Secretary retains the authority to act personally in any case as well. References in this declaration to the "Secretary" should be read to include her delegates where appropriate.

tortured." As the U.S. official with ultimate responsibility for determining whether a fugitive will be extradited, the Secretary carries out the obligation of the United States under the Torture Convention.

6. The Department's regulations at 22 C.F.R. Part 95, which the Department promulgated pursuant to section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-277, outline the procedures for considering the question of torture in the context of the Secretary's determination as to whether a fugitive will be extradited. Whenever allegations relating to torture are brought to the Department's attention by the fugitive or other interested parties, appropriate policy and legal offices within the Department with regional or substantive expertise review and analyze information relevant to the particular case in preparing a recommendation to the Secretary. The Department's Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports . . . is a key participant in this process. The views of the relevant regional bureau, country desk, and U.S. Embassy also play an important role in the Department's evaluation of torture claims, because our regional bureaus, country desks, and Embassies are knowledgeable about matters such as human rights, prison conditions, and prisoners' access to counsel, in general and as they may apply to a particular case in a requesting State.

* * * *

8. The Secretary will not approve an extradition whenever she determines that it is more likely than not that the particular fugitive will be tortured in the country requesting extradition. Based on the analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State or to deny surrender of the fugitive. . . . [I]n some cases, the Secretary might condition the extradition on the requesting State's provision of assurances related to torture or aspects of the requesting State's criminal justice system that protect against mistreatment. . . . Whether assurances are sought is decided on a case-by-case basis. . . .

* * * *

11. Consistent with federal statutes and the Department's regulations, the Secretary makes her extradition determination, and in particular evaluates any claims regarding the likelihood of torture, only after the fugitive has been committed for extradition and any habeas petitions have been resolved. *See* 7 FAM 1634.3(f), which provides as follows:

> Under U.S. law (18 U.S.C. 3188), a fugitive who has been certified extraditable and committed to custody must be transferred to the requesting country within two calendar months of such certification and commitment. A fugitive who is not transferred by the expiration date of the statutory two-month period may petition the District Court for release. For this reason, the Department of State may initiate the final review of the case as soon as feasible after the receipt of the record of the case. However, if a fugitive seeks judicial review of the extradition judge's finding of extraditability, the Department suspends its final review of the case. After the district court denies the petition for habeas corpus the Department typically begins or resumes its review process unless a court has stayed the surrender pending appeal.

This is the approach the Department intends to take in this case as well. A contrary approach would be wasteful of government resources and potentially detrimental to the foreign policy of the United States, as it would be ill-advised for the Department to embark on the extensive and sensitive process described above if there were still a question as to whether the fugitive will be found to be extraditable. Moreover, the Department's ability to seek and obtain assurances, should that become necessary, would be limited if the Department is unable to explain to the requesting State whether and on what charges the fugitive could be surrendered if the assurances were given.

* * * *

14. A judicial decision overturning a determination made by the Secretary after extensive discussions and negotiations with a

requesting State could seriously undermine our foreign relations. Moreover, judicial review of the Secretary's determination—which as noted above is based on a wide range of information derived from people who are professionally expert in country conditions in the requesting State—to surrender a fugitive to a requesting State inevitably would add delays to extradition in what is already frequently a lengthy process. A new round of judicial review and appeal could undermine the requesting State's ability to prosecute and also harm our efforts to press other countries to act more expeditiously in surrendering fugitives for trial in the United States.

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The court denied Trinidad's motion on March 3, 2008, finding:

> . . . [I]t is clear that the Secretary has compelling reasons to wait until habeas review is complete before embarking on her own discretionary review of an extradition request. It is equally clear that courts should be careful not to intrude on the Secretary's discretion in this area. . . .
>
> Courts have discretion to stay proceedings in the interest of managing their dockets . . . . Nonetheless, that discretion does not authorize unwarranted interference in the internal workings of the State Department. This is especially true in the extradition context, as to which the Ninth Circuit has cautioned that courts must defer to the executive unless explicitly authorized to act.

Trinidad y Garcia v. Benov, Case No. CV 07-06387 MMM (C.D. Cal). The court's unpublished order is available at *www.state.gov/s/l/c8183.htm*.

On April 15, 2008, Trinidad asked the court to reconsider its order or allow him to dismiss his challenge to the magistrate judge's decision while retaining jurisdiction over his CAT claim and staying extradition until the Secretary had decided on that claim. On May 12, 2008, the court denied the motion. On July 17, 2008, the court dismissed Trinidad's habeas petition without prejudice to the filing of a new motion

if the Secretary decides to surrender him, and on September 17, 2008, Trinidad filed a second habeas petition. On September 29, 2008, the court stayed Trinidad's extradition pending completion of the habeas proceedings, and further litigation remained pending at the end of 2008.

(2) In re Extradition of Tawakkal

On August 29, 2007, Pakistan requested the extradition of Muhammad Farooq Tawakkal and Muhammad Farid Tawakkal (the "Qadirs") on charges of corruption and corrupt practices. On February 13, 2008, the United States filed a complaint for extradition under the Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland of December 22, 1931 (47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59), which continued in force between the United States and Pakistan, pursuant to the Schedule to the Independence (International Arrangements) Order of 1947, and 18 U.S.C. §§ 3181–3196. The Qadirs argued that they were not extraditable because no extradition treaty existed between the United States and Pakistan. Their other challenges included the claim that they would be tortured if they were extradited to Pakistan. On August 22, 2008, the magistrate judge issued a memorandum opinion finding the Qadirs extraditable to Pakistan, as well as certificates of extraditability. *In re Extradition of Tawakkal*, 2008 U.S. Dist. LEXIS 65059 (E.D. Va. 2008).

Excerpts from the magistrate judge's opinion below discuss the impact of Pakistan's independence from British colonial rule on the applicability of the extradition treaty, as well as the judge's determination that the rule of non-inquiry prevented the court from exercising jurisdiction over the Qadirs' allegations concerning fear of torture. (Some footnotes and all citations to the parties' submissions are omitted.)

* * * *

The Qadirs maintain that the Government has not established Factor Three because no extradition treaty between the United States and Pakistan exists. The Qadirs argue that, because the 1973 Pakistani Constitution and the India Independence Act of 1947[7] failed to adopt the treaty specifically, and Pakistan does not qualify as a successor state to British India, the treaty lapsed as to Pakistan.[8]

In jumping to these arguments, however, the Qadirs fail to show this Court why it should ignore the vast amount of evidence establishing that the treaty is, indeed, in full force and effect. First, Congress has listed this treaty with Pakistan as one of the bilateral treaties of extradition in effect with the United States. 18 U.S.C. § 3181 (*citing* 47 Stat. 2122, noting that the treaty with Pakistan was signed on December 22, 1931, and that it entered into force on March 9, 1942); 47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59. The Court finds the current statutory recognition of the Treaty to be highly persuasive, and the Qadirs offer no explanation why this Court should inquire beyond it.

Second, a competent representative of the Department of State has sworn under penalty of perjury that this treaty is in full force and effect. This same official appends Pakistan's August 29, 2007 request for extradition of the Qadirs made pursuant to the Treaty and diplomatic notes which he says confirm the adoption of the Treaty by both countries. The Qadirs offer no sworn statement or judicial finding countermanding the sworn evidence from the Department of State.

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[7] Specifically, the Qadirs argue that Article 7(b) of the Indian Independence Act eviscerates application of the treaty when it provides that British sovereignty lapses "and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the Rulers of Indian States." The Qadirs add that Pakistan failed to specifically adopt the treaty with the lawmaking power provided under Article 6 of the Independence Order, which extends to laws with extraterritorial operation.

[8] The Qadirs claim this is so because Pakistan's borders are not contiguous to previously existing borders, and distinguish Pakistan from India in that manner. For instance, they note that India took over an extant seat in the United Nations, while a new seat had to be created for Pakistan.

This Court must give great weight to the interpretation of treaties given by the Department of State. *See Sayne v. Shipley*, 418 F.2d 679, 684 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970) ("Because we recognize that the conduct of foreign affairs is a political, not a judicial function, such advice, while not conclusive on this Court is entitled to great weight and importance.)" (citation omitted). Indeed, the Court must give weight to the intentions of both countries. *See Hoxha v. Levi*, 371 F. Supp. 2d 651, 659 (E.D. Pa. 2005) ("[T]he Court must defer to the intentions of both countries' respective state departments when deciding the continued validity of a treaty."). This Court finds the declarations and the letters as to the existence of the Treaty highly persuasive.

Moreover, other courts clearly recognize that Pakistan and the United States have an extradition treaty. *See, e.g.*, *United States v. Khan*, 993 F.2d 1368, 1372 n.1 (9th Cir. 1993) ("[T]he United States Extradition Treaty with Great Britain dated December 22, 1931, which was made applicable to India from March 9, 1942, is the operative extradition treaty between the United States and Pakistan."); *Ahmed v. Morton*, No. CV96-0760 (CPS), 1996 WL 118543, at *3 (E.D.N.Y. Mar. 6, 1996). Several recent cases discuss the extradition of individuals pursuant to the Treaty.[11] *See, e.g.*, *United States v. Khattak*, 273 F.3d 557, 559 (3d Cir. 2001) ("Khattak, a resident of Pakistan . . . . was arrested and extradited to the United States."); *United States v. Yousef*, 927 F. Supp. 673, 681 (S.D.N.Y. 1996) ("Yousef was surrendered to United States officials by the Pakistan government pursuant to an extradition request made by the United States."); *Ahmed*, 1996 WL 118543,

[11] Although the Qadirs suggest that these cases should not persuade because none of the subject extraditees in those cases challenged the existence of the Treaty, this Court finds otherwise. The validity of the Treaty is integral to any decision to extradite. Especially given the record at bar, this court is loathe to presume that so many other courts failed properly to assess the validity of the Treaty. Moreover, the failure to challenge the application of the Treaty in so many cases can attest to its treatment as a fact one cannot challenge because it is so obviously true.

*1–3. Former extraditions under the Treaty provide a "clear indication" that the Treaty remains in effect. *Hoxha*, 371 F. Supp. 2d at 659.

Finally, the United States presents an aspect of the Independence Order that calls into question the Qadirs' claim that the Treaty lapsed. The United States proffers Schedule 4 of the Indian Independence (International Arrangements) Order of 1947, which states in part:

> 4. Subject to Articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions.

The Gazette of India Extraordinary, Aug. 14, 1947, at 911–12. This appears to confirm that the international agreements such as the one at bar remain in effect.

Given the variety of manners in which this Treaty has been recognized, and given that this Court has before it statements from competent individuals in the United States and Pakistan that the treaty exists, this Court declines the invitation to analyze Pakistani constitutional and international law to confirm whether this should be discredited. The arguments presented by the Qadirs do not warrant such inquiry. On this record, it is well beyond the Court's purview. Accordingly, the Court finds that Factor Three is satisfied because an extradition treaty between the United States and Pakistan is in full force and effect.

* * * *

D. Torture

Finally, the Court addresses the Qadirs' argument that extradition should not be certified because they fear torture if they are extradited to Pakistan. The Qadirs base these arguments on several reports, including two by the United States Department of State, which discuss police and security forces in Pakistan

engaging in torture or corrupt practices.[25] As to the Qadirs themselves, they state that "there also are questions about the political implications, under the current regime, of the privatization of the Pakistan Automobile Corp. Ltd., which became Naya Daur Motors Ltd." During oral argument, the Qadirs confirmed that the heart of their argument stemmed from Pakistan's practices generally, rather than from threats specific to them.

Given its limited role at this stage, the Court cannot consider this argument as a basis for denying certification. The so-called rule of judicial non-inquiry leaves political determinations to the Secretary of State: "It is the duty of the judicial branch to ensure that the individual sought is subject to extradition, while it is the duty of the executive branch, which possesses great power in the realm of foreign affairs, to ensure that extradition is not sought for political reasons and that no individual will be subject to torture if extradited." *Hoxha*, 371 F. Supp. 2d at 660 (*citing In re Extradition of Singh*, 123 F.R.D. 127, 133 (D.N.J. 1987); *Peroff* [*v. Hylton*], 542 F.2d [1247,] 1249 [(4th Cir. 1976)]. Article 6 of the Treaty at bar prohibits extradition when the offense for which a person is sought is "of a political character." (Treaty, Art. 6.) While noting exceptions for circumstances not present here, the Fourth Circuit has recently confirmed that such political decisions are generally left to the Secretary of State. *Ordinola v. Hackman*, 478 F.3d 588, 604 (4th Cir.), *cert. denied*, 128 S. Ct. 373 (2007).[26]

The rule of non-inquiry does not prevent the Qadirs from presenting such evidence altogether; it merely delays presentation to a branch of government with an "ability to speak with one voice" as to foreign policy and a branch better able to "consider sensitive foreign policy issues." *Munaf v. Geren*, 128 S. Ct. 2207, 2226

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[25] Country Reports on Human Rights Practices 2007, Pakistan at Sec. 1(c) ¶1 (Dept. of State Mar. 11, 2008) (available at *http:www.state.gov/g/drl/rls/hrrpt/2007/100619.htm*); Country Reports on Human Rights Practices 2006, Pakistan at Sec. 1(c) ¶1 (Dept. of State Mar. 6, 2007) (available at *http.www.state.gov/g/drl/rls/hrrpt/2006/78874.htm*).

[26] The Fourth Circuit has noted that, once the executive has determined that extradition should commence, judicial inquiry into a claim of torture may be available in limited circumstances. *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007), *cert. dismissed*, 128 S. Ct. 976 (2008). . . .

(2008) . . . . [For a discussion of the Supreme Court's decision, *see* 1.g. below.] Courts have noted that "[t]he interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States . . . judge concerning the fairness of its laws and the manner in which they are enforced." *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990).

Department of State regulations make it clear that the United States will not extradite a fugitive to a country where it believes it is more likely than not that the fugitive will be tortured. *See* 22 C.F.R. 95.2. The fact that the Qadirs rely on State Department studies for their claim highlights where the expertise on this issues lies, and provides an even greater reason to leave that examination to the branch that has developed such expertise. The studies also confirm that the State Department is not "oblivious" to the concerns raised by the Qadirs. *Munaf*, 128 S. Ct. at 2226 (*quoting* appellate decision, *Omar v. Harvey*, 479 F.3d 1, 20 n.6 (D.C. Cir 2007)). This Court should defer because the "other branches possess significant diplomatic tools and leverage the judiciary lacks." *Id*.

Because the Court lacks jurisdiction to consider these claims in this extradition proceeding, so they will not be heard.

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c. Role of Geneva conventions in extradition: Noriega v. Pastrana

On October 26, 2007, after a magistrate judge in Florida certified that Manuel Noriega was extraditable to France, Noriega petitioned the U.S. District Court for the Southern District of Florida for a writ of habeas corpus. Noriega argued that his extradition would violate his rights as a prisoner of war under the Third Geneva Convention. For prior background in this case, including discussion of the U.S. opposition to the petition, *see Digest 2007* at 108–17. On January 14, 2008, the district court denied Noriega's petition.

On January 31, 2008, the district court granted Noriega's motion seeking a stay of extradition pending appeal. *Noriega v. Pastrana*, 2008 U.S. Dist. LEXIS 7203 (S.D. Fla. 2008).

In doing so, the court concluded that, although "Noriega has not made a strong showing that he is likely to prevail on the merits," the "unique legal issues" posed by the case, including the interpretation and application of provisions of the Third Geneva Convention and the "complex interplay between the Geneva Convention and the extradition treaty between the United States and France," as well as the balance of other factors warranted granting a stay. Noriega's appeal to the U.S. Court of Appeals for the Eleventh Circuit was pending at the end of 2008.*

d. Extradite or prosecute

On November 3, 2008, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixtieth session. U.N. Doc. A/63/10, available at *http://untreaty.un.org/ilc/reports/2008/2008report.htm*. Mr. Simonoff's comments on the ILC's work concerning the issue of the obligation to extradite or prosecute, particularly the need for the ILC to complete a comprehensive review of state practice in this area, are excerpted below. The full text of his statement is available at *www.state.gov/s/l/c8183.htm*. The ILC report is available at *http://untreaty.un.org/ilc/reports/2008/2008report.htm*.

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. . . The United States is a party to a number of international conventions that contain an obligation to extradite or submit a

* Editor's note: On April 8, 2009, the Eleventh Circuit affirmed the decision of the district court dismissing Noriega's habeas petition. *Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2009). On July 7, 2009, Noriega filed a petition for writ of certiorari in the Supreme Court, which was pending when this volume went to press.

matter for prosecution. We consider such provisions to be an integral and vital aspect of collective efforts to deny terrorists and other criminals a safe haven.

The United States believes, however, that its practice, as well as the practice of other States, reinforces the view that there is not a sufficient basis in customary international law or State practice to formulate draft articles that would extend an obligation to extradite or prosecute beyond binding international legal instruments that contain such obligations. Instead, States only undertake such obligations by joining binding international legal instruments that contain relevant provisions, and the obligations extend only to other States that are parties to such instruments and only to the extent of the terms of such instruments. Otherwise, States could be required to extradite or prosecute an individual under circumstances where the States lacked the necessary legal authority to do so, such as the necessary bilateral extradition relationship or jurisdiction over the alleged offense.

Last year, the Commission reiterated the importance of ascertaining State practice in this area before proceeding to any conclusions. General Assembly resolution 62/66, highlighting a request from the Commission, invited Governments to provide information on legislation and practice regarding the topic. . . . The United States has provided the requested information and looks forward to receiving the relevant information from States that have not yet provided it.

The United States believes that a comprehensive view of State practice in this area is essential to any consideration of whether there is a basis for inferring a customary international legal norm to extradite or prosecute. This is particularly the case where, as here, the State practice reported to date is largely confined to implementing treaty-based obligations. While the lack of consistent and sustained State practice to extradite or prosecute in the absence of a treaty-based obligation might suffice to determine that there is not yet such a customary international law norm, any consideration that there might in fact be such a norm would necessitate a broader range of reporting.

. . . As has been noted by the Commission ever since its first report on this topic, if the obligation to extradite or prosecute

exists only under international treaties, draft articles on the topic may not be appropriate. We urge the Commission, if it continues to believe that consideration of a customary norm in this area might be warranted, to allow sufficient time to receive and evaluate information provided by States.

e. Extradition-related restriction on foreign assistance

Section 683 of Title VI of the Department of State, Foreign Operations and Related Programs Appropriations Act, 2008, enacted as Division J of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, imposes an extradition-related restriction on foreign assistance funds the act appropriates for the Department of State. Such funds may not be used to provide assistance "for the central government of a country which has notified the Department of State of its refusal to extradite to the United States any individual indicted for a criminal offense for which the maximum penalty is life imprisonment without the possibility of parole or for killing a law enforcement officer." The restriction applies only to a country with which the United States has an extradition treaty and diplomatic relations, and only if that country has refused a specific U.S. extradition request in violation of the extradition treaty. The Secretary of State may waive the restriction on a case-by-case basis if she certifies to the congressional appropriations committees "that such waiver is important to the national interests of the United States."

f. Temporary transfer under the U.S.–Mexico extradition treaty

On October 21, 2008, the United States carried out the first temporary surrender of an individual under Article 15(2) of the U.S.–Mexico Extradition Treaty, as amended, 31 U.S.T. 5059, T.I.A.S. No. 9656. Article 15(2) addresses the situation in which a state party has granted an extradition request but has not extradited that individual because it has convicted and sentenced that person. In such cases, the party may,

on request, surrender that individual temporarily to the requesting state for prosecution. Article 15(2) requires the requesting party to keep the surrendered person in custody and to return him or her to the requested party after the conclusion of the proceedings, in accordance with conditions to be determined by agreement of the parties.

In this case, the United States responded to Mexico's request for the temporary surrender of Jose Francisco Granados de la Paz. A U.S. magistrate judge found Granados de la Paz extraditable on August 20, 2007, following proceedings in the U.S. District Court for the Middle District of Pennsylvania. On October 9, 2007, the State Department's Under Secretary for Political Affairs signed a warrant authorizing Granados de la Paz's extradition to the custody of Mexican escort agents. Extradition was deferred because Granados de la Paz was serving a sentence in a federal corrections institution in Pennsylvania on U.S. charges. Although Article 15(2) contemplates the return of a temporarily surrendered individual to the United States upon the conclusion of Mexican court proceedings, the United States relinquished its claim to the return of Granados de la Paz if he remained in Mexican custody through March 2010. If, for any reason, Granados de la Paz would be subject to release from Mexican custody before then, the United States required his return to the United States.

g. Munaf v. Geren

On June 12, 2008, the U.S. Supreme Court vacated two lower court judgments, *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007), and *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007), and an injunction issued in *Omar*.* *Munaf v. Geren*, 128 S. Ct.

* Editor's note: After the appeals court issued its decision in *Omar*, Pete Geren, Acting Secretary of the U.S. Army, was substituted for Secretary of the Army Francis J. Harvey in the two cases. When the Supreme Court granted certiorari in both *Munaf* and *Omar*, it consolidated the two cases. 128 S. Ct. 741 (2007).

2207 (2008). Both cases concerned habeas petitions brought by U.S. citizens who were detained by the Multinational Force–Iraq ("MNF–I") and sought to prevent their transfer to Iraqi custody for criminal prosecution. The Court determined that the petitioners were not entitled to the relief they sought and refused to enjoin their transfer. The Court decided that granting the petitioners' request "would interfere with Iraq's sovereign right 'to punish offenses against its laws committed within its borders.'" The Court rejected the petitioners' arguments that general principles of sovereignty did not apply in their case because their transfer to Iraqi custody would likely result in torture.

As excerpted below, while it found that the detainees' allegations were "a matter of serious concern," the Court concluded that the political branches, not the judiciary, should address that concern. The Court noted that the executive branch had evaluated the risk that the two petitioners would be tortured if they were transferred to Iraqi custody and determined that the facilities run by the Iraqi Ministry of Justice, which would have custody over the two petitioners, "generally met internationally accepted standards for basic prisoner needs." (Citations to other submissions in the case are omitted.) *See* Chapter 18.A.4.a.(5) for additional discussion of the Court's decision.

A brief on the merits for the federal parties and a reply on the merits submitted by the United States in January and March 2008 are available at *www.usdoj.gov/osg/briefs/2007/3mer/2mer/2007-0394.mer.aa.html* and *www.usdoj.gov/osg/briefs/2007/3mer/2mer/2007-0394.mer.rep.html*, respectively. For discussion of the history of the litigation, *see Digest 2007* at 956–68 and *Digest 2006* at 1194–213.

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. . . Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil. As Chief Justice Marshall explained nearly two centuries ago, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Schooner*

Exchange ***v.*** *McFaddon*, 7 Cranch 116, 136 (1812). See *Wilson* [*v. Girard*, 354 U.S. 524,] 529 [(1957)] ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction"); *Reid v. Covert*, 354 U.S. 1, 15, n.29 (1957) (opinion of Black, J.) ("[A] foreign nation has plenary criminal jurisdiction . . . over all Americans . . . who commit offenses against its laws within its territory"); *Kinsella v. Krueger*, 351 U.S. 470, 479 (1956) (nations have a "sovereign right to try and punish [American citizens] for offenses committed within their borders," unless they "have relinquished [their] jurisdiction" to do so).

This is true with respect to American citizens who travel abroad and commit crimes in another nation whether or not the pertinent criminal process comes with all the rights guaranteed by our Constitution. "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people." *Neely v. Henkel*, 180 U.S. 109, 123 (1901).

. . . Not only have we long recognized the principle that a nation state reigns sovereign within its own territory, we have twice applied that principle to reject claims that the Constitution precludes the Executive from transferring a prisoner to a foreign country for prosecution in an allegedly unconstitutional trial.

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Petitioners contend that these general principles are trumped in their cases because their transfer to Iraqi custody is likely to result in torture. This allegation was raised in Munaf's petition for habeas, but not in Omar's. Such allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the judiciary. See M. Bassiouni, International Extradition: United States Law and Practice 921 (2007) ("*Habeas corpus* has been held not to be a valid means of inquiry into the treatment the relator is anticipated to receive in the requesting state").

. . . Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments. Thus, the Court in *Neely* concluded that an American citizen who "commits a crime in a foreign country" "cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people," but went on to explain that this was true "unless a different mode be provided for by treaty stipulation between that country and the United States." 180 U.S., at 123. Diplomacy was the means of addressing the petitioner's concerns.

By the same token, while the Court in *Wilson* stated the general principle that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders," it recognized that this rule could be altered by diplomatic agreement in light of particular concerns—as it was in that case—and by a decision of the Executive to waive jurisdiction granted under that agreement—as it was in that case. 354 U.S., at 529. . . . This recognition that it is the political branches that bear responsibility for creating exceptions to the general rule is nothing new; as Chief Justice Marshall explained in the *Schooner Exchange*, "exemptions from territorial jurisdiction . . . must be derived from the consent of the sovereign of the territory" and are "rather questions of policy than of law, that they are for diplomatic, rather than legal discussion." 7 Cranch, at 143, 146. The present concerns are of the same nature as the loss of constitutional rights alleged in *Wilson* and *Neely*, and are governed by the same principles.[5]

The Executive Branch may, of course, decline to surrender a detainee for many reasons, including humanitarian ones. Petitioners

[5] The United States has in fact entered into treaties that provide procedural protections to American citizens tried in other nations. See, *e.g.*, North Atlantic Treaty: Status of Forces, June 19, 1951, 4 U.S.T. 1802, T.I.A.S. No. 2846, Art. VII, ¶ 9 (guaranteeing arrested members of the Armed Forces and their civilian dependents, *inter alia*, an attorney, an interpreter, and a prompt and speedy trial, as well as the right to confront witnesses, obtain favorable witnesses, and communicate with a representative of the United States).

here allege only the possibility of mistreatment in a prison facility; this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway. Indeed, the Solicitor General states that it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result. In these cases the United States explains that, although it remains concerned about torture among some sectors of the Iraqi Government, the State Department has determined that the Justice Ministry—the department that would have authority over Munaf and Omar—as well as its prison and detention facilities have "'generally met internationally accepted standards for basic prisoner needs.'" The Solicitor General explains that such determinations are based on "the Executive's assessment of the foreign country's legal system and . . . the Executive['s] . . . ability to obtain foreign assurances it considers reliable."

The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area. See The Federalist No. 42, p. 279 (J. Cooke ed. 1961) (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations"). In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is. As Judge Brown noted, "we need not assume the political branches are oblivious to these concerns. Indeed, the other branches possess significant diplomatic tools and leverage the judiciary lacks." [*Omar v. Harvey*,] 479 F.3d [1,] 20, n.6 [(D.C. Cir. 2007)] (dissenting opinion).

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The Court also rejected the detainees' argument that the United States had no legal authority to transfer them to Iraqi custody. As the Court stated:

> . . . [T]his is not an extradition case, but one involving the transfer to a sovereign's authority of an individual captured and already detained in that sovereign's territory.

> In the extradition context, when a "fugitive criminal" is found within the United States, "'there is no authority vested in any department of the government to seize [him] and surrender him to a foreign power,'" in the absence of a pertinent constitutional or legislative provision. [*United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).] But Omar and Munaf voluntarily traveled to Iraq and are being held there. They are therefore subject to the territorial jurisdiction of that sovereign, not of the United States. Moreover, as we have explained, the petitioners are being held by the United States, acting as part of MNF–I, at the request of and on behalf of the Iraqi Government. It would be more than odd if the Government had no authority to transfer them to the very sovereign on whose behalf, and within whose territory, they are being detained.

2. Mutual Legal Assistance Treaties and Related Issues

a. U.S.–EU mutual legal assistance agreement

On September 23, 2008, the Senate provided its advice and consent to ratification of the Agreement on Mutual Legal Assistance between the United States of America and the European Union, signed at Washington on June 25, 2003 (S. Treaty Doc. No. 109-13), subject to a declaration stating that the treaty "is self-executing." 154 Cong. Rec. S9333 (2008). In addition, the Senate provided its advice and consent to ratification of 27 bilateral instruments between the United States and the member states of the European Union (S. Treaty Doc. No. 109-13), and to the Treaty between the Government of the United States of America and the Government of Sweden on Mutual Legal Assistance in Criminal Matters, signed at Stockholm on December 17, 2001 (S. Treaty Doc. No. 107-12), each subject to a declaration stating that it "is self-executing." 154 Cong. Rec. S9333–S9335 (2008). For background, *see* testimony of State Department Deputy Legal Adviser Susan Biniaz at S. Rep. No. 110-12, at 23–26, 33–35 (2008); *see also Digest 2006* at 139–47.

b. U.S.–Malaysia mutual legal assistance agreement

On September 23, 2008, the Senate provided its advice and consent to ratification of the Agreement on Mutual Legal Assistance between the United States of America and Malaysia, signed at Kuala Lumpur on July 28, 2006 (S. Treaty Doc. No. 109-22), subject to a declaration stating that the treaty "is self-executing." 154 Cong. Rec. S9331–S9332 (2008).* In written testimony to the Senate Committee on Foreign Relations on May 20, 2008, excerpted below, Ms. Biniaz commented on the significance of the treaty. For the full transcript of the hearing, *see* S. Rep. No. 110-12, at 21–41 (2008).

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One of the less common features of this treaty is the provision allowing either party to refuse assistance in the absence of so-called "dual criminality"—in other words, if the conduct being investigated and prosecuted would not also constitute an[] offense in the state receiving the request punishable by a maximum sentence of at least 1 year's imprisonment. Unlike extradition treaties, most MLATs do not have, and do not require, such a provision but it is not unprecedented and we view it as a workable approach. To provide sufficient certainty that cooperation will be available for the range of requests we are likely to submit, our negotiators undertook two important steps: first, they conducted a review and comparison of the criminal codes of the two countries and concluded [there] was sufficient commonality between the two that U.S. authorities would be able to obtain assistance in a broad range of matters. In addition, the negotiators prepared and included an annex to the treaty that outlines a set of offenses for which assistance will not be denied on the ground of absence of dual criminality. This annex includes the types of offenses for which U.S. prosecutors generally seek assistance abroad.

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* Editor's note: The U.S.–Malaysia MLAT entered into force on January 21, 2009.

c. Sharing of classified information

On February 26, 2008, the U.S. Mission to the European Union conveyed a diplomatic note to the Office of Security of the General Secretariat of the EU Council, approving a technical security arrangement among the Department of State, the General Secretariat of the EU Council Security Office, and the European Commission Security Directorate. The three authorities concluded the security arrangement pursuant to the 2007 Agreement between the European Union and the Government of the United States of America on the Security of Classified Information ("Agreement"). *See Digest 2007* at 128–29. As envisioned in the Agreement, the technical security arrangement elaborates reciprocal standards for protecting classified information exchanged under the Agreement. Since the two European authorities had approved the arrangement and notified the United States accordingly in July 2007, the U.S. diplomatic note completed the final step to enable the three authorities to exchange classified information.

d. Exchange of biometric and other data with Germany

On March 11, 2008, the United States signed an agreement with Germany, which enabled both countries to exchange biometric (fingerprint) as well as certain other types of personal data to combat terrorism and other crime. A press release issued by the Department of Homeland Security, excerpted below, provides additional background on the agreement. The full text is available at *www.dhs.gov/xnews/releases/pr_1205330012342.shtm*. At the end of 2008, the agreement had not yet entered into force.

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The agreement gives the countries mutual access to fingerprint databases for the purpose of determining if evidence in them could

be helpful in criminal investigations and prosecutions. It also sets forth procedures for obtaining that evidence through lawful processes, while ensuring that personal data is appropriately protected.

The agreement additionally provides a mechanism for the U.S. and Germany to share information about known and suspected terrorists, allowing the two countries to more readily assist one another in preventing serious threats to public security, including terrorist entry into either country.

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Under the agreement, the U.S. and Germany can, for the purpose of advancing criminal investigations and prosecutions, query each other's fingerprint databases with unknown prints to determine if the other party has information about the print. If a "hit" is received, the querying party will make a mutual legal assistance request for identifying data, and the use of that data is governed by treaty. If no hit is received, then no information is retained.

Additionally, the agreement contains a spontaneous sharing article that can be used to share biographic and fingerprint information about known and suspected terrorists, as well as information about planned attacks or persons trained to commit terrorist acts.

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e. Visa Waiver Program agreements on preventing serious crime

As part of its efforts to admit new countries to the Visa Waiver Program ("VWP") (*see* Chapter 1.C.4.), the United States signed bilateral agreements on combating serious crime with the Czech Republic, the Slovak Republic, Estonia, Malta, Lithuania, Latvia, Hungary, and Korea in 2008. These agreements were a prerequisite for these countries' admission to the VWP on November 17, 2008. The United States also began negotiating these agreements with the 24 countries that were already VWP members in order to enhance mutual security in accordance with the Implementing

Recommendations of the 9/11 Commission Act, Pub. L. No. 110-53, 121 Stat. 266.

The agreements provide a mechanism for exchanging personal data, including biometric (fingerprint) information, for use in detecting, investigating, and prosecuting criminals. They are based closely on the information-sharing agreement between the United States and Germany discussed in 2.d. *supra*, but are broader in that they expressly contemplate use for criminal justice purposes at the border, where an individual has been identified for further inspection. The agreements give designated national contact points in the parties' law enforcement communities access to each other's fingerprint databases for a criminal justice purpose, including at the border when an individual for whom the additional data is sought has been identified for further inspection. If a search yields a match between fingerprinting data, the agreements subject the exchange of any further personal data to applicable national laws and practices including existing legal assistance mechanisms between the United States and the relevant country. Because some of the parties do not yet have fully operational and automated fingerprint identification databases, the agreements provide an alternative system the United States can use to access a country's criminal records.

In certain cases, the agreements also permit the parties, in compliance with their respective laws, to provide fingerprint and certain other personal information without a request to each other's national contact points. For example, the parties can supply information spontaneously on an individual if they have reason to believe he or she will commit or has committed terrorist or terrorism related offenses.

The parties also may allow each other's national contact points to access their DNA databases if permissible under the national law of both parties and on the basis of reciprocity. U.S. law currently does not permit foreign access to the U.S. DNA database or indexing system, so the provisions with respect to DNA sharing would enter into force only if U.S. law changes and then following a separate exchange of notes.

The 2008 agreements are either in force definitively or provisionally. A copy of the U.S. agreement with Malta, which is substantially similar to the other agreements, is available at *www.state.gov/s/l/c8183.htm*.

B. INTERNATIONAL CRIMES

1. Terrorism

a. Country reports on terrorism

On April 30, 2008, the Department of State released the 2007 Country Reports on Terrorism. The annual report is submitted to Congress in compliance with 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report is available at *www.state.gov/s/ct/rls/crt/2007*.

b. United Nations

(1) General Assembly

(i) President's address

In his annual speech to the UN General Assembly on September 23, 2008, President George W. Bush addressed the threat of international terrorism and the responsibilities of multilateral organizations to confront terrorism. President Bush's remarks are excerpted below; the full text of his speech is available at 44 WEEKLY COMP. PRES. DOC. 1243–47 (Sept. 29, 2008).

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. . . For 8 years, the nations in this assembly have worked together to confront the extremist threat. We've witnessed successes and

setbacks, and through it all a clear lesson has emerged: The United Nations and other multilateral organizations are needed more urgently than ever. To be successful, we must be focused and resolute and effective. Instead of only passing resolutions decrying terrorist attacks after they occur, we must cooperate more closely to keep terrorist attacks from happening in the first place. Instead of treating all forms of government as equally tolerable, we must actively challenge the conditions of tyranny and despair that allow terror and extremism to thrive. By acting together to meet the fundamental challenge of our time, we can lead toward a world that is more secure, and more prosperous, and more hopeful.

In the decades ahead, the United Nations and other multilateral organizations must continually confront terror. This mission requires clarity of vision. We must see the terrorists for what they are: ruthless extremists who exploit the desperate, subvert the tenets of a great religion, and seek to impose their will on as many people as possible. Some suggest that these men would pose less of a threat if we'd only leave them alone. Yet their leaders make clear that no concession could ever satisfy their ambitions. Bringing the terrorists to justice does not create terrorism; it's the best way to protect our people.

Multilateral organizations must respond by taking an unequivocal moral stand against terrorism. No cause can justify the deliberate taking of innocent human life, and the international community is nearing universal agreement on this truth. The vast majority of nations in this assembly now agree that tactics like suicide bombing, hostage-taking and hijacking are never legitimate. The Security Council has passed resolutions declaring terror unlawful and requiring all nations to crack down on terrorist financing. And earlier this month, the Secretary General held a conference to highlight victims of terror, where he stated that terrorism can never be justified.

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Around the globe, nations are turning these words into action. Members of the United Nations are sharing intelligence with one another, conducting joint operations, and freezing terrorist finances. . . .

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. . . The nations of this body must stand united in the fight against terror. We must continue working to deny the terrorists refuge anywhere in the world, including ungoverned spaces. . . . We must not relent until our people are safe from this threat to civilization.

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(ii) Counter-Terrorism Strategy review

On September 8, 2006, the UN General Assembly adopted the UN Global Counter-Terrorism Strategy ("Strategy"). U.N. Doc. A/RES/60/288. As noted in the Department of State's 2006 report on United States Participation in the United Nations, the Strategy is "a UN plan to enhance national, regional and international efforts to counter terrorism," and its adoption "marked the first time that all UN member states agreed to a common strategic approach to fighting terrorism, including practical steps to be taken individually and collectively." The full text of the 2006 report is available at *www.state.gov/documents/organization/104304.pdf*.

On September 4–5, 2008, the General Assembly reviewed the Strategy. During that review, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, expressed support for the Strategy and outlined U.S. views on the UN's counterterrorism efforts, as excerpted below. Ambassador Wolff's remarks are available at *www.archive.usun.state.gov/press_releases/20080904_231.html*.

The United States welcomes the Review of the United Nations General Assembly Counter Terrorism Strategy. The unanimous adoption of the Strategy during the 61st General Assembly marked the first time that all UN member states agreed to a common strategic approach to fighting terrorism. The Strategy represents a pragmatic, action-oriented approach to that end.

Today, global terrorism remains one of our greatest collective challenges. It affects the lives of all people and all nations, in both direct and indirect ways. No geographic region is immune. The recent terrorist attacks specifically targeting UN offices in Algiers and UN officials underscore the need for all Member States to work together to support the General Assembly's Counter Terrorism efforts.

The success of the Review is a testament to the resiliency of our collective will to battle terrorism. And it is one the United States welcomes. The United States remains strongly committed to supporting the efforts both of the General Assembly, and the Security Council, toward this end.

. . . We believe this Review will enhance the overall UN counterterrorism program. . . .

The United States strongly supports the central role of the United Nations in the global fight against terrorism and wants to strengthen the UN's ability and resolve to play a constructive and effective role.

The United States views the creation of the UN Global Counter-Terrorism Strategy and the Counter-Terrorism Implementation Task Force as key milestones in the international effort to eliminate terrorism. We must ensure the full and effective implementation of the Strategy.

We must also continue to cooperate with the Security Council's counterterrorism committees, to ensure that our obligations under the Charter are fully implemented, and that those Member States having the will, but not the capacity to fulfill these obligations, receive the help they need to do so.

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As a complement to our own bilateral efforts, we support the holistic approach to countering terrorism embraced in the Strategy and reaffirmed in the Review. If we, as Member States, are to be successful in our common struggle against terrorism, we must work together with our growing networks of partners, in a strategic and coordinated manner.

While we think the Security Council should continue to play a key part in the UN's effort, many others in the UN system can and should make contributions to the broader counterterrorism effort,

whether it concerns capacity-building, education, economic development, or helping address the underlying conditions that terrorists and extremists exploit.

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(2) Security Council 1267 (al-Qaeda/Taliban) sanctions

On June 18, 2008, the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1822 (U.N. Doc. S/RES/1822). The resolution decides that States must take the measures previously imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000), and paragraphs 1 and 2 of Resolution 1390 (2002), with respect to al-Qaeda, Usama bin Laden, and the Taliban, as well as other individuals, groups, undertakings, and entities associated with them. U.N. Doc. S/RES/1267; U.N. Doc. S/RES/1333; U.N. Doc. S/RES/1390. (These measures, also referred to as the "1267 sanctions," are an asset freeze, travel ban, and arms embargo.) Resolution 1822 requires the posting of narrative summaries explaining the reasons for listing for each of the approximately 500 names currently on the Security Council 1267 Committee's Consolidated List, which lists the individuals and entities that are subject to the 1267 sanctions. Resolution 1822 also includes other new provisions for reviewing, maintaining, and otherwise ensuring the accuracy of the Consolidated List.

On November 12, 2008, Ambassador Rosemary DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, addressed a Security Council meeting at which the Chairmen of the 1267 Committee, the Counter-Terrorism Committee, and the 1540 Committee briefed the Council. Excerpts follow from her remarks concerning the 1267 sanctions regime; the full text is available at *www.archive.usun.state.gov/press_releases/20081112_311.html.*

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The 1267 sanctions regime has been one of the great success stories of UN counter-terrorism efforts. Its success is a credit to global solidarity in confronting the al-Qaeda/Taliban threat, and its work has produced tangible results. The Council has created an unquestionably useful tool to help prevent al-Qaeda and the Taliban from traveling internationally or acquiring arms, and has resulted in the freezing of millions of dollars that could otherwise be used to fund terrorism. Because of the severity of the threat that al-Qaeda and the Taliban continue to pose to international peace and security, we have a special responsibility to ensure that the 1267 regime retains its effectiveness, including by ensuring that the 1267 Consolidated List remains as up-to-date as possible.

The 1267 regime has evolved in a short period of time. In recent years, the Council established a Focal Point to allow sanctioned individuals/entities to petition the UN directly for de-listing, and recently mandated the committee to make information publicly available explaining the committee's reasons for approving new listings. The Council's adoption in June of resolution 1822 was another tremendous leap forward in ensuring fair and clear committee procedures. . . .

This discussion about procedures and process should not cause us to forget the regime's ultimate goal: mitigating and ultimately eliminating the threat posed by al-Qaeda and the Taliban. We should encourage more states to submit names for designation to the Committee and to redouble efforts to ensure implementation of these preventive measures.

* * * *

c. Countries not cooperating fully with antiterrorism efforts

On May 14, 2008, John D. Negroponte, Deputy Secretary of State, acting on delegated authority, determined and certified to Congress pursuant to § 40A of the Arms Export Control Act, 22 U.S.C. § 2781, and Executive Order 11958, as amended, that Cuba, Eritrea, Iran, North Korea, Syria, and Venezuela were not cooperating fully with U.S. counterterrorism efforts. 73 Fed. Reg. 29,172 (May 20, 2008). With respect to the

re-designation of North Korea, Deputy Secretary Negroponte notified Congress that

> the decision . . . comes during an ongoing review of the designation of North Korea as a state sponsor of terrorism. The outcome of this review may warrant a re-assessment of whether North Korea should be included among the Countries certified as not cooperating fully with United States antiterrorism efforts.

As a result of Eritrea's placement on the list, the Department of State added Eritrea to its International Traffic in Arms Regulations, prohibiting exports and sales of arms to certain countries, effective October 3, 2008. 73 Fed. Reg. 58,041 (Oct. 6, 2008).

d. State sponsors of terrorism

On June 26, 2008, President Bush issued a "Certification of Rescission of North Korea's Designation as a State Sponsor of Terrorism," in a memorandum for the Secretary of State excerpted below, which included the accompanying memorandum of justification. 73 Fed. Reg. 37,351 (July 1, 2008). On that same day, President Bush's certification and accompanying memorandum were submitted to Congress. On October 11, 2008, Secretary of State Condoleezza Rice, "based upon the considerations contained in the memorandum accompanying the Presidential Report of June 26, 2008, regarding North Korea," rescinded North Korea's designation as a state sponsor of terrorism. 73 Fed. Reg. 63,540 (Oct. 24, 2008). With the rescission of North Korea's designation, only four countries are currently designated as state sponsors of terrorism: Cuba, Iran, Sudan, and Syria.

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and consistent with section 6(j)(4)(B)

of the Export Administration Act of 1979, Public Law 96-72, as amended (50 U.S.C. App. 2405(j)), and as continued in effect by Executive Order 13222 of August 17, 2001, 66 *FR* 44025, I hereby certify, with respect to the rescission of the determination of January 20, 1988, regarding North Korea that:

(i) the Government of North Korea has not provided any support for international terrorism during the preceding 6-month period; and
(ii) the Government of North Korea has provided assurances that it will not support acts of international terrorism in the future.

This certification shall also satisfy the provisions of section 620A(c)(2) of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (22 U.S.C. 2371(c)), and section 40(f)(1)(B) of the Arms Export Control Act, Public Law 90-629, as amended (22 U.S.C. 2780(f)).

* * * *

The memorandum of justification accompanying the President's report provided greater detail on the DPRK's involvement with and renunciation of terrorism, as excerpted below. The full text of the memorandum is available at *www.state.gov/s/l/c8183.htm*.

North Korea was designated on January 20, 1988 as a state sponsor of terrorism, following the North Korean state's involvement in the bombing of a KAL passenger flight on November 29, 1987. After careful review and as described in this Justification, the President has decided that the record supports the statutorily required certification that the DPRK has not provided any support for acts of international terrorism during the preceding six-month period and has provided assurances that it will not provide support for acts of international terrorism in the future.

* * * *

Since 1998, the DPRK has taken a number of steps to distance itself from international terrorism. On August 13, 1998, following the August 7 bombings of the U.S. Embassies in Tanzania and Kenya, the DPRK expressed deep regret and stated that it had consistently opposed all sorts of terrorist acts and any support for them.

On October 6, 2000, the United States and the DPRK issued a joint statement noting that international terrorism poses an unacceptable threat to global security and peace, and that terrorism should be opposed in all its forms, including terrorist acts involving chemical, biological, or nuclear devices or materials. During the talks leading up to the statement, the DPRK affirmed that, as a matter of official policy and as its government had stated previously, it opposed all forms of terrorism against any country or individual. . . .

On October 12, 2000, in a Joint Communiqué, the United States and the DPRK reiterated their October 6 agreement to support and encourage international efforts against terrorism.

On December 12, 2000, the DPRK voted in favor of the UNGA resolution on Measures to Eliminate Terrorism (Res 55/158).

On September 12, 2001, following the September 11 terrorist attacks on the United States, the DPRK issued a statement noting the graveness of terrorism and stating that, as a UN member, the DPRK's position of opposing all forms of terrorism and any support to it remained unchanged. . . .

In November and December of 2001, the DPRK acceded to the International Convention Against the Taking of Hostages and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

On October 14, 2002, the President of the Presidium of the DPRK's Supreme People's Assembly sent a message of sympathy to the President of the Republic of Indonesia, following the bomb attack in Bali, explicitly clarifying the DPRK's opposition to all forms of terrorism.

On May 15, 2003, Foreign Minister Paek Nam-sun sent a message to the Foreign Minister of Saudi Arabia following bombings in Riyadh expressing deep sympathy and saying that it was the consistent stand of the DPRK to oppose all sorts of terrorism.

On March 31, 2004, the Permanent Representative of the DPRK to the United Nations reported to the Security Council Committee established pursuant to UNSC Resolution 1267, that the DPRK has no relations at all with the Taliban and Al-Qaida or any other individuals, groups, undertakings and entities associated with them and is fully implementing the measures imposed in UNSC Resolution 1267 and related resolutions.

On September 8, 2006, the DPRK joined in the consensus adoption of the United Nations Global Counter-Terrorism Strategy (GA Res 60/288).

On November 8, 2007, following an incident in which the North Korean trading ship "Taehongdan" came under attack in waters off Somalia and the United States supplied assistance to the North Korean crewmen, the DPRK noted that it is its Government's consistent principled position to oppose all forms of terrorism, that this incident served as a symbol of DPRK–U.S. cooperation in the struggle against terrorism, and that the DPRK will continue to render international cooperation in the struggle against terrorism.

Most recently, on June 10, 2008, the North Korean Government, through its Foreign Ministry, issued an authoritative and direct public statement and subsequently conveyed this to the United States Government. . . . In the statement, the DPRK calls attention to the previous demonstrations of its opposition to international terrorism and concludes with the following:

> "The DPRK fully supports the international community in its efforts to establish an international legal mechanism to combat terrorism and will actively cooperate with it in taking effective measures for it.
>
> It will take active part in the international efforts to prevent substance, equipment and technology to be used for the production of nukes and biochemical and radioactive weapons from finding their ways to the terrorists and the organizations that support them and faithfully fulfill its duty in the field of non-proliferation as it committed itself in the statement of the Ministry of Foreign Affairs on October 3, 2006 and agreements made at the six-party talks.

> Upon the authorization of the government, the DPRK Ministry of Foreign Affairs clarifies that the DPRK will firmly maintain its consistent stand of opposing all forms of terrorism and any support to it and fulfill its responsibility and duty in the struggle against terrorism as a dignified member of the United Nations, in the future, too."

Japan also announced June 13, 2008 that North Korea has agreed to cooperate in handing over the remaining members of the Japanese Red Army involved in the hijacking of a Japan Airlines plane to North Korea in 1970. These assurances, and in particular that of June 10, 2008, satisfy the statutory requirement for rescission that the President certify to the Congress that the government concerned has provided assurances that it will not support acts of international terrorism in the future.

The current intelligence assessment satisfies the second statutory requirement for rescission. Following a review of all available information, we see no credible evidence at this time of ongoing support by the DPRK for international terrorism, and we assess that the current intelligence assessment, including the most recent assessment published May 21, 2008, provides a sufficient basis for certification by the President to Congress that North Korea has not provided any support for international terrorism during the preceding 6-month period. Our review of intelligence community assessments indicates there is no credible or sustained reporting at this time that supports allegations (including as cited in recent reports by the Congressional Research Service) that the DPRK has provided direct or witting support for Hezbollah, Tamil Tigers, or the Iranian Revolutionary Guard. Should we obtain credible evidence of current DPRK support for international terrorism at any time in the future, the Secretary could again designate the DPRK a state sponsor of terrorism.

* * * *

The designation of the DPRK in 1988 as a state sponsor of terrorism put the world on notice that the DPRK's sponsorship of international terrorism would not be tolerated. Since 1998, the DPRK has distanced itself from international terrorism; it has not

provided any support for international terrorism during the preceding six months; and it has provided assurances that it will not support acts of international terrorism in the future.

The DPRK Government has also assured us that it will take active part in the international efforts to prevent substance[s], equipment and technology from being used for the production of nuclear, biochemical, and radioactive weapons from finding their way to terrorists and the organizations that support them and faithfully fulfill its duty in the field of non-proliferation. The Government of the DPRK has also assured us that it does not support acts of international terrorism and will not support acts of terrorism in the future.

It is now 20 years since the DPRK was designated as a state sponsor of terrorism. The President's report to Congress certifying that the DPRK has not provided any support for acts of international terrorism during the preceding six-month period and has provided assurances that it will not provide support for acts of international terrorism in the future will permit the Secretary of State to rescind the DPRK's designation following the 45-day Congressional review period. Rescission in this case will strongly support the objectives of the state sponsor legislation and will demonstrate to the DPRK the benefits of turning away from practices that are anathema to the international community.

A Department of State press release issued on October 11, 2008, noted that, despite the rescission of North Korea's designation as a state sponsor of terrorism, "[t]he D.P.R.K. remains subject to numerous sanctions resulting from its 2006 nuclear test, its proliferation activities, its human rights violations, and its status as a communist state." The full text of the press statement is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110922.htm*; *see http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110923.htm* for details on the U.S. sanctions remaining in effect with respect to the DPRK.

e. Senate advice and consent to four international conventions

On September 25, 2008, the Senate provided its advice and consent to four counterterrorism treaties: the International

Convention for Suppression of Acts of Nuclear Terrorism, adopted on April 13, 2005, and signed on behalf of the United States on September 14, 2005 ("Nuclear Terrorism Convention") (S. Treaty Doc. No. 110-4); the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("2005 SUA Protocol") and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf ("2005 Fixed Platforms Protocol") (S. Treaty Doc. No. 110-8), both of which were adopted on October 14, 2005, and signed on behalf of the United States on February 17, 2006; and the amendment to the Convention on the Physical Protection of Nuclear Material ("CPPNM amendment"), adopted on July 8, 2005 (S. Treaty Doc. No. 110-6). For a brief summary of each of the four treaties, *see* the testimony of Patricia A. McNerney, Principal Deputy Assistant Secretary of State for International Security and Nonproliferation, before the Senate Committee on Foreign Relations on May 7, 2008, at *http://foreign.senate.gov/hearings/2008/hrg080507p.html*.

Additional background on the four treaties is provided in *Digest 2007* at 132–39 (Nuclear Terrorism Convention); 140–42, 985–88, 1062–71 (2005 SUA Protocol and 2005 Fixed Platforms Protocol); and 142–43, 1076–78 (CPPNM amendment); *Digest 2006* at 211–12 (2005 SUA Protocol and 2005 Fixed Platforms Protocol); and *Digest 2005* at 112–13, 1117–20 (2005 SUA Protocol and 2005 Fixed Platforms Protocol); 109–10, 960, 1092, 1095, 1121–23 (CPPNM amendment); and 106–08, 960–61, 1092, 1123–24 (Nuclear Terrorism Convention).

Each of the four resolutions of advice and consent contained substantially similar reservations related to the provision in each treaty concerning dispute resolution, as well as declarations that, apart from the provisions of the treaties that require the United States to establish offenses in its criminal law, the treaties are self-executing and do not create private rights of action. 154 Cong. Rec. S9555–S9556 (2008). The resolutions for the Nuclear Terrorism Convention, the 2005 SUA Protocol, and the 2005 Fixed Platforms Protocol

also contained an understanding with respect to provisions in these treaties that require states parties to guarantee fair treatment to "[a]ny person who is taken into custody, or regarding whom any other measures are taken or proceedings are being carried out" pursuant to the treaty. That understanding stated that U.S. law with respect to persons in custody and persons charged with crimes fulfilled the relevant requirements of the treaty and that the United States did not intend to enact new legislation to fulfill its obligations under the applicable treaty provision.

The resolutions for all four treaties also contained understandings relating to a provision in each treaty exempting the activities of armed forces during an armed conflict from the scope of the treaty, discussed in Chapter 18.A.3.b. The nonproliferation understanding contained in the resolution for the 2005 SUA Protocol is discussed in Chapter 18.B.1.b.

The reservation and declaration to the CPPNM amendment are set forth below.

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* * * *

Section 2. Reservation.

. . . [T]he following reservation . . . shall be included in the instrument of ratification:

Consistent with Article 17(3) of the Convention on the Physical Protection of Nuclear Material, the United States of America declares that it does not consider itself bound by Article 17(2) of the Convention on the Physical Protection of Nuclear Material with respect to disputes concerning the interpretation or application of the Amendment.

Section 4. Declaration. . . .

With the exception of the provisions that obligate the United States to criminalize certain offenses, make those offenses punishable by appropriate penalties, and authorize the assertion of jurisdiction over such offenses, this Amendment is self-executing. Included among the self-executing provisions are those provisions

obligating the United States to treat certain offenses as extraditable offenses for purposes of bilateral extradition treaties. This Amendment does not confer private rights enforceable in United States courts.

f. U.S. actions against support for terrorists

(1) Criminal prosecutions: Holy Land Foundation of Relief and Development

On November 24, 2008, a federal jury in Texas convicted five leaders of the Holy Land Foundation of Relief and Development ("HLF") on charges relating to the provision of material support to Hamas, a designated foreign terrorist organization. The jury verdict achieved the largest number of convictions under the material support statute (18 U.S.C. § 2339B) since its enactment. Excerpts from a Department of Justice press release are set forth below; the full text is available at *www.justice.gov/archive/opa/pr/2008/November/08-nsd-1046.html.*[*]

* * * *

HLF was incorporated by Shukri Abu Baker, Mohammad El-Mezain, and Ghassan Elashi. Mufid Abdulqader and Abdulrahman Odeh worked as fund raisers. Together, with others, they provided material support to the Hamas movement. From its inception, HLF was linked to radical groups promoting jihad. Before it was designed as a Specially Designated Terrorist by the Treasury Department and shut down in December 2001,

* Editor's note: On May 27, 2009, the defendants Shukri Abu Baker and Ghassan Elashi were sentenced to 65 years each, the defendant Mufid Abdulqader was sentenced to 20 years, and the defendants Mohammed El-Mezain and Abdulrahem Odeh were sentenced to 15 years each. *See www.usdoj.gov/opa/pr/2009/May/09-nsd-519.html.*

it was the largest U.S. Muslim charity. . . . The "material support statute," as it is commonly referred to, was enacted in 1996 as part of the Antiterrorism and Effective Death Penalty Act. That statute recognizes that money is fungible, and that money in the hands of a terrorist organization—even if for so called charitable purposes—supports that organization's overall terrorist objectives.

The jury convicted all defendants on the conspiracy charges—conspiracy to provide material support and resources to a foreign terrorist organization; conspiracy to provide funds, goods and services to a specially designated terrorist; and conspiracy to commit money laundering. In addition, Abu Baker and Elashi were convicted of conspiring to impede and impair the IRS [Internal Revenue Service].

HLF, Abu Baker and Elashi were also convicted on all of the substantive charges of providing material support and resources to a foreign terrorist organization, providing funds, goods and services to a specially designated terrorist and money laundering. Abu Baker was convicted on one count of filing a false tax return and Elashi was convicted on two counts of filing a false tax return.

* * * *

The defendants provided financial support to the families of Hamas martyrs, detainees, and activists knowing and intending that such assistance would support the Hamas terrorist organization. Since 1995, when it first became illegal to provide financial support to Hamas, HLF provided approximately $12.4 million in funding to Hamas through various Hamas-affiliated committees and organizations located in Palestinian-controlled areas and elsewhere.

* * * *

(2) U.S. financial sanctions implementing UN Security Council resolutions

The United States implements its obligations to target, designate, and implement financial sanctions against terrorists,

terrorist organizations, and terrorist supporters under UN Security Council Resolution 1373 (2001), UN Security Council Resolution 1267 (1999), and subsequent UN Security Council resolutions concerning al-Qaeda/Taliban sanctions through Executive Order 13224 of September 24, 2001. U.N. Doc. S/RES/1373; U.N. Doc. S/RES/1267. *See* B.1.b.(2) *supra*.

Executive Order 13224, which President Bush issued pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706, the United Nations Participation Act of 1945, 22 U.S.C. § 287c, and 3 U.S.C. § 301, imposes economic sanctions on persons who have been designated in the annex to the executive order; persons designated by the Secretary of State for having committed or for posing a significant risk of committing acts of terrorism; and persons designated by the Secretary of the Treasury for working for or on behalf of, providing support to, or having other links to, persons designated under the executive order. Background on Executive Order 13224 is available at *Digest 2007* at 155–58.

(i) Office of Foreign Assets Control

(A) New designations

During 2008 OFAC designated 36 individuals and five entities pursuant to Executive Order 13224. Of that number, OFAC designated four individuals associated with Lashkar-e-Tayyiba, a group that was subsequently implicated in the December 2008 terrorist attacks in Mumbai: Muhammad Saeed, Zaki-ur-Rehman Lakhvi, Haji Muhammad Ashraf, and Mahmoud Ahmed Bahaziq. 73 Fed. Reg. 31,544 (June 2, 2008).

During 2008 the Security Council Committee established by Resolution 1267 (1999) ("1267 Committee") added 27 of these individuals and entities to its list of individuals and entities subject to the al-Qaeda/Taliban sanctions ("Consolidated List"), including the four individuals associated with Lashkar-e-Tayyiba mentioned above. *See www.un.org/sc/committees/1267/index.shtml*.

(B) Amendments and de-listing

On July 2, 2008, OFAC also amended the designations of Al Rashid Trust and Al-Akhtar Trust International to reflect the organizations' new aliases. 73 Fed. Reg. 40,912 (July 16, 2008). A Treasury Department press release, available at *www.treas.gov/press/releases/hp1065.htm*, provided additional details. The 1267 Committee also amended its designations for these two organizations; *see www.un.org/News/Press/docs/2008/sc9527.doc.htm*.

On June 19, 2008, OFAC determined that Lokman Amin Mohammed, who had been designated pursuant to E.O. 13224 on December 5, 2004, "no longer continues to meet the criteria for designation under the Order and is appropriate for removal from the list of Specially Designated Nationals and Blocked Persons." 73 Fed. Reg. 37,533 (July 1, 2008). The 1267 Committee previously had removed Lokman Amin Mohammed from its Consolidated List. *See www.un.org/sc/committees/1267/docs/Delisted.pdf*.

(ii) Department of State

In 2008 the Secretary of State or the Deputy Secretary of State designated three individuals and four entities pursuant to E.O. 13224, as follows: (1) one entity on January 9, 2008 (73 Fed. Reg. 1906 (Jan. 10, 2008)); (2) one entity on February 15, 2008 (73 Fed. Reg. 11,981 (Mar. 5, 2008)); (3) one entity on February 26, 2008 (73 Fed. Reg. 14,550 (Mar. 18, 2008)); (4) one individual on February 29, 2008 (73 Fed. Reg. 12,499 (Mar. 7, 2008)); (5) one entity and one individual on June 8, 2008 (73 Fed. Reg. 34,063 (June 16, 2008)); and (6) one individual on August 22, 2008 (73 Fed. Reg. 51,038 (Aug. 29, 2008)).

Secretary Rice also amended the designations of the Salafist Group for Call and Combat and the Islamic Jihad Group to reflect the two organizations' new names, al-Qa'ida in the Islamic Maghreb and Islamic Jihad Union (IJU), and

associated aliases. 73 Fed. Reg. 9400 (Feb. 20, 2008); 73 Fed. Reg. 30,443 (May 27, 2008).

(3) Foreign terrorist organizations

(i) New designations and amendments

In 2008 Secretary Rice designated two additional organizations, al-Shabaab and Harakat ul-Jihad-i-Islami/Bangladesh, as foreign terrorist organizations ("FTOs") pursuant to § 219 of the Immigration and Nationality Act, as amended ("INA"), 8 U.S.C. § 1189. Secretary Rice also designated both entities pursuant to § 1(b) of Executive Order 13224 (*see* (2)(ii) *supra*). 73 Fed. Reg. 11,980 (Mar. 5, 2008); 73 Fed. Reg. 14,550 (Mar. 18, 2008).

Secretary Rice also amended the FTO designations of two organizations, Islamic Jihad Group and Salafist Group for Call and Combat, to add their new aliases, which included Islamic Jihad Union and al-Qa'ida in Iraq. 73 Fed. Reg. 30,443 (May 27, 2008); 73 Fed. Reg. 9400 (Feb. 20, 2008); *see also* (2)(ii) *supra*.

(ii) Reviews of FTO designations

On June 9, 2008, Secretary Rice determined that the FTO designation of Lashkar i Jhangvi should remain in place. As explained in the Federal Register notice excerpted below, Secretary Rice based her determination on a review of the administrative record and a conclusion that the facts that formed the basis for the organization's 2003 designation had not changed in "in such a manner as to warrant revocation . . . ." 73 Fed. Reg. 34,356 (June 17, 2008).

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* * * *

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the

Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the circumstances that were the basis for the 2003 designation of Lashkar i Jhangvi as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation.

Therefore, I hereby determine that the designation of Lashkar i Jhangvi as a foreign terrorist organization, pursuant to Section 219 of the Immigration and Nationality Act, as amended (8 U.S.C. 1189), shall be maintained.

* * * *

The designations of 13 other FTOs were reviewed later in 2008. Secretary Rice or Deputy Secretary Negroponte determined that the designations for these organizations (the Real Irish Republican Army, the Basque Fatherland and Liberty, the National Liberation Army, the Islamic Resistance Movement, Hizballah, the Popular Front for the Liberation of Palestine-GC, the Kurdistan Workers Party, the Abu Sayyaf Group, the Revolutionary People's Liberation Party/Front ("DHKP/C"), the Revolutionary Armed Forces of Colombia ("FARC"), the Shining Path ("SL"), Jaish-e-Mohammed ("JEM"), and Lashkar-e-Tayyiba ("LT")), should be left in place. 73 Fed. Reg. 34,356 (June 17, 2008); 73 Fed. Reg. 49,230 (Aug. 20, 2008); 73 Fed. Reg. 66,094 (Nov. 6, 2008); 73 Fed. Reg. 68,489 (Nov. 18, 2008); and 73 Fed. Reg. 79,539 (Dec. 29, 2008).

The reviews were conducted consistent with the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638, which amended the INA's previous requirement for the Secretary to redesignate FTOs every two years and replaced it with procedures for review and revocation of those designations. *See Digest 2005* at 113–16 for a description of the IRTPA amendments. As noted in a Department of State fact sheet, available in full at *http://2001-2009.state.gov/s/ct/rls/fs/08/103392.htm*:

> IRTPA provides that an FTO may file a petition for revocation 2 years after its designation date (or in the case of

redesignated FTOs, its most recent redesignation date) or 2 years after the determination date on its most recent petition for revocation. In order to provide a basis for revocation, the petitioning FTO must provide evidence that the circumstances forming the basis for the designation are sufficiently different as to warrant revocation. If no such review has been conducted during a 5 year period with respect to a designation, then the Secretary of State is required to review the designation to determine whether revocation would be appropriate. In addition, the Secretary of State may at any time revoke a designation upon a finding that the circumstances forming the basis for the designation have changed in such a manner as to warrant revocation, or that the national security of the United States warrants a revocation. The same procedural requirements apply to revocations made by the Secretary of State as apply to designations. A designation may be revoked by an Act of Congress, or set aside by a Court order.

g. Airline passenger vetting and other screening

(1) Secure Flight program

On October 28, 2008, the Department of Homeland Security's Transportation Security Administration ("TSA") issued a final rule concerning the Secure Flight program. 73 Fed. Reg. 64,018 (Oct. 28, 2008). As the preamble to the final rule explained, TSA promulgated the rule pursuant to the Intelligence Reform and Terrorism Prevention Act ("IRTPA"). According to the preamble, IRTPA

> . . . requires the Department of Homeland Security (DHS) to assume from aircraft operators the function of conducting pre-flight comparisons of airline passenger information to Federal government watch lists for domestic flights and international flights to, from, and overflying the United States. . . .

> This final rule allows TSA to begin implementation of the Secure Flight program, under which TSA will receive passenger and certain non-traveler information, conduct watch list matching against the No Fly and Selectee portions of the Federal government's consolidated terrorist watch list, and transmit a boarding pass printing result back to aircraft operators. . . .
>
> Excerpts follow from the preamble to the final rule, including the Summary and Background sections of the preamble (footnotes omitted), as well as TSA's responses to certain public comments arguing that the proposed rule would violate treaties such as the International Convention on Civil and Political Rights and the Convention on International Civil Aviation ("Chicago Convention"). The excerpts also provide TSA's response to the Canadian Embassy's comments that all flights to, from, and within Canada that overfly the United States should be exempt from the rule, as well as comments that the program should be consistent with other countries' data privacy laws.

* * * *

I. Background

TSA performs passenger and baggage screening at the Nation's commercial airports. Covered aircraft operators currently supplement this security screening by performing passenger watch list matching using the Federal No Fly and Selectee portions of the consolidated terrorist watch list maintained by the Federal government, as required under security directives that TSA issued following the terrorist attacks of September 11, 2001. Covered aircraft operators also conduct this watch list matching process for non-traveling individuals authorized to enter the sterile area of an airport within the United States in order to escort a passenger or for some other purpose approved by TSA.

Section 4012(a) of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) requires DHS to assume from air carriers the comparison of passenger information to the Selectee

and No Fly Lists and to utilize all appropriate records in the consolidated and integrated watch list that the Federal Government maintains. . . .

Consequently, pursuant to sec. 4012(a) of the IRTPA, TSA issues this final rule to implement the Secure Flight program. Under the program, TSA will receive passenger and certain nontraveler information from aircraft operators. After conducting watch list matching, TSA will transmit boarding pass printing results based on watch list matching results back to aircraft operators.

II. Secure Flight Program Summary

This final rule will affect all covered flights operated by U.S. aircraft operators that are required to have a full program under 49 CFR 1544.101(a), and covered flights operated by foreign air carriers that are required to have a security program under 49 CFR 1546.101(a) or (b). These aircraft operators generally are the passenger airlines that offer scheduled and public charter flights from commercial airports. . . .

TSA will assume the watch list matching function from aircraft operators to more effectively and consistently prevent certain known or suspected terrorists from boarding aircraft where they may jeopardize the lives of passengers and others. The Secure Flight program is designed to better focus enhanced passenger screening efforts on individuals likely to pose a threat to civil aviation . . . .

* * * *

III. Response to Comments

* * * *

A. Scope of the Rulemaking

. . . A commenter . . . argued that the Secure Flight program violates Article 12 of the International Covenant on Civil and Political Rights (ICCPR) because it restricts "liberty of movement."

TSA Response: . . . The Government may place reasonable restrictions on the right to travel in order to protect compelling interests; in this case, transportation and national security. The Secure Flight program does not deny individuals their right to

travel or other constitutional rights. Courts have consistently held that travelers do not have a constitutional right to travel by a single mode or the most convenient form of travel. The Secure Flight program would only regulate one mode of travel (aviation) and would not impose any restriction on other modes of travel. Thus, Secure Flight does not unlawfully infringe or restrict individuals' freedom of movement or assembly. Also, the Secure Flight regulations are reasonable and are not onerous or unduly burdensome to individuals.

Additionally, Article 12 of the ICCPR does not apply to laws that are necessary to protect national security. Because the purpose of the Secure Flight program is to protect national security, Article 12 would not apply even if the Secure Flight program did somehow restrict liberty of movement.

1. Overflights and Foreign Air Carriers

. . . Several commenters argued that including overflights within the scope of Secure Flight may violate international treaties such as the Convention on International Civil Aviation (Chicago Convention).

TSA Response:

* * * *

Although international law recognizes the general right of overflight, it also recognizes a State's right to regulate aircraft entering into, within or departing from its territory. Moreover, the Chicago Convention expressly recognizes that each State has sovereignty over its airspace.

The Chicago Convention, the International Air Services Transit Agreement (IASTA), and the U.S. model open skies agreement all contain provisions requiring aircraft in U.S. territory to comply with a broad array of U.S. laws and regulations. Article 11 of the Chicago Convention requires compliance with "the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory." Similarly, Article 13 requires compliance with a State's laws and regulations "as to the admission to or

departure from its territory of passengers, crew or cargo of aircraft * * * upon entrance into or departure from, or while within the territory of that State." These Chicago Convention obligations are incorporated by reference in Article I, Section 2, of IASTA, and are restated in Article 5 of the model open skies agreement.

The domestic laws and regulations with which compliance is mandated are defined broadly and may include security-based measures, such as Secure Flight. This is reinforced by the security provisions in most U.S. bilateral air services agreements. Those provisions generally obligate our bilateral partners to observe and assist the U.S. Government in its enforcement of U.S. security-based regulations. For instance, Article 7 of the U.S. model open skies agreement obligates each party to observe the "security provisions required by the other party for entry into, for departure from, and while within the territory of that other [p]arty, and to take adequate measures to protect aircraft and to inspect passengers * * * prior to and during boarding or loading." Model Article 7 also imposes specific obligations on our bilateral partners to assist in preventing unlawful acts against the safety of aircraft, and "to address any other threat to security of civil air navigation."

Moreover, in the event that an airline fails to comply with the laws and regulations with which compliance is mandated, both IASTA and most U.S. bilateral agreements grant a State the option of revoking or denying that airline's operating authorizations or technical permissions. Under Article I, Section 5, of IASTA, each State reserves the "right to withhold or revoke a certificate or permit to an air transport enterprise of another State * * * in case of failure of such air transport enterprise to comply with the laws of the State over which it operates." Similar rights exist in almost all U.S. bilateral agreements. For example, Article 4 of the U.S. model open skies agreement provides that either party may "revoke, suspend or limit the operating authorizations or technical permissions" of an airline of the other party in the event that that airline has failed to comply with the laws and regulations with which compliance is mandated.

Accordingly, TSA's Secure Flight program does not violate international treaties, such as the Chicago Convention, and is

entirely consistent with and is buttressed by international and bilateral agreements.

* * * *

. . . The Canadian Embassy requested that all flights to, from, and within Canada that overfly the U.S. be exempt from the . . . final rule . . . .

TSA Response: Flights between two Canadian locations or between two Mexican locations that overfly the United States are likely to merely skirt the border with the United States or enter U.S. airspace only for a brief period of time. . . .

TSA is not exempting all overflights that originate from Canada, because most international flights originating from Canada overfly a significant portion of the United States. As stated above, TSA has determined that conducting watch list matching of passengers on these flights is an important security measure to protect national and transportation security. However, the Assistant Secretary may exempt categories of flights that overfly the United States as provided in § 1560.3. TSA will consider requests to exempt certain categories of flights and will consider all the applicable factors, including the security risks and the benefits from doing so. For instance, TSA will consider whether the country requesting the exemption applies a no fly list system to flights that may affect the security of the United States, whether that no fly list system will provide robust protection from persons who may endanger the flights, and whether the requesting country sufficiently shares information with the United States.

* * * *

F. Privacy

* * * *

6. Retention of Data

. . . TSA received a number of comments expressing the opinion that the retention of SFPD [Secure Flight Passenger Data, which includes full name, date of birth, gender, and passport information, if available] must be consistent with European Union/United States data privacy rules as well as privacy laws of other countries. . . .

TSA Response: SFPD is security information exempt from European Union Data Protection Directives and typically from other data privacy governance around the world. It is not the same as PNR [Passenger Name Record] data and thus, it is not subject to the DHS–EU PNR agreement [*see Digest 2007* at 158–59]. TSA will retain Secure Flight data pursuant to published record retention schedules as specified in the final rule. The records retention schedule for this rule requires that the Secure Flight program retain records for most individuals encountered by Secure Flight for only a short period. Records for individuals who are cleared by the automated matching tool would only be retained for seven days after the completion of the individual's directional travel. This 7-day period will be the retention period for the majority of people who travel. Records for individuals who are potential matches would be retained for seven years after the completion of the individual's directional travel in order to expedite future screening and to enable TSA to respond to any possible legal action. Records for individuals confirmed as a positive match to an individual on the watch list will be retained for 99 years after the completion of the individual's directional travel to support law enforcement and intelligence activities.

* * * *

(2) U.S.–Switzerland information access agreement

Through an exchange of diplomatic notes on December 23, 2008, the United States and Switzerland concluded an agreement concerning the transfer of Passenger Name Record ("PNR") data from air carriers operating flights between the United States and Switzerland. The Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597, as implemented in 19 C.F.R. § 122.49d, requires all carriers operating passenger flights to or from the United States to provide U.S. Customs and Border Protection ("CBP"), Department of Homeland Security, with access to PNR data in their automated reservation/departure control systems. The agreement replaced a previous arrangement obligating air carriers operating commercial services from Switzerland

to the United States to provide CBP with PNR data. It was necessary to satisfy Swiss data protection laws, which require a binding international agreement as the basis for the lawful transfer of PNR data to a foreign government.

The agreement ensured that the United States could use PNR data to combat terrorism and serious transnational crime while satisfying Switzerland's legal requirements concerning the protection of the privacy of its citizens. The agreement confirmed that PNR data derived from flights from Switzerland to the United States is subject to privacy protections set out in CBP's System of Records Notice ("SORN") for the Automatic Targeting System ("ATS"), 72 Fed. Reg. 43,650 (Aug. 6, 2007), and stated that these domestic law protections are substantially the same as those contained in the 2007 PNR Agreement between the United States and the European Union. For background on the U.S.–EU PNR Agreement, *see Digest 2007* at 158–59. The United States also agreed to inform Switzerland of any relevant amendments to the ATS SORN and any amendments or successor agreements to the 2007 EU PNR Agreement and to give the Swiss government the opportunity to consult with the United States if it determines that the changes conflict with Swiss domestic law. For its part, Switzerland confirmed that the U.S. protections for PNR data satisfy its law. Switzerland also agreed to ensure that air carriers operating flights between its territory and the United States make PNR data available to the U.S. government in accordance with U.S. law. The diplomatic notes are available at *www.state.gov/s/l/c8183.htm*.

(3) HSPD-6 arrangements on the exchange of terrorist screening information

During 2008 the United States also concluded agreements and arrangements for the exchange of screening information concerning known or suspected terrorists. The arrangements call upon each party to provide its terrorist screening information to the other within a specified period of time after the arrangements are concluded and to update that information

on a regular basis. The arrangements also contain safeguards to protect any information exchanged from disclosure.

In negotiating and concluding these arrangements the State Department satisfied a requirement in Homeland Security Presidential Directive 6 ("HSPD-6") of September 16, 2003, to develop a proposal for "enhancing cooperation with certain foreign governments," beginning with members of the VWP, to establish "appropriate access" to those governments' terrorism screening information. More broadly, HSPD-6 directed the heads of U.S. executive departments and agencies to implement various measures to strengthen the U.S. government's ability to counter terrorism by

> (1) develop[ing], integrat[ing], and maintain[ing] thorough, accurate, and current information about individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism (Terrorist Information); and (2) us[ing] that information as appropriate and to the full extent permitted by law to support (a) Federal, State, local, territorial, tribal, foreign-government, and private-sector screening processes, and (b) diplomatic, military, intelligence, law enforcement, immigration, visa, and protective processes.

Additional information on HSPD-6 is available at *www.dhs.gov/xabout/laws/gc_1214594853475.shtm*.

The United States has signed agreements binding under international law with two countries to satisfy those countries' domestic requirements; the other 14 arrangements, while substantively similar, are not legally binding.

h. Maritime counterterrorism efforts

Section 70108 of the Maritime Transportation Security Act of 2002 ("Act"), Pub. L. No. 107-295, 116 Stat. 2066, requires the Secretary of Homeland Security to assess the effectiveness of foreign ports' antiterrorism measures. Section 70110

of the Act authorizes the imposition of conditions of entry on vessels arriving from or carrying cargo or passengers originating from or transshipped through any port that the Secretary has determined "does not maintain effective antiterrorism measures." The Coast Guard has implemented this section of the Act through its International Port Security Program, which conducts the assessments. The Coast Guard uses the requirements of the International Maritime Organization's International Ship & Port Facility Security ("ISPS") Code (XI-2/1 of SOLAS 74, as amended), which entered into force on July 1, 2004, as a benchmark for assessing the effectiveness of a country's anti-terrorism measures in its ports. *See https://homeport.uscg.mil/mycg/portal/ep/home.do*.

In 2008 the Coast Guard determined that Indonesia (73 Fed. Reg. 10,042 (Feb. 25, 2008)), Syria (73 Fed. Reg. 12,186 (Mar. 6, 2008)), Iran (73 Fed. Reg. 14,993 (Mar. 20, 2008)), Cuba (73 Fed. Reg. 18,546 (Apr. 4, 2008)), and Cambodia (73 Fed. Reg. 63,499 (Oct. 24, 2008)) were not maintaining effective counterterrorism measures and imposed conditions of entry on vessels that have visited ports in those countries (with certain exceptions) during their last five ports of call. The Coast Guard's previous determinations with respect to Cameroon, Equatorial Guinea, Guinea-Bissau, Liberia, and Mauritania remained in effect throughout 2008.

2. Narcotrafficking

a. Majors List certification process

(1) International Narcotics Control Strategy Report

On March 1, 2008, the Department of State released the 2008 International Narcotics Control Strategy Report ("INCSR"), an annual report submitted to Congress in accordance with § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291h(a). The report described the efforts of key

countries to attack all aspects of the international drug trade in Calendar Year 2007. Volume I covered drug and chemical control activities and Volume II covered money laundering and financial crimes. The report is available at *www.state.gov/p/inl/rls/nrcrpt/2008/index.htm*.

(2) Major drug transit or illicit drug producing countries

Presidential Determination 2008-28, Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2009, was released September 15, 2008. 44 WEEKLY COMP. PRES. DOC. 1214 (Sept. 22, 2008). In this annual determination, the President named Afghanistan, The Bahamas, Bolivia, Brazil, Burma, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. The President designated Bolivia, Burma, and Venezuela as countries that had "failed demonstrably . . . to adhere to their obligations" in fighting narcotrafficking, and determined that "support for programs to aid Venezuela's democratic institutions and continued support for bilateral programs in Bolivia are vital to the national interests of the United States."

b. Interdiction assistance

During 2008 President Bush certified, with respect to Colombia (73 Fed. Reg. 54,283 (Sept. 18, 2008)) and Brazil (73 Fed. Reg. 62,849 (Oct. 22, 2008)), that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) that country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with

such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft.

These determinations were made pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–2294. Notwithstanding any other provision of law, during the respective 12-month period following each determination, it is not unlawful for authorized employees or agents of Colombia and Brazil (including members of the armed forces of that country) to interdict or attempt to interdict an aircraft in their country's territory or airspace if that aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking. It is also not unlawful for authorized employees or agents of the United States (including members of the Armed Forces of the United States) to provide assistance for the interdiction actions of Colombia and Brazil during that time period.

c. Designations under the Kingpin Act

(1) New designations

On May 30, 2008, President Bush transmitted to Congress designations of four persons and three entities under the Foreign Narcotics Kingpin Designation Act ("Act"), 21 U.S.C. §§ 1901–1908, and reported that he had directed the imposition of sanctions against them, as the Act requires. 44 WEEKLY COMP. PRES. DOC. 765 (June 2, 2008).

The Treasury Department's Office of Foreign Assets Control ("OFAC") also designated 87 individuals and 47 entities under the Act during 2008. 73 Fed. Reg. 4045 (Jan. 23, 2008) (one entity, six individuals); 73 Fed. Reg. 23,004 (Apr. 28, 2008) (two entities, two individuals); 73 Fed. Reg. 27,608 (May 13, 2008) (one entity); 73 Fed. Reg. 45,802 (Aug. 6, 2008) (six entities, 13 individuals); 73 Fed. Reg. 46,706 (Aug. 11, 2008) (14 entities, 17 individuals); 73 Fed. Reg. 54,453 (Sept. 19, 2008) (three individuals); 73 Fed. Reg. 57,729

(Oct. 3, 2008) (eight individuals); 73 Fed. Reg. 59,708 (Oct. 9, 2008) (six entities, 10 individuals); and 73 Fed. Reg. 70,697 (Nov. 21, 2008) (17 entities, 26 individuals).

(2) De-listing

On October 22, 2008, OFAC removed two individuals from its list of Specially Designated Nationals and Blocked Persons pursuant to the Foreign Narcotics Kingpin Designation Act (21 U.S.C. §§ 1901–1908) and unblocked their property and interests in property. 73 Fed. Reg. 64,010 (Oct. 28, 2008). The property and interests in property of the two individuals had been blocked pending investigation.

3. Trafficking in Persons

a. Annual report

On June 4, 2008, the Department of State released the Trafficking in Persons Report 2008 pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000 ("TVPA"), Div. A of Pub. L. No. 106-386, 114 Stat. 1464, as amended, 22 U.S.C. § 7107. The report covered the period April 2007 through March 2008, reported on 170 countries, and included a new focus on the vulnerability of migrants to trafficking for the purpose of forced labor. As the TVPA requires, the report also designated each country it covered as a Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 country. Excerpts below from the introduction to the report describe the Department's methodology for making such designations, as well as the potential consequences of a Tier 3 designation. The full report is available at *www.state.gov/g/tip/rls/tiprpt/2008/*.

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* * * *

. . . The Department first evaluates whether the government fully complies with the TVPA's minimum standards for the elimination

of trafficking . . . . Governments that fully comply are placed in Tier 1. For other governments, the Department considers whether they are making significant efforts to bring themselves into compliance. Governments that are making significant efforts to meet the minimum standards are placed in Tier 2. Governments that do not fully comply with the minimum standards and are not making significant efforts to do so are placed in Tier 3. Finally, the Special Watch List criteria are considered and, when applicable, Tier 2 countries are placed on the Tier 2 Watch List.

The Special Watch List—Tier 2 Watch List

The TVPA created a "Special Watch List" of countries on the TIP Report that should receive special scrutiny. The list is composed of: 1) Countries listed as Tier 1 in the current Report that were listed as Tier 2 in the 2007 Report; 2) Countries listed as Tier 2 in the current Report that were listed as Tier 3 in the 2007 Report; and, 3) Countries listed as Tier 2 in the current Report, where:

a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing;
b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecutions, and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials; or
c) The determination that a country is making significant efforts to bring itself into compliance with the minimum standards was based on commitments by the country to take additional future steps over the next year.

* * * *

Potential Penalties for Tier 3 Countries

Governments of countries in Tier 3 may be subject to certain sanctions. The U.S. Government may withhold non-humanitarian, non-trade-related foreign assistance. Countries that receive no

such assistance would be subject to withholding of funding for participation by officials and employees of such governments in educational and cultural exchange programs. Consistent with the TVPA, governments subject to sanctions would also face U.S. opposition to assistance (except for humanitarian, trade-related, and certain development-related assistance) from international financial institutions such as the International Monetary Fund and the World Bank. Sanctions, if imposed, will take effect October 1, 2008.

All or part of the TVPA's sanctions can be waived upon a determination by the President that the provision of such assistance to the government would promote the purposes of the statute or is otherwise in the national interest of the United States. The TVPA also provides that sanctions can be waived if necessary to avoid significant adverse effects on vulnerable populations, including women and children. Sanctions would not apply if the President finds that, after this Report is issued but before sanctions determinations are made, a government has come into compliance with the minimum standards or is making significant efforts to bring itself into compliance.

* * * *

b. Presidential determinations

Consistent with § 110(c) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7107 (2000), the President annually makes one of four specified determinations with respect to "each foreign country whose government, according to [the annual Trafficking in Persons report]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant efforts to bring itself into compliance." The four determination options are set forth in § 110(d)(1)–(4). On October 17, 2008, President Bush issued Presidential Determination No. 2009-5 with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons in a memorandum for the Secretary of State. 73 Fed. Reg. 63,839 (Oct. 28, 2008). The Presidential

Determination is also available, together with the Memorandum of Justification Consistent with the Trafficking Victims Protection Act of 2000, Regarding Determinations with Respect to "Tier 3" Countries, at *www.state.gov/s/l/c8183.htm*. The memorandum of justification summarized the determinations made by the President and their effect, as excerpted below; the memorandum also included a separate discussion of each of the named countries.

. . . The President has determined to sanction Burma, Cuba, the Democratic People's Republic of Korea (DPRK), Iran, and Syria. The United States will not provide funding for participation by officials or employees of the Government of Cuba in educational and cultural exchange programs until such government complies with the Act's minimum standards to combat trafficking or makes significant efforts to do so. The United States will not provide certain non-humanitarian, non-trade-related foreign assistance to the Governments of Burma or Syria until such government complies with the Act's minimum standards to combat trafficking or makes significant efforts to do so. Furthermore, the President determined, consistent with the Act's waiver authority, that provision of certain assistance to the governments of the DPRK and Iran would promote the purposes of the Act or is otherwise in the national interest of the United States. The President also determined, consistent with the Act's waiver authority that provision of all bilateral and multilateral assistance to Algeria, Fiji, Kuwait, Papua New Guinea, Qatar, Saudi Arabia, and Sudan that otherwise would have been cut off would promote the purposes of the Act or is otherwise in the national interest of the United States.

The determinations also indicate the Secretary of State's subsequent compliance determinations regarding Moldova and Oman. It is significant that 2 of the 14 Tier 3 countries took actions that averted the need for the President to make a determination regarding sanctions and waivers. Information highlighted in the Trafficking in Persons report and the possibility of sanctions, in conjunction with our diplomatic efforts, encouraged these countries' governments to take important measures against trafficking.

Section 110(d)(1)(B) of the Act interferes with the President's authority to direct foreign affairs. We, therefore, interpret it as precatory. Nonetheless, it is the policy of the United States that, consistent with the provisions of the Act, the U.S. Executive Director of each multilateral development bank, as defined in the Act, and of the International Monetary Fund will vote against, and use the Executive Director's best efforts to deny any loan or other utilization of the funds of the respective institution to the governments of Burma, Cuba, the DPRK, Iran, and Syria for Fiscal Year 2009, until such a government complies with the minimum standards or makes significant efforts to bring itself into compliance, as may be determined by the Secretary of State in a report to the Congress pursuant to section 110(b) of the Act.

* * * *

c. Reauthorization legislation

On December 23, 2008, President Bush signed into law the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("Act"), Pub. L. No. 110-457, 122 Stat. 5044, authorizing measures to combat trafficking in persons. The Act generally increases focus on labor trafficking, particularly among foreign migrant workers (*see*, *e.g.*, § 103), and calls for programs to help other countries regulate labor recruiters and protect workers. Amendments made by § 106 of the Act to the requirements for the State Department's annual Trafficking in Persons Report may result in coverage of additional countries; also relating to the report, § 107 of the Act requires the State Department automatically to downgrade to the report's "Tier 3" list any country that has been on the report's "Tier 2 Watch List" for two consecutive years after enactment of the Act, with a waiver available (*see* 3.a. *supra* for a discussion of the tiers).

The Act also expands the availability of immigration relief for trafficking victims and their family members (§§ 201, 205), and, subject to the exercise of a waiver, requires the Secretary of State to deny visas to applicants seeking to work for

diplomatic missions or international organizations if the Secretary determines that there is credible evidence that employees have been exploited there in the past and the mission or international organizations tolerated such actions (§ 203). It also provides a number of new protections for unaccompanied alien children, a group particularly vulnerable to trafficking in persons, in the United States (§ 235). The Act also strengthens existing U.S. criminal statutes on trafficking; criminalizes new offenses, including fraud in foreign labor contracting; and extends extra-territorial jurisdiction for trafficking in persons crimes committed abroad by U.S. nationals or long-term permanent residents or anyone who is present in the United States (§§ 222, 223).

4. Money Laundering

In 2008, the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") issued two notices withdrawing its previous findings that a jurisdiction and a financial institution were primary money laundering concerns. The Treasury Department had published those findings pursuant to § 311 of the USA PATRIOT Act, Pub. L. No. 107-56, 31 U.S.C. § 5318A, which among other things authorizes the Secretary of the Treasury to designate a foreign jurisdiction or a financial institution operating outside of the United States as being of "primary money laundering concern" and to impose one or more of five "special measures" with respect to such jurisdiction or institution.

On April 10, 2008, FinCEN withdrew its August 24, 2004 finding that First Merchant Bank of the "Turkish Republic of North Cyprus"* was a financial institution of primary money

* Editor's note: As explained in the 2004 finding, "[b]ecause the United States does not recognize the 'Turkish Republic of Northern Cyprus,' all references to the country or government in this proposed rulemaking are placed within quotation marks." 69 Fed. Reg. 51,979 (Aug. 24, 2004). The 2008 Federal Register notice followed the same practice.

laundering concern, based on information "indicating that First Merchant Bank is no longer conducting transactions as a financial institution." 73 Fed. Reg. 19,452 (Apr. 10, 2008); *see Digest 2004* at 138–39.

On April 18, 2008, FinCEN withdrew its 2002 notice that the Republic of Nauru was a jurisdiction of primary money laundering concern, based on reporting that Nauru had "taken remedial measures to address the deficiencies" in its anti-money laundering regime and on actions taken by the Financial Action Task Force. 73 Fed. Reg. 21,178 (Apr. 18, 2008); *see Digest 2002* at 126–31 for background on the initial finding.

5. Corruption

On October 9, 2008, David T. Johnson, Assistant Secretary of State, Bureau of International Narcotics and Law Enforcement Affairs, addressed the General Assembly's Third Committee on issues including the responsibility of international business to help prevent corruption, the importance of the UN Conventions Against Corruption and Transnational Organized Crime, and the link between corruption and narcotics trafficking. Excerpts from Mr. Johnson's remarks follow; the full text of his statement is available at *www.archive.usun.state.gov/press_releases/20081009_267.html*.

* * * *

Corruption, Mr. Chairman, poses a double threat to governments and societies. . . . Corruption helps to create an environment where criminals, insurgents and terrorists can operate. It undermines the rule of law, erodes democratic institutions, slows development and distorts economies. . . .

Companies that engage in bribery and corrupt practices commit a crime and this reinforces the criminal behavior of government officials, feeding a vicious cycle of supply—those that offer the bribes—and demand—those taking the bribes.

In the United States, we take global corruption very seriously. As early as 1977, Congress passed the Foreign Corrupt Practices Act to provide a platform to target foreign bribery by American companies and American citizens. . . . We have expanded collaboration with foreign authorities on bribery cases and have made more effective use of mutual legal assistance mechanisms. . . .

* * * *

Public corruption is an international problem that requires an international solution. Fortunately, we've crafted a solid global foundation on which to build. The comprehensive road map to address both the supply and demand for corrupt international practices is the UN Convention against Corruption (UNCAC). The UNCAC, with 126 parties and another 14 signatories (as of October 6) . . . provides the framework and tools for States individually and collectively to make it more difficult for corrupt officials and those who corrupt them to enjoy the fruits of their unlawful activities. It includes requirements for measures to prevent corruption in the first place, criminalization of bribery and other corrupt conduct, the first ever roadmap for facilitating recovery of stolen assets, and a framework for international law enforcement cooperation.

As a result of these new standards, awareness of the destructive effect of corruption on societies is at a historically high level. High-profile investigations are progressing, fueled also in part by the OECD Anti-bribery Convention, and by institutions like the World Bank which disqualifies corrupt companies from projects they finance. . . .

An important parallel to the UNCAC, the UN Convention against Transnational Organized Crime (UNTOC), has galvanized States in the fight against transnational organized crime. Where corruption ends and other forms of organized crime begin is difficult to distinguish; the twin phenomena are two sides of the same coin and must be dealt with together. . . . Fortunately, more countries actually are turning to the Convention to pursue legal assistance and extradition cases. Just since the 3rd Conference of Parties

in October 2006, the number of mutual legal assistance and extradition cases involving the UNTOC has grown by 50%.

* * * *

The fight against international drugs, crime and corruption is a long-term process that requires fundamental changes in the way our governments work together. No one country or group of countries working alone can stop or disrupt transnational organized crime, drug trafficking and corruption. It takes all of us working together—through the UN and elsewhere—to set anti-crime and anti-drug standards, implement those standards on the ground, and cooperate at the operational level to close off the safe-havens where drug and crime groups seek refuge and stage operations. In the past few years, the UN process has provided two new and powerful weapons for this fight in the form of the UNTOC with its Protocols and the UNCAC. . . .

6. Torture

On October 30, 2008, a federal jury in Miami, Florida, convicted Roy M. Belfast Jr. (also known as Charles Taylor, Jr.), son of Charles G. Taylor, former president of Liberia, on five counts of torture, one count of conspiracy to torture, one count of using a firearm during the commission of a violent crime, and one count of conspiracy to use a firearm during the commission of a violent crime. The prosecution was the first one brought under 18 U.S.C. § 2340A, which provides criminal penalties for "[w]hoever outside the United States commits or attempts to commit torture" and provides jurisdiction over such activity if "(1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender." The extraterritorial criminal torture statute, 18 U.S.C. §§ 2340–2340B, was enacted as § 506 of Public Law 103-236 in 1994 to implement U.S. obligations under the Convention Against Torture. Additional

background is available in *Digest 2007* at 173–80. Excerpts from a Department of Justice press release follow; the complete text is available at *www.justice.gov/archive/opa/pr/2008/October/08-crm-971.html*. *See also* A.1.b. *supra* for a discussion of torture-related challenges to extradition.*

A federal jury in Miami today convicted Roy M. Belfast Jr. of crimes related to the torture of people in Liberia between April 1999 and July 2003, the Department of Justice and U.S. Immigration and Customs Enforcement (ICE) announced.

Belfast, 31, a/k/a Chuckie Taylor, Charles Taylor Jr., Charles Taylor II and Charles McArther Emmanuel, was convicted of five counts of torture, one count of conspiracy to torture, one count of using a firearm during the commission of a violent crime and one count of conspiracy to use a firearm during the commission of a violent crime. Belfast, the son of former Liberian President Charles Taylor, was charged in a November 2007 superseding indictment with torture, conspiracy to commit torture, using a firearm during a crime of violence and conspiracy to use a firearm during a crime of violence.

Belfast, who was born in the United States, was alleged to have been a commander of an armed security force in Liberia during his father's administration. According to trial testimony, Belfast commanded a paramilitary organization known as the Anti-Terrorist Unit that was directed to provide protection for the Liberian president and additional dignitaries of the Liberian government. Between 1999 and 2002, in his role as commander of the unit, Belfast and his associates committed forms of torture including burning victims with molten plastic, lit cigarettes, scalding water, candle wax and an iron; severely beating victims with firearms; cutting and stabbing victims; and shocking victims with an electric device.

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* Editor's note: On January 9, 2009, Taylor was sentenced to 97 years in prison for the crimes for which he was convicted. *See www.justice.gov/archive/opa/pr/2009/January/09-crm-021.html*.

Belfast was prosecuted under a statute that criminalizes torture and provides U.S. courts jurisdiction to hear cases involving acts of torture committed outside the United States if the offender is a U.S. national or is present in the United States, regardless of nationality.

* * * *

7. Maritime Crime

a. Conviction under SUA Convention implementing legislation

On April 24, 2008, the U.S. Court of Appeals for the Ninth Circuit upheld the first U.S. conviction of a defendant under the implementing legislation for the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA Convention"), 18 U.S.C. § 2280. *United States v. Lei Shi*, 525 F.3d 709 (9th Cir. 2008). A district court had convicted the defendant under 18 U.S.C. § 2280(a)(1)(A) and (B) for fatally stabbing the captain and first mate of a fishing boat he was serving on and then taking control of the ship for two days. 396 F. Supp. 2d 1132 (D. Haw. 2003). The crimes occurred while the fishing boat, registered to the Republic of the Seychelles, was in international waters off the coast of Hawaii. The defendant was apprehended after the Coast Guard intercepted the ship and boarded it, pursuant to a waiver of jurisdiction provided by the Seychelles. The defendant was subsequently detained and brought to Honolulu, where he was indicted.

Excerpts from the Ninth Circuit's decision below (footnotes omitted) provide background on the SUA Convention and § 2280 and explain the court's conclusion that the district court had jurisdiction over the defendant because the jurisdictional requirements in § 2280 were met and the statute was constitutional as applied. The Supreme Court denied certiorari on October 6, 2008. 129 S. Ct. 324 (2008).

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* * * *

[I] B

The government filed an indictment charging Shi with several violations of § 2280, which proscribes certain acts of violence that endanger maritime navigation. The statute codifies the United States' obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the "Maritime Safety Convention"), 27 I.L.M. 672 (1988), which authorizes any signatory state to extradite or prosecute offenders, regardless of where the offender's acts occurred. Accordingly, § 2280 authorizes federal jurisdiction over any offender "later found" in the United States after a prohibited act is committed. 18 U.S.C. § 2280(b)(1)(C). . . .

* * * *

[II] A

Section 2280 codifies the United States' obligations under the Maritime Safety Convention to extradite or to prosecute those who commit acts of maritime violence. Section 2280(a)(1) lists eight proscribed acts, and § 2280(b)(1) vests federal courts with jurisdiction if certain conditions are met. 18 U.S.C. § 2280. At issue here is the provision which renders jurisdiction proper if the "offender is *later found* in the United States." *Id.* § 2280(b)(1)(C) (emphasis added). The district court concluded that § 2280 provided it with jurisdiction over Shi because Shi's arrest and transport to Honolulu rendered him "later found" in the United States as the statute defines that term.

1

Article I, Section 8, Clause 10 of the United States Constitution (the "Offense Clause") empowers Congress to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." Because the high seas, by definition, lie outside United States territory, *see United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990), the Offense Clause grants Congress the authority to apply federal law beyond the borders of the United States, *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

Section 2280 is an exercise of Congress's constitutional authority to define and punish "Felonies on the high Seas" because it proscribes felony offenses and expressly applies to international waters. *See* 18 U.S.C. § 2280(e). In addition, §§ 2280(a)(1)(A) and (B), the provisions under which Shi was charged, proscribe offenses which meet the definition of piracy. . . . Section 2280(a)(1)(A) prohibits "seiz[ing] or exercis[ing] control over a ship by force or threat thereof," and § 2280(a)(1)(B) prohibits "act[s] of violence against a person on board a ship" that are "likely to endanger the safe navigation of that ship." . . .

In addition to the Offense Clause, Congress derived the authority to promulgate § 2280 by virtue of the Necessary and Proper Clause. That Clause empowers Congress "to make all Laws which shall be necessary and proper for carrying into execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. Such "Powers" include the Executive's Article II Treaty Power. *See Missouri v. Holland*, 252 U.S. 416, 432 (1920). Section 2280 implements the Maritime Safety Convention, . . . which requires signatory states to "prosecute or extradite" offenders found within their territory regardless of where the offense was committed. *See United States v. Yousef*, 327 F.3d 56, 95–96 (2d Cir. 2003) (per curiam) (discussing a similar provision in the Montreal Convention). In order to satisfy this obligation, it was necessary for the United States to codify the Convention's "extradite or prosecute" requirement into federal law. Section 2280 accomplishes this task. Accordingly, the Treaty Power coupled with the Necessary and Proper Clause provided Congress with an additional source of authority to apply § 2280 beyond U.S. borders.

2

Congress's constitutional authority to apply a federal law outside U.S. borders does not end our inquiry, however, because we may not presume that Congress intended to do so unless it clearly expresses such intent. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993). Section 2280(b)(1) applies to "covered ships,"

which the statute defines as ships "navigating or . . . scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a *single country*," 18 U.S.C. § 2280(e) (emphasis added). In addition, the statute provides federal jurisdiction over acts committed on such ships if "the offender is *later found* in the United States." *Id.* § 2280(b)(1)(C) (emphasis added). We are satisfied that these two provisions are a clear expression that § 2280 applies outside United States territory.

3

Even if Congress had the authority to apply § 2280 beyond the United States' borders and clearly manifested its intent to do so, Shi argues that the application of the statute to him violates the Due Process Clause of the Fifth Amendment. Shi points to our decision in *Davis*, in which we held that when the Maritime Drug Law Enforcement Act ("MDLEA") is applied to a foreign defendant apprehended on a foreign-flag ship, due process requires "a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." 905 F.2d at 249–50 (internal citation and footnote omitted). . . .

The Due Process Clause requires that a defendant prosecuted in the United States "should reasonably anticipate being haled into court in this country." *United States v. Moreno-Morillo*, 334 F.3d 819, 827 (9th Cir. 2003) (internal quotation marks and citation omitted).

We need not determine whether the *Full Means No. 2* was a foreign-flag or stateless vessel at the time it was intercepted by the Coast Guard in order to resolve this case. Instead, we abide by our instruction in [*United States v. Caicedo*, 47 F.3d 370 (9th Cir. 1995)] that "[a] nexus requirement, imposed as a matter of due process, makes sense when the 'rough guide' of international law also requires a nexus." *Id.*; *see also Davis*, 905 F.2d at 249 n.2 (explaining that while not binding, "[i]nternational law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States").

In applying the "rough guide" of international law, we turn to the principle of universal jurisdiction. Universal jurisdiction is

based on the premise that offenses against all states may be punished by any state where the offender is found. *See* Stephen Macedo, *Universal Jurisdiction* 2–12 (2004). Accordingly, it allows a state to claim jurisdiction over such an offender even if the offender's acts occurred outside its boundaries and even if the offender has no connection to the state.

As explained above, the acts with which Shi is charged constitute acts of piracy. . . . Prosecuting piracy was the original rationale for creating universal jurisdiction, *see, e.g.*, Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785, 803 (1988) (citing piracy as the "archetypal universal crime"), and federal courts have historically accepted the notion that a pirate may be tried by any state, *see* [*United States v.*] *Smith*, 18 U.S. [153,] 176 [(1820)] . . . . Due process does not require a nexus between such an offender and the United States because the universal condemnation of the offender's conduct puts him on notice that his acts will be prosecuted by any state where he is found. . . .

Sections 2280(a)(1)(A) and (B) prohibit interference with the safe navigation of a maritime vessel through the use or threat of force. Because these are acts of piracy, and because such acts are universally condemned, due process does not require the same nexus between the offender and the United States as does the MDLEA.

Moreover, due process does not require the same nexus between violators of § 2280 and the United States because § 2280 implements the Maritime Safety Convention, which expressly provides foreign offenders with notice that their conduct will be prosecuted by any state signatory. . . .

* * * *

Congress's authority to apply § 2280 beyond United States borders stems in part from its power under the Offense Clause to punish "Piracies on the high Seas," not merely "Felonies," as Congress has done in statutes such as the MDLEA. Because piracy is a universally-condemned crime, a jurisdictional nexus is not required to satisfy due process. As such, we conclude that the universal condemnation of Shi's conduct and the existence of the

Maritime Safety Convention provided him with all the notice due process requires that he could be prosecuted in this country. . . .

B

Having established that the district court's exercise of jurisdiction over Shi satisfied the Constitution's requirements, we next consider Shi's arguments that jurisdiction was improper under the statutory requirements set forth in § 2280, which permits jurisdiction if the "offender is *later found* in the United States." *Id.* § 2280(b)(1)(C) (emphasis added). . . .

It is well-established that jurisdiction over a defendant is not impaired by the fact that he was brought within the jurisdictional territory of the court against his will. *See Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). Yet Shi argues that § 2280 creates an exception to this rule because it requires the defendant to be "later found" in the United States. 18 U.S.C. § 2280(b)(1)(C). Accordingly, he reads the statute to require a defendant to enter the United States voluntarily before he can be prosecuted.

* * * *

We . . . conclude that the requirement that a defendant be "later found" does not contain the implicit requirement that the defendant's arrival in the United States be voluntary. Indeed, if Congress intended to create such an exception to the *Ker-Frisbie* rule, we would expect it to manifest its intent more directly. Moreover, the Maritime Safety Convention contains no such voluntary entry requirement. *See* Maritime Safety Convention, art. 9. To the extent Congress intended § 2280 to deviate from the Convention it was designed to implement, we would expect such an instruction to be express.

Accordingly, we conclude that Shi's arrest on the *Full Means No. 2* after the United States had established jurisdiction over the ship and his subsequent transport to the Honolulu federal building rendered him "later found" in the United States and subjected him to jurisdiction under § 2280. . . .

* * * *

b. Prosecution under MARPOL implementing legislation

On June 30, 2008, the U.S. Court of Appeals for the Fifth Circuit reversed and remanded a district court decision dismissing criminal charges brought against Kun Yun Jho and Overseas Shipholding Group, Inc. ("OSG") under the implementing legislation for the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 thereto ("MARPOL 73/78"), 33 U.S.C. § 1908(a), and the corresponding regulations, 33 C.F.R § 151.25. *United States v. Kun Yun Jho*, 534 F.3d 398 (5th Cir. 2008). Kun Yun Jho was the chief engineer of the *M/T PACIFIC RUBY*, a ship owned by OSG that transferred petroleum from off-shore tankers to U.S. ports and flew the flag of the Marshall Islands. Among other things, Kun Yun Jho was responsible for entering information about the ship's discharge and disposal of oil in the ship's oil record book. After the Coast Guard detected evidence that the ship had discharged pollutants unlawfully, the United States indicted Kun Yun Jho and OSG on charges that included knowingly failing to maintain an oil record book, in violation of 33 U.S.C. § 1908(a) and 33 C.F.R. § 151.25.

Excerpts follow from the court's opinion (footnotes omitted).

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* * * *

II

The Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. § 1901, *et seq*., represents Congress' implementation of two related marine environmental treaties to which the United States is a party: the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships. Together, these treaties are generally referred to as MARPOL 73/78 ("MARPOL"). These treaties specifically target the prevention of oil pollution in the sea. The APPS authorizes the Coast Guard to

"prescribe any necessary or desired regulations to carry out the provisions of the MARPOL protocol . . . ." 33 U.S.C. § 1903(b)(1). The APPS prohibits violations of MARPOL, the APPS, and the regulations promulgated pursuant to § 1903(b). In terms of criminal sanctions, the APPS provides that, "[a] person who knowingly violates the MARPOL Protocol . . . this chapter, or the regulations issued thereunder commits a Class D felony." 33 U.S.C. § 1908(a). Civil penalties are available for any violation, whether knowing or not. *See* 33 U.S.C. § 1908(b).

The criminal charges brought against Jho and OSG under § 1908(a) arise from alleged knowing violations of oil record book requirements outlined in 33 C.F.R. § 151.25. In order to help monitor and prevent pollution from oil discharges, the APPS regulations require that ships over a certain tonnage "maintain" an oil record book. *See* 33 C.F.R. § 151.25(a). The regulation states that the "master or other person having charge of [the] ship" is responsible for "maintenance of such record." *Id.* at 151.25(j). The oil record book must be kept on board the ship and "be readily available for inspection at all reasonable times." *Id.* at 151.25(I). APPS regulations give the Coast Guard authority to board the ship and inspect the ship for compliance with MARPOL, the APPS, and APPS regulations. *Id.* at 151.23(a); *see* 14 U.S.C. § 89(a). . . .The Coast Guard's inspection authority includes the ability to examine the oil record book kept by a ship. *See* 33 C.F.R. § 151.23(c).

The APPS provides two pertinent limitations on the application of § 1908(a) and 33 C.F.R. § 151.25. First, the record book requirements of 33 C.F.R. § 151.25 only apply to foreign-flagged ships, such as the *M/T PACIFIC RUBY*, "while in the navigable waters of the United States, or while at a port or terminal under the jurisdiction of the United States." 33 C.F.R. § 151.09(a)(5); *see also* 33 U.S.C. § 1902(a) (limiting application of the APPS to foreign-flagged vessels while they are in the "navigable waters of the United States"). Second, the APPS states that, "[a]ny action taken under [Chapter 33] shall be taken in accordance with international law." 33 U.S.C. § 1912. . . .

* * * *

III

A

. . . [W]e first conclude that the district court erred in construing the criminal conduct alleged against Jho and OSG to have occurred "outside U.S. waters."

The indictment alleges that Jho failed to maintain an accurate oil record book on eight separate dates. On each of the dates listed in the indictment, the *M/T PACIFIC RUBY* docked in a U.S. port. . . . [W]e read the indictment to allege eight knowing failures to maintain an oil record book that each occurred entirely within the ports of the United States. As explained below, the statute, its purposes, and related case law reinforce this reading of the indictment.

The defendants argue that § 151.25's requirement that an oil record book be "maintained" does not impose a separate substantive duty. . . . Consequently, the defendants claim that the offense conduct took place outside of U.S. ports or navigable waters because the allegedly incorrect entries were made in international waters. However, ignoring the duty to maintain puts the regulation at odds with MARPOL and Congress' clear intent under the APPS to prevent pollution at sea according to MARPOL. Under 33 C.F.R. § 151.09 and 33 U.S.C. § 1902(a), the record book requirements may be enforced against foreign-flagged ships only for violations that occur within the navigable waters of the United States, or while at a port or terminal under the jurisdiction of the United States. Accurate oil record books are necessary to carry out the goals of MARPOL and the APPS. If the record books did not have to be "maintained" while in the ports or navigable waters of the United States, then a foreign-flagged vessel could avoid application of the record book requirements simply by falsifying all of its record book information just before entry into a port or navigable waters. . . . We refuse to conclude that by imposing limitations on the APPS's application to foreign-flagged vessels Congress intended so obviously to frustrate the government's ability to enforce MARPOL's requirements. Instead, we read the requirement that an oil record book be "maintained" as imposing a duty upon a foreign-flagged vessel to ensure that its oil record

book is accurate (or at least not knowingly inaccurate) upon entering the ports of navigable waters of the United States.

* * * *

B

[W]e now turn to whether international law limits the prosecution of the oil record book counts. "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Wilson v. Girard*, 354 U.S. 524, 529 (1957). In *Cunard S.S. Co. v. Mellon*, the Supreme Court recognized "that the territory subject to [United States'] jurisdiction includes the land areas under its dominion and control, *the ports*, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles." 262 U.S. 100, 122 (1923) (emphasis added). . . . A state's exercise of jurisdiction over foreign-flagged ships in its ports is permissive, and a port state may, based on comity concerns, decide not to exercise its jurisdiction. *See* [*Mali v. Keeper of the Common Jail*, 120 U.S. 1, 12 (1887)]; Thomas J. Schoenbaum, 1 ADMIRALTY AND MARITIME LAW § 3–12, at 148 (4th Ed. 2004). However, the United States has decided to exercise its criminal jurisdiction in this case, and thus, the charges against Jho and OSG will stand unless the United States has consented to surrender its jurisdiction to prosecute oil record book offenses carried out in United States' ports. . . .

Jho and OSG argue that § 1912 represents the United States' consent to surrender its jurisdiction to prosecute APPS violations where prosecution is not "in accordance with international law." 33 U.S.C. § 1912. However, the sources of international law relied upon by the district court in dismissing the oil record book charges do not limit the government's jurisdiction to prosecute violations of domestic law committed in port. First, the district court relied on the law of the flag doctrine. The traditional statement of the doctrine provides that a merchant ship is part of the territory of the country whose flag she flies, and that actions aboard that ship are subject to the laws of the flag state. *See Cunard*, 262 U.S. at 123. However, the district court read this doctrine too broadly in

finding that it prevented the prosecution of the oil record book offenses in this case. . . . The law of the flag doctrine does not mandate that *anything* that occurs aboard a ship *must* be handled by the flag state. In fact, the Supreme Court has recognized that the law of the flag doctrine does not completely trump a sovereign's territorial jurisdiction to prosecute violations of its laws: "[The law of the flag doctrine] is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign." *Cunard*, 262 U.S. at 123; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 502, cmt. d (1987) ("The flag state['s] . . . jurisdiction is not exclusive when the ship is in a port or internal waters of another state."). We note also that the limitations imposed by 33 U.S.C. § 1902 and 33 C.F.R. § 151.09 track the general principles of the law of the flag. Accordingly, we find that the oil record book offenses in this case were charged "in accordance with" the law of the flag. *See* 33 U.S.C. § 1912.

The district court also relied on articles 216 and 230 of the THIRD UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1982), 21 I.L.M. 1245 (1982) (hereinafter UNCLOS). . . .

* * * *

As discussed above, it has long been established that a state has the power to prosecute violations of its laws committed by foreign-flagged vessels in its ports, as long as the port state has not abdicated the authority to do so. UNCLOS does not limit, but broadens, this traditional rule when it comes to the power of port states to enforce marine pollution laws. The enforcement scheme created by UNCLOS provides port states the power to pursue violations beyond those that occur in its ports. UNCLOS allows port states to pursue violations of marine pollution laws that occur within the port state's territorial sea or exclusive economic zone. *See* UNCLOS art. 220(1), 21 I.L.M. at 1313. UNCLOS goes further in broadening the authority of port states in order to increase their role in preventing marine pollution. Article 218 provides a port state with power to institute proceedings based on pollution violations that occurred entirely outside its coastal zones. *See* UNCLOS art. 218, 21 I.L.M. at 1312–13 . . . .

The specific UNCLOS provisions cited by the district court, articles 216 and 230, do not limit the authority exercised by port states under UNCLOS. Article 216 provides that coastal states may seek enforcement against vessels when "dumping" occurs "within its territorial sea or its exclusive economic zone or onto its continental shelf." Under article 216, flag states may enforce dumping laws against ships bearing its registry. And article 230(2) limits the remedies available to a state pursuing "violations . . . committed by foreign vessels in the territorial sea [*i.e.*, a coastal zone]." Nothing in these articles or the remaining provisions of the UNCLOS enforcement scheme limits the power of a state to prosecute violations of its criminal laws that occur after a ship has voluntarily entered its port. Instead, UNCLOS broadens the traditional authority of a port state to allow a port state to pursue violations of marine pollution law that occur outside of its ports, and in some circumstances, outside of its coastal zones.

In sum, we reject the idea that 33 U.S.C. § 1912 prevents prosecution of the oil record book offenses charged against Jho and OSG. Neither UNCLOS nor the law of the flag doctrine encroaches on the well-settled rule that a sovereign may exercise jurisdiction to prosecute violations of its criminal laws committed in its ports. Far from signaling an abdication of this traditional authority, the APPS indicates Congressional willingness to criminalize knowing violations of MARPOL, the APPS, and APPS regulations committed by foreign-flagged ships while in United States' ports and navigable waters. *See* 33 U.S.C. §§ 1908(a) & 1902(a); 33 C.F.R. § 151.09. Because the conduct the government charges against Jho and OSG in Counts 3-10 occurred entirely within the ports of the United States, 33 U.S.C. § 1912 presents no obstacle to the government's prosecution of those counts.

* * * *

C. INTERNATIONAL AND HYBRID TRIBUNALS

1. Overview

On November 14, 2008, Department of State Legal Adviser John B. Bellinger, III, spoke about U.S. perspectives on

international criminal justice at the Fletcher School of Law and Diplomacy in Medford, Massachusetts. Excerpts follow from the speech; *see also* Mr. Bellinger's remarks on the United States and the International Criminal Court at DePaul College of Law on April 25, 2008. The full texts of both speeches are available at *www.state.gov/s/l/c8183.htm*.

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* * * *

. . . [T]he United States has been a consistent supporter of international criminal justice. This fact is often lost on critics, who tend to focus on the United States' objections to certain aspects of the International Criminal Court. There is sometimes a mistaken impression that this Administration opposes international tribunals, including international criminal tribunals. Not so. The fact is that U.S. support is vital to the operation of these institutions, and the United States is among the largest providers of financial, political, and technical support for international criminal justice. Indeed, the United States recognizes that international criminal tribunals, in the right circumstances, play a key role in ensuring accountability for those who commit war crimes, genocide, and crimes against humanity.

. . . [W]here the United States has expressed concerns about international tribunals—leaving aside the ICC . . . —those concerns have generally *not* been about tribunals' ultimate purposes, but rather to ensure that tribunals function efficiently. In the United States, we of course have the saying that "justice delayed is justice denied." The same is often true of international tribunals. Not only do delays and inefficiencies thwart the purpose of meting out justice; they undermine what is often one of the essential[] purposes of international tribunals: to redress serious crimes in a manner that allows *all* sides to a violent conflict to come to terms with what has happened and reconcile their differences.

. . . [I]n the United States' view, local institutions are the preferred avenue for dispensing justice. Solutions that empower local institutions of criminal justice also inspire local ownership of results. We believe that fostering domestic institutions is central to the promotion and development of the rule of law. In appropriate

circumstances, however, international tribunals can supply the resources or technical capacity that local courts may lack; they can provide legitimacy and fairness where local institutions are inchoate or mistrusted; and most important, they can provide the political will to carry out justice where that will is absent, or insufficient, at the domestic level. But it is critically important that we rely on local criminal-justice institutions where they are available and up to the task, and, where they are not, that we work to develop those institutions. An example of the United States' approach in this area has been our support for the Iraq High Tribunal, which the Iraqis determined was the best way to achieve justice and reconciliation in their country. The United States stood virtually alone, however, in supporting the tribunal, perhaps because of lingering international pique over the Iraq war and in part because some countries and human rights groups preferred an international tribunal. This was unfortunate. International tribunals should not be the presumptive option: where, as in Iraq, justice can be handled locally, that is where it should be done.

* * * *

ICTY and ICTR

* * * *

. . . The United States has strongly supported these tribunals—financially and otherwise—in order to ensure that the perpetrators of these crimes are held accountable and ultimately to encourage reconciliation among the parties to the conflicts in those regions. In fact, the United States—and the Office of the Legal Adviser in particular—was instrumental in setting up these tribunals. . . .

The tribunals are funded through assessed UN contributions, and the United States is the largest contributor to both institutions. We have provided about one quarter of the cost of the ICTY and the ICTR—the International Criminal Tribunal for Rwanda. All told, our total contributions to the tribunals since their inception exceeds half a billion dollars.

Along with these financial contributions, the United States has offered significant political and technical support to the tribunals. . . . [W]e have actively cooperated with requests by the

tribunals for information or access to witnesses—both from the prosecution *and* the defense—in order to ensure fair trials. For example, we have provided the ICTY with imagery of mass graves at Srebrenica, which has been used by prosecutors to help establish the facts surrounding the slaughter of approximately 8000 men and boys in the summer of 1995—an act of genocide that shocked the world.

. . . We now must continue to work toward the arrest of remaining fugitives, particularly Ratko Mladic, and at the ICTR, Felicien Kabuga.

The time is approaching, however, when both tribunals need to wrap up their work, consistent with the "Completion Strategy" laid out by the Security Council. The tribunals have taken steps to increase efficiency, but it is clear that the timelines for finishing work are slipping. We encourage continued improvement in efficiency, and note that, given that the delay is due in part to the recent capture of fugitives, it will be necessary to make some reasonable accommodation.

We are now working in New York with other members of the Security Council to define which functions will be assigned to the residual mechanism (or mechanisms) that will handle certain limited matters once the tribunals have completed their current work, probably in 2011. The United States would like to see a mechanism with a limited mandate, but also with the capacity to ramp up and handle trials of Mladic and Kabuga if they are not apprehended and tried before the tribunals' operations cease.

At the same time, we need to work to build the capacity of domestic courts to try war crimes. This has not only been critical to the success of the ICTY and the ICTR completion strategies, but is also essential for lasting justice and reconciliation. The United States has been a significant supporter of building the capacity of local courts, particularly in Bosnia, but to some extent in Croatia and Serbia as well, and the ICTY has been able to transfer a number of cases to courts in the region for prosecution. The ICTR has had difficulty transferring certain cases to Rwanda, and transferring individuals for genocide prosecutions in European national courts has not proved to be a straightforward alternative. Nevertheless, as ethnic and political reconciliation slowly take

hold in the former Yugoslavia and in Rwanda, we need to be mindful that local political entities will ultimately need to exercise responsibility for addressing the remaining issues that stem from their respective conflicts.

Special Court for Sierra Leone

The Special Court for Sierra Leone . . . represents a hybrid model of international criminal justice . . . in that it combines local and international components. Unlike the ICTY and the ICTR, which were created directly by the Security Council through Chapter VII resolutions, the Special Court was established through an agreement between the UN and the Government of Sierra Leone, undertaken by the UN Secretary General in accordance with a resolution of the UN Security Council. The court has jurisdiction to prosecute crimes under both Sierra Leonean and international law, and includes judges appointed by the Government of Sierra Leone and by the UN Secretary General.

The United States has been the Special Court's principal supporter. . . . [T]he court's funding consists entirely of voluntary contributions from the international community. The United States has provided approximately $60 million in funds to-date—which is roughly forty percent of all voluntary contributions to the court and more than the total funds provided by the next three largest contributors *combined*. The United States has also provided extensive technical and political support to the Special Court. Although we are not under a legal obligation to assist the Special Court as we are the ICTY and the ICTR, we have nevertheless cooperated with the Special Court in the same manner.

Last year saw the start of the trial of former Liberian President Charles Taylor in The Hague. This was a significant moment: Taylor is the first African president to be indicted by an international court for war crimes, crimes against humanity, and other serious international crimes. The United States went to extraordinary lengths to help locate Taylor, bring him to Liberia, and facilitate his trial. Secretary Rice was personally instrumental in these efforts, and I remember personally calling ICC President Philippe Kirsch to tell him we had no objection to the use of ICC facilities

for the trial. Although we do have concerns about the ICC, . . . we do not have concerns about the use of its bricks and mortar.

* * * *

Khmer Rouge Tribunal

Like the Special Court for Sierra Leone, the Khmer Rouge Tribunal is a "hybrid" court established by agreement between the UN and the Cambodian government to bring to justice those responsible for the deaths of as many as two million Cambodians under the Khmer Rouge regime in the late 1970's. One notable feature of the Tribunal is that, although it consists of both Cambodian personnel and UN-appointed personnel, Cambodians are entitled to a majority of judges in both the Trial and appellate Chambers of the Tribunal. . . .

The United States strongly supports the goal of bringing Khmer Rouge leaders to justice, and is committed to the work of the Tribunal and to helping Cambodia build a society based on the rule of law. We have, however, also had serious concerns about the ability of the Tribunal to meet international standards of justice and address corruption.

Of late, the Tribunal has made notable progress on management and corruption issues, but there is more work to be done. . . .

Special Tribunal for Lebanon

The Special Tribunal for Lebanon represents yet another model for international criminal justice. The Tribunal was created, in accordance with UN Security Council Resolution 1757, to bring to justice those responsible for the murder of former Lebanese Prime Minister Rafik Hariri and others. The Tribunal's mandate is to prosecute violations of Lebanese *domestic* law. This distinguishes the tribunal from the ICTY and the ICTR, whose jurisdiction covers war crimes, genocide, and crimes against humanity. The Lebanon Special Tribunal is, in other words, an *international* institution set up to prosecute *domestic* crimes. Usually the prosecution of such crimes is left to a state's internal legal process, but Lebanon was a case where that process was itself subverted by threats of violence and terrorism. We therefore believe an

international criminal justice mechanism is necessary in order to deter further political assassinations and to protect the sovereignty of Lebanon.

The Tribunal process is now underway, and, as the UN Secretary General has affirmed, that process is irreversible. . . . The United States has been a principal supporter of the Tribunal. So far, we have contributed $14 million toward the set up and first-year operations of the Tribunal, and we expect to continue to be among the Tribunal's strongest backers. In addition, we fully support the work of Daniel Bellemare, Commissioner of the UN International Independent Investigation Commission . . . . In the end, it is important that the Tribunal will ultimately punish those responsible for the assassination of former Prime Minister Hariri and others in Lebanon and help ease civil discord.

International Criminal Court

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While long a proponent of the idea of a permanent international criminal court, during the run-up to the Rome Statute in the 1990's, the United States consistently stressed that establishing an international criminal court was not an end in itself. Rather, we believed, a court's effectiveness would depend on the powers given to the court and the ways in which those powers were integrated into the existing international system for peace and security. In particular, Clinton Administration representatives at Rome made clear that the ICC must operate in coordination, not in conflict, with the UN Security Council. They opposed proposals to give the court's prosecutor the authority to commence investigations on his or her own initiative, without a referral from the Security Council. They emphasized that the United States and other governments participate together in military alliances and peacekeeping operations around the world, and that the soldiers undertaking these important tasks need to be able to do their jobs without exposure to potentially politicized prosecutions from the court. They also expressed concerns with proposals to have the court exercise jurisdiction over crimes, such as a crime of aggression, which had a very different character than war crimes, genocide, and crimes against humanity.

While U.S. negotiators worked hard to secure agreement on a treaty that would meet these objectives, the negotiations at Rome failed to produce acceptable terms. The concerns the United States made clear at Rome were the basis for President Clinton's decision, announced in December 2000, that the United States would sign the Rome Statute but that he would not submit it to the Senate for advice and consent to ratification. . . .

. . . [T]his Administration has been criticized for its approach to the ICC, particularly in the first term, when the United States formally notified the UN Secretary-General that it did not intend to become a party to the Rome Statute. This has been widely misunderstood as a confrontational U.S. rejection of the ICC. In fact, the central motivation was to resolve any confusion whether, as a matter of treaty law, the United States had residual legal obligations arising from its signature of the Rome Statute not to take steps inconsistent with the treaty's "object and purpose."

I want to be clear here that it was not the policy of the United States to try to kill the ICC. We have respected the decisions of other states to become parties to the Rome Statute. Under Secretary of State Marc Grossman emphasized this very principle in his 2002 announcement that the United States did not intend to become a party to the Statute. He said: "the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court." Our policies have been consistent with this approach—including the so-called "un-signing," and our efforts to secure Article 98 agreements with other states, which were designed to protect U.S. personnel from the jurisdiction of the court, not to interfere with the decisions made by Rome Statute parties to subject their own nationals to the court's jurisdiction.

The concerns, however, that underlay the Clinton Administration's actions and the decision in 2002 to inform the UN that the United States did not intend to become a party are still relevant today. They reflect the unique role and interests of the United States as a global military power and as a permanent member of the Security Council, as well as our historically-rooted concern that institutional power must be subject to appropriate checks. . . .

Still, even if the United States is not a party to the Rome Statute, there are many ways for the United States and ICC parties to work constructively on international criminal justice issues. In recent years, this Administration has sought to steer the focus away from unnecessary wrangling over the issues that divide the ICC's supporters and opponents and toward finding practical and constructive ways to cooperate in advancing our common values and our shared commitment to international justice.

We've re-emphasized as a core principle of our policy our respect for the decisions of other states to join the ICC, and have acknowledged that the court can have a valuable role to play in certain cases. . . . In 2005, in one of the first major policy decisions of Secretary Rice's tenure at the State Department, the United States accepted the decision of the UN Security Council to refer the Darfur situation to the ICC. We have said that we want to see the ICC's Darfur work succeed and indicated our willingness to consider an appropriate request for assistance from the ICC in connection with the Darfur matter, consistent with applicable U.S. law. And in recent months, we have opposed efforts by some countries to invoke Article 16 of the ICC Statute to defer the investigation and prosecution of Sudanese President Al Bashir. . . . And beyond Darfur, the President has waived restrictions under U.S. law on assistance to a number of countries that had not signed Article 98 agreements with the United States in order to ensure the continuation of important aid to those countries.

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2. International Criminal Court

a. General Assembly

On November 10, 2008, the United States did not participate and disassociated from the General Assembly's adoption of a resolution on the report of the International Criminal Court. U.N. Doc. A/RES/63/21. Carolyn L. Willson, Minister-Counselor and Legal Adviser at the U.S. Mission to the

United Nations, made a statement explaining the U.S. position, which is excerpted below. The full text of Ms. Willson's statement is available at *www.archive.usun.state.gov/press_releases/20081110_321.html.*

* * * *

Our concerns about the ICC are concerns about means, not about ends. We have remained steadfastly committed to promoting the rule of law and helping to bring violators of international humanitarian law to justice, wherever the violations may occur, and have continued to play a leadership role to right these wrongs. Our actions over the last years with respect to Sudan can leave no doubt about the strength of these commitments. As we have emphasized, we cannot ignore the terrible crimes that have occurred throughout the conflict in Darfur, and the massive human suffering that the world has witnessed.

We underscore once again that we respect the right of other states to become party to the Rome Statute, and have asked in return that other states respect our decision and right not to become a party. While respecting each other's choices, there are practical ways in which the United States and ICC supporters can work together to advance the cause of international criminal justice. In this connection, we appreciate the inclusion of language in this year's resolution that emphasizes the importance of cooperation by States parties with States that are not parties to the Rome Statute and that notes that the upcoming review conference provides an opportunity to address the concerns of non-Parties.

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b. Security Council

On February 12, 2008, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, provided a statement to the Security Council at its meeting

on children and armed conflict. As part of his remarks, Ambassador Wolff commented that,

> . . . with respect to the recommendation in paragraph 166,* we do not agree that the Security Council should have a general policy or practice of referring cases to the International Criminal Court. Different States have different views about the best mechanism for combating crimes against children. We think it important to bear in mind that not all UN Member States are Parties to the Rome Statute and those who are not need to be taken into account.

Ambassador Wolff's statement is available at *www.archive.usun.state.gov/press_releases/20080212_025.html*.

3. International Criminal Tribunals for the Former Yugoslavia and Rwanda

a. Statement to Security Council

On December 12, 2008, Ambassador Rosemary DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, addressed the Security Council on the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR"). Ambassador DiCarlo's remarks, excerpted below, are available in full at *www.archive.usun.state.gov/press_releases/20081212_365.html*.

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* Editor's note: Paragraph 166 of the Secretary-General's report on children and armed conflict, dated December 21, 2007 (U.N. Doc. S/2007/757), encouraged the Security Council to refer certain violations committed against children during armed conflict to the ICC.

The United States recognizes the many accomplishments of the tribunals and we acknowledge, in particular, the recent arrests of Radovan Karadzic and Stojan Zupljanin and the commencement of proceedings in their cases. We urge the tribunals to continue to implement their completion strategies in order to fulfill their ultimate mandate of bringing to justice those responsible for crimes in the Former Yugoslavia and Rwanda.

We note the difficulties that the ICTR faces in transferring the cases of indictees to national jurisdictions, and we urge the international community to reaffirm its commitment to strengthening the domestic judicial capacity of Rwanda. We commend the domestic prosecutorial and judicial efforts to ensure accountability for crimes committed in the Balkan wars, which is critical to the long-term stability of the region.

. . . [W]e want to stress once again that the fugitive indictees must be brought to justice. We cannot allow individuals who have been indicted by the ICTY and ICTR to enjoy impunity simply because they outlast the tribunals. It must be clear to them and to those who support them that such a strategy will not succeed. Accordingly, the United States urges the international community to work diligently toward securing the arrests of the 15 individuals indicted by the ICTY and ICTR who remain at large.

We also call on all States to fulfill their legal obligations to cooperate fully with the Tribunals. We are encouraged by recent cooperation between the ICTR and the Democratic Republic of the Congo in tracking fugitives but greater cooperation is needed. We are troubled however, by the lack of urgency in the Kenyan government to act on reports that ICTR fugitive and alleged genocide financier Felicien Kabuga continues to have links to Kenya. We urge Kenya to act immediately on the Tribunal's recommendations and take additional steps to deny Kabuga access to his networks of support.

Concerning the ICTY, we applaud Serbia for the arrest and transfer of Radovan Karadzic. The remaining fugitives, Ratko Mladic and Goran Hadzic, must also be apprehended, and we call on the Serbian authorities to do everything in their power to locate and arrest these individuals. A resolution of their cases is critical for stability and reconciliation in the Balkans. . . . [W]e note our

concern over Prosecutor Brammertz's report that the prosecution has not yet received key documents for the Gotovina trial, despite some encouraging steps taken by the Croatian government. We urge the authorities in Bosnia and Herzegovina, Croatia, and Serbia to continue to work closely with the ICTY and for their governments to fulfill all of their responsibilities relative to the Tribunal. In addition, we urge the national authorities in the region to work closely with each other so as to enhance information sharing, to facilitate the transfer of war crimes proceedings between states as appropriate, and to consider revisions to laws so as to allow extradition of nationals charged with war crimes.

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b. Rewards for bringing to justice ICTR fugitive indictees

On May 12, 2008, Jendayi Frazer, Assistant Secretary for State for African Affairs, and Clint Williamson, Ambassador-at-Large for War Crimes Issues, announced that the State Department would launch a new Rewards for Justice campaign as part of a renewed effort to bring to justice persons most responsible for the 1994 genocide in Rwanda. Excerpts of the press briefing at which Ms. Frazer and Ambassador Williamson described the initiative follow; the full text of the briefing is available at *http://2001-2009.state.gov/p/af/rls/rm/2008/104667.htm*.

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AMBASSADOR WILLIAMSON: . . . This campaign aims to secure the arrest of the 13 men indicted by the ICTR for genocide and crimes against humanity who remain at large.

As you know, ethnic violence of the scale and horror that we witnessed in 1994 does not happen spontaneously; it requires extensive preparation and planning. Many of the architects behind the Rwandan genocide have been arrested, thanks to political and material support from a wide range of nations including the

United States. These arrests and the trials and convictions that have followed challenge the notion that those who direct crimes such as these can go unpunished.

But years later, thirteen of those indicted remain at large. These men include Augustin Bizimana, Idelphonse Nizeyimana, Protais Mpiranya, Gregoire Ndahimana, Ladislas Ntaganzwa and Félicien Kabuga. All of these individuals exercised positions of power and influence in the lead-up to and during the genocide itself. The impunity of these men, fourteen years after these crimes were committed, and their continuing presence in the region represents a threat to stability and reconciliation.

The State Department is cooperating with other governments, with the UN, and with the ICTR to make it harder for these fugitives to remain at large. The Rewards for Justice initiative that we're announcing today is one element of an international effort to tighten the net around them.

Because many of the fugitives are believed to be living in the Democratic Republic of Congo, this Rewards for Justice campaign will be focused there. In the next weeks, our Embassy in Kinshasa will work with the UN mission and other partners in the Congo to distribute posters, matchbooks, and other articles indicating that these men are wanted for genocide—and advertising a financial reward of up to $5 million for information that leads to their arrest.

Information generated by the Rewards for Justice campaign will support the efforts of the ICTR, whose team of investigators continue to pursue fugitives. Callixte Nzabonimana, an indicted government minister, was arrested in March thanks to cooperation between the ICTR's tracking team and the Government of Tanzania. He now awaits trial at the ICTR.

As this shows, some of the most critical steps to ending the impunity of these fugitives must be taken by national governments in the region. Just last week, the Government of Kenya persuaded a Kenyan court to freeze real estate property from which Félicien Kabuga, the ICTR's most wanted indictee, is believed to have drawn funds to support his life at large. This is a welcome development, but it's our strong hope that this represents only a single step

toward still more aggressive action from all governments in the region to capture these men.

We look forward to seeing the results from this campaign. We believe it will accelerate the process of bringing to justice those most responsible for these horrible crimes.

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. . . [R]ight now we're reaching a critical stage in the life of the Rwanda and Yugoslavia tribunal[s]. They have certain deadlines that had been imposed by the Security Council to complete their work. So there is some urgency in trying to resolve the issue of all the fugitives that are out there. There has also, I think, been renewed interest on the part of the ICTR to operationalize the hunt for these people. They have enhanced the capabilities of their tracking unit. We've had new indications of the willingness of governments to take this on. The UN Mission in the DRC has also been very interested in doing this. So I think it's just all of these factors coming together that we felt like this was the right time to restart it.

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c. ICTR convictions

On December 18, 2008, the Department of State issued a press statement welcoming the International Criminal Tribunal for Rwanda's conviction of three senior Rwandan Army officers for genocide, crimes against humanity, and war crimes. A fourth defendant was found responsible for killing a former Rwandan prime minister and ten Belgian peacekeepers. The press statement described the ruling as "an important step in providing justice and accountability for the Rwandan people and the international community" and said the conviction of Theoneste Bagosora, former director of the Rwandan Defense Ministry, "shows that even those at the highest levels of government are not immune from prosecution in the face of such grave atrocities." *See http://2001-2009.state.gov/r/pa/prs/ps/2008/dec/113350.htm.*

Cross References

Removal of African National Congress from treatment as a terrorist organization under Immigration and Nationality Act ("INA"), **Chapter 1.C.3.**
Exemptions for terrorism-related provisions of INA, **Chapter 1.D.1.**
International Covenant on Civil and Political Rights, **Chapter 6.A.2.a.-c. and D.6.**
Role of diplomatic assurances in implementing obligations under Convention Against Torture, **Chapter 6.F.2.**
Narcotics-related trade preferences, **Chapter 11.D.3.a.**
U.S. views on ICC investigation on Darfur and its relationship to the peace process, **Chapter 17.A.6. and B.3.**
Criminal jurisdiction over pirates, **Chapter 18.A.5.**

Chapter 4

Treaty Affairs

A. SELF-EXECUTING AND NON-SELF-EXECUTING TREATIES

1. Non-self-executing Treaty: *Medellín v. Texas*

On March 25, 2008, the U.S. Supreme Court ruled that the judgment of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 21 ("*Avena*"), did not preempt contrary state law. *Medellín v. Texas*, 128 S. Ct. 1346 (2008). Among other things, the Court discussed the difference between self-executing and non-self-executing treaties. *See* Chapter 5.A.1.a.

2. Executive Branch Statements Concerning the Self-executing and Non-self-executing Status of Treaties

On September 26, 2008, President George W. Bush transmitted to the Senate for its advice and consent to ratification the Agreement on the Conservation of Albatrosses and Petrels, with Annexes ("Agreement"). The Agreement, which was done at Canberra on June 19, 2001, entered into force on February 1, 2004. Eleven states were parties as of September 26, 2008. *See* C.3. below and Chapter 13.A.3.c. for further discussion of the Agreement. As noted in President Bush's transmittal letter:

> . . . [T]he Agreement is not self-executing and thus does not by itself give rise to domestically enforceable

> Federal law. Implementing legislation would be required, which will be submitted separately to the Congress for its consideration.

The Secretary of State's letter submitting the Agreement to the President for transmittal to the Senate, contained in S. Treaty Doc. No. 110-22, also explained that the Agreement "is not intended to be enforced directly in U.S. court. The Agreement will require implementing legislation, which will be submitted shortly to Congress for its consideration. . . ."

3. Senate Statements Concerning the Self-executing and Non-self-executing Status of Treaties

In its resolutions of advice and consent for 78 of the 82 treaties to which it provided advice and consent in 2008, the Senate inserted declarations concerning the self- or non-self-executing nature of the treaties. *See, e.g.*, Chapters 3.A.1.a.(3), 3.A.2.a.-b., 7.B.1.d., 11.F.5., 13.A.2.b., 13.A.2.e., 18.A.2.b., 18.A.3.a., and 18.B.1.b. In its resolutions of advice and consent for nine of those 78 treaties, the Senate included a statement that the treaty does not confer private rights enforceable in U.S. courts in each declaration concerning the self- or non-self-executing nature of the treaty. *See* Chapters 3.B.1.e., 18.A.2.b., and 18.A.3.a. As the Senate Committee on Foreign Relations explained in the executive report for one such treaty, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded at the Hague on May 14, 1954, "[t]he committee . . . proposes making such a declaration in the Resolution of advice and consent in light of the recent Supreme Court decision, *Medellín v. Texas,* 128 S. Ct. 1346 (2008), which has highlighted the utility of a clear statement regarding the self-executing nature of treaty provisions." S. Rep. No. 110-26, at 9 (2008). *See* Chapter 18.A.3.a.

4. Private Right of Action in Self-executing Treaty: *McKesson v. Iran*

On August 26, 2008, the U.S. Court of Appeals for the District of Columbia Circuit held that the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, June 16, 1957, 8 U.S.T. 899 ("Treaty of Amity"), does not provide a private cause of action and remanded the case to the U.S. District Court for the District of Columbia. *McKesson v. Iran*, 539 F.3d 485 (D.C. Cir. 2008); for prior history in the case *see Digest 2003* at 258–67; *Digest 2002* at 219–26, 519–22. In so holding, the court reversed the district court's 2007 decision finding that the Treaty of Amity provided the U.S. plaintiff, McKesson Corporation, a cause of action to sue Iran in the United States for unlawfully expropriating its investment in an Iranian dairy company. 520 F. Supp. 2d 38 (D.D.C. 2007). McKesson argued that Article IV of the Treaty of Amity, which states that "property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation," gave it a cause of action. In an *amicus curiae* brief filed on February 1, 2008, the United States argued that the Treaty of Amity does not create a private cause of action against Iran under U.S. law. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

The D.C. Circuit directed the district court to consider three issues: (1) whether McKesson has a cause of action under Iranian law; (2) whether, in light of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), McKesson has a cause of action under customary international law; and (3) whether the act of state doctrine applies.

Excerpts follow from the court's opinion finding that the Treaty of Amity does not overcome "the presumption that international agreements do not create private rights or provide for a private right of action in U.S. courts."

* * * *

To determine whether a treaty creates a cause of action, we look to its text. *See United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."). The Treaty of Amity, like other treaties of its kind, is self-executing. *See Medellín v. Texas*, 128 S. Ct. 1346, 1365–66 (2008); *Blanco v. United States*, 775 F.2d 53, 60 (2d Cir. 1985) (Friendly, J.); CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 379 (2d ed. 2006) ("[C]ourts commonly assume that certain types of bilateral treaties, such as . . . Friendship, Commerce, and Navigation (FCN) treaties, are self-executing."). As such, it "operates of itself without the aid of any legislative provision," *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.), and its text is "the supreme Law of the Land," U.S. CONST. art. VI, cl. 2, on par with that of a statute, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). That the Treaty of Amity is self-executing begins but does not end our search for a treaty-based cause of action, because "[w]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1986) [hereinafter RESTATEMENT]; *accord Renkel v. United States*, 456 F.3d 640, 643 n.3 (6th Cir. 2006); *United States v. Li*, 206 F.3d 56, 67 (1st Cir. 2000) (en banc) (Selya & Boudin, JJ., concurring). "Even when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Medellín*, 128 S. Ct. at 1357 n.3 (quoting RESTATEMENT, *supra*, § 907 cmt. a).

. . . The Treaty of Amity tells us *what* McKesson will receive—money—but leaves open the critical question of *how* McKesson is to secure its due. For a federal court trying to decide whether to interject itself into international affairs, the Treaty of Amity's silence on this point makes all the difference. A treaty that "only set[s] forth substantive rules of conduct and state[s] that compensation shall be paid for certain wrongs . . . do[es] not create private rights of action for foreign corporations to recover compensation

from foreign states in United States courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989). And without a cause of action, McKesson cannot invoke federal judicial authority to pursue its desired remedy. . . .

It would be one thing if the Treaty of Amity explicitly called upon the courts for enforcement, as the Warsaw Convention does. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (declaring that "carrier[s] shall be liable for damage" to passengers and baggage (arts. 17, 18(1)); that "action[s] for damages" must be brought before certain courts (art. 28(1)); that "[t]he right to damages" lasts for two years (art. 29(1)); and that "passenger[s] or consignor[s] shall have a right of action" in cases of successive carriers (art. 30(3))) . . . . Federal court participation is appropriate where the President, by and with the advice and consent of the Senate, makes a treaty declaring that money should change hands by way of judicial compulsion rather than executive negotiation. But unlike the Warsaw Convention, with its explicit references to "right[s] of action" and "action[s] for damages," the Treaty of Amity reflects no such determination.

Reasoning by analogy to the Takings Clause of the Fifth Amendment, McKesson next asks us to use our federal common law power to recognize an implied cause of action. The phrase "just compensation" appears in both the Treaty of Amity and the Takings Clause. . . .

This attempt to draw an analogy between a treaty and the Constitution is unsound. . . . [I]nferring a treaty-based cause of action embroils the judiciary in matters outside its competence and authority. *See Medellín*, 128 S. Ct. at 1357 n.3 (noting presumption against finding treaty-based causes of action); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (noting that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," and that "the possible collateral consequences of making international rules privately actionable argue for judicial caution"); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 799, 801–08 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that separation-of-powers concerns counsel against inferring treaty-based causes of action). . . .

In the absence of a textual invitation to judicial participation, we conclude the President and the Senate intended to enforce the Treaty of Amity through bilateral interaction between its signatories. We give "'great weight'" to the fact that the United States shares this view. *Medellín*, 128 S. Ct. at 1361 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)); *see* United States Amicus Br. at 5–11 (arguing that the Treaty of Amity does not create a cause of action). . . . The Treaty of Amity does not provide a cause of action. We must leave to the political branches the implementation of its just compensation guarantee.

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B. AMENDMENTS

Radio Regulations and Procedures for Future Revisions

On September 23, 2008, the Senate provided its advice and consent to two treaties concluded under the auspices of the International Telecommunication Union ("ITU"). The first treaty was the Partial Revision of the Radio Regulations (Geneva, 1979), with appendices, signed by the United States at the World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum on March 3, 1992 ("1992 Partial Revision") (S. Treaty Doc. No. 107-17). The second treaty was the 1995 Revision of the Radio Regulations, with appendices, signed by the United States at Geneva at the World Radiocommunications Conference on November 17, 1995 ("1995 Revision") (S. Treaty Doc. No. 108-28). 154 Cong. Rec. S9332 (2008).

The resolutions of advice and consent conditioned the Senate's advice and consent on certain of the U.S. declarations and reservations contained in the Final Acts of the conferences at which the revisions were adopted. Each resolution also contained a declaration that the treaty "is not self-executing."

In its report on the 1992 and 1995 revisions, the Senate Committee on Foreign Relations indicated that future

revisions to the ITU's Radio Regulations normally would not require the Senate's advice and consent, explaining that:

> Revisions to the Radio Regulations are technical implementing instruments anticipated in the ITU Constitution, which are expected to regulate the international use of telecommunications and are subject to the provisions of the Constitution and Convention [of the International Telecommunication Organization, as amended]. Given the nature of these instruments, the committee believes that in the future, revisions to the Radio Regulations will not, in the normal course, require the advice and consent of the Senate. Thus, in the future, the committee does not expect the Executive to submit for advice and consent revisions to the Radio Regulations. If there is any question, however, as to whether a revision goes beyond the current mandate of the Radio Regulations as anticipated in the ITU Constitution, the committee expects the executive branch to consult with the committee in a timely manner in order to determine whether advice and consent is necessary.

S. Rep. No. 110-18, at 8 (2008) (footnote omitted).

On July 10, 2008, Richard C. Beaird, Senior Deputy Coordinator for International Communications and Information Policy, Department of State, explained the technical nature of the two treaties in testimony before the Senate Committee on Foreign Relations:

> The . . . amendments to the Radio Regulations . . . are treaties governing the use of the radio-frequency spectrum and the geostationary and non-geostationary satellite orbits. At the 1992 World Administrative Radio Conference (WARC), the United States was successful in obtaining a considerable amount of additional spectrum to relieve frequency congestion in the existing broadcasting bands used by Voice of America. Allocation for Low Earth Orbit (LEO) satellite systems to enable voice-grade telephony and data was one of the most difficult and

complex debates during WARC-92 and one of the highest U.S. priorities and achievements. The conference essentially adopted the U.S. allocation proposal. The United States also secured a Satellite Digital Audio Radio Service frequency allocation. In support of NASA's communication needs, the United States obtained additional spectrum for such programs as the International Space Station, lunar and Mars missions, and NASA's next-generation robotic deep space exploration programs.

At the 1995 World Radiocommunication Conference (WRC), the United States achieved a new spectrum allocation that would permit global deployment of new satellite technologies, specifically, Mobile Satellite Systems. This allocation was critical to the future operation of LEO satellite systems, which are used for expanding communications and observation networks. WRC-95 also acted favorably on the U.S. spectrum proposal for non-geostationary fixed satellites. This new technology paved the way for U.S. industry to provide satellite based global broadband Internet to remote regions. All these achievements are reflected in the proposed amendments to the Radio Regulations for which we are seeking advice and consent.

The full text of Mr. Beaird's testimony is available at *http://foreign.senate.gov/hearings/2008/hrg080710p.html*; *see* Chapter 7.B.1.d. for a discussion of the ITU's organizational structure, membership, and policymaking mechanisms. For additional background *see Digest 2004* at 634–39.

C. RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS

1. Partnership for Peace Regarding the Status of Forces Agreement and Additional Protocol

On August 28, 2007, the Russian Federation deposited its instrument of ratification of the Agreement among the States

Parties to the North Atlantic Treaty and the other States Participating in the Partnership for Peace Regarding the Status of Their Forces ("Agreement" or "PfP SOFA"), and the Additional Protocol thereto, done at Brussels June 19, 1995. The United States serves as the depositary for the Agreement. The instrument of ratification was accompanied by a statement by Russia setting forth its "understanding" of the provisions of the Agreement.

On September 12, 2008, Secretary of State Condoleezza Rice sent a diplomatic note to the chiefs of mission of the parties to NATO and other states participating in the Partnership for Peace, stating:

> In performance of the depositary duties of the Government of the United States of America, the Secretary of State encloses a statement by the United States of America, in its capacity as a party to the Agreement, concerning the statement accompanying the instrument of ratification by the Russian Federation.

The U.S. statement indicated that it considered some of the "understandings" to be reservations. Excerpts below from the U.S. statement address three of the six Russian statements contained within its submission. The full texts of the U.S. diplomatic notes, the Russian statement (as translated by the Department of State), and the U.S. statement are available at *www.state.gov/s/l/c8183.htm*.

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The Government of the United States responds to each of the "understandings" contained in the statement submitted by the Russian Federation as follows:

1. Russian "understanding": "[T]he provision of Article III(4) of the Agreement, which obligates the authorities of the sending State to immediately inform the authorities of the receiving State

of cases where a member of a force or of a civilian component fails to return to his country after being separated from the service, shall also apply to cases where those persons absent themselves without authorization from the site of deployment of the force of the sending State and are carrying weapons;"

> This statement purports to create an additional notification obligation on the sending State that is not contained in the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces or in the PfP SOFA. Article III (4) of the Agreement requires the sending State to inform the host country if a member is no longer employed by the sending State and is not repatriated (and thus may no longer be covered by the SOFA) and if a member has absented himself for more than 21 days. There is no obligation in the Agreement to notify if an individual absents himself without authorization even if he is carrying a weapon. The Russian Federation cannot by unilateral statement extend the obligations of the United States or any other country, other than the Russian Federation, beyond those obligations contained in the PfP SOFA without the express consent of the United States or such other countries. Such a statement is only effective insofar as the statement constitutes a unilateral declaration by Russia that, on a unilateral basis, Russia will provide notice as a sending State under Article III (4) in the stated circumstances, which go beyond those required by the PfP SOFA. The United States does not consider this statement to have any effect in respect of the rights and obligations of the United States under the PfP SOFA.
>
> However, the United States notes that the concern to which the Russian statement appears to be addressed is a legitimate concern, and it could be addressed in a bilateral supplementary agreement setting forth the terms and conditions of a particular deployment, or in a general bilateral SOFA supplementary agreement.

2. Russian "understanding": "[O]n the basis of reciprocity, the Russian Federation will understand the words 'possess arms' used in Article VI of the Agreement to mean the application and use of weapons, and the words 'shall give sympathetic consideration to requests from the receiving State' to mean the obligation of the authorities of the sending State to consider the receiving State's requests concerning the shipment, transportation, use, and application of weapons;"

> The Government of the United States considers this to be a reservation and objects to it because it purports to broaden the rights of the receiving State and narrow the rights of the sending State. The right of the receiving State is to make requests. The sending State retains the right to determine when and how members of its force possess and carry arms within the receiving State. The only obligation of the sending State is to give sympathetic consideration to requests made by the receiving State concerning that matter. Any limitation on the carrying of weapons and other issues such as the use and transportation of weapons is a matter that is appropriately and regularly addressed within separate bilateral agreements between the sending and receiving States.
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> The United States also notes that Article VI of the Agreement does not address matters concerning the rules on use of force, which remain matters for discussion between the sending and receiving States.

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4. Russian "understanding": "[P]ursuant to Article VII (4) of the Agreement, the Russian Federation presumes that the authorities of the sending State have the right to exercise their jurisdiction in the event that, at sites where the sending State's force is deployed, unidentified persons commit offenses against that State, members of its force, and members of its civilian component, or their family members. When a person who committed an offense is

identified, the procedure established by the Agreement takes effect;"

> The Government of the United States recognizes that a sending State is entitled to conduct non-custodial investigation as long as the persons who committed an offense remain unidentified. As soon as the persons are identified, however, the sending State would only have authority to exercise jurisdiction as specified in the Agreement. For example, if an individual is caught in the act of committing a crime at a site where the sending State's forces are deployed, the sending State may exercise its jurisdiction to stop and search the suspect, and if he or she is determined not to be a person over whom the sending State is empowered to exercise criminal or disciplinary jurisdiction under Article VII of the SOFA, to turn the person and any items recovered from him or her over to receiving State authorities. If this is a correct characterization of the Russian Federation's understanding, the United States finds this understanding acceptable.
>
> However, if the intent of the Russian Federation's statement is to expand investigative jurisdiction to permit custodial detention and interrogation of any individual not determined to be a person over whom the sending State is empowered to exercise jurisdiction under Article VII of the SOFA, the Government of the United States would consider this to be a reservation, and would object to such a reservation.

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2. Interpretive Declarations

On October 31, 2008, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the General Assembly's Sixth (Legal) Committee on the report of the

International Law Commission ("ILC" or "Commission") on the work of its sixtieth session. Mr. Simonoff's comments on the thirteenth report of ILC Special Rapporteur Alain Pellet of France, concerning states' and international organizations' reactions to interpretative declarations, also known as interpretive declarations, concerning treaties (U.N. Doc. A/CN.4/600), are excerpted below. The full text of Mr. Simonoff's statement is available at *www.state.gov/s/l/c8183.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2008/2008report.htm*.

* * * *

On the subject of Reservations to Treaties, I would first like to compliment the Special Rapporteur on the impressive work that has gone into the draft guidelines. We are grateful for the scholarship he has brought to bear on this important topic. We have, however, concerns regarding the Rapporteur's 13th Report dedicated to States' and international organizations' reactions to interpretative declarations, which in our view is not ripe for the work of the Commission and goes beyond the original mandate of the project regarding reservations to treaties.

As the Report notes, there is a "scarcity [and] relative uncertainty of practice" with regard to such reactive declarations. There is not enough state practice from which to derive suitable guidelines at this point. In addition, we do not think the "general regime" put forth in the Report is nuanced enough to address what little practice there is in this area. The proposed categories of reactions are too restrictive and do not take into account, for example, reactions to interpretative declarations that are positive but are not intended to express "agreement" with the interpretative declaration, or negative but do not ultimately "reject" the interpretation at issue or purport to propose a concrete alternative.

Moreover, the terms proposed in the Report for labeling reactions—"approval" for positive statements and "opposition" for negative statements—imply that a State's reaction to an interpretative declaration has legal consequences for the interpretative

statement to which it is reacting. In our view, such a reaction would rarely, if ever, have a legal effect on the other Party's interpretative declaration. In this sense, the proposed regime draws far too heavily on the regime used for responding to reservations, which are, as noted by the Special Rapporteur, fundamentally different.

Similarly, although the Report in several places notes that silence cannot be understood to indicate "approval" of an interpretative declaration as it does in the case of reservations, the proposed guideline 2.9.9 takes this position. The guideline states that "[i]n certain specific circumstances . . . a State . . . may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be." While a State's conduct may be relevant, it is entirely unclear on what basis a State's silence would be a consideration, given the extraordinarily rare practice of opposing interpretative declarations.

The proposed guidelines go beyond the progressive development of international law and instead promote a new legal regime where one does not currently exist. Consequently, the guidelines are likely to produce a significant burden on the treaty offices of States that will feel compelled to review all interpretative declarations and respond to them, so as not to suggest that they are agreeing to a particular interpretation of a provision through their lack of response.

In sum, we have a great many concerns regarding the work done on this topic, of which I have only mentioned a few. While there is no one better suited to do this work than the Special Rapporteur, in our view the Commission should put this work aside.

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3. Party to Agreement Where Not Party to Underlying Convention

As discussed in A.2. *supra* and in Chapter 13.A.3.c., President Bush transmitted to the Senate for its advice and consent to ratification the Agreement on the Conservation of Albatrosses and Petrels, with Annexes ("Agreement") in September 2008.

The Agreement was adopted pursuant to the Convention on the Conservation of Migratory Species of Wild Animals ("Convention"), done at Bonn on June 23, 1979. The President's transmittal letter noted that, "[a]lthough the United States is not a Party to the Convention, the United States may nonetheless become a Party to the Agreement." As explained in greater detail in the Department of State report, submitted to the President by Secretary of State Rice on August 22, 2008, and included in S. Treaty Doc. No. 110-22:

> The Agreement . . . is [an] "Agreement" within the meaning of Article IV(3) of the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn June 23, 1979 (the Convention). Although the United States is not a party to the Convention, Article V(2) of the Convention recognizes that non-parties to the Convention may become parties to Agreements referred to in Article IV(3). In other words, there is no legal barrier to the United States becoming a party to the Agreement without being a party to the Convention. Similarly, the United States would have no obligation to become a party to the Convention by virtue of being a party to the Agreement.

Excerpts follow from the Department of State report, discussing the declaration proposed by the executive branch to clarify the status of the United States with respect to the Convention.

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Article XVII contains provisions for reservations. Although Article XII allows for a Party to enter a reservation regarding the addition of or an amendment to an existing annex, the Agreement's provisions are not subject to general reservations. Upon signature or, as the case may be, upon ratification, acceptance, approval, or accession, a specific reservation may be entered in respect of any

species covered by the Agreement, or in respect of any specific provision of the Action Plan. Such a reservation may be withdrawn at any time.

A Party to the Agreement that is not a party to the Convention may make [] declarations or statements to the effect of clarifying its status vis-á-vis either the Agreement or the Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of the Agreement in their application to that Party. Accordingly, it is recommended that the United States include the following declaration in its instrument of ratification:

> The United States is not a party to the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn June 23, 1979. Accordingly, the United States of America shall not be bound by any provision of that Convention, except as provided in Article XIV, paragraph 5, of the Agreement.

The United States does not intend to make any specific reservations upon accession to the Agreement.

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D. EFFECT OF ARMED CONFLICT ON TREATIES

On October 29, 2008, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixtieth session. Mr. Simonoff's comments concerning the effect of armed conflict on treaties are set forth below. The full text of Mr. Simonoff's statement is available at *www.state.gov/s/l/c8183.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2008/2008report.htm*.

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The United States has consistently supported an approach to this subject that preserves the reasonable continuity of treaty obligations during armed conflict, takes into account particular military necessities, and provides practical guidance to States by identifying factors relevant to determining whether a treaty should remain in effect in the event of armed conflict. We are pleased that the draft articles reflect this approach.

We have, however, raised certain concerns regarding issues that remain outstanding in the draft articles. For example, we feel strongly that attempting to define the term "armed conflict," as in draft article 2(b), is likely to be confusing and counterproductive. The wide variety of views that have been expressed about what the definition should be is evidence of the challenges that such an exercise involves. A better approach would be to make clear that armed conflict refers to the set of conflicts covered by common articles 2 and 3 of the Geneva Conventions (*i.e.*, international and non-international armed conflicts). We have also expressed concerns that draft article 2(b) conflates "occupation" and "armed conflict," when the two terms refer to separate concepts in the law of armed conflict. Thus, if occupation continues to be covered, it should be referred to *in addition* to armed conflict, rather than *as part of* armed conflict. Moreover, we have noted that the text should clearly state that international humanitarian law is the *lex specialis* that governs in armed conflict.

In addition to these and other comments we have made in the past, we recall that the Special Rapporteur made clear that the draft articles would be without prejudice to their final form. We agree with this approach and note that, should the draft articles *not* ultimately take the form of binding articles, the need for the so-called "savings clauses" contained in the draft articles should be reconsidered. Moreover, we believe that draft article 8.2 regarding the effective date of notification of termination, withdrawal or suspension should be made subject to the proviso: "unless the notice states otherwise." Finally, we note that we continue to review several other draft articles, including in particular draft article 15.

These and other issues will continue to require further study. We therefore appreciate that the Commission transmitted the draft

articles to Governments so they may provide their comments and observations during the upcoming year. We look forward to continuing our review of the draft articles on the effects of armed conflicts on treaties.

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E. RELATIONSHIP AMONG TREATY OBLIGATIONS

Application of the Treaty of Amity and the Treaty of Ghent to NAFTA Dispute

As discussed in Chapters 6.E. and 11.B.1.c.(2), on December 22, 2008, the United States filed its counter-memorial in *Grand River Enterprises Six Nations v. United States of America*. In this case, Grand River Enterprises Six Nations, Ltd., a Canadian tobacco manufacturer that exports cigarettes to the United States, and certain members of Canadian First Nations contended that certain U.S. state laws relating to the 1998 Master Settlement Agreement, which settled litigation brought by U.S. states against major tobacco companies, violated Chapter 11 of the North American Free Trade Agreement ("NAFTA"). The claim was submitted to arbitration under the NAFTA in 2004; *see Digest 2006* at 688–93. Among other challenges, the claimants alleged that the state laws violated the 1794 Jay Treaty and the 1814 Treaty of Ghent, which in turn breached Article 1105. Excerpts of the U.S. arguments in response addressing U.S. obligations under the two treaties follow. (Most footnotes and citations to other submissions are omitted.) The counter-memorial (with confidential information redacted) is available at *www.state.gov/s/l/c11935.htm*.

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. . . Claimants assert that they have relied on Article 3 of the 1794 Jay Treaty and Article 9 of the 1814 Treaty of Ghent when making

their alleged investment in the United States,[401] claiming that Article 3 gives them the "legitimate expectation" that they can manufacture and distribute billions of deadly cigarettes free from state regulation.

Claimants' reliance on the Jay Treaty, however, does not support finding a breach of Article 1105. *First*, the 1794 Jay Treaty

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[401] *See* Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, By Their President, with the Advice and Consent of Their Senate, Nov. 19, 1794, U.S.–U.K., T.S. No. 105 ("Jay Treaty"); Treaty of Peace and Amity, Between His Britannic Majesty and the United States of America, Dec. 24, 1814, U.S.–U.K., T.S. No. 109 ("Treaty of Ghent"). Article 3 of the Jay Treaty provides in relevant part:

> It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America . . . and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other.
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> . . .
>
> No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.

Article 9 of the Treaty of Ghent provides in relevant part:

> The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities: . . . .

At the time the United States signed these treaties, Canada was still controlled by Great Britain. As Claimants recognize, Canada acceded to all international law obligations of the United Kingdom in respect of the Dominion of Canada in 1931.

and the 1814 Treaty of Ghent do not provide, and never have provided, a basis for Claimants' purported expectation that they could distribute billions of cigarettes throughout the United States free of any state regulation. *Second*, Claimants could not rely on the duty exemption under Article 3 of the Jay Treaty for any "legitimate expectation" of exemption from state regulation, because the United States has maintained for decades that Article 3 remains in force only to the extent that it relates to the right of Indians to pass across the border. *Third and finally*, even if the provisions of the Jay Treaty and Treaty of Ghent gave rise to an expectation of exemption from state regulation, it already has been established by agreement of the NAFTA Parties, as confirmed by the binding FTC interpretation, that a breach of a separate international agreement does not establish a breach of Article 1105.

The United States and Great Britain signed the Jay Treaty on November 19, 1794, in an effort to resolve numerous trade and boundary disputes that arose in the years following the Revolutionary War. Article 3 of that Treaty delineated the effect of the northern border of the United States on the constituents of both nations, as well as on Indians, and is regarded as containing two separate provisions, which conferred distinct privileges. *First*, it contained a "free passage" provision that entitled citizens of the United States and Great Britain, as well as Native Americans, to cross the border in both directions without hindrance. *Second*, it contained a "duty free" provision that entitled everyone to a duty exemption for pelts, and enabled Native Americans, specifically, to transport their "own proper" goods and effects, not in "bales or other large packages," across the border without the payment of any customs duty or fee. Neither of these provisions conveyed to Indians an exemption from taxation or other regulation of their cross-border commercial activities.

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At the time the Jay Treaty was negotiated, the Lieutenant Governor of Upper Canada explained to members of the Six Nations in Canada that Article 3 conferred the following rights: "Upon these principles the present Treaty is established, you have a right to go to the British settlements, or those of the U. States,

as shall suit your convenience, nor shall your passing or repassing with your own proper goods and effects of whatever nature, pay for the same any impost or duty whatever." This language affirmed for Indians that the Jay Treaty would ensure both the free passage of persons, and the free passage of their own proper goods, without payment of duties.

But Article 3's duty exemption was not unqualified: the treaty provision expressly stipulated that "goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians" and therefore, would be subject to duties. Five years after the treaty was executed, the United States Congress codified Article 3's duty exemption for Indians in the Tariff Act of 1799 and reiterated that the duty exemption did not apply to "goods in bales or other large packages unusual among Indians." This legislation confirmed that the Article 3 duty exemption for Indians would not apply to large quantities of goods or goods in packages that Indians would not have carried at that time.

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Finally, the United States has maintained for decades that Article 3 of the Jay Treaty remains in force only "so far as it relates to the right of Indians to pass across the border." The United States has clearly articulated this position in its annual publication, *Treaties in Force*, every year since 1973. In 1977, the United States specifically amended *Treaties in Force* to acknowledge the Court of Customs and Patent Appeals holding in *Akins v. United States*, which stated "that Congress intended to terminate the Indian duty exemption" in the Jay Treaty when it repealed the same exemption from domestic legislation in the Tariff Act of 1897. Accordingly, Claimants could not rely on the Article 3 duty exemption as part of any "legitimate expectation" of exemption from state regulation.

Nor would Article 9 of the Treaty of Ghent support any such expectation. The purported treaty rights asserted by Claimants are *Jay Treaty* rights; Claimants rely on the Treaty of Ghent only to argue that their alleged Jay Treaty rights survived the War of 1812. Whatever the status, in 1814, of the Article 3 duty exemption, the United States has maintained for decades that Article 3 remains in

force only to the extent that it relates to the right of Indians to pass across the border.

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Cross References

Executive branch treaty-making power in implementing U.S. obligations under Convention Against Torture, **Chapter 3.A.1.b.**
Role of Geneva Conventions in extradition, **Chapter 3.A.1.c.**
Role and composition of human rights treaty bodies, **Chapter 6.A.2.**
New Mexico–State of Chihuahua agreement, **Chapter 6.C.1.a.(1)**
U.S. as party to Optional Protocol to Convention on Children in Armed Conflict but not to the Convention, **Chapter 6.C.2.**
Executive agreements concerning Nazi-era claims, **Chapter 8.C.**
Role of WTO dispute settlement bodies, **Chapter 11.C.1.b.**
Tacit amendment procedures in multilateral treaties, **Chapters 11.F.4.b., 13.A.2.b., 13.A.2.e., and 14.D.**
U.S. approach to ratification of treaties in law of armed conflict, **Chapter 18.A.2. and 3.**

Chapter 5

Foreign Relations

A. FOREIGN RELATIONS LAW OF THE UNITED STATES

1. Implementation of International Court of Justice Decision

a. U.S. Supreme Court decision: Medellín v. Texas

On March 25, 2008, the U.S. Supreme Court ruled that the judgment of the International Court of Justice ("ICJ") in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 21 ("*Avena*") did not preempt contrary state law. *Medellín v. Texas*, 128 S. Ct. 1346 (2008) ("*Medellín II*"). In *Avena* the ICJ required the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences" of 51 Mexican nationals as a remedy for the failure of the competent U.S. authorities to comply with consular notification obligations under Article 36 of the Vienna Convention on Consular Relations ("VCCR"). All of the Mexican nationals covered by *Avena* had been sentenced to death by state courts. *See Digest 2004* at 37–43; *see also Digest 2003* at 43–103. On February 28, 2005, President George W. Bush issued a memorandum in which he determined that "the United States will discharge its international obligations" under *Avena* "by having State courts give effect to the decision in accordance with general principles of comity" in cases involving any of the Mexican nationals covered by *Avena*. *See Digest 2005* at 29–59. On November 15, 2006, the Court of Criminal Appeals of Texas denied an

application for writ of habeas corpus filed by Medellín, one of the Mexican nationals covered by *Avena,* holding that such relief was barred by state law and that neither the ICJ judgment nor the President's memorandum superseded that law. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006). In 2007 the Supreme Court granted Medellín's petition for writ of certiorari. The United States filed a brief as *amicus curiae* arguing that *Avena* "is not privately enforceable in its own right," but that "the President's determination that the Nation will comply with *Avena* falls within his authorized power to effectuate our treaty obligations." The text of the U.S. brief on the merits is available at *www.usdoj.gov/osg/briefs/2006/3mer/1ami/2006-0984.mer.ami.html*. *See Digest 2006* at 86–88 and *Digest 2007* at 73–77.

Excerpts follow from the Supreme Court's analysis in concluding that although the United States had an international obligation to implement the *Avena* judgment, the judgment "does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions" and that under the U.S. Constitution, the President alone was not empowered to implement the judgment (most footnotes and citations to other submissions in the case omitted).

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In 1969, the United States, upon the advice and consent of the Senate, ratified the Vienna Convention on Consular Relations (Vienna Convention or Convention), Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820, and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol or Protocol), Apr. 24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820. The preamble to the Convention provides that its purpose is to "contribute to the development of friendly relations among nations." 21 U.S.T., at 79. . . . Toward that end, Article 36 of the Convention was drafted to "facilitat[e] the exercise of consular functions." Art. 36(1), 21 U.S.T., at 100. It provides that if a person detained by a foreign country "so requests,

the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his righ[t]" to request assistance from the consul of his own state. Art. 36(1)(b), *id.*, at 101.

The Optional Protocol provides a venue for the resolution of disputes arising out of the interpretation or application of the Vienna Convention. Art. I, 21 U.S.T., at 326. Under the Protocol, such disputes "shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] . . . by any party to the dispute being a Party to the present Protocol." *Ibid.*

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Under Article 94(1) of the U.N. Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." 59 Stat. 1051. The ICJ's jurisdiction in any particular case, however, is dependent upon the consent of the parties. See Art. 36, 59 Stat. 1060. . . .

B

Petitioner José Ernesto Medellín, a Mexican national, has lived in the United States since preschool. A member of the "Black and Whites" gang, Medellín was convicted of capital murder and sentenced to death in Texas for the gang rape and brutal murders of two Houston teenagers.

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Medellín first raised his Vienna Convention claim in his first application for state postconviction relief. The state trial court held that the claim was procedurally defaulted because Medellín had failed to raise it at trial or on direct review. The trial court also rejected the Vienna Convention claim on the merits, finding that Medellín had "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment." The Texas Court of Criminal Appeals affirmed.

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. . . The ICJ [subsequently issued its judgment in *Avena*, in which it] held that the United States had violated Article 36(1)(b)

of the Vienna Convention by failing to inform the 51 named Mexican nationals, including Medellín, of their Vienna Convention rights. 2004 I.C.J., at 53–55. In the ICJ's determination, the United States was obligated "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals." The ICJ indicated that such review was required without regard to state procedural default rules.

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II

Medellín first contends that the ICJ's judgment in *Avena* constitutes a "binding" obligation on the state and federal courts of the United States. He argues that "by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are *already* the 'Law of the Land' by which all state and federal courts in this country are 'bound.'" . . . Accordingly, Medellín argues, *Avena* is a binding federal rule of decision that pre-empts contrary state limitations on successive habeas petitions.

No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.

This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law. The distinction was well explained by Chief Justice Marshall's opinion in *Foster v. Neilson*, 2 Pet. 253, 315 (1829), overruled on other grounds, *United States v. Percheman*, 7 Pet. 51 (1833), which held that a treaty is "equivalent to an act of the legislature," and hence self-executing, when it "operates of itself without the aid of any legislative provision." *Foster, supra,* at 314. When, in contrast, "[treaty]

stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). In sum, while treaties "may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." *Igartúa-De La Rosa v. United States*, 417 F. 3d 145, 150 (CA1 2005) (en banc) (Boudin, C. J.).[2]

A treaty is, of course, "primarily a compact between independent nations." *Head Money Cases*, 112 U.S. 580, 598 (1884). It ordinarily "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Ibid.*; see also The Federalist No. 33, p. 207 (J. Cooke ed. 1961) (A. Hamilton) (comparing laws that individuals are "bound to observe" as "the supreme law of the land" with "a mere treaty, dependent on the good faith of the parties"). "If these [interests] fail, its infraction becomes the subject of international negotiations and reclamations . . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Head Money Cases, supra,* at 598. Only "[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment." *Whitney*, *supra*, at 194.[3]

Medellín and his *amici* nonetheless contend that the Optional Protocol, United Nations Charter, and ICJ Statute supply the

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[2] The label "self-executing" has on occasion been used to convey different meanings. What we mean by "self-executing" is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a "non-self-executing" treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.

[3] Even when treaties are self-executing in the sense that they create federal law, the background presumption is that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." 2 Restatement (Third) of Foreign Relations Law of the United States § 907, Comment *a,* p. 395 (1986) (hereinafter Restatement). Accordingly, a number of the Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary. . . .

"relevant obligation" to give the *Avena* judgment binding effect in the domestic courts of the United States.[4] Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not automatically binding domestic law.

A

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The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions. Article 94(1) provides that "[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party." 59 Stat. 1051 (emphasis added). The Executive Branch contends that the phrase "undertakes to comply" is not "an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. members," but rather "a *commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision."

We agree with this construction of Article 94. The Article is not a directive to domestic courts. It does not provide that the United States "shall" or "must" comply with an ICJ decision, nor indicate that the Senate that ratified* the U.N. Charter intended to

[4] The question is whether the *Avena* judgment has binding effect in domestic courts under the Optional Protocol, ICJ Statute, and U.N. Charter. Consequently, it is unnecessary to resolve whether the Vienna Convention is itself "self-executing" or whether it grants Medellín individually enforceable rights. As in *Sanchez-Llamas*, 548 U.S., at 342–343, we thus assume, without deciding, that Article 36 grants foreign nationals "an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification."

* Editor's note: As noted correctly elsewhere in the opinion, pursuant to Article II, § 2 of the U.S. Constitution, the UN Charter and other relevant treaties were ratified by the President with the advice and consent of the

vest ICJ decisions with immediate legal effect in domestic courts. Instead, "[t]he words of Article 94 . . . call upon governments to take certain action." *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929, 938 (CADC 1988) (quoting *Diggs v. Richardson*, 555 F. 2d 848, 851 (CADC 1976); internal quotation marks omitted). In other words, the U.N. Charter reads like "a compact between independent nations" that "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S., at 598.

The remainder of Article 94 confirms that the U.N. Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts. Article 94(2)—the enforcement provision—provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state. 59 Stat. 1051.

The U.N. Charter's provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts. See *Sanchez-Llamas,* 548 U.S., at 347. And even this "quintessentially *international* remed[y]," *id.*, at 355, is not absolute. First, the Security Council must "dee[m] necessary" the issuance of a recommendation or measure to effectuate the judgment. Art. 94(2), 59 Stat. 1051. Second, as the President and Senate were undoubtedly aware in subscribing to the U.N. Charter and Optional Protocol, the United States retained the unqualified right to exercise its veto of any Security Council resolution.

This was the understanding of the Executive Branch when the President agreed to the U.N. Charter and the declaration accepting general compulsory ICJ jurisdiction. See, *e.g.*, The Charter of the United Nations for the Maintenance of International Peace and Security: Hearings before the Senate Committee on Foreign Relations, 79th Cong., 1st Sess., 124–125 (1945) ("[I]f a state fails to perform its obligations under a judgment of the [ICJ], the other party may have recourse to the Security Council"); *id.*, at 286

Senate, not by the Senate. Article II § 2 provides: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."

(statement of Leo Paslovsky, Special Assistant to the Secretary of State for International Organizations and Security Affairs) ("[W]hen the Court has rendered a judgment and one of the parties refuses to accept it, then the dispute becomes political rather than legal. It is as a political dispute that the matter is referred to the Security Council"); A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 before the Subcommittee of the Senate Committee on Foreign Relations, 79th Cong., 2d Sess., 142 (1946) (statement of Charles Fahy, State Dept. Legal Adviser) (while parties that accept ICJ jurisdiction have "a moral obligation" to comply with ICJ decisions, Article 94(2) provides the exclusive means of enforcement).

If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause. Mexico or the ICJ would have no need to proceed to the Security Council to enforce the judgment in this case. Noncompliance with an ICJ judgment through exercise of the Security Council veto—always regarded as an option by the Executive and ratifying Senate** during and after consideration of the U.N. Charter, Optional Protocol, and ICJ Statute—would no longer be a viable alternative. There would be nothing to veto. In light of the U.N. Charter's remedial scheme, there is no reason to believe that the President and Senate signed up for such a result.

In sum, Medellín's view that ICJ decisions are automatically enforceable as domestic law is fatally undermined by the enforcement structure established by Article 94. His construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law. And those courts would not be empowered to decide whether to comply with the judgment—again, always regarded as an option by the political branches—any more

** *See* Editor's note * *supra.*

than courts may consider whether to comply with any other species of domestic law. This result would be particularly anomalous in light of the principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

The ICJ Statute, incorporated into the U.N. Charter, provides further evidence that the ICJ's judgment in *Avena* does not automatically constitute federal law judicially enforceable in United States courts. Art. 59, 59 Stat. 1062. To begin with, the ICJ's "principal purpose" is said to be to "arbitrate particular disputes between national governments." *Sanchez-Llamas, supra*, at 355 (citing 59 Stat. 1055). Accordingly, the ICJ can hear disputes only between nations, not individuals. Art. 34(1), 59 Stat. 1059 ("Only states [*i.e.,* countries] may be parties in cases before the [ICJ]"). More important, Article 59 of the statute provides that "[t]he decision of the [ICJ] has *no binding force* except between the parties and in respect of that particular case." *Id.,* at 1062 (emphasis added). . . .

* * * *

It is, moreover, well settled that the United States' interpretation of a treaty "is entitled to great weight." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–185 (1982); see also *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999). The Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law.[9]

[9] In interpreting our treaty obligations, we also consider the views of the ICJ itself, "giv[ing] respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [the treaty]." *Breard v. Greene,* 523 U.S. 371, 375 (1998) (*per curiam*); see *Sanchez-Llamas, supra*, at 355–356. It is not clear whether that principle would apply when the question is the binding force of ICJ judgments themselves, rather than the substantive scope of a treaty the ICJ must interpret in resolving disputes. In any event, nothing suggests that the ICJ views its judgments as automatically enforceable in the domestic courts of signatory nations. The *Avena* judgment itself directs the United States to

The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through direct enforcement in domestic courts, and "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own." *Sanchez-Llamas*, 548 U.S., at 347.

B

* * * *

Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. U.S. Const., Art. I, § 7. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. Art. II, § 2. . . .

* * * *

. . . The point of a non-self-executing treaty is that it "addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court." *Foster*, *supra*, at 314 (emphasis added); *Whitney*, 124 U.S., at 195. . . . The dissent's contrary approach would assign to the courts—not the political branches—the primary role in deciding when and how international agreements will be enforced. To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law.

C

Our conclusion that *Avena* does not by itself constitute binding federal law is confirmed by the "postratification understanding"

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provide review and reconsideration of the affected convictions and sentences "*by means of its own choosing*." 2004 I.C.J., at 72 (emphasis added). This language, as well as the ICJ's mere suggestion that the "judicial process" is best suited to provide such review, *id.*, at 65–66, confirm that domestic enforceability in court is not part and parcel of an ICJ judgment.

of signatory nations. See *Zicherman*, 516 U.S., at 226. There are currently 47 nations that are parties to the Optional Protocol and 171 nations that are parties to the Vienna Convention. Yet neither Medellín nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts. . . . [T]he lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts.

Our conclusion is further supported by general principles of interpretation. To begin with, we reiterated in *Sanchez-Llamas* what we held in *Breard*, that "'absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.'" 548 U.S., at 351 . . . . Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended. Here there is no statement in the Optional Protocol, the U.N. Charter, or the ICJ Statute that supports the notion that ICJ judgments displace state procedural rules.

* * * *

In short, and as we observed in *Sanchez-Llamas*, "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." 548 U.S., at 354. Given that holding, it is difficult to see how that same structure and purpose can establish, as Medellín argues, that *judgments* of the ICJ nonetheless were intended to be conclusive on our courts. A judgment is binding only if there is a rule of law that makes it so. And the question whether ICJ judgments can bind domestic courts depends upon the same analysis undertaken in *Sanchez-Llamas* and set forth above.

* * * *

. . . We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments—only that the U.N. Charter, the Optional Protocol, and the ICJ Statute do

not do so. And whether the treaties underlying a judgment are self-executing so that the judgment is directly enforceable as domestic law in our courts is, of course, a matter for this Court to decide. See *Sanchez-Llamas*, *supra*, at 353–354.

D

Our holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements. . . . "[A]n agreement to abide by the result" of an international adjudication—or what he really means, an agreement to give the result of such adjudication domestic legal effect—can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution. The point is that the particular treaty obligations on which Medellín relies do not of their own force create domestic law.

The dissent worries that our decision casts doubt on some 70-odd treaties under which the United States has agreed to submit disputes to the ICJ according to "roughly similar" provisions. . . . Again, under our established precedent, some treaties are self-executing and some are not, depending on the treaty. That the judgment of an international tribunal might not automatically become domestic law hardly means the underlying treaty is "useless." . . . Such judgments would still constitute international obligations, the proper subject of political and diplomatic negotiations. See *Head Money Cases*, 112 U.S., at 598. And Congress could elect to give them wholesale effect . . . through implementing legislation, as it regularly has. . . .

Further, that an ICJ judgment may not be automatically enforceable in domestic courts does not mean the particular underlying treaty is not. Indeed, we have held that a number of the "Friendship, Commerce, and Navigation" Treaties cited by the dissent, see *post,* Appendix B, are self-executing—based on "the language of the[se] Treat[ies]." . . . Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.

In addition, Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial

disputes. . . . The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. See, *e.g.*, 22 U.S.C. § 1650a(a) ("An award of an arbitral tribunal rendered pursuant to chapter IV of the [Convention on the Settlement of Investment Disputes] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States"); 9 U.S.C. §§ 201–208 ("The [U.N.] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter," § 201). Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result.

. . . The general rule . . . is that judgments of foreign courts awarding injunctive relief, even as to private parties, let alone sovereign States, "are not generally entitled to enforcement." See 2 Restatement § 481, Comment *b,* at 595.

In sum, while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions. . . . [A] contrary conclusion would be extraordinary, given that basic rights guaranteed by our own Constitution do not have the effect of displacing state procedural rules. See 548 U.S., at 360. Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by "many of our most fundamental constitutional protections." *Ibid.*

III

Medellín next argues that the ICJ's judgment in *Avena* is binding on state courts by virtue of the President's February 28, 2005 Memorandum. The United States contends that while the *Avena* judgment does not of its own force require domestic courts to set aside ordinary rules of procedural default, that judgment became

the law of the land with precisely that effect pursuant to the President's Memorandum and his power "to establish binding rules of decision that preempt contrary state law." . . .

A

The United States maintains that the President's constitutional role "uniquely qualifies" him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision and "to do so expeditiously." We do not question these propositions. . . . In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.

Such considerations, however, do not allow us to set aside first principles. The President's authority to act, as with the exercise of any governmental power, "must stem either from an act of Congress or from the Constitution itself." *Youngstown, supra,* at 585; *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).

Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S., at 635 (Jackson, J., concurring). Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.*, at 637. In this circumstance, Presidential authority can derive support from "congressional inertia, indifference or quiescence." *Ibid.* Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Id.*, at 637–638.

B

The United States marshals two principal arguments in favor of the President's authority "to establish binding rules of decision that preempt contrary state law." The Solicitor General first argues that the relevant treaties give the President the authority to implement the *Avena* judgment and that Congress has acquiesced in the exercise of such authority. The United States also relies upon an "independent" international dispute-resolution power wholly apart from the asserted authority based on the pertinent treaties. . . .

1

The United States maintains that the President's Memorandum is authorized by the Optional Protocol and the U.N. Charter. That is, because the relevant treaties "create an obligation to comply with *Avena*," they "*implicitly* give the President authority to implement that treaty-based obligation." *Id.*, at 11 (emphasis added). As a result, the President's Memorandum is well grounded in the first category of the *Youngstown* framework.

We disagree. The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. . . .

The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution, which divides the treaty-making power between the President and the Senate. The Constitution vests the President with the authority to "make" a treaty. Art. II, § 2. If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented "in mak[ing]" the treaty, by ensuring that it contains language plainly providing for domestic enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote, *ibid.,* consistent with all other constitutional restraints.

Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "'[t]he power to make the necessary laws is in Congress; the power to execute in the President.'" *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006) (quoting *Ex parte Milligan*, 4 Wall. 2, 139 (1866) (opinion of Chase, C. J.)); see U.S. Const., Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"). As already noted, the terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto. See Art. I, § 7. Indeed, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S., at 587.

A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result. We therefore conclude, given the absence of congressional legislation, that the non-self-executing treaties at issue here did not "express[ly] or implied[ly]" vest the President with the unilateral authority to make them self-executing. . . . Accordingly, the President's Memorandum does not fall within the first category of the *Youngstown* framework.

Indeed, the preceding discussion should make clear that the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so. When the President asserts the power to "enforce" a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate.*** His assertion

*** *See* Editor's note * *supra*.

of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson's third category, not the first or even the second. . . .

Each of the two means described above for giving domestic effect to an international treaty obligation under the Constitution—for making law—requires joint action by the Executive and Legislative Branches: The Senate can ratify[****] a self-executing treaty "ma[de]" by the Executive, or, if the ratified treaty is not self-executing, Congress can enact implementing legislation approved by the President. . . .

The United States nonetheless maintains that the President's Memorandum should be given effect as domestic law because "this case involves a valid Presidential action in the context of Congressional 'acquiescence'." . . .

. . . [E]ven if we were persuaded that congressional acquiescence could support the President's asserted authority to create domestic law pursuant to a non-self-executing treaty, such acquiescence does not exist here. . . .

* * * *

None of this is to say, however, that the combination of a non-self-executing treaty and the lack of implementing legislation precludes the President from acting to comply with an international treaty obligation. It is only to say that the Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect. That is, the non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts. The President may comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution. But he may not rely upon a non-self-executing treaty to "establish binding rules of decision that preempt contrary state law."

2

We thus turn to the United States' claim that—independent of the United States' treaty obligations—the Memorandum is a valid

[****] *Id.*

exercise of the President's foreign affairs authority to resolve claims disputes with foreign nations. *Id.*, at 12–16. The United States relies on a series of cases in which this Court has upheld the authority of the President to settle foreign claims pursuant to an executive agreement. See *Garamendi*, 539 U.S., at 415; *Dames & Moore*, 453 U.S., at 679–680; *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937). In these cases this Court has explained that, if pervasive enough, a history of congressional acquiescence can be treated as a "gloss on 'Executive Power' vested in the President by § 1 of Art. II." *Dames & Moore*, *supra,* at 686 (some internal quotation marks omitted). This argument is of a different nature than the one rejected above. Rather than relying on the United States' treaty obligations, the President relies on an independent source of authority in ordering Texas to put aside its procedural bar to successive habeas petitions. Nevertheless, we find that our claims-settlement cases do not support the authority that the President asserts in this case.

The claims-settlement cases involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals. See, *e.g.*, *Belmont, supra*, at 327. They are based on the view that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," can "raise a presumption that the [action] had been[taken] in pursuance of its consent." *Dames & Moore, supra*, at 686 (some internal quotation marks omitted). . . . Even still, the limitations on this source of executive power are clearly set forth and the Court has been careful to note that "[p]ast practice does not, by itself, create power." *Dames & Moore, supra,* at 686.

The President's Memorandum is not supported by a "particularly longstanding practice" of congressional acquiescence, see *Garamendi, supra,* at 415, but rather is what the United States itself has described as "unprecedented action," Brief for United States as *Amicus Curiae* in *Sanchez-Llamas*, O. T. 2005, Nos. 05–51 and 04–10566, pp. 29–30. Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to

state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws. . . . The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.

* * * *

b. Further proceedings before the International Court of Justice and in the United States

On June 5, 2008, Mexico filed an application requesting the International Court of Justice ("ICJ" or "Court") to interpret paragraph 153(9) of the March 31, 2004, judgment in *Avena* and also requesting provisional measures. On July 16, 2008, the ICJ issued an order indicating provisional measures, including that the United States "shall take all measures necessary to ensure" that five named Mexican nationals, including Medellín, "are not executed pending judgment" on Mexico's request for interpretation "unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141" of the *Avena* judgment. Order of July 16, 2008 on the Request for the Indication of Provisional Measures ("2008 Provisional Measures Order") at ¶ 80(II)(a). The state of Texas had scheduled August 5, 2008, as the date of execution of Medellín and the Court found that the other four were also "at risk of execution in the coming months." Order at ¶ 73. In reaching its decision on preliminary measures, the Court noted the U.S. recognition of its obligations and efforts to fulfill them, stating:

> 75. . . . [T]he Court is fully aware that the federal Government of the United States has been taking many diverse and insistent measures in order to fulfil the international obligations of the United States under the *Avena* Judgment;
>
> 76. . . . [T]he Court notes that the United States has recognized that, were any of the Mexican nationals named

in the request for the indication of provisional measures to be executed without the necessary review and reconsideration required under the *Avena* Judgment, that would constitute a violation of United States obligations under international law; whereas, in particular, the Agent of the United States declared before the Court* that "[t]o carry out Mr. Medellín's sentence without affording him the necessary review and reconsideration obviously would be inconsistent with the *Avena* Judgment";

77. . . . [T]he Court further notes that the United States has recognized that "it is responsible under international law for the actions of its political subdivisions", including "federal, state, and local officials", and that its own international responsibility would be engaged if, as a result of acts or omissions by any of those political subdivisions, the United States was unable to respect its international obligations under the *Avena* Judgment; whereas, in particular, the Agent of the United States acknowledged before the Court that "the United States would be responsible, clearly, under the principle of State responsibility for the internationally wrongful actions of [state] officials."

On August 1, 2008, the United States filed a letter with the Court in accordance with paragraph 80(II)(b) of the 2008 Provisional Measures Order, which requested the United States to "inform the Court of the measures taken in implementation of this Order." The full text of the letter, from John B. Bellinger, III, Department of State Legal Adviser, to Philippe Couvreur, Registrar, International Court of Justice, is available at *www.state.gov/s/l/c8183.htm*. Among other efforts, the letter reported that Secretary of State Condoleezza Rice and Attorney General Michael Mukasey wrote to Rick Perry, Governor of the State of Texas, on June 17, 2008, calling

* Editor's note: The Court is referring to the closing statement of John B. Bellinger, III, Department of State Legal Adviser, before the Court on June 20, 2008 at 4:30 p.m. *See www.icj-cij.org/docket/index.php?p1=3&p2=3&k=11&case=139&code=musa&p3=2*.

attention to the U.S. continuing international law obligation and formally asking Governor Perry for "the assistance of the State of Texas in carrying out an international legal obligation of the United States." The letter also requested "that Texas take the steps necessary to give effect to the *Avena* decision with respect to the convictions and sentences addressed therein." Governor Perry responded in a letter dated July 18, 2008, indicating avenues available and Texas support for individuals claiming actual prejudice from a lack of consular notification:

> Currently, in federal habeas proceedings in which consular notification is raised, the State of Texas submits briefing on whether actual prejudice or harm may have resulted. This provides the court with a fully presented argument on that issue should the court decide to consider it. I am further advised that if any individual under Texas custody and subject to *Avena* has not previously received a judicial determination of his claim of prejudice under the Vienna Convention and seeks such review in a future federal habeas proceeding, the State of Texas will ask the reviewing court to address the claim of prejudice on the merits.
>
> The consideration of facts showing actual prejudice as discussed in *Avena* also may be urged by an offender before the Texas Board of Pardons and Paroles in its consideration of any clemency request that comes before it.

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

The August 1 letter also informed the Court that federal legislation* had been introduced in the U.S. House of Representatives "that would create a civil action to provide judicial remedies for a violation of Article 36 of the Vienna Convention. The bill was referred to the Committee on the

* Editor's note: Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2008).

Judiciary, and we understand no further action has been taken."

During this period, Medellín pursued relief both through a request for commutation or reprieve to the Texas Board of Pardons and Paroles and in Texas courts. On July 31, the Texas Court of Criminal Appeals rejected Medellín's application on state-law procedural grounds. *Ex parte Medellín*, 280 S.W.3d 854 (Tex. Crim. App. 2008). Medellín filed a petition for writ of habeas corpus in the U.S. Supreme Court, principally arguing, as he did in Texas courts, that his execution should be stayed until legislation could be considered.

On August 4, 2008, the Texas Board of Pardons and Paroles decided not to recommend commutation of Medellín's death sentence or the 240-day reprieve Medellín had sought. On August 5, the U.S. Supreme Court denied Medellín's requests for a writ of habeas corpus. 129 S. Ct. 360 (2008) ("*Medellín III*"). The court concluded that Medellín's arguments seeking to establish that the Vienna Convention violation required invalidation of the state court judgment—including the argument that counsel was inadequate due to the violation—were "insubstantial." After the Supreme Court's decision, Texas carried out Medellín's sentence.

On August 29, 2008, the United States submitted written observations on Mexico's June 5 request that the Court find that paragraph 153(9) of the *Avena* Judgment constitutes an "obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide 'review and reconsideration of the convictions and sentences' but leaving it the 'means of its own choosing'." The U.S. submission explained the steps it had taken and continued to take to enable it to comply with *Avena*. It argued that there was no interpretive dispute before the ICJ cognizable under Article 60 of the Statute of the ICJ because the United States agreed with Mexico's interpretation that *Avena* imposed an "obligation of result." Excerpts follow from the U.S. August 29 written observations and from further written observations submitted on October 6, 2008 (footnotes omitted). In the October submission, the United States also argued

that the Court lacked jurisdiction to rule that the United States had breached the 2008 Provisional Measures Order and that there was no basis for the Court to order guarantees of non-repetition with respect to the *Avena* judgment. For the full text of written submissions to the Court, *see www.icj-cij.org/docket/index.php?p1=3&p2=3&k=11&case=139&code=musa&p3=1.*

The case remained under consideration at the end of 2008.*

Written Observations by the United States, August 29, 2008

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I. The United States Has Consistently Interpreted the *Avena* Judgment to Impose an "Obligation of Result"

1. The United States has consistently interpreted the *Avena* Judgment to impose an obligation to provide review and reconsideration of the convictions and sentences of the individuals included in the *Avena* Judgment. Like Mexico, we understand this obligation to be one of "result," not merely "means." In addition, the United States has taken actions to implement the *Avena* Judgment consistent with this interpretation, and those actions reflect the seriousness with which we regard our obligation to comply with the Court's decision.

A. The President's Memorandum

2. The United States' efforts to implement the *Avena* Judgment began shortly after the decision. During the time immediately after

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* Editor's note: On January 19, 2009, the Court issued a judgment (1) finding no interpretive dispute between Mexico and the United States under Article 60; (2) finding that the United States had breached its obligation under the provisional measures order; (3) reaffirming the binding nature of the *Avena* judgment; (4) declining to order guarantees of non-repetition; and (5) rejecting further submissions of Mexico. Relevant aspects of the judgment will be discussed in *Digest 2009*.

the decision, the United States undertook a comprehensive review of the options for implementation, including how the federal Executive Branch could best require courts in U.S. states to provide review and reconsideration.

3. In 2005, the President issued a memorandum to the U.S. Attorney General directing that state courts give effect to *Avena*. . . .

4. The purpose of the President's determination was to provide the Mexican nationals named in the *Avena* Judgment with an avenue to seek review and reconsideration of their claims under the Vienna Convention on Consular Relations ("Vienna Convention") in state courts. State courts were to determine—without regard to procedural default rules—whether the violations of the Convention caused actual prejudice to the defendant at trial or sentencing. The President's determination was an extraordinary attempt to implement *Avena*, requiring states to set aside, if necessary, their own generally applicable procedural rules in order to provide additional legal process to dozens of convicted murderers.

5. After the President issued the memorandum, the U.S. Department of Justice filed . . . amicus brief[s] in the case of Mr. José Ernesto Medellín Rojas, which was then pending before the U.S. Supreme Court. . . . [and in Texas courts.] . . .

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B. The *Medellín* Decision

7. Mr. Medellín again appealed to the U.S. Supreme Court last year, and again, the United States argued that under the President's determination, state courts must give effect to the *Avena* Judgment. Unfortunately, as the Court knows, in March 2008 the Supreme Court rejected the United States' arguments and refused to treat the President's determination as binding on state courts. . . .

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C. Efforts After the *Medellín* Decision

9. If the United States understood *Avena* to impose only an "obligation of means," we would have stopped there. But we did not. Indeed, our actions since the *Medellín* decision clearly belie Mexico's claim that the United States' conduct "confirms its understanding that paragraph 153(9) imposes only an obligation of means."

10. Since the *Medellín* decision, the United States has engaged in numerous high-level discussions regarding alternative approaches to implement the *Avena* Judgment. These have included discussions with our Mexican counterparts about finding a practical solution to implement the "obligation of result" imposed by *Avena*.

11. In June, Secretary of State Rice and Attorney General Mukasey jointly sent a letter to Texas Governor Perry calling attention to the United States' continuing international law obligation and formally asking him for "the assistance of the State of Texas in carrying out an international legal obligation of the United States." In addition, it requested "that Texas take the steps necessary to give effect to the *Avena* decision with respect to the convictions and sentences addressed therein."

12. The letter was intended to start a series of discussions between U.S. and Texas officials about how to implement the *Avena* Judgment in the wake of the Supreme Court's *Medellín* decision. Those discussions began shortly after the hearing before the Court on Mexico's request for provisional measures, and they have continued until the present time. During that period, Department of State officials have held several discussions with representatives of the state of Texas on how to ensure review and reconsideration of the convictions and sentences of those Texas defendants included in the *Avena* Judgment, including Mr. Medellín.

13. On July 18, Governor Perry responded to the letter from the Secretary of State and Attorney General. This letter includes an important commitment on the part of the Governor. The letter states that if an *Avena* defendant in Texas custody has not previously received a judicial determination of prejudice resulting from a Vienna Convention violation and seeks such review in a federal habeas proceeding, the state will ask the reviewing court to address the claim of prejudice on the merits. This commitment may enable certain *Avena* defendants incarcerated in Texas to obtain review and reconsideration of their convictions and sentences in light of the Vienna Convention violation.

14. In a parallel effort, the Department of State has pursued discussions with the Texas Board of Pardons and Paroles (the "Board")—a key organ of the Texas government in capital cases.

Only upon the positive recommendation of the Board can the Governor grant a commutation of sentence or a reprieve of more than 30 days. These discussions included an exploration of the practice and procedure of the Board as well as the requirements of the *Avena* Judgment. In the *Avena* case, this Court recognized that "appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in paragraph 114 above." Among the Mexican nationals mentioned in paragraph 114 are César Roberto Fierro Reyna and Roberto Moreno Ramos, both of whom are incarcerated in Texas and covered by the Court's July 16 Order. This approach to the Board was also in keeping with the Governor's July 18 letter, which stated that "consideration of facts showing actual prejudice as discussed in *Avena* also may be urged by an offender before the Texas Board of Pardons and Paroles in its consideration of any clemency request that comes before it."

15. In addition, in late July, after Mr. Medellín petitioned the Board, State Department Legal Adviser John B. Bellinger, III wrote to the Board's presiding officer about Mr. Medellín's case. The letter asked that the Board carefully consider whether violations of the Vienna Convention resulted in actual prejudice to Mr. Medellín's conviction and sentence and that, in view of the importance of the case, the Board provide "a specific written finding regarding whether the failure to provide Mr. Medellín with consular information and notification pursuant to Article 36 of the Vienna Convention resulted in actual prejudice to his conviction and sentence."

16. We understand from our discussions with Texas officials that when considering a petition, the Board does in fact carefully evaluate all information before it, including claims of the sort presented by Mr. Medellín. The Board's consistent practice, however, is *not* to issue written determinations regarding petitioners' claims, and the Board was unfortunately not willing to depart from that practice in this instance. On August 4, 2008, the Board announced that it had decided not to recommend commutation of the death sentence or the 240-day reprieve requested by Mr. Medellín.

Governor Perry was thus without authority either to commute the death sentence to a lesser sentence or to provide the requested reprieve.

17. While his petition was pending before the Board, Mr. Medellín concurrently pursued actions in Texas courts. He again sought post-conviction relief and a stay of execution from the Texas Court of Criminal Appeals, arguing that the court should allow time for Congress to take up the "*Avena* Case Implementation Act of 2008," a bill introduced by two Members of the U.S. House of Representatives on July 14, 2008. Mr. Medellín's application to the court, presented by two attorneys who also are advocates for Mexico in this case, acknowledged universal agreement that *Avena* imposes an obligation of result . . . .

18. On July 31, the Texas Court of Criminal Appeals rejected Mr. Medellín's application on state-law procedural grounds. In a concurring opinion, two judges specifically addressed Mr. Medellín's claim of prejudice. The judges examined the evidence Mr. Medellín claimed he would have presented had he been informed of his right to seek consular assistance, and concluded that none of it would have resulted in a different sentence. The judges determined that "there is no likelihood at all that the unknowing and inadvertent violation of the Vienna Convention actually prejudiced Medellín."

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20. On August 5, the U.S. Supreme Court denied Mr. Medellín's various requests for relief. . . . [and] Texas carried out Mr. Medellín's sentence.

21. In all, 41 Mexican nationals included in the *Avena* Judgment remain on death row in the United States; nine have already obtained relief from the death penalty. No other individuals included in *Avena* are presently scheduled to be executed by Texas or any other state, and we understand that Texas is unlikely to carry out sentences of such individuals in the next year. During this time, the United States will continue to work to implement the *Avena* Judgment by seeking to ensure review and reconsideration of the convictions and sentences for all individuals covered by *Avena*.

II. Mexico's Application Must Be Dismissed Because There Is No Dispute for the Court to Adjudicate

22. Mexico's application does not present a dispute regarding the "meaning or scope" of the *Avena* Judgment; there is nothing for the Court to adjudicate. This defect is fatal to Mexico's application, and whether it is regarded as an issue of the Court's jurisdiction under Article 60 of the Court's Statute, or of the application's admissibility, the result is the same: Mexico's request for interpretation must be dismissed.

A. The Court Cannot Proceed in the Absence of a Dispute

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24. The Court's July 16, 2008 Order regarding provisional measures (the "July 16 Order") did not finally decide the[ ] threshold issues [of jurisdiction and admissibility]. That ruling was limited only to the issue whether there was a sufficient basis for the Court to indicate provisional measures. The Court declined to dismiss Mexico's application on grounds of a "manifest lack of jurisdiction." . . .

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26. In this case, the issues of jurisdiction and admissibility turn on the same basic question: whether Mexico's application presents a "dispute" between Mexico and the United States regarding the "meaning or scope" of the *Avena* Judgment. The requirement of a dispute derives from two sources. *First*, as the United States explained in oral proceedings at the provisional measures stage, "the existence of a dispute is the primary condition for the Court to exercise its judicial function." In particular, Article 38 of the Court's Statute states that the function of the Court is "to decide in accordance with international law such disputes as are submitted to it." *Second*, Article 60 of the Statute specifically requires that a request for interpretation involve a dispute as to the "meaning or scope" of the relevant judgment.

27. This Court has consistently stated that a "dispute" requires "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." Still, it is not enough to show

that as a general matter, "the interests of the two parties to such a case are in conflict." Rather, "[i]t must be shown that the *claim* of one party is positively opposed by the other." In addition, the Court has made clear that a party's own characterization of whether a dispute exists is not dispositive, and that the issue is "a matter for objective determination."

28. Even if "dispute" as used in Article 60 is given a somewhat broader meaning than elsewhere in the Statute, an interpretation case under Article 60 must still satisfy the basic requirement of a "dispute." . . .

29. . . . Insofar as there is no dispute, Mexico's application must be understood not as a request for clarification, but rather as an effort to enlist the Court in the role of monitoring and enforcing its judgments. As the Court is aware, the UN Charter does not assign that responsibility to the Court, and to the extent the Charter speaks to the issue at all, it allows a party to a judgment to "have recourse to the Security Council" in certain circumstances.

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B. There Is No Dispute for the Court to Hear

33. In its concluding remarks on provisional measures, Mexico shifted course, acknowledging the United States' agreement with its requested interpretation and claiming instead that it was not clear that "all of the constituent parts of the United States share the U.S. Administration's stated view regarding the interpretation and scope of the *Avena* Judgment." According to Mexico, by scheduling Mr. Medellín's execution, the state of Texas "unmistakably communicated its disagreement with Mexico's interpretation of the Judgment." It is this asserted disagreement that now appears to form the basis of Mexico's claim of a dispute.

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i. International Law Dictates That Executive Officials of the National Government Speak for the State on the International Plane

36. Mexico appears to claim that a dispute within the meaning of Article 60 may arise if it is determined that a constituent state of the United States does not share the interpretation requested

by Mexico. That is simply incorrect. It is established under international law that certain officials of the national government have authority to speak for the State on the international plane. This principle is recognized in international treaty law and diplomatic practice, in the Statute of the Court, and in the Court's jurisprudence.

37. The entire conduct of diplomatic relations among States rests on international law and practice recognizing the authority of certain representatives of the national government to speak on behalf of a State in its international affairs. "[I]t is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments." It is also established that "[a]mbassadors and other diplomatic agents carry out their duties under [the] authority" of the foreign minister or head of government and their acts are capable of binding the State in appropriate circumstances.

38. The power of heads of State and other appropriate individuals "to act on behalf of the State in its international relations is *universally recognized*, and reflected in, for example, Article 7, paragraph 2(a), of the Vienna Convention on the Law of Treaties." Article 7 of the Vienna Convention on the Law of Treaties (VCLT) regarding full powers sets out who may appropriately represent a State for the purpose of concluding treaties. It expressly identifies those executive officials of the *national* government that are deemed to speak on behalf of the State "for the purpose of performing all acts relating to the conclusion of a treaty"—namely, "Heads of State, Heads of Government and Ministers for Foreign Affairs." These officials are deemed to represent the State "[i]n virtue of their functions." In addition, "certain heads of diplomatic missions and accredited representatives" are "[i]n virtue of their functions" considered as representing their State "for the purpose of adopting the text of a treaty."

39. In addition to the VCLT, other international law authorities recognize the power of heads of State, ministers of foreign affairs, and other officials acting within their area of competence

to authoritatively represent their governments in international matters. For example, the Vienna Convention on Diplomatic Relations defines the functions of the diplomatic mission to include "representing the sending State in the receiving State" and "negotiating with the Government of the receiving State." United Nations practice reflects the same principle. The Rules of Procedure for the General Assembly require that credentials for the State representatives specified in Article 9 of the Charter be "issued either by the Head of the State or Government or by the Minister of Foreign Affairs." Indeed, State practice shows that "declarations creating legal obligations for States are quite often made by heads of State or Government or ministers for foreign affairs *without their capacity to commit the State being called into question*."

40. These black-letter principles are reflected in the statute and practice of the Court. Under Article 34 of the Statute, "[o]nly *states* may be parties in cases before the Court." There is no provision for according a governmental sub-entity of the State the status of a party. In addition, Article 42(1) of the Court's [Statute] requires parties to appoint an agent to represent them before the Court. Although the choice of an agent is generally a matter for the State, "[t]he Court will regard as competent authority for this purpose one of the high officers of State mentioned in Article 7 of the Vienna Convention on the Law of Treaties of 1969, normally the minister for foreign affairs."

41. The Court's cases have likewise recognized that certain persons or entities should *not* be regarded as speaking for the State in the international sphere. In the *Gulf of Maine* case, for example, the Court rejected Canada's claim that a letter from a mid-level official in the United States Bureau of Land Management regarding a maritime border represented the views of the United States government. Under the circumstances, the Court stated, it was not appropriate for Canada "to rely on the contents of a letter . . . as though it were an official declaration of the United States Government on that country's international maritime boundaries." The underlying reason, of course, is that the letter did not necessarily have the imprimatur of those who *are* deemed to speak with authority on behalf of the State. The same principle applies to Mexico's application: the words or actions of officials of other

federal government entities or of a U.S. state cannot be deemed to reflect the official views of the United States government.

42. Two further brief observations are warranted. *First*, in a federal State like the United States, it is generally the national government that determines the State's relations with foreign States. Oppenheim explains:

> When, as happens frequently, a federal state assumes *in every way* the external representation of its member states, so far as international relations are concerned, the member states make no appearance at all. This is true of the United States of America and all those other American federal states whose constitution is modeled on that of the United States. Here the member states are sovereign too, but only with regard to *internal* affairs. All their external sovereignty being absorbed by the federal state, they are not international persons at all.

43. *Second*, as a matter of international law and practice, it is federal *executive* officials that represent the State on the international plane. "For the purposes of Article 60 of the Statute of the Court, as generally in international law and practice, it is the Executive of the State that represents the State and speaks for it at the international level. Other organs, whether part of the central government or of a territorial unit, unless otherwise authorized, do not." The VCLT, of course, deems officials who exercise *executive* functions—"Heads of State, Heads of Government and Ministers for Foreign Affairs"—to represent the State "in virtue of their functions."

44. In short, under established international law, whether Texas, or any other U.S. state, has a different interpretation of the Court's judgment is irrelevant to the issue before the Court. Similarly irrelevant are any interpretations by officials of other entities of the federal government that are not deemed by international law to speak on behalf of the United States. The United States—through its authorized representatives in this Court—has agreed with Mexico's requested interpretation; the *Avena* Judgment, we agree, imposes on the United States an "obligation

of result," and not merely an "obligation of means." Officials of Texas, or any other U.S. state, do not speak for the United States on the international plane, and nothing they have said or done can constitute a difference of views as to the meaning or scope of the *Avena* Judgment as between the only parties before the Court—Mexico and the United States.

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ii. Under U.S. Domestic Law, the President and His Representatives Speak for the United States

46. Under international law, representatives of the President and the Secretary of State are deemed to speak on behalf of the United States, and the Court need not look to U.S. domestic law to resolve that issue. Even so, U.S. domestic law clearly vests the President with the authority to conduct the United States' relations with foreign States.

47. The U.S. Constitution *expressly* assigns authority to conduct the foreign relations of the United States exclusively to the national government, in particular to the President. The U.S. Constitution grants the President the powers to serve as "Commander in Chief of the Army and Navy," "make Treaties" and "appoint Ambassadors [and] other public Ministers and Consuls" with the advice and consent of the Senate, and "receive Ambassadors." These authorities clearly comprise the power to speak authoritatively on behalf of the United States in international fora.

48. Moreover, the U.S. Constitution specifically *denies* certain foreign affairs powers to the states. Article I, Section 10 of the Constitution states that "[n]o state shall enter into any treaty," and provides further that states may not enter into agreements with other states or with foreign nations without the consent of the federal government. The Constitution also includes restrictions on the states' "laying any Imposts or Duties on Imports or Exports," and "engaging in War."

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52. . . . [E]ven if it were relevant, discerning the understanding of Congress regarding the "meaning or scope" of the *Avena*

Judgment would be a virtually impossible task. The nature of the Supreme Court involves different limitations that make it equally unsuited to speak for the United States on the international plane. Most important, the court has authority only to decide particular *cases* that come before it; it has no power to seek out and pronounce on questions of international law in the abstract.

53. Finally, to the extent the Supreme Court's understanding can be discerned, it would have to be regarded as sharing Mexico's requested interpretation. The Supreme Court stated in the *Medellín* decision that "[n]o one disputes that the *Avena* decision . . . constitutes an international law obligation on the part of the United States," and the decision appeared to take it for granted that the *Avena* decision imposed an obligation of result. As for Congress, nothing can be gleaned from the fact that it has not enacted legislation. There are countless reasons why Congress, or any legislative body, might not act on a particular issue, including the fact that other pressing issues may take priority. In any event, two legislators have offered a bill entitled the "Avena Case Implementation Act of 2008" which would provide a judicial remedy for persons "whose rights are infringed by a violation by any nonforeign governmental authority of article 36 of the Vienna Convention on Consular Relations."

C. The Fact That the Actions of U.S. State and Federal Authorities Engage the International Responsibility of the United States Does Not Mean Those Authorities Speak for the United States

54. Despite a mountain of legal authority establishing that the President, the Secretary of State, and their representatives speak authoritatively on behalf of the United States on the international plane, Mexico claims that Texas's understanding of the *Avena* Judgment nevertheless gives rise to a real dispute because the "actions of Texas engage the international responsibility of the United States." That argument confuses the principle of state responsibility with the question of who speaks for the state. Under international law, the question of whose actions implicate a State's international responsibility is clearly distinct from the question of who speaks authoritatively for the State on the international plane.

55. The law of state responsibility dictates that actions of governmental organs may be attributed to the State under international law. As the Commentary to the Draft Articles of State Responsibility states, "the first principle of attribution for the purposes of State responsibility in international law [is] that the conduct of an organ of the State is attributable to that State," and "[t]he principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility." According to this principle, the United States' international responsibility is implicated by a U.S. state carrying out the sentence of an *Avena* defendant without that person having received the review and reconsideration mandated by the *Avena* Judgment.

56. This does *not* mean, however, that that same U.S. state represents the United States internationally or speaks for the United States on the international plane. The Commentary to Chapter II of the Draft Articles (Articles 4–11) makes this distinction equally clear: "The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State." "*Such rules have nothing to do with attribution for the purposes of State responsibility*."

57. The judges of this Court who would have dismissed this case for lack of jurisdiction at the provisional measures stage noted this critical distinction. *See* Op. of Buergenthal, J. para. 13 ("The United States would, of course, be liable under international law for the failure of Texas or, for that matter, any other state of the United States to comply with the *Avena* Judgment, but only the United States Government is authorized under domestic law and international law to speak for the United States on the international plane."); Op. of Owada, Tomka, and Keith, JJ., paras. 16, 17 ("The proposition of law on which Mexico relies is not relevant in this context. . . . The issue of attribution is distinct from the question of who is authorized to speak for the State."); *see also* Op. of Skotnikov, J., para. 5.

58. . . . The international obligation falls on the United States as a whole. And the actions of all U.S. state and federal authorities

with respect to that obligation engage the international responsibility of the United States.

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60. The law . . . is this: The actions of U.S. states and other government entities engage the international responsibility of the United States, but those entities do not speak for it. The President, Secretary of State, and their representatives are competent to speak authoritatively on behalf of the United States on the international plane, including in this Court. And the United States *agrees* with Mexico's requested interpretation; it agrees that the *Avena* Judgment imposes an "obligation of result." There is thus nothing for the Court to adjudicate, and Mexico's application must be dismissed.

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Further Written Observations by the United States, October 6, 2008

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B. Speculative Inferences Regarding the United States' Conduct Cannot Negate Its Unequivocally Stated Interpretation of *Avena*

14. Having failed to cite a single inconsistent U.S. statement, Mexico argues that the Court can somehow infer a different interpretation from the United States' conduct—specifically, its decision to pursue certain means of implementing *Avena* over others. Mexico's argument has no merit.

15. For one thing, the Court has never in an interpretation case looked to the conduct of a party to determine whether a dispute exists. There is a good reason for this: An interpretive dispute necessarily involves opposing legal understandings regarding the meaning or scope of a prior judgment—it "requires a divergence of *views* between the parties on *definite* points." Those views and understandings are revealed by a party's statements before the Court and elsewhere, and cannot readily be discerned by the mute facts of a party's conduct. The fact that a party may be unable to fulfill an international obligation simply does not mean that it has a different interpretation of what that obligation is.

16. The situation is different in a dispute about the *application* of legal obligations to a party's conduct. For this reason, Mexico's reliance on the Court's decision in the *Headquarters Agreement Case* is misplaced. That case arose after the UN Secretary General requested that the United States enter into arbitration under the Headquarters Agreement, claiming that the U.S. violated the agreement by implementing a newly-enacted domestic law barring the Palestine Liberation Organization (PLO) from maintaining an observer mission at the United Nations. . . .

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18. Critically, the Court . . . state[d] that the dispute at issue concerned the *application* of the Headquarters Agreement. The Court observed that, on the main interpretive question, the United States did not dispute the United Nations' claim that U.S. actions were contrary to the Headquarters Agreement. Rather, the Court said, there existed "a dispute between the United Nations and the United States concerning the *application* of the Headquarters Agreement."

19. . . . Because the Headquarters Agreement required the parties to arbitrate disputes regarding *application* of the agreement, the United States' conduct was relevant in determining jurisdiction. Article 60, on the other hand, provides jurisdiction only as to disputes concerning *interpretation* of a prior judgment. While consideration of the United States' conduct would be relevant to whether the United States has complied with its obligations under *Avena*, that conduct cannot, by itself, reveal how the United States understands those obligations.

C. The United States' Conduct Is In Fact Consistent With Its Stated Position That *Avena* Imposes What Mexico Calls an "Obligation of Result"

20. The . . . United States' actions since the *Avena* decision make clear that it regards the decision as imposing an obligation to provide review and reconsideration of the convictions and sentences of the individuals included in *Avena*. Those actions are detailed at length in the United States' oral pleadings on

provisional measures, in its August 1, 2008 letter to the Court, and in its August 29, 2008 filing.

21. Mexico, however, picks out what the United States has *not* done, and argues on the basis of these "acts and omissions" that the Court should ignore the United States' stated position that it is bound to implement *Avena*. . . .

22. *First*, as we have previously informed the Court, the United States has sought practical and effective ways to implement the *Avena* Judgment. We have accordingly engaged Texas officials with a view to securing review and reconsideration for individuals included in the *Avena* decision. While we did not achieve what we hoped in Mr. Medellín's case, our efforts have yielded results. . . .

23. The fact that the United States, in implementing *Avena*, eschewed particular avenues that it judged unlikely to succeed or arguments that it viewed as inconsistent with existing rulings of the U.S. Supreme Court as a matter of U.S. domestic law does not mean that the United States has a different view of its international legal obligation under *Avena*. With respect to Mr. Medellín's last round of litigation, the Supreme Court's decision in *Medellín II* had previously made clear that Mr. Medellín could not obtain relief on the basis of the *Avena* Judgment or the President's directive to States to provide review and reconsideration to Mexican nationals covered by that Judgment. In addition, it was apparent from *Medellín II* that this Court's July 16, 2008 Order Indicating Provisional Measures (the "July 16 Order") could provide no additional legal ground on which Mr. Medellín could seek relief. We can appreciate Mexico's frustration with respect to the recent litigation involving Mr. Medellín, but the United States' decisions with respect to that litigation do not mean that it has a different understanding of the *Avena* Judgment.

24. *Second*, despite Mexico's insistent focus on the issue, legislation is not an especially promising avenue for implementing *Avena* at this time. It is true that a bill was introduced by two members of one house of Congress, but no committee, much less the full Congress, took any action on the bill before Congress adjourned. [H.R. 6481, 100th Cong. (2008)] Moreover, as the United States made clear in its first written submissions, the fact that Congress has not enacted legislation is irrelevant to whether

the United States interprets *Avena* to impose an "obligation of result." Mexico also complains that the federal Executive has not pushed the legislation. But it is up to U.S. officials to decide how best—legally and politically—to ensure compliance with *Avena*. The fact that the Executive did not push for legislation in a short legislative session occupied with many other pressing priorities obviously is no basis for the Court to second-guess the United States' stated interpretation of the *Avena* Judgment.

III. The Court Lacks Jurisdiction to Entertain Mexico's Request for a Declaration of Breach of the Provisional Measures Order

25. The Court lacks jurisdiction to rule on the merits of Mexico's supplemental request that the Court declare the United States in breach of the Court's July 16 Order.

26. The Court's jurisdiction to determine whether a party has breached a provisional measures order is derived from its jurisdiction to adjudicate the underlying dispute. *LaGrand* is instructive. In that case, Germany sought to add to its Vienna Convention claims a claim for breach of the Court's provisional measures order. The Court determined that it had jurisdiction over the additional claim because it "concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction [and] *are thus covered by Article I of the Optional Protocol* [to the Vienna Convention]." In other words, the Court held that it could hear the provisional measures claim because it rested on the same jurisdictional basis—Article I of the Optional Protocol—as Germany's Vienna Convention claims.

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28. [In this case, *f*]*irst*, because the Court has no basis to adjudicate Mexico's request for interpretation, it also has no basis to address an ancillary claim founded entirely on that application. The principle here, closely related to the Court's reasoning in *LaGrand*, is that where the Court does not have jurisdiction to decide a case, it lacks jurisdiction to rule on ancillary submissions. Consistent with this principle, the Court has carefully distinguished its power to indicate provisional measures under the "special

provision" in Article 41 of the ICJ Statute from its authority to entertain the merits of a case. In *Anglo-Iranian Oil Co.*, the Court's jurisdiction to hear the merits was governed by "the general rules laid down in Article 36 of the Statute," which the Court made clear "are wholly different from the special provisions of Article 41 . . . [and] are based on the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties."Article 41 authorizes the Court only to indicate provisional measures to preserve the rights of the parties while the case is pending; the Court requires a separate jurisdictional basis to hear a case on the merits. Here, the Court's jurisdiction to entertain the merits is governed by Article 60, not Article 36, but the same principle holds: the limited power granted by Article 41 to indicate provisional measures does not provide jurisdiction to examine the question of breach of the provisional measures order.

29. There are sound reasons for this approach. Provisional measures are intended only to preserve the status quo pending the Court's resolution of the rights of the parties as they existed at the time of the application. But once the Court determines that it has no basis to adjudicate that application, it serves no purpose to inquire whether the parties have maintained the status quo with respect to a claim that is now only theoretical.

30. Where the Court lacks jurisdiction, a declaration of non-compliance with provisional measures would seriously undermine the consensual basis of the Court's jurisdiction. This concern is real enough when the Court indicates provisional measures before finally establishing its jurisdiction. As Professor Rosenne observes, "prima facie jurisdiction can make serious inroads into the traditional consensual basis of the Court's jurisdiction." In such situations, it may be that the risk of imposing obligations on a State without its consent is warranted if the preliminary measures are necessary for the Court to perform its adjudicatory function. But once the Court has determined that it lacks jurisdiction—in effect, a finding that one of the parties has *not* consented to the Court's intervention—there is no justification for declaring that party's legal obligations.

31. *Second*, even if the Court has jurisdiction over the request for interpretation, Article 60 does not provide jurisdiction for Mexico's provisional measures claim. The Court's jurisdiction in the present proceedings is defined by Article 60, which limits jurisdiction to disputes as to the "meaning or scope" of the *Avena* judgment. Mexico's claim that the United States breached the Court's provisional measures order is not a dispute as to the "meaning or scope" of the *Avena* Judgment and is thus beyond the Court's Article 60 jurisdiction.

32. *LaGrand*, of course, was different. There, the Court had jurisdiction under the Optional Protocol over *all* "disputes arising out of the interpretation or application of the [Vienna Convention]." Even if a case had not been already pending before the Court, there would have been jurisdiction under the Optional Protocol for Germany to bring a separate claim that the execution of the LaGrand brothers violated the United States' Vienna Convention obligations. Germany's claim that the LaGrand executions violated the provisional measures order was simply another aspect of its Vienna Convention claims. For this reason, in concluding that it had jurisdiction, the Court noted that the provisional measures claim also concerned issues that were "covered by Article I of the Optional Protocol."

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34. The Court has repeatedly stated that it will not address new claims that would transform a case "into another dispute which is different in character." Mexico's provisional measures claim would undoubtedly transform the nature of the present proceedings and remove them from Article 60 special jurisdiction. The Court has no basis to entertain it.

* * * *

2. Alien Tort Statute and Torture Victim Protection Act

a. Overview

The Alien Tort Statute ("ATS"), also often referred to as the Alien Tort Claims Act ("ATCA"), was enacted in 1789 and is

now codified at 18 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." The statute was rarely invoked until *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); following *Filartiga*, the statute has been relied upon by plaintiffs and interpreted by the federal courts in various cases raising claims under international law. In 2004 the Supreme Court held that the ATS is "in terms only jurisdictional" but that, in enacting the ATS in 1789, Congress intended to "enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act ("TVPA") was enacted in 1992 and is codified at 28 U.S.C. § 1350 note. It provides a cause of action in federal courts against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals regardless of nationality, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains a ten-year statute of limitations.

On April 11, 2008, Department of State Legal Adviser John B. Bellinger, III, spoke about "Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches" at Vanderbilt Law School in Nashville, Tennessee. Mr. Bellinger's speech, excerpted below, provided a history of litigation brought by foreign plaintiffs in U.S. courts under the ATS, and the executive branch's response to those suits. The speech also analyzed the ways in which such suits may not be consistent with U.S. policies for promoting human rights abroad. The full text of Mr. Bellinger's speech is available at *www.state.gov/s/l/c8183.htm*.

* * * *

. . . [T]he Supreme Court for the first time considered the ATS in its modern incarnation in the 2004 case of *Sosa v. Alvarez-Machain*. . . .*

The Supreme Court ruled that the ATS is only a jurisdictional statute, and does not by itself create a cause of action. But the Court also reasoned that the First Congress "understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations." Justice Souter's opinion for the Court identified three 18th-century causes of action as paradigmatic: offenses against ambassadors, violations of "safe conduct,"—that is, official permission for a foreigner to travel freely through U.S. jurisdiction—and piracy. The Court also did not foreclose certain additional suits for violations of international law, provided, among other limitations, that the claim "rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features [of these paradigmatic offenses]." . . .

* * * *

The Court thus accepted the narrow "jurisdictional" interpretation of the ATS advocated by the Executive Branch, but held that the ATS authorized federal courts to recognize certain new causes of action. Significantly, however, the Court identified a number of factors that counseled special "judicial caution" and a "restrained conception of the discretion a federal court should exercise in considering a new cause of action" under the ATS. Among other things, the Court recognized the "potential implications for the foreign relations of the United States" that "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." Accordingly, the Court stressed that devising new federal common law causes of action based on international law "should be undertaken, if at all, with great caution." Justice Souter's opinion summed up the situation: the door for ATS litigation was "still ajar subject to vigilant doorkeeping."

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* Editor's note: *See Digest 2004* at 340–54 for a discussion of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Notwithstanding the Court's directive for restraint, almost four years later, litigation has showed no signs of slowing down. Plaintiffs continue to push against the door the Court left "ajar," arguing for expansive applications of customary international law. . . . The Second and Ninth Circuits, in particular, have proceeded as before. . . .

This continued litigation under the ATS reflects fundamental problems with how lower courts have approached these suits. These problems center on five key issues: *First*, whether the ATS applies extraterritorially—that is, whether a U.S. court can properly apply U.S. federal common law under the ATS to conduct that occurred entirely in the territory of a foreign State. *Second*, even if such a cause of action could properly be recognized, whether exhaustion of adequate and available local remedies in that foreign country should be a prerequisite to bringing an ATS suit. *Third*, whether corporations or other private entities may be held liable under the ATS for aiding and abetting human rights abuses perpetrated by foreign governments. A *fourth* issue is how to apply *Sosa*'s requirement that an international-law norm be sufficiently accepted and specific. And *fifth*, in what circumstances should courts dismiss suits based on what *Sosa* referred to as "case-specific deference to the political branches"?

* * * *

. . . Since *Sosa*, we have made . . . [amicus] filings in about a dozen cases. Given the nature of the underlying allegations in certain cases, the decision whether to file can be a weighty one.

Our usual practice in these cases has been to make arguments for *general* legal principles concerning ATS litigation, and to avoid delving into the underlying merits of any particular case. We have typically argued, . . . for limiting ATS litigation by resolving legal issues in light of *Sosa*. These include the issues of extraterritoriality, aiding and abetting, and exhaustion of local remedies. . . . The Executive has sought to have courts dismiss one case—the suit involving the bulldozers used by the Israelis—based on "case-specific" deference to the political branches, as suggested in *Sosa*.** Although the

** Editor's note: *See Digest 2007* at 219–26 for a discussion of *Corrie v. Caterpillar*, 503 F.3d 924 (9th Cir. 2007).

bulldozer case was dismissed, these arguments have not always won traction in the lower courts. Still, they remain in play in a number of cases and ultimately their validity will likely be determined by the Supreme Court.

Now let me turn to some of the issues raised by ATS litigation.

To start, it has been argued that ATS litigation holds out the possibility of certain benefits. Let me mention three quickly. *First* is that ATS suits can promote accountability and provide a public voice to victims of terrible human rights abuses, when no other forum is available, and that allowing claims of human rights abuses to be heard in court helps recognize the dignity of the victims. *Second* is that ATS litigation may help to raise public and political awareness of human rights abuses that might not gain attention otherwise, which, it is said, might have the effect of spurring political action to address ongoing abuses, prevent future abuses, or devise appropriate standards of conduct for corporations. *Third*, ATS litigation might advance U.S. participation in the development of customary international law.

Apart from the fact that they are not legal arguments, and were not the reasons for enactment of the ATS, these suggested benefits also may not be as significant as they might first seem. ATS cases might not be always driven by a simple desire to see justice done; like all private civil litigation, they might sometimes be motivated by other considerations, such as money or politics. Moreover, litigating issues in U.S. courts does not generally promote the development of effective remedial mechanisms in the foreign country concerned. The benefits of having U.S. courts engage in the development of international law are also not altogether clear, because much ATS litigation has focused on defining U.S. *domestic* law and its proper reach. And properly so: the Supreme Court held in *Sosa* that the law to be applied under the ATS is *U.S.* federal common law. That law governs, for example, the extraterritorial application of the ATS, and also in large part aiding and abetting liability and exhaustion of local remedies. When courts do consider customary international law, there is also a risk that their interpretations could be in tension with those advanced internationally by the Executive Branch. Still, an assessment of the ATS as a matter of policy should consider these issues.

There are also substantial costs to ATS litigation. The important ones are not financial . . . . The real costs, however, fall into two basic categories: what I will call "diplomatic" costs and "democratic" costs.

First, the "diplomatic" costs. . . . [F]oreign governments do not see the ATS as an instance of the United States constructively engaging with international law. . . .

In letters to the State Department or in amicus filings in federal courts, foreign governments consistently argue that the assertion of U.S. court jurisdiction over cases that have little connection to the United States is inconsistent with customary international law principles and interferes with national sovereignty. . . .

* * * *

. . . The diplomatic friction caused by these cases runs directly contrary to one of the reasons for enacting the ATS—to *prevent* harassment of foreign officials in the United States and *prevent* international incidents. . . .

In addition to causing diplomatic friction, ATS litigation also exacts "costs" through the lack of democratic checks and accountability. For one, the ATS places few limits on who may bring suit. By its terms, any "alien" can bring suit, and often suits are brought by aliens who have no presence in, or contacts with, the United States. . . .

More broadly, the lack of a predicate judgment by the political branches that such suits should be brought is a significant problem. . . . Congress, in the text of the ATS, has provided virtually no guidance to courts as to how to define causes of action under U.S. law based on international legal norms. . . .

Furthermore, unlike the limited and specific nature of 18th-century law-of-nations offenses, such as piracy, international law today has developed significantly and comprises a significant and somewhat unwieldy body of norms. ATS plaintiffs nearly always rely on customary international law. As a practical matter, management of ATS litigation depends on the . . . Judiciary . . . interpreting an ill-defined body of law—customary international law—that is the *President*'s responsibility on the international

plane, and that unlike statutory or treaty law, is not the product of a formal Legislative or Executive process.

* * * *

As I have said, the Executive Branch often participates in ATS litigation as an amicus. Such filings are made by the Justice Department in coordination with the State Department and, as appropriate, other components within the Executive Branch. Sometimes, especially in the district courts, filings are made in response to an invitation from the court to express the views of the United States. Those requests are themselves a sign that ATS litigation is putting the courts in the awkward position of adjudicating issues touching on U.S. foreign policy. . . .

Such case-by-case participation can put the Executive Branch in a difficult spot, too. Foreign governments will continue to press U.S. Administrations to weigh in on their behalf in ATS litigation. If the Executive is expected to weigh in when litigation presents foreign policy concerns, courts may come to infer (wrongly) from its silence in other cases that there are no such concerns. In addition, foreign governments may come to regard the Executive's decisions whether or not to file as a reflection of the United States' view of its bilateral relationship with that government. . . .

But despite the problems of case-by-case participation, the Executive Branch has real interests in ensuring that as a matter of policy, ATS litigation does not interfere with its conduct of foreign relations. I have already noted foreign governments' concerns about the scope of U.S. court jurisdiction under the ATS. In addition, recent ATS suits have been used by litigants to duplicate, replace, or proceed on top of the U.S. government's systemic efforts to reform foreign government practices or help end foreign conflicts. Often, these suits are brought as class actions for all aliens injured by the challenged conduct, effectively asking the U.S. courts to serve as administrator of an international claims program for foreign nationals. . . . Cases such as these tend to directly implicate broad U.S. foreign policy concerns.

Without a formal role in the statute, the Executive's participation through statements of interest and amicus briefs is one of the

few practical ways that the United States can seek to confine the scope of the ATS in a manner that is faithful both to its limited historical roots and the restrained conception of the ATS explained by the Supreme Court in *Sosa*. . . .

* * * *

Beyond the ATS, however, we also need to focus on the many other tools the U.S. government, and in particular the State Department, can use to prevent and redress human rights abuses. Some of these are tools of persuasion—for example, the State Department's annual human rights reports, which review countries' human rights practices and focus attention on reported abuses. The State Department also conducts quiet and public diplomacy, in bilateral and multilateral fora, and administers a variety of programs intended to foster development of the rule of law in other countries—a critical aspect of preventing and redressing human rights abuses. We also support voluntary multi-stakeholder initiatives to promote corporate codes of conduct in the developing world, such as the Voluntary Principles in the Extractive Industries.

At the same time, the United States continues to support holding foreign government officials, and other persons, criminally accountable when they commit torture or other serious human rights abuses. In the cases of Rwanda and the former Yugoslavia, the United States has supported special international tribunals to try and punish the guilty. In addition, the domestic *criminal* law and jurisdiction of the United States is available to punish torture and genocide. . . .

We need to continue to foster these and other approaches to enforcing human rights. . . .

b. Political question: Exxon Mobil Corp. v. Doe

On June 16, 2008, the Supreme Court denied a writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit in a case involving claims brought by Indonesian villagers against U.S. companies and an Indonesian subsidiary

for alleged torture and killings committed by Indonesian military security forces. *Exxon Mobil Corp. v. Doe*, 128 S. Ct. 2931 (2008). The D.C. Circuit had determined that it had no jurisdiction to review a district court's decision dismissing claims based on the ATS and TVPA as barred by the political question doctrine and denying dismissal of claims based on state law on that ground. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007). In May 2008 the United States had filed an *amicus* brief at the invitation of the Supreme Court in the case, addressing the question posed:

> Whether a district court's denial of a private defendant's motion to dismiss state-law tort claims on the ground that the litigation will interfere with the Nation's foreign relations is immediately appealable under the collateral order doctrine.

The United States argued that the question should be answered in the negative because U.S. concerns on foreign relations grounds had been adequately addressed by the district court. Excerpts below set forth the U.S. view on the proper role of U.S. foreign affairs concerns in these circumstances (citations to other submissions in the case omitted). The full text of the U.S. *amicus* brief is available at *www.usdoj.gov/osg/briefs/2007/2pet/6invit/2007-0081.pet.ami.inv.html*.

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* * * *

The district court carefully considered concerns identified by the United States in its submissions to that court. Largely on the basis of those concerns (and reaching the result the United States had advocated with respect to respondents' ATS claims), the court dismissed respondents' federal-law claims, and dismissed all claims against a defendant indirectly owned by the Indonesian government. The court did not, however, dismiss respondents' state-law tort claims against the private defendants. While the motion to dismiss was pending, the United States expressed concern that the

extensive discovery sought by respondents would have adverse consequences for the Nation's foreign affairs. The district court responded by limiting discovery in a manner intended to avoid offending Indonesia's sovereign interests. In light of that procedural history and the absence of a request by the United States that the case be dismissed in its entirety, the court of appeals reasonably regarded petitioners' interlocutory appeal as one from the denial of a motion to dismiss state-law tort claims based on an assertion by private defendants, not by the Executive, that the litigation itself would have adverse consequences for the Nation's foreign policy interests and thus raised separation-of-powers concerns.

. . . Moreover, the court of appeals concluded that this case did not clearly involve the premise on which petitioners rest their question presented—*i.e.*, that there was a warning by the Executive that the litigation itself, even as substantially narrowed by the district court, would risk a potentially serious adverse impact on significant foreign policy interests of the United States. . . .

* * * *

[1.] . . . As the Court recognized in *Ex Parte Republic of Peru*, 318 U.S. 578 (1943), which came to the Court on a petition for a writ of mandamus, "it is of public importance that the action of the political arm of the Government" in recognizing a foreign state's claim of immunity "be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court." *Id.* at 587.

2. To the extent that the court of appeals' opinion suggests that separation-of-powers considerations could support the right to avoid the burdens of trial and therefore warrant collateral order appeal only in cases involving a claim of immunity, the United States does not agree. . . .

* * * *

In the foreign affairs context, the Court has recognized that the views of the Executive Branch with regard to the implications of certain litigation for the Nation's foreign affairs would be entitled

to deference. See *Sosa*, 542 U.S. at 733 n.21; *Altmann*, 541 U.S. at 702. When the Executive Branch determines that the very pendency of litigation in United States courts involving the conduct of foreign governments will frustrate the Nation's foreign policy goals, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa*, 542 at 733 n.21. See *Altmann*, 541 U.S. at 702 (State Department's "opinion on the implications of exercising jurisdiction over *particular* [foreign government defendants] in connection with *their* alleged conduct * * * might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy"). When the Executive explicitly seeks dismissal because the *pendency* of the litigation will adversely affect foreign relations, a district court's refusal to defer to that determination would satisfy the third prong of the collateral order doctrine. For, in that situation, "a trial * * * would imperil a substantial public interest," such that delaying appellate review until after such a trial would "effectively" deny relief, *Will*, 546 U.S. at 353. In that case, but not in all cases in which a political question defense is raised, the very import of the defense will be lost if the suit proceeds to discovery and trial. Thus, the court of appeals was incorrect to the extent it suggested that only when an immunity from suit is asserted can separation-of-powers values support a collateral order appeal.

* * * *

b. This case is not in any event a suitable vehicle for resolving the question petitioners raise. Petitioners frame the question presented as whether collateral order appeal is available when the "lawsuit challenges the activities of a foreign government, and the Executive warns that the litigation itself, and not just the effects of a final judgment, would risk a potentially serious adverse impact on significant foreign policy interests of the United States." The court of appeals did not decide that question, however, because it did not believe that the factual predicate of the question as framed by petitioners was satisfied. To the contrary, the court rejected petitioners' assertion of a "conflict between the views of the State Department and those of the district court."

The court of appeals emphasized that the case, as it came before that court, was not one that challenged the conduct of the Indonesian government. Thus, the court pointed out that the district court had "dismissed [respondents'] claims against a natural gas company that was partially owned by the Indonesian government," which the district court recognized as posing a "risk of interfering in Indonesian affairs," . . . Moreover, the United States had said that its "concerns can be avoided by holding * * * that the ATS does not create an independent right of action," and the district court responded by granting petitioners' motion to dismiss the ATS and TVPA claims, which were premised on alleged violations of international law by the Indonesian government. The court of appeals therefore regarded respondents' case as having been narrowed to one involving state "tort claims by private plaintiffs against a private corporation."

For similar reasons, the court of appeals did not regard petitioners' appeal as one in which the Executive Branch had warned that the litigation itself would interfere with the Nation's foreign policy interests. The Executive had not "requested the dismissal of the action against Exxon" in its entirety, and the majority noted that the United States "did not intervene" or otherwise participate in the court of appeals in support of petitioners' appeal or its petition for mandamus. No decision of this Court or of any other court of appeals supports the availability of a collateral order appeal by a private party in these circumstances.

Petitioners place considerable emphasis on this Court's recognition in *Sosa* and *Altmann* of the important concerns relating to the separation-of-powers that are at stake in litigation that implicates the Nation's foreign affairs. But as a result of the district court's rulings narrowing the scope of respondents' suit, the case now presents neither of the particular situations discussed in *Sosa* and *Altmann*. In *Sosa*, the Court addressed the deference owed to the Executive Branch by the courts in exercising their federal-common-law-making authority under the ATS with respect to claims alleging violations of international law. 542 U.S. at 725–733. Here, the district court dismissed respondents' claims under the ATS, as the United States had requested, as well as those under the TVPA. In *Altmann*, the Court addressed the question whether a suit against a foreign government, although within the terms

of one of the exceptions to immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. 1605(a) (Supp. V 2005), might nonetheless present a sufficient threat to the Nation's foreign policy interests that it should be dismissed. *Altmann*, 541 U.S. at 701–702. Here, respondents' claims against PT Arun, an Indonesian corporation that is majority owned by Indonesia's state-owned oil and gas company, were dismissed by the district court out of concern that "[a]djudicating the liability of an entity owned by the Indonesian government would create a significant risk of interfering in Indonesian affairs." The petition's emphasis on the troublesome nature of claims brought under the ATS and TVPA, and suits against foreign states, ignores those rulings by the district court. And in so doing, it asks the Court to resolve a question that the court of appeals did not believe was presented, and that it therefore could not have purported to answer.

* * * *

c. International comity: Mother Doe v. Sheikh Hamdan

In 2007 a group of plaintiffs sued Sheikh Hamdan, the Minister of Finance of the United Arab Emirates ("UAE") and the Deputy Ruler of Dubai, and other unnamed defendants under the Alien Tort Statute, alleging that the defendants had trafficked them (or their children) into the UAE from various African and South Asian countries to serve as camel jockeys, camel trainers, and camel tenders. *Mother Doe v. Sheikh Hamdan*, Civ. No. 07-CV-00293 KSF (E.D. Ky.). The complaint, which was filed in the Eastern District of Kentucky, asserted that the defendants had violated international norms prohibiting slavery and forced labor and included counts of battery, assault, intentional infliction of emotional distress, wrongful death, and survival based on state law.*

* Editor's note: The plaintiffs had filed a nearly identical lawsuit in federal district court in Florida in 2006, but on July 30, 2007, the court dismissed that suit without prejudice on personal jurisdiction grounds. *See Mother Doe I ex rel. R.M. v. Al Maktoum*, 2007 WL 2209258 (S.D. Fla. 2007).

On September 5, 2008, the United States filed a Statement of Interest in support of Sheikh Hamdan's motion to dismiss. The United States summarized its position as follows:

> . . . [T]he United States submits that the Alien Tort Statute (ATS), 28 U.S.C. § 1350, does not apply to purely extraterritorial claims such as those asserted here. Moreover, even if some extraterritorial claims could be cognizable under the ATS, the United States requests that the Court defer, on grounds of international comity, to the comprehensive remedy created by those countries with the strongest interests in the alleged events underlying this litigation, and intended by those countries to be the exclusive remedy for plaintiffs' claims.
>
> . . . [T]he United States is committed to combating human trafficking in all its forms and has repeatedly condemned the abuse of child camel jockeys. The United States' participation in this litigation is intended not to condone any of the activities alleged by plaintiffs but rather to set forth its interest in the proper application of the ATS and, importantly, to support dismissal of this suit on grounds of international comity even if the Court were to find plaintiffs' claims to be cognizable under the ATS or otherwise.

In its Statement of Interest, the United States further described the U.S. commitment to combating human trafficking, both within and outside of the United States, particularly through initiatives arising out of the Trafficking Victims Protection Act of 2000, as amended, 22 U.S.C. §§ 7101–7112. The United States described the Department of State's annual Trafficking In Persons ("TIP") Report (*see* Chapter 3.B.3.a.) as a "key element of the United States' diplomatic efforts to combat international human trafficking," noting that the June 2005 TIP Report had "strongly condemned the practice of trafficking young African and South Asian boys to serve as camel jockeys in the UAE," and urged the UAE "to take immediate steps to rescue and care for the many foreign children trafficked to the UAE as camel jockeys . . . ."

The United States also described the UAE's efforts to end the practice of using trafficked children in the camel racing industry and establish a remedy for former child camel jockeys in conjunction with the former child jockeys' countries of nationality. As the report stated:

> The UAE banned the use of children as camel jockeys in 2005, and has actively monitored camel races since then to ensure compliance with the ban. In addition to ending the use of child camel jockeys, the UAE has pursued a two-part remedial program to provide social services and compensation to benefit former child camel jockeys, referred to herein as the "UAE Program."
>
> First, in 2005 the UAE and UNICEF created a program to identify, shelter, and repatriate former child camel jockeys, and to provide additional social and support services to them in their home communities. . . . Broadly speaking, the community-based UNICEF programs seek to ensure that the children's reintegration into their families and communities is successful and lasting, to prevent those children from being trafficked again, and to facilitate their access to education and training. . . .
>
> The second part of the remedial program was launched in April 2007, when the UAE signed bilateral memoranda of understanding (MOUs) with Pakistan, Bangladesh, Sudan, and Mauritania that created claims facilities to compensate former child camel jockeys for injuries that they suffered while in the UAE. . . .
>
> Each of the bilateral MOUs contains a clause expressing the intent of the parties "that the Program, consisting of both the UAE–UNICEF community-based benefits and the individual benefits provided by the Facility, serve as the exclusive remedy for children formerly involved in camel racing in the UAE." In addition, on April 24, 2007, the governments of the UAE, Pakistan, Bangladesh, Sudan, and Mauritania, and a representative of UNICEF signed the Abu Dhabi Declaration, which declared that

> "it would be in the best interests of achieving the important goals of providing prompt, meaningful and adequate aid and compensation to children formerly involved in camel racing, as well as their families and the communities from which they originate, for the Program to be the preferred and most appropriate remedy and forum for the resolution of all claims that have been or may be asserted by children formerly involved in camel racing in the UAE."

Excerpts follow from the U.S. Statement of Interest addressing the U.S. argument that, as a matter of international comity, the court should defer to the UAE Program as the exclusive remedy for addressing the injuries of former child camel jockeys. (Footnotes and citations to most other submissions in the case are omitted.) The full text of the U.S. Statement of Interest and the accompanying letter from John B. Bellinger, III, Department of State Legal Adviser, are available at *www.state.gov/s/l/c8183.htm*. The case was dismissed for lack of personal jurisdiction on November 8, 2008. *Mother Doe v. Sheikh Hamdan*, 2008 U.S. Dist. LEXIS 93758 (E.D. Ky. 2008).

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The Supreme Court has described international comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895)).

Concerns for international comity arise in this case because of the direct conflict between the provision of the MOUs calling for the UAE Program to "serve as the exclusive remedy for children formerly involved in camel racing in the UAE" and the alternative

remedies plaintiffs ask this Court to create pursuant to its authority under the ATS. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993) (holding that the existence of a conflict between foreign and domestic law is a predicate to the application of the international comity doctrine) (citing *Societe Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part)). Because this Court cannot adjudicate plaintiffs' claims and also give effect to the exclusivity provisions of the MOUs, this Court must determine whether to defer to the foreign law at issue in this case—the UAE Program—or create federal common law pursuant to the ATS to resolve plaintiffs' claims.

In determining whether to defer to conflicting foreign law, a federal district court must "perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime." *Societe Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part). . . .

Courts have recognized that "'international comity' may describe two distinct doctrines: as a canon of construction, it might shorten the reach of a statute; second, it may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996). The first "might be termed 'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws." *Hartford Fire*, 509 U.S. at 817 (Scalia, J., dissenting). The second has been referred to as "the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere." *Id.* Both aspects of comity are implicated in this case brought pursuant to the ATS, because this Court must determine both whether to create a cause of action that conflicts with the exclusivity provisions of the UAE Program and whether to decline to exercise its subject-matter jurisdiction in favor of the alternative forum created by the MOUs.

Relying on notions of prescriptive comity, courts have constricted the reach of domestic statutes that might otherwise be applied to extraterritorial conduct in deference to conflicting foreign law. *See Hartford Fire*, 509 U.S. at 814–21. . . .

This line of analysis . . . has been applied generally to temper U.S. statutes that may apply extraterritorially. *See Hartford Fire*, 509 U.S. at 816–18 (citing cases restricting the extraterritorial application of antitrust laws when United States interests are outweighed by foreign interests). This line of analysis is also consistent with the Restatement (Third) of Foreign Relations Law of the United States, which requires a state to limit the reach of its prescriptive jurisdiction—even where the exercise of such prescriptive jurisdiction is reasonable—when the exercise of such jurisdiction conflicts with that of a nation with "clearly greater" interests in the regulated conduct. Restatement (Third) of Foreign Relations Law of the United States § 403(3). . . . The Restatement's framework has been adopted by courts attempting to resolve conflicts between foreign and domestic law. *See In re French*, 440 F.3d 145, 153 (4th Cir. 2006) (applying Restatement factors in bankruptcy context); *In re Maxwell*, 93 F.3d at 1048 (same); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 63 (S.D. Tex. 1994) (dismissing claims brought by Ecuadorian nationals for environmental harm suffered in Ecuador on grounds of international comity).

Here, consideration of both the foreign interests and the interests of the United States (as well as the international community's interest in a smoothly functioning legal regime, which is intertwined with those interests) counsels dismissal of this case in favor of the UAE Program.

1. Foreign Interests

The foreign interests in the alleged events underlying this case are considerably stronger than the United States' interest in those alleged events, and uniformly support dismissal of this case. Plaintiffs' claims arose largely, if not entirely, in the territories of the signatories of the MOUs, and the parties to this litigation are likely nationals of those same countries. The "source" countries of Pakistan, Bangladesh, Sudan, and Mauritania have clearly stated their intent that the UAE Program should serve as the exclusive remedy for the resolution of their nationals' claims. They have done so based on their view that exclusive resort to the UAE Program is "in the best interests of achieving the important goals of providing prompt, meaningful and adequate aid and

compensation to children formerly involved in camel racing, as well as their families and the communities from which they originate. . . ."

Federal courts routinely recognize the authority of nation-states to determine the appropriate forum for the resolution of claims against foreign governments or entities by their nationals. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 687 (1981) (upholding Presidential orders implementing an international agreement between the United States and Iran requiring the United States to terminate and prohibit all litigation involving the claims of its nationals against Iran and submit the claims to binding arbitration); *Bi v. Union Carbide Chemicals and Plastics Co. Inc.*, 984 F.2d 582, 585–86 (2d Cir. 1993) (affirming dismissal of a suit seeking redress for injuries suffered by plaintiffs in the Bhopal chemical disaster in recognition of an Indian law that gave to the Indian government "the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim" relating to the disaster). Likewise, under international law "a state may bring claims, inter alia, for violations of international obligations resulting in injury to its nationals or to other persons on whose behalf it is entitled to make a claim under international law." Restatement (Third) of Foreign Relations Law of the United States § 902(2).

Accordingly, "a state's claim for a violation that caused injury to rights or interests of private persons is a claim of the state and is under the state's control. The state may determine what international remedies to pursue, may abandon the claim, or settle it." *Id.* (comment i). Here, the source countries have, by international agreement, plainly stated their intention that the exclusive remedy for the resolution of plaintiffs' claims is the UAE Program, which is currently providing social support services and hearing claims in the source countries. Concerns for international comity counsel deference to foreign sovereigns' wishes to settle disputes involving their nationals in a local forum. *See Republic of the Philippines v. Pimentel*, __ U.S. __, 128 S. Ct. 2180, 2190 (2008) ("There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or

good cause."). And the source countries' decisions to resolve the claims of their nationals—claims with no nexus to the United States—should not be subject to reexamination in a U.S. court. In this regard, the Supreme Court has repeatedly recognized "'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W.S. Kirkpatrick & Co., Inc. v. Envt'l Tectonics Corp.*, 493 U.S. 400, 404–05 (1990) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). Accordingly, due respect for the sovereign interests of the source countries supports dismissal on grounds of international comity.

Likewise, the UAE has substantial interests in resolving claims against its nationals that have arisen, in large part, within its territorial jurisdiction. In analogous circumstances, federal courts have recognized the interests of Germany in resolving Nazi-era claims against German corporations in an alternative forum created by international agreement, and dismissed cases brought in U.S. courts on grounds of international comity. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1239 (11th Cir. 2004) ("[T]he German government has a significant interest in having the Foundation be the exclusive forum for these claims in its efforts to achieve lasting legal peace with the international community."); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 386–88 (D.N.J. 2001). In addition to the exclusivity provisions of the MOUs and the Abu Dhabi Declaration, the UAE has expressed its concern to the United States through diplomatic channels that continued litigation in the United States will interfere with the continued operation of the UAE Program and severely jeopardize the good relationship between the UAE and the United States. Thus, the strong foreign interests present in this litigation support recognition of the UAE Program as the exclusive remedy.

2. The United States' Interests

As regards international comity, the Court's final task is to determine the interests of the United States in regulating the conduct at issue in this case. As noted, none of the events giving rise to this litigation occurred within the territorial jurisdiction of the

United States, and none of the parties are citizens or residents of the United States. Furthermore, as described in the attached letter from John Bellinger, Legal Adviser for the United States Department of State, dismissal of this case in deference to the UAE Program is consistent with the foreign policy interests of the United States. The Department of State's articulation of this "case's impact on foreign policy" is entitled to "serious weight." As the Supreme Court recognized in *Sosa*, the "potential implications for the foreign relations of the United States of recognizing [new causes of action based on the law of nations] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727.

The United States has a strong interest in encouraging other countries to collaborate in their efforts to combat trafficking in the most effective manner. *See* 22 U.S.C. § 7101(24); 22 U.S.C. § 7103(d)(4). Recognition of the UAE Program as the exclusive remedy will further this interest. Conversely, failure to defer to the UAE Program will threaten to disrupt the "close and cooperative relationship" between the United States and the UAE, and signal to other countries that efforts to address human trafficking in response to concerns raised by the United States and other countries or international organizations may be undermined by litigation in the United States.

Furthermore, as the Department of State explains, the UAE Program is superior to litigation in the United States because it provides prompt, certain, and local benefits that would not be available through litigation in the United States:

> The UAE remedial programs offer benefits that are unavailable through litigation in U.S. courts. Both the community-based social services and monetary compensation the claims facilities provide are available to all former child camel jockeys who worked in the UAE, without regard to who their particular employer was (and thus, without a need to identify a particular "defendant"). Moreover, the social services have already been made available and continue to be available, without any need to await formal

> adjudication. Further, the claims adjudication process that will make monetary compensation available is an expedited process designed to provide prompt payment. In contrast, the plaintiffs' ability to recover in U.S. courts at all is uncertain, and any recovery could be delayed by years of litigation.

For these reasons, the United States requests that the Court implement the stated desire of those foreign nations with the strongest interests in these claims that the UAE Program should be the exclusive remedy, and supports dismissal on international comity grounds.

* * * *

d. Aiding and abetting: American Isuzu Motors v. Lungisile Ntsebeza

On May 12, 2008, the U.S. Supreme Court entered an order "affirming [*Khulumani v. Barclay Nat'l Bank, Ltd.*, 509 F.3d 148 (2d Cir. 2007)] with the same effect as upon affirmance by an equally divided Court" without considering the case on the merits. *American Isuzu Motors, Inc. v. Lungisile Ntsebeza*, 128 S. Ct. 2424 (2008). Four of the Justices had recused themselves from the case and thus, the Court explained, under the circumstances—that it "lack[ed] a quorum" and that "a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of the Court," i.e., that the recusal issue could not be resolved—the judgment was affirmed under 28 U.S.C. § 2109.* Such summary

* Editor's note: Section 2109 provides: "In any [case other than a direct appeal from a district court] brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

affirmances do not create precedent and thus the issue remains unresolved in circuit courts of appeal other than the Second Circuit.

The United States filed an *amicus* brief in February 2008 in the case, which comprised actions under the ATS against various multinational corporations that did business in South Africa during the apartheid regime. *See In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004), *rev'd*, *Khulumani v. Barclay Nat'l Bank, Ltd.*, 509 F.3d 148 (2d Cir. 2007). The U.S. brief argued that the Second Circuit's holding that "a plaintiff may plead a theory of aiding and abetting liability under the [ATS]" must be reversed:

> The court of appeals' decision allows an unprecedented and sprawling lawsuit to move forward and represents a dramatic expansion of U.S. law that is inconsistent with well-established presumptions that Congress does not intend to authorize civil aiding and abetting liability or extend U.S. law extraterritorially. The decision does so, moreover, in an area fraught with foreign relations perils, where "judicial caution" is especially appropriate before "exercising innovative authority over substantive law." *Sosa* [*v. Alvarez-Machain*], 542 U.S. at 726. The consequence is to invite lawsuits challenging the conduct of foreign governments toward their own citizens in their own countries—conduct as to which the foreign states are themselves immune from suit—through the simple expedient of naming as defendants those private corporations that lawfully did business with the governments. Such lawsuits inevitably create tension between the United States and foreign nations, as the present litigation demonstrates.
>
> This Court should grant certiorari . . . to review the court of appeals' extension of the ATS to encompass claims of aiding and abetting a foreign state's violation of international law in its own territory. Although the court left open the possibility that the district court might yet dismiss the lawsuit based on "case-specific prudential

> doctrines," it has categorically held that "a plaintiff may plead a theory of aiding and abetting liability under the [ATS]." That holding invites similar lawsuits to be filed and will preclude their early dismissal, which, in turn, will undermine efforts to encourage foreign investment.

(Internal cross references and citations to the petition are omitted.) The full text of the U.S. *amicus* brief is available at *www.usdoj.gov/osg/briefs/2007/2pet/5ami/2007-0919.pet.ami.html*.

e. Exhaustion of local remedies: Sarei v. Rio Tinto

On December 16, 2008, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, remanded a case under the ATS for the district court to determine in the first instance whether to impose a requirement that plaintiffs exhaust local remedies. *Sarei v. Rio Tinto*, 550 F.3d 822 (2008). In doing so, the court was fractured on the issue; there were five separate opinions, none of which garnered more than four votes. The plurality explained:

> . . . Although the ATS does not itself require an alien to exhaust local remedies before invoking the jurisdiction of our courts, the Supreme Court signaled in *Sosa v. Alvarez-Machain* that a prudential or judicially-imposed exhaustion requirement for ATS claims "would certainly [be considered] in an appropriate case." 542 U.S. 692, 733 n.21 (2004). The application of *Sosa* to exhaustion under the ATS is a matter of first impression in this circuit, and we hold that this is "an appropriate case" to consider whether to invoke the exhaustion analysis.
>
> Although we decline to impose an absolute requirement of exhaustion in ATS cases, we conclude that, as a threshold matter, certain ATS claims are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law. [footnote omitted] Where the "nexus" to the United States

> is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of "universal concern." Matters of "universal concern" are offenses "for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders." *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (citing *Restatement (Third) Foreign Relations Law of the United States* § 404 (1987) ("*Restatement (Third)*")). Because the district court did not analyze exhaustion as a discretionary matter, we remand for the district court to address this issue in the first instance, using the framework outlined below.

Excerpts follow from the Ninth Circuit's plurality opinion in the case, involving claims by current and former residents of Bougainville, Papua New Guinea, alleging various war crimes, crimes against humanity, racial discrimination, and environmental torts arising out of Rio Tinto's mining operations on Bougainville (most footnotes omitted). For background on the case, *see Digest 2007* at 227–31; *Digest 2006* at 431–50.

* * * *

I. Exhaustion in ATS Cases

* * * *

The parties, the district court, and the panel majority and dissent all analyzed the exhaustion question by initially asking whether the ATS *requires* exhaustion. The inquiry as to whether exhaustion is required by the statute leads with the wrong foot post-*Sosa*.

Our starting point is the Court's explicit reference to exhaustion in *Sosa*:

> This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the

> federal courts for violations of customary international law, though it disposes of this action. For example, the European Commission argues as *amicus curiae* that basic principles of international law require that before asserting the claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals. We would certainly consider this requirement in an appropriate case.

542 U.S. at 733 n.21 (internal citations omitted). . . . Thus, the Court appears to consider exhaustion a prudential "principle" *among others* that courts should consider beyond the initial task of determining whether the alleged violations of the ATS satisfy the "requirement of clear definition." *Id.* at 733 n.21.

* * * *

III. THE EXHAUSTION OF LOCAL REMEDIES RULE IN INTERNATIONAL LAW

"Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged." *Restatement (Third)* § 713 cmt. f; *see also id.* § 703 cmt. d; *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 26 (Mar. 29) ("The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."). The rule is generally applied when one state pursues the cause of one of its nationals, whose rights another state has disregarded in violation of international law: "Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system." *Interhandel*, 1959 I.C.J. at 27; *see also Restatement (Third)* §§ 703 cmt. d, 713 cmt. f.

Because sovereigns are co-equal in the international legal arena, one sovereign can exercise power over another only through consent. *See United States v. Diekelman*, 92 U.S. 520, 524 (1875)

("[A sovereign's] own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed."). Even in the face of sovereigns' consent to the jurisdiction of international tribunals, principles of comity have dictated that exhaustion remains a requirement. Thus, for example, the treaties establishing international human rights courts have codified the exhaustion principle in their statutes as a general requirement for the admissibility of complaints. *See, e.g.*, *The Matter of Viviana Gallardo et al*, Series A., No. G 101/81, Inter-Am. C.H.R., Nov. 13, 1981, ¶ 26 ("[Exhaustion] is designed for the benefit of the State," because it "excuse[s] the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means.").[8]

Nonetheless, codification of the exhaustion requirement in international treaties is not in absolute terms. International law—both private and public—has long anticipated that local remedies might not always be adequate and that justice may be denied if claimants are forced to exhaust before being heard in an international forum. *Restatement (Third)* §§ 703 cmt. d, 713, cmt. f. A core element of the exhaustion rule is its futility, or denial of justice exception, which excuses exhaustion of local remedies where they are unavailable or inadequate. *Id.*

United States courts have also recognized the futility exception with regard to human rights claims, *see, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996) (discussing Senate Report for the TVPA, which places the burden on the plaintiff to show that the local remedies were "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile"), as well as in

[8] *See also* The European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35, Nov. 4, 1950, 213 U.N.T.S. 222 ("The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law."); The American Convention on Human Rights, art. 46, Nov. 22, 1969, 1144 U.N.T.S. 143 ("Admission by the Commission of a petition or communication . . . shall be subject to the following requirements: that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.").

more routine matters, such as tax, *see, e.g.*, *Newcomb v. Comm'r*, 23 T.C. 954, 960–61 (1955) ("We do not think that if respondent had attempted to pursue any remedies in the Canadian courts he would have met with any success. The courts do not require one to do a useless act.").

IV. CONSIDERATIONS ANIMATING EXHAUSTION

Though it is self-evident, it is worth remembering that in ATS adjudication, the United States courts are *not* international tribunals. With this in mind, the appropriateness of applying prudential exhaustion to some ATS cases only gains force; if exhaustion is considered essential to the smooth operation of international tribunals whose jurisdiction is established only through explicit consent from other sovereigns, then it is all the more significant in the absence of such explicit consent to jurisdiction.

Certain ATS cases, like this one, present United States courts with scenarios that simultaneously appeal to two divergent impulses that have traditionally played out in our country's international affairs and have been imported into our legal system. The first impulse is to safeguard and respect the principle of comity. *See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."). The second is the American role in establishing collective security arrangements that support international institutions, including international tribunals. *See, e.g.*, *Charter of the International Military Tribunal*, art. 1, Aug. 8, 1945 (The United States, along with the Allied powers, collectively establishing the Tribunal "for the just and prompt trial and punishment of major war criminals of the European Axis."). Both impulses draw from the recognition that we need a complement to our domestic system, because we are but one member in a community of nations. In that community, international law plays a substantive role.

But international law also imposes limits. The lack of a significant United States "nexus" to the allegations here stimulates the comity impulse. These claims involve a foreign corporation's complicity in acts on foreign soil that affected aliens (though at

least one of them—Sarei—has enjoyed the status of a lawful permanent resident of this country for some time now). This situation thus lacks the traditional bases for exercising our sovereign jurisdiction to prescribe laws, namely nationality, territory, and effects within the United States. *See Restatement (Third)* § 403(2) at cmt. d. (stating jurisdiction is appropriately exercised with respect to activity outside the state that has or intends to have substantial effect within the state's territory). The lack of a significant U.S. "nexus" is an important consideration in evaluating whether plaintiffs should be required to exhaust their local remedies in accordance with the principle of international comity.

The nature of certain allegations and the gravity of the potential violations of international law also trigger the second impulse: our historical commitment to upholding customary international law. Some of the claims—torture, crimes against humanity, and war crimes—may implicate matters of "universal concern," generally described as offenses "for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders." *Kadic*, 70 F.3d at 240 (citing *Restatement (Third)* § 404); *see also Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 108 (2d Cir. 2000) (holding "the policy expressed in the TVPA favoring adjudication of claims of violations of international prohibitions on torture" weighed against dismissing the action on *forum non conveniens* grounds).

Nonetheless, simply because universal jurisdiction *might* be available, does not mean that we should exercise it. Indeed, the basis for exercising universal *civil* jurisdiction, such as under the ATS, is not as well-settled as the basis for universal *criminal* jurisdiction. *See Sosa*, 542 U.S. at 761–63 (Breyer, J., concurring in part and in the judgment) (noting the lack of "similar procedural consensus supporting the exercise of jurisdiction" in ATS cases as obtained to piracy in the 18th century or the contemporary exercise of universal *criminal* jurisdiction over matters of universal concern). Even the few courts that have exercised some form of universal *criminal* jurisdiction over matters of "universal concern" have done so cautiously. *See* Cedric Ryngaert, *Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle*, 19 Crim. L.F. 153, 155–73 (2006)

(surveying decisions by Austria, Belgium, France, Germany, and Spain).

This caution counsels that in ATS cases where the United States "nexus" is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of "universal concern." With these underlying principles in place, we suggest a framework for evaluating exhaustion.

V. A FRAMEWORK FOR EVALUATION EXHAUSTION

To begin, exhaustion under the ATS should be approached consistently with exhaustion principles in other domestic contexts. The defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies. . . .

* * * *

As a preliminary matter, to "exhaust," it is not sufficient that a plaintiff merely initiate a suit, but rather, the plaintiff must obtain a final decision of the highest court in the hierarchy of courts in the legal system at issue, or show that the state of the law or availability of remedies would make further appeal futile. Chitharanjan Felix Amerasinghe, *Local Remedies in International Law* 181 (2d ed. 1990); *see also Interhandel*, 1959 I.C.J. at 26–27 (analyzing, in determining whether remedies had been exhausted, the stage of litigation plaintiff had reached in United States courts).

Another basic element is that the remedy must be available, effective, and not futile. *Restatement (Third)* §§ 703 cmt. d, 713 cmt. f; *see generally* Amerasinghe, *supra*, at 166–71, 187–207. To measure effectiveness, a court must look at the circumstances surrounding the access to a remedy and the ultimate utility of the remedy to the petitioner. *Restatement (Third)* §§ 703 cmt. d, 713 cmt. f. In addition, "[w]hen a person has obtained a favorable decision in a domestic court, but that decision has not been complied with, no further remedies need be exhausted." *Id.* § 713 cmt. f. A judgment that cannot be enforced is an incomplete, and thus ineffective, remedy. The adequacy determination will also necessarily include an assessment of any delay in the delivery of a decision. Amerasinghe, *supra*, at 203–06.

* * * *

3. U.S. Sovereign Immunity in Foreign Relations

On August 7, 2008, the U.S. Embassy in Jakarta, Indonesia, submitted a diplomatic note to the Department of Foreign Affairs of the Republic of Indonesia, requesting that it "take all steps available to it" to cause the dismissal of a case brought before the Central Jakarta District Court. The plaintiff brought proceedings against the World Health Organization and the United States for the death of his son from avian flu. In its diplomatic note, the United States referred to the "immunity to which the United States is entitled as a matter of international law," and continued:

> . . . [T]he United States wishes to state that the allegations in the complaint regarding the conduct of the United States are on their face false and without credibility. The United States views any attempt to use a national court as a forum to disseminate groundless allegations regarding the conduct of the World Health Organization, the United States of America, or other states and organizations in responding to outbreaks of disease and attempting to prevent its spread, as an abuse of process.

The case was dismissed on November 7, 2008.

B. CONSTITUENT ENTITIES

Republic of the Marshall Islands

On April 4, 2008, the United States filed briefs as defendant in the U.S. Court of Appeals for the Federal Circuit in two cases concerning claims related to U.S. nuclear testing from 1946–1958. The Court of Claims had dismissed the suits, *Bikini v. United States,* 77 Fed. Cl. 744 (Fed. Cl. 2007), and *John v. United States*, 77 Fed. Cl. 788 (Fed. Cl. 2007). In both *Bikini* and *John,* the United States summarized its argument in substantially similar language, as follows:

> The Court of Federal Claims correctly held that it lacked subject matter jurisdiction to entertain appellants' claims.

> In the Compact [of Free Association Act of 1985], Congress has expressed an unambiguous intention to withdraw . . . jurisdiction for all claims arising from the nuclear testing program, including appellants' claims-based takings claims . . . , as well as their land-based takings claims . . . .*
>
> The Court of Federal Claims judgments of dismissal can be affirmed on several alternative grounds. The political question doctrine forecloses judicial review of appellants' claims because those claims challenge the adequacy of an international settlement agreement and recognition of a foreign government—responsibilities charged to the Executive and Legislative branches of government.
>
> Appellants' claims are also barred by the six-year statute of limitations because they are based upon the United States' decision to enter into the Compact [of Free

* Editor's note: Under § 177(a) of the Compact of Free Association entered into in 1986 by the United States and the Republic of the Marshall Islands, the United States accepted "responsibility for compensation owing to citizens of the Marshall Islands . . . for loss or damage to property and person of the citizens of the Marshall Islands . . . resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958." Section 177(b) provided for the United States and the RMI to negotiate a separate claims settlement agreement.

The "Section 177 Agreement" established a $150 million trust fund, the income from which was earmarked, in part, for distribution to the people of Bikini, Enewetak, Rongelap, and Utrik and the Nuclear Claims Tribunal and allocated $75 million to the Bikini Distribution Authority in payment of claims for loss or damage to property and the people of Bikini. Article X, § 1 of the Section 177 Agreement provided that the agreement constituted "the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program. . . ." Article XII stated: "All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed."

> Association between the United States and the Republic of the Marshall Islands ("RMI")] and the "Section 177 Agreement," *i.e.*, acts that became effective in 1986. In this regard, appellants' pursuit of relief from the RMI nuclear claims tribunal does not affect the accrual of their claims because Congress has not expressly required the exhaustion of any remedies as a prerequisite to a Tucker Act suit challenging the adequacy of a tribunal award. . . .
>
> Additionally, the judgment below can be affirmed upon the ground that appellants, as nonresident aliens, lack standing to invoke the protections of the Takings Clause [of the U.S. Constitution] with respect to foreign property.
>
> Finally, the Court of Federal Claims correctly held that the complaint fails to state claims upon which relief can be granted. Because the Compact agreements and the funds provided under them are in full settlement of all of appellants' claims, appellants cannot establish a property interest in receiving additional funds, including payment of the amount awarded by the Tribunal. Even assuming that appellants could allege a cognizable property interest, they fail to allege any action of the United States that deprived them of any property interest.

The full texts of the U.S. briefs are available at *www.state.gov/s/l/c8183.htm*. *See also Digest 2007* at 256–63 and *Digest 2006* at 316–25.**

** Editor's note: The appellate court consolidated the *Bikini* and *John* cases and, on January 29, 2009, affirmed the lower court's dismissal of claims against the United States. *Bikini v. United States*, 554 F.3d 996 (Fed. Cir. 2009). The court of appeals concluded that the Section 177 Agreement removed the jurisdiction of U.S. courts over the claims. Additional discussion of the court's opinion will be provided in *Digest 2009*.

Cross References

U.S. efforts to combat trafficking in persons, **Chapter 3.B.3.**
Pre-emption of state law, **Chapter 8.B.**
Separation of powers, Owens v. Sudan, **Chapter 10.A.1.a.(2)(iii)**
Applicability of the U.S. Constitution to non-contiguous territories, **Chapter 18.A.4.a.(1)(i)**

Chapter 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On March 6, 2008, the Department of State released the 2007 Country Reports on Human Rights Practices. The Department of State submits the document annually to Congress in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 ("FAA"), as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for U.S. views on various aspects of human rights practice in other countries. On March 11, 2008, Jonathan Farrar, Acting Assistant Secretary of the Bureau of Democracy, Human Rights and Labor provided an overview of the report and noted its new subsection concerning statelessness. The report is available at *www.state.gov/g/drl/rls/hrrpt/2007*; Mr. Farrar's remarks are available at *http://2001-2009.state.gov/g/drl/rls/rm/2008/102116.htm*.

2. Role and Composition of Human Rights Treaty Bodies

a. Overview

In 2008 the United States provided extensive comments to various UN bodies, outlining U.S. views on the role and legal character of human rights treaty-monitoring bodies.

In general, the United States stressed that the functions and authorities of such committees are set forth in and strictly limited to the relevant treaties that established them. As a result, the United States emphasized that treaty-monitoring bodies cannot arrogate to themselves additional powers under international law, and that while their views are entitled to respect, they do not create legal obligations for states. As the United States advised the UN Human Rights Committee on October 17, 2008:

> It is a fundamental and long-standing principle of customary international law that treaties are authoritatively interpreted by the Parties themselves through mutual agreement, either directly through the ordinary channels of international relations or indirectly as the result of recourse to good offices, mediation, or conciliation. A treaty may be authoritatively interpreted by an international body in the case of a dispute regarding the interpretation of a provision but only if and only to the extent that the Parties agree, either in the treaty at issue or through a separate[] agreement, to submit the dispute to such an international organ.

See A.2.b. below.

Excerpts summarizing the U.S. position follow from observations the United States submitted to the Office of the UN High Commissioner for Human Rights ("OHCHR") and the World Health Organization ("WHO") on the OHCHR/WHO Fact Sheet No. 31 on the Right to Health (*see also* A.2.e. and D.2. below). The full text of the U.S. observations is available at *www.state.gov/s/l/c8183.htm*.

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16. General comments and other documents issued by treaty monitoring bodies express the opinions of individuals acting in their expert capacities; such documents are not the result of deliberations among States. While the views of treaty monitoring bodies

are entitled to respect and should be considered carefully by States Parties, they do not create legal obligations or "requirements." Although States Parties to a treaty can agree to establish a third party to render authoritative treaty interpretations or to definitively resolve legal disputes, in the case of UN human rights treaties, no such authorities have been given to the relevant Committees.

17. For instance, Article 40, paragraph 4 of the ICCPR simply states that "The [Human Rights] Committee shall study the reports submitted by the States Parties to the present Covenant" and also "transmit its reports, and such general comments as it may consider appropriate, to the States Parties." . . .

18. Furthermore, the pronouncements of a treaty monitoring body are directed only to the States Parties of the relevant treaty.

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Also in 2008 the United States stressed the positive role the UN human rights bodies can play, as in this example from a statement to the Third Committee of the General Assembly on October 21 by Ambassador T. Vance McMahan, U.S. Representative to the Economic and Social Council:

> Although the General Assembly can play an important role in calling attention to the most serious violations of human rights, the treaty bodies are extremely valuable in strengthening countries' implementation of their treaty obligations. While the Committee's concluding views, observations and general comments are non-binding, they may be useful to countries striving to implement more effectively their treaty obligations. They may prod countries to work on a particular problem area. But perhaps most important is the positive effect of the overall treaty reporting process—the formal report prepared by a State for submission to a treaty body; the answers to a treaty body's written questions, and the preparations for the oral dialogue between a State and a treaty body. To carry out these tasks, a State is compelled to undertake a government-wide effort to evaluate its progress in meeting its treaty obligations. This process of internal

> reflection often brings about change in State polices and practices.
>
> . . . We believe that treaty bodies play a valuable role in countries' implementation of their treaty obligations. To maximize the usefulness and persuasiveness of their recommendations to governments, we believe that these bodies must focus carefully on the actual obligations of States Parties. . . .

Ambassador McMahan's statement is available in full at *www.archive.usun.state.gov/press_releases/20081021_281.html.*

b. Observations on UN Human Rights Committee Draft General Comment 33

On October 20, 2008, the United States submitted observations to the UN Human Rights Committee on its Draft General Comment 33: Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights. In providing its observations, which expressed strong disagreement with the draft and urged the Committee to withdraw or significantly revise it, the United States stated:

> Although the United States is not a Party to the Optional Protocol, it nevertheless has a substantial interest in Draft General Comment 33, most notably because . . . the Draft General Comment . . . contains reasoning and conclusions that directly affect all States Parties to the Covenant, irrespective of whether they have joined the Optional Protocol. In addition, some of the problematic assertions in the Draft General Comment would seem to have implications, if correct, for the status of pronouncements issued by some other human rights treaty bodies. . . .
>
> Although there are a substantial number of legal statements and conclusions in the Draft General

> Comment with which the United States does not agree, these comments address only a select number of subjects that the United States considers to be most problematic.
>
> The U.S. observations addressed three topics: (1) the Committee and the legal nature of its "views;" (2) "subsequent practice" of the Parties; and (3) grave breaches, as provided below (some footnotes omitted). The full text of the U.S. observations is available at *www.state.gov/s/l/c8183.htm.*

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I. The Committee and the legal nature of its "views"

4. First and foremost, the United States considers it axiomatic that the functions and authorities of the Committee are those set forth in the Covenant and its Optional Protocol. The texts of these treaties are, in the view of the United States, sufficiently clear with respect to the functions and authorities established by States Parties for the Committee. In particular, it is clear from these instruments that the Committee does not have the authority to issue views that are judicial in character. As discussed below, resort to the *travaux preparatoires* powerfully underscores the clear intent of the negotiators with respect to those functions and authorities. In Draft General Comment 33, however, the Committee purports to arrogate to itself additional authorities that have not been given to the Committee by the States Parties to the Covenant or its Optional Protocol and are likewise unsupported by the negotiating record.

5. Contrary to the suggestion in paragraph 11 of Draft General Comment 33, there is nothing in the Convention or Optional Protocol that suggests the Committee is a judicial body, either in fact or "spirit." The Committee has no rules of evidence, does not conduct oral hearings, is not composed of judges, and is authorized to issue "views" under the Optional Protocol rather than legally binding "decisions" or "judgments." The *travaux preparatoires* show that the term "Human Rights Committee" was chosen by the drafters of the Covenant over other potential designations,

including "Human Rights Tribunal." Indeed, the rationale for avoiding the term "tribunal" was that such a term "would be inappropriate for a body which was not of a judicial or arbitral character, nor confined to deliberative functions."[1]

6. Negotiations over the requisite qualifications for members of the Committee also reflect a decision of the drafters to avoid creating a body to serve a judicial function. Although most members of the Committee have legal training, the *travaux* reveal that the drafters did not want to require members to have judicial experience because it was not a juridical organ. Multiple States agreed that it was "necessary to avoid the impression that the intention was to set up a judicial organ when in fact it was not the case."[2] Rather, they intended the Committee to be a "committee of experts" that could include "a wide range of persons, such as statesmen, historians, philosophers and jurists."[3] This view is reflected in the Covenant itself, which stipulates that members are to be "persons of high moral character and recognized competence in the field of human rights." Under the terms of the Covenant, far from being a requirement for membership on the Committee, only "*consideration*" is to be "given to the usefulness of the participation of *some persons* having legal experience."[4]

7. The Draft General Comment reasons, erroneously, that because the Committee has decided *on its own* to issue "views" that "exhibit most of the characteristics of a judicial decision," its work is therefore to be treated by States Parties as if it has a judicial character. The United States does not accept that views issued by the Committee—either pursuant to its functions under the Covenant or the Optional Protocol—are "to be regarded as

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[1] U.N. Comm'n H.R., 6th Sess. (1950), 7th Sess. (1951), 9th Sess. (1953) U.N. Doc. A/2929, Ch. VII, § 2, E/CN.4/SR.214, 7 (1950), in MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 502 (1987) (emphasis added).

[2] U.N. Comm'n H.R., 6th Sess. (1950), 7th Sess. (1951), 9th Sess. (1953), U.N. Doc. A/2929, Ch. VII, § 4, E/CN.4/SR.187, § 63 (F), E/CN.4/SR.214, 8 (RL); E/CN.4/SR.346, 6 (AUS),7 (RL), in BOSSUYT, 507.

[3] *Id.*

[4] International Covenant on Civil and Political Rights ["Covenant"], Article 28.2 (emphasis added).

determinative" of the issues for States Parties, even if the Committee styles its views as judicial determinations.

8. Paragraph 14 states that the views of the Committee under the Optional Protocol "represent an authoritative determination of a body established under the Covenant itself as the [an] authentic interpreter of that instrument." . . . The Committee is not a body established pursuant to the Covenant that is intended to provide authoritative interpretations of the treaty. Rather, the Committee is intended to assist and facilitate *States Parties'* implementation of the Covenant. The States Parties to the Covenant and Optional Protocol remain the authoritative interpreters of the instruments.

9. Like paragraph 11, paragraph 14 reaches its conclusion through tautological and conclusory reasoning. According to the Draft General Comment, the "integral role of the Committee under both instruments" is the "reason" why its views are to be accorded the same respect as obligations enshrined in the Covenant itself. This extraordinary assertion has no basis in the text of the Covenant or the Optional Protocol and cannot be accepted. Paragraph 18 uses similarly problematic and conclusory reasoning, stating that "[t]he legal character of the Committee's views is reflected in the consistent wording adopted by the Committee in issuing its views in cases where a violation has been found."[6] The circularity of this argument suggests that the Committee is empowered to decide for itself its "legal character." The Committee as a

[6] The United States further objects to the substance of the Committee's "consistent wording," which states, *inter alia*, that "the State Party has undertaken to ensure to all individuals within its territory *or* subject to its jurisdiction the rights recognized in the Covenant. . . ." (Paragraph 18 of the Draft General Comment 33; emphasis added). This characterization dispenses with the actual text of Article 2 of the Covenant—which refers to "individuals within its territory *and* subject to its jurisdiction—in favor of the Committee's formulation as set out in its General Comment 31, which has no basis in either the text or negotiating history of the Covenant. *See* "Observations by the United States of America on Human Rights Committee General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant," transmitted to the Human Rights Committee on Dec. 27, 2007.

matter of international law enjoys only those powers and authorities granted to it by the States Parties to the Covenant and the Optional Protocol. Citations to the Committee's own working methods or work products cannot provide, or even support, an inference of new powers and authorities not given to the Committee under those treaties. This is the central, fundamental analytical failure of Draft General Comment 33, in which the Committee purports to define its own authorities without regard to the instruments drafted by States that actually specify those authorities.

10. The draft also suggests in paragraph 14 that the Committee's views regarding communications received under the Optional Protocol have some bearing on the interpretation of rights and obligations of States Parties to the Optional Protocol, and also to States Parties to the underlying Covenant that have not joined the Optional Protocol. This cannot be the case for either group of States Parties. The Optional Protocol is a distinct agreement requiring separate ratification, which simply authorizes the Committee to "receive and consider communications" from individuals claiming to be victims of violations by States Parties to the Covenant that are also a Party to the Optional Protocol, and to forward its "views" about communications to the relevant individuals and States. At no point does the Optional Protocol provide that its States Parties are obliged to "respect" or follow interpretations made by the Committee regarding provisions of the Covenant—and certainly nothing in the Covenant provides that the Committee's views are to be accorded such authority.[7] If the countries that negotiated the Optional Protocol intended to provide such far reaching authorities to the Committee, they would certainly have specifically included treaty text providing for such authority.

11. In paragraph 16, the Committee asserts that the "principle of good faith to the discharge of treaty obligations . . . leads to an

[7] This assertion is clearly without foundation in the texts of the underlying treaties, and would constitute an extraordinary and unprecedented expansion of the Committee's authorities. Even the Statute of the International Court of Justice—the primary judicial organ o[f] the United Nations—makes clear that the Court's decisions have "no binding force except between the parties and in respect of that particular case." ICJ Statute, Art. 59.

obligation to respect the view of the Committee in a given case." The United States clearly agrees that a State Party is required to perform its treaty obligations in good faith. However, the United States is unable to understand how the "principle of good faith" could create an entirely new and distinct obligation not found in either the Covenant or the Optional Protocol. The United States is similarly unable to understand how a State Party's obligations with respect to *procedures* constitute a legal basis for according "respect" to the *substantive* views of the Committee. The reasoning underpinning these arguments appears to the United States to be unsound and to have no basis in the actual text of the Optional Protocol.

12. In paragraph 29, the Committee states that its views in relation to an individual communication are not "merely recommendatory but constitute an essential element of the undertaking by States parties under article 2, paragraph 3 of the Covenant to afford an effective remedy to persons whose rights have been violated." A variant of this argument is made in Paragraph 15, in which the Committee asserts that a finding of a violation by the Committee engages a "legal obligation" of the State Party by virtue of article 2, paragraph 3 of the Covenant. Here again, these assertions appear to have no basis in the text of the Covenant or the Optional Protocol. Although the Committee can, of course, provide its views as to whether an individual's rights enumerated in the Covenant have been violated and to propose an effective remedy, the Committee's views are simply advisory. The Committee's views regarding a violation are not determinative of the issue and, furthermore, if the intent was to oblige States Parties to adhere to the Committee's views when considering an "effective remedy" in the context of article 2, paragraph 3 of the Covenant, language to that effect would have been added to the treaty text.

13. As noted above, the Optional Protocol establishes that, after "examining" a communication that it has received, the Committee is to forward its "views" to the State Party concerned and to the individual. The word "views" in Article 5.4 replaced "suggestions," which had been contained in an earlier draft of the Optional Protocol proposed by a ten-state cross-regional coalition. This change in wording was not intended to produce a substantive

change, but rather to create consistency between Article 5.4 and the text of the Covenant, specifically Article 42.7(c), which spells out the role of a Conciliation Commission in the inter-State communication procedure.[9] Like the Committee, a Conciliation Commission has no authority to make a "determinative" decision or an "authoritative determination" on the matter before it.[10]

14. The Human Rights Committee's own reports and statements also recognize its inability to legally bind States Parties—either with respect to its consideration of communications under the Optional Protocol or with respect to its "General Comments" or "Concluding Observations" issued under the Covenant. In its Annual Report for 1988, for instance, the Committee commented that "[t]he Committee's decisions on the merits are non-binding recommendations."[11] In its response to the Observations of the United States to General Comment 24, the Chairman of the Committee stated that it "would like to assure the delegation of the United States that General Comments do not suggest that the Committee's interpretations are strictly binding." The Chairman also expressed the "hope" that General Comments "carry a certain weight and authority" with States Parties.[12] Draft General Comment 33, at paragraph 13, now conveys the revolutionary assertion that it is "not a justifiable conclusion" to regard the Committee's views as "recommendatory."

15. To be sure, the United States considers that the views of the Committee are entitled to respect and should be considered carefully by States Parties. Such views are not, however, a source

[9] A/C.3/L.14.2/Rev.2; A/C.3/L.1411/Rev.2 in MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 708 (1993).

[10] Rather, it is to submit to the Committee a report that "embod[ies] its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter." The States Parties concerned must then "notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission." Covenant, Articles 42.7(c) and (d).

[11] U.N. Human Rights Comm., *Annual Report*, 151, U.N. Doc A/43/40 (1988).

[12] "Chairman's Statement on the Issue of Reservations," Human Rights Committee, Mar. 31, 1995.

of international legal obligation, nor do they have a "determinative," "authoritative," or "judicial" character. Were the States Parties to the Covenant or the Optional Protocol to decide that it would be beneficial to alter and expand the authorities of the Committee in the manner suggested in this draft general comment, the way to do so under international law would be to amend those treaties or negotiate a new instrument to provide such authority with respect to those countries that became party to such an amendment or instrument. Under international law, it is not the provenance of the Committee itself to attempt to amend the Covenant or the Optional Protocol through the guise of issuing new interpretive assertions with respect to their scope and meaning. The United States is supportive of the important work the Committee is charged with under the Covenant and the Optional Protocol, and provides these comments in the belief that assertions by the Committee that have no basis in international law can actually serve to undermine the credibility of the Committee and thereby do unfortunate damage to the respect afforded to the Committee and its work products.

II. "Subsequent Practice" of the Parties

16. The current draft also makes a series of problematic assertions with respect to international treaty law in an effort to support its novel and non-textually-based interpretation of its authority. Notably, the Draft General Comment states in paragraph 17 that the "general body of jurisprudence generated by the Committee" may be considered to constitute the "'subsequent practice in application of the treaty which establishes the agreement of the parties regarding its interpretation' within the sense of article 31(3)(b) of the Vienna Convention on the Law of Treaties, or, alternatively, the acquiescence of States Parties in those determinations constitutes such practice." The United States strongly disagrees with this extraordinary assertion.

17. The views of the Committee cannot as a legal matter constitute the "subsequent practice" of the States Parties to the Covenant. The United States is not a party to the Vienna Convention on the Law of Treaties, but nevertheless considers its Articles 31 and 32 on the interpretation of treaties to reflect customary

international law. The provision referred to in this case, Article 31(3)(b), has never been interpreted, so far as the United States is aware, to include the views of expert bodies. The "subsequent practice" referred to in this provision is generally understood to mean the actual practice of the States Parties, provided that such practice is consistent and is common to, or accepted by, all the Parties.[13] The "subsequent practice" of the States Parties cannot be the views of experts that "serve in their personal capacity"[14] as to what the practice of States Parties *should* be in carrying out their rights and obligations under the Covenant.

18. Moreover, even if the Committee is simply suggesting that it is reflecting information received from States Parties regarding their practice, certainly a small number of States' responses to the Committee's views on a particular communication cannot be understood to provide a full record of the practice of States Parties. Moreover, the so-called "acquiescence" of States Parties in the views of the Committee cannot be seen either to reflect the practice of States in the application of the Covenant or to establish the agreement of the Parties regarding the Covenant's interpretation as required by Article 31(3)(b). The United States, for one, does not consider that its silence in response to a particular treaty body General Comment, View, or Observation represents its acquiescence to the conclusions contained therein.

19. Apart from the legal infirmities in this line of argument, it should be noted as a factual matter that States Parties to the Optional Protocol do not invariably accept and implement the "views" of the Committee and follow their recommendations. Thus, there would be no factual basis to argue that the views of the Committee have become the consistent and common practice of States Parties to the Optional Protocol, much less the consistent and common practice of States Parties to the Covenant that are not States Parties to the Optional Protocol. This fact is also true with respect to other writings of the Committee, whether they be in the form of Concluding Observations on States Parties' reports or General Comments. All of these are recommendatory materials,

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[13] *See e.g.*, US–France Air Services Arbitration 1963 (54 ILR 303).

[14] Covenant, Art. 28.3.

which countries are free to consider, but are not required to comply with. To cite just one example, the United States respects and carefully considers the views of the Committee, but does not follow recommendations with which it disagrees. Nothing in the Committee's corpus of recommendatory writings could properly be considered to reflect the subsequent practice in application of either the Covenant or the Optional Protocol that establishes the agreement of the States Parties regarding its interpretation.

III. Grave Breaches

20. Paragraph 24 of the Draft General Comment refers to a "grave breach of [a State Party's] obligations under the Optional Protocol." It is inappropriate for the Committee to determine what constitutes a "grave breach" of the Covenant or the Optional Protocol. Moreover, neither treaty uses the term "grave breach," nor does either treaty establish separate categories of breach that differ with respect to their degree of seriousness. This differs from the Geneva Conventions, for instance, which do designate a set of "grave breaches" that are subject to a particular set of obligations.

21. The United States Government appreciates the important work the Human Rights Committee performs consistent with its mandate as set out in the Covenant and the Optional Protocol. Although the United States fundamentally disagrees with the content of Draft General Comment 33, and urges its withdrawal, it fully appreciates efforts undertaken by the Committee to improve implementation of the Covenant by States Parties, including by those Parties that have also joined the Optional Protocol.

c. Observations on UN Human Rights Committee General Comment 33

On December 22, 2008, the United States provided observations on the Human Rights Committee's final, revised General Comment 33 (*see also* A.2.b. *supra*). In submitting its observations, the United States stated:

> . . . [W]e appreciate the effort made by the Committee to make improvements. Nevertheless, while some of the

> flawed reasoning and problematic conclusions contained in the initial draft have been eliminated, the main conclusions of General Comment 33 remain unsupported by the plain text of the Covenant, its Optional Protocol, the negotiating history of the two treaties, and international law on treaty interpretation. Without addressing all of the statements in the General Comment with which the United States may not agree, these observations address those statements that the United States considers to be most problematic.
>
> The U.S. observations addressed three topics: the non-judicial nature of the Committee; the legal character of the Committee's views; and the right to a remedy, as excerpted below. The full text of the observations is available at *www.state.gov/s/l/c8183.htm*. The general comment is available at *www2.ohchr.org/English/bodies/hrc/comments.htm*.

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2. The United States takes extremely seriously its obligations under the Covenant and under other human rights treaties to which it is Party, and therefore considers it necessary to record its strong disagreement with important aspects of General Comment 33. These disagreements, registered by a State Party to the Covenant, preclude any claim that the assertions made in General Comment 33 regarding the Committee's legal authorities represent an international consensus of any kind.

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4. . . . In General Comment 33 . . . the Committee purports to arrogate to itself a legal authority that is unsupported by the texts or negotiating records of either the Covenant or its Optional Protocol.

I. Non-judicial nature of the Committee

5. Paragraph 11 of *draft* General Comment 33 stated that the views of the Committee "exhibit most of the characteristics of a

judicial decision, follow a judicial method of operation, and are issued in a judicial spirit." Paragraph 11 of General Comment 33 now asserts that the Committee's views "exhibit *some* important characteristics of a judicial decision" (emphasis added) and are "arrived at in a judicial spirit."

6. The United States fails to see a substantive distinction between these two sentiments and reiterates its disagreement with the conclusion that continues to follow from such an assessment. Whether the Committee's views exhibit "most" or merely "some important" characteristics of a judicial decision has no bearing on the underlying legal character of the Committee's pronouncements. There is nothing in the Convention or Optional Protocol that suggests the Committee is a judicial body . . . . The Committee has no rules of evidence, does not conduct oral hearings, and has no procedure for re-hearings or appeals. The Committee is not composed of judges, and indeed the Committee has had several members who were active duty diplomats during their period of service. It is authorized to issue only its "views" under the Optional Protocol and not legally binding "decisions" or "judgments."

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II. Legal character of the Committee's views

9. . . . The Covenant and Optional Protocol make clear that the Committee is intended to assist and facilitate States Parties' implementation of the Covenant, including by studying the reports of States Parties under the Covenant, examining communications under the Optional Protocol, and transmitting to States Parties its comments and views.[7]

10. Nevertheless, paragraph 11 of General Comment 33 asserts that there is a "determinative character of the decisions" of the Committee. Paragraph 13 elaborates, stating that "[t]he views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument." Legally and factually, it is not the case that the Committee is charged under

[7] *See* Covenant, Art. 40; Optional Protocol to the Covenant, Art. 5.

the Covenant with interpreting the instrument. The Covenant contains, and the Committee cites, no such authority or responsibility. Further, even if the Covenant had charged the Committee with responsibility for "interpreting the instrument," it does not logically follow that its "views" issued under the Optional Protocol—a separate treaty—would necessarily carry authoritative weight, particularly with respect to parties to the Covenant that are not parties to the Optional Protocol.

11. The Committee seems to base its extraordinary assertion of authority on three arguments, none of which are sound in law or logic. First, paragraph 13 of General Comment 33 states that the Committee's "views derive their character, and the importance which attaches to them, from the *integral role* of the Committee under both the Covenant and the Optional Protocol" (emphasis added). The United States does not accept this reasoning. The fact that the Committee plays an "integral role" does not constitute a basis for the conclusion that its views and interpretations are authoritative or have a "determinative character" (paragraph 11).

12. Second, in paragraph 14, the Committee cites itself as an authority for the proposition that its views are authoritative. Specifically, the Committee notes that when it issues its views, it tells the State Party concerned that "By becoming a party to the Optional Protocol the state Party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. . . ." This statement is not legally accurate, as it contradicts the express language of Article 1 of the Optional Protocol.[8] Furthermore, this argument misleadingly suggests that the Committee is empowered to decide for itself the legal character

[8] The competence that a State recognizes in becoming a Party is set forth in Article 1 of the Optional Protocol: "A State Party to the Covenant that becomes a Party to the present Protocol *recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant*" (emphasis added). This is recognized by the Committee in paragraph 4 of General Comment 33, which contradicts the ". . . wording consistently used by the Committee in issuing its views . . ." cited in paragraph 14 of General Comment 33.

of its views. As a matter of international law, the Committee enjoys only those powers and authorities granted to it by the Covenant and the Optional Protocol. . . .

13. Third, citing the Vienna Convention on the Law of Treaties in paragraph 15 of General Comment 33, the Committee states that "[t]he character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations." Indeed, a State Party is required to perform its treaty obligations in good faith. But it is hard to understand how a "principle of good faith" can create an entirely new and distinct obligation that is not found in either the Covenant or the Optional Protocol. Any duty to cooperate with the Committee's processes of examining and commenting on communications and reports would not imbue Committee views with an "authoritative" character or require States Parties to "give effect" to those views. The principle of *pacta sunt servanda* cannot create an obligation that goes beyond the obligations found in the treaties. The reasoning underpinning these arguments by the Committee is unsound and without basis in the actual text of the Covenant or the Optional Protocol.

III. The right to a remedy

14. In its *draft* General Comment 33, the Committee stated that its views are not "merely recommendatory but constitute an essential element of the undertaking by States parties under article 2, paragraph 3 of the Covenant to afford an effective remedy to persons whose rights have been violated." General Comment 33 no longer makes this categorical assertion, but nevertheless invokes Article 2(3) in Paragraph 14 to argue that States Parties to the Optional Protocol are somehow obligated to follow the Committee's recommendations. Similarly, paragraph 20 asserts that "States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee."

15. Although the Committee can, of course, provide its views as to whether an individual's rights enumerated in the Covenant

have been violated and propose a remedy, the Committee's views are simply advisory. The Committee's views regarding a violation are not an authoritative determination that triggers obligations under Article 2(3). . . . If there was an intent to oblige States Parties to adhere to the Committee's views when considering an "effective remedy" in the context of article 2(3) of the Covenant, the States that carefully negotiated the Covenant and the Protocol would have added language to that effect in the texts of those instruments.

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18. Although General Comment 33 is not as misplaced as the *draft* on which the United States and other States previously commented, it nevertheless retains the fundamentally problematic core proposition that the views of the Committee have a determinative, or legally binding, character that gives rise to substantive obligations to "give effect to the views issued by the Committee" (Paragraph 20).

19. To be sure, the United States considers that the views of the Committee are entitled to respect and should be considered carefully by States Parties. However, were the States Parties to the Covenant or the Optional Protocol to decide that it would be beneficial to alter and expand the authorities of the Committee in the manner suggested in this general comment, the way to do so under international law would be to amend those treaties or negotiate a new instrument to provide such authority with respect to those countries that became party to such an amendment or instrument. Under international law, it is not the provenance of the Committee itself to attempt to amend the Covenant or the Optional Protocol through the guise of issuing *ex cathedra* assertions with respect to their scope and meaning. . . .

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d. Convention on the Elimination of Discrimination Against Women ("CEDAW")

In a statement to the Third Committee on the implementation of human rights instruments on October 21, 2008,

Ambassador McMahan provided views on the work of the UN Committee on the Elimination of All Forms of Discrimination against Women:

> . . . The CEDAW Committee of Experts has addressed some of the most persistent and entrenched inequalities in society. . . . At the same time, however, the United States regrets that the CEDAW Committee, through the country review sessions and Concluding Comments, often presses for legislative changes far beyond the text and spirit of the Convention itself. That approach may result in undermining respect for international law and the important work of treaty bodies more generally.

Ambassador McMahan's statement is available in full at *www.archive.usun.state.gov/press_releases/20081021_281.html*.

e. Observations on Fact Sheet No. 31 on the Right to Health

On October 15, 2008, the United States submitted observations on Fact Sheet No. 31 on the Right to Health, produced by the Office of the UN High Commissioner for Human Rights ("OHCHR") and the World Health Organization ("WHO"). The fact sheet is available at *www.who.int/mediacentre/factsheets/fs323/en/index.html*. As with the comments in A.2.a. *supra*, the United States observed that the Fact Sheet "mischaracterizes the roles and authorities of UN treaty monitoring bodies" and provided specific comments as to the Committee on Economic, Social and Cultural Rights, as excerpted below. U.S. observations on other topics addressed in the fact sheet are discussed in D.2. below, and the complete U.S. observations are available at *www.state.gov/s/l/c8183.htm*.

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15. . . . According to the "Fact Sheet," the general comments adopted by treaty monitoring bodies "provide an authoritative and detailed interpretation of the provisions found in the treaties" (p. 10). The "Fact Sheet" also suggests in numerous places that treaty monitoring bodies are empowered to identify or "clarify" the specific legal obligations or requirements of States, even where those obligations or requirements are not expressly found in the relevant treaty.[1] Indeed, many of the conclusions and assertions in the "Fact Sheet" are based on General Comment No. 14 of the Committee on Economic, Social and Cultural Rights ("ESC Committee").[*]

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17. . . . As the authors of the "Fact Sheet" are likely aware, the ESC Committee was not even created by the ESC Covenant; rather, it is a creation of the UN's Economic and Social Council.[4]

18. Furthermore, the pronouncements of a treaty monitoring body are directed only to the States Parties of the relevant treaty. The authors of the "Fact Sheet", perhaps inadvertently, repeatedly characterize the statements of the treaty bodies as applying to "States," regardless of whether a particular state has ratified the relevant treaty.[5]

19. . . . Although the United States is not a Party to the ESC Covenant, it nevertheless considers it apparent that a number of

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[1] *See e.g.*, Fact Sheet at 3 (". . . characteristics of the right to health are *clarified* . . . by Committee on Economic, Social and Cultural Rights."); 8 (". . . the Committee on Economic, Social and Cultural Rights has *made it clear* . . .); 13 ("The Committee on the Elimination of Discrimination against Women further *requires States parties* to . . .").

[*] Editor's note: General Comment No. 14 is available at *www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En.*

[4] ECOSOC, res. 1985/17, May 28, 1985.

[5] *See e.g.*, Fact Sheet at 13 ("The Committee on the Elimination of Discrimination against Women *requires States to* . . .); 25 ("With respect to the right to health, the Committee has underlined that States *must ensure* . . ." and "The Committee on Economic, Social and Cultural Rights has also stressed that *States have a core minimum obligation to* . . .); 30 ("The Committee on Economic Social and Cultural Rights has underlined that *States must* . . .).

statements and assertions in General Comment No. 14 go beyond the Covenant and purport to create a panoply of health-related rights that are not found in the treaty itself. The U.S. does not accept such conclusions—many of which pervade the "Fact Sheet"—as they are not found in international human-rights instruments.

20. Some of the assertions of legal rights and obligations made by the Committee (and OHCHR and WHO by extension) also raise profound questions about how those rights and obligations would be implemented and how compliance could be meaningfully assessed. For instance, States cannot be held meaningfully accountable to an obligation "to respect the enjoyment of the right to health in other countries".[6] Overall, the United States does not consider General Comment No. 14 to be a viable foundation upon which to elaborate a "fact sheet" dealing with human rights and health.

f. Observations on UN Committee Against Torture General Comment No. 2

On November 3, 2008, the United States submitted observations to the UN Committee Against Torture ("Committee") concerning General Comment No. 2: Implementation of Article 2 by States Parties, adopted by the Committee on January 24, 2008. U.N. Doc. CAT/C/GC/2. One of the topics the United States addressed was the Committee's authority and role, as excerpted below. *See* E.1. below for a discussion of U.S. observations on the other topics addressed in General Comment No. 2. The full text of the U.S. observations is available at *www.state.gov/s/l/c8183.htm*.

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[6] Fact Sheet at 30; Committee on Economic, Social and Cultural Rights, general comment No. 14 on the right to the highest attainable standard of health, para. 39 (2000).

30. . . . General Comment 2 in several different paragraphs overstates the authorities of the Committee and the normative content of its written work products. As an example, paragraph 1, states that "[t]he provisions of article 2 reinforce [the] peremptory *jus cogens* norm against torture and constitute the foundation of the Committee's authority to implement effective means of prevention. . . ."

31. The United States does not consider this characterization to accurately describe the role of the Committee or the origin of its responsibilities. The Committee's functions and responsibilities are those, and only those, that it has formally received from the Convention and its Optional Protocol. A review of the Convention reveals no Committee "authority to implement effective means of prevention. . . ." The Committee is not an implementation body; rather, it is a body that carries out specific functions, as set forth in the Convention, to assist States Parties in implementing their obligations. As a matter of treaty law, the United States considers that neither Article 2 nor the characteristic[s] of the norm protected by the Convention are relevant to the Committee's authority. Rather, the basis of the Committee's authority can be found in Part II of the Convention (Arts. 17–24), which sets forth various functions and responsibilities of the Committee.[11] In this regard, the United States notes that, unlike other treaty bodies that issue general comments or recommendations for consideration by all States Parties, the Convention authorizes the Committee to issue "general comments" only with respect to the report of a State Party.[12]

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[11] Although not relevant here, with respect to States Parties to the Optional Protocol, the Committee has additional responsibilities and functions, as set forth in that instrument.

[12] Article 19, paragraph 3 of the Convention states that "Each report [of a State Party] shall be considered by the Committee which may make such *general comments* on the report as it may consider appropriate and shall forward these to the State Party concerned. . . ." (Emphasis added.) Thus, although the Committee is authorized to make "general comments," the Convention is clear that those are to be made "on the report" of a State Party. . . .

32. General Comment 2, paragraphs 12–14 also suggest that the Committee is empowered to pronounce certain "measures"—other than those set forth in the Convention itself—as obligatory within the meaning of Article 2. The Committee describes a number of measures that it considers particularly important and states that "article 2 provides authority to build upon the remaining articles and to expand the scope of measures required to prevent torture." (Paragraph 14.)

33. The "authority" to which the Committee is referring is unclear from this presentation and has no clear basis in the Convention. While the United States respects and values the experience of the Committee, it does not consider that Article 2 provides the Committee with any "authority" not expressly provided for in the text of the Convention. If the point intended by the Committee is simply that "effective measures" is not a static concept, the United States is in agreement. States Parties, to continue to meet their Convention obligations, may need to regularly review their relevant laws and practices. This approach is reflected in Article 11 of the Convention, which requires States Parties to "keep under systematic review" various rules and practices "with a view to preventing any cases of torture."

34. General Comment 2, paragraph 4 states that "States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention *in accordance with the Committee's concluding observations and views adopted on individual communications*." (Emphasis added.)

35. The United States strongly objects to this statement, as it asserts an exceptionally broad, new power for the Committee that the States Parties have not given to the Committee under the Convention. While the Committee's concluding observations and views on individual communications are deserving of respect and should be considered carefully by States Parties, they do not create legal obligations. Although States Parties to a treaty can agree to establish a third party to render authoritative treaty interpretations or to definitively resolve legal disputes, in this case, no such authorities have been given to the Committee.

36. With respect to the Committee's concluding observations, the Convention says only that the Committee, after having reviewed the report of a State Party, "may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee." CAT, Article 19, para. 3. With respect to individual communications, the Committee's competence on this matter depends on whether a State Party has made a declaration pursuant to Article 22. Even in situations in which a State Party has made such declaration—which the United States has not—and where the Committee has examined a communication under Article 22, the Convention provides only that "[t]he Committee shall forward its views to the State Party concerned and to the individual." CAT, Article 22, para. 7. Thus, with respect to both concluding observations and individual communications, the Convention grants no authority to the Committee to issue legally binding views on States Parties' obligations.

37. Finally, and as a general matter, the United States observes that General Comment 2 is presented in the style of an advisory opinion issued by a juridical body. As discussed throughout these Observations, the General Comment is replete with legal pronouncements, many of which have little or no textual or historical foundation. The United States considers this approach unbefitting of the Committee's role and reputation as a body charged with assisting and advising States Parties with respect to their implementation of the Convention. Neither does the United States consider the legalistic approach embodied in General Comment 2 to be the most effective means of advancing the objectives of the Convention, namely the prevention of torture and ill-treatment. Having reviewed several hundred reports of States Parties and having considered numerous individual cases, the Committee is in the unique position of being able to identify the most important themes, patterns, best practices, and lessons learned regarding the prevention of torture and ill-treatment. The United States considers that the Committee, rather than issue conclusory and ill-founded legal pronouncements would be doing a great service by distilling and disseminating such valuable information to the international community.

38. The United States Government concludes these Observations with a statement of its appreciation for the work of the Committee Against Torture. Although the United States does not agree with a significant number of the Committee's views on the interpretation of the Convention, it fully shares the Committee's absolute opposition to torture and ill-treatment and appreciates the Committee's continuing efforts to advise States Parties on effective means to prevent and punish acts of torture and ill-treatment. The United States looks forward to its continuing dialogue with the Committee on these issues.

g. Composition of treaty bodies

On November 20, 2008, the United States voted in the Third Committee against a resolution on equitable geographic distribution in human rights treaty bodies. Ambassador McMahan's explanation of vote is excerpted below. The full text of his statement is available at *www.archive.usun.state.gov/press_releases/20081120_328.html.* On December 18, 2008, the General Assembly adopted the resolution by a vote of 128 in favor and 55 opposed, with two abstentions. U.N. Doc. A/RES/63/167.

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. . . This draft resolution purports to establish new requirements pertaining to the selection of experts to human right[s] treaty bodies. The problem with this resolution is that the qualifications of members of treaty bodies, and the procedure for their election, are already expressly set forth in those treaties. We strongly believe that these independent treaty bodies benefit from having experts who come from all over the world and from a wide range of different cultures and legal systems. . . .

That said, as the States Parties to each human rights treaty have already agreed to the legally relevant considerations that apply to the election of members of that treaty body, it is not appropriate for the General Assembly to attempt to substitute its judgment for those of States Parties. As a matter of international

treaty law, it is for the States Parties to those treaties to determine the methodologies related to election of members of such bodies. . . . This resolution constitutes a serious threat both to the independence of these important treaty-based human rights mechanisms and, ultimately, to the perceived objectivity and independence of their work. . . .

3. Protection of Persons in the Event of Disasters

On November 3, 2008, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixtieth session. U.S. views on the ILC's consideration of the issue of protection of persons in times of natural disaster are excerpted below. The full text of Mr. Simonoff's statement is available at *www.state.gov/s/l/c8183.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2008/2008report.htm*.

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We welcome the Commission's decision to consider this important topic. We appreciate the efforts of the Special Rapporteur and believe and hope that the Commission will be able to contribute significantly to advancements in this field. We find the Preliminary Report of the Special Rapporteur (SR) of the ILC on this topic and the preparatory reports of the UN Secretariat to contain a number of extremely useful elements for consideration—which we are currently studying. . . .

We wish to note our reservations about taking a rights-based approach to the topic as has been preliminarily suggested by the Special Rapporteur, as well as our objections to incorporating the responsibility to protect concept into the consideration of this topic.

Instead, we hope the Commission will focus its study on areas of the law that will have the most significant practical impact on

mitigating the effects of such disasters, including, for example, developing practical tools that could be used to facilitate coordination among providers of necessary disaster assistance or drafting model bilateral agreements that could be used to facilitate access of people and equipment to affected areas in a country.

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B. DISCRIMINATION

1. Race

a. International Convention on the Elimination of All Forms of Racial Discrimination

On February 21–22, 2008, the United States appeared before the UN Committee on the Elimination of Racial Discrimination ("Committee"). The Committee met to consider the combined fourth, fifth, and sixth periodic reports the United States submitted in 2007 pursuant to article 9 of the International Convention on the Elimination of Racial Discrimination ("CERD"). *See Digest 2007* at 293–315. In connection with its appearance, the United States submitted responses to 32 questions posed by the Committee.

Among other things, the U.S. responses provided detailed information about the U.S. constitutional and legal framework to eliminate racial discrimination, the Department of Justice's enforcement of anti-discrimination measures throughout the United States, and other U.S. agencies' activities to combat discrimination, including their coordination with state and local governments. The United States also addressed the Department of Justice's prosecution of gender-related criminal offenses involving racial minorities, including human trafficking. The U.S. submission also included a discussion of U.S. economic development and other programs to support Native American, Native Hawaiian, and Pacific Islander communities; U.S. measures to protect the rights of Native Americans with respect to areas of

spiritual and/or cultural significance on public lands; and U.S. compensation to the Western Shoshone Tribe for land claims.

U.S. responses to the Committee's questions concerning (1) the proof needed to find discrimination under U.S. law; (2) U.S. measures to ensure effective implementation of the convention at the federal, state, and local levels; (3) U.S. immigration law; (4) U.S. implementation of article 5 of the CERD; and (5) U.S. practice with respect to its treaties with Native American tribes are excerpted below (footnotes omitted). The full text of the U.S. responses as well as other documents submitted on compliance with the CERD and other human rights treaties are available at *www.state.gov/g/drl/hr/treaties/index.htm*.*

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3. According to information received, claims of racial discrimination under civil rights statutes must be accompanied by proof of intentional discrimination. Please comment on the consistency of this approach with the definition of racial discrimination provided in article 1, paragraph 1 of the Convention, which covers "any distinction, exclusion, restriction or preference (. . .) which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms . . .". (CERD/C/USA/6, paras. 317–323)

Answer:

The question's incomplete citation to article 1(1) and its emphasis of the words "or effect" could be misconstrued to suggest that all acts—including those drawing no distinctions on the basis of race—that may have adverse effects, even if unintended, on racial or ethnic groups fall within the definition of "racial

* Editor's note: On January 13, 2009, the United States submitted its one-year follow-up report to the Committee's observations. *Digest 2009* will discuss relevant aspects of the U.S. report, which is available at *www.state.gov/g/drl/rls/cerd_report/index.htm*.

discrimination." Article 1(1) provides, in pertinent part, that "[i]n this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference *based on race, colour, descent, or national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms . . . ." [Emphasis added]. By the terms of article 1, "racial discrimination" for purposes of the Convention requires the existence of a distinction, exclusion, restriction or preference that is based on race, colour, descent, or national or ethnic origin.

Like all States Parties to the Convention, when the United States takes action to combat racial discrimination, governmental authorities in the United States must carefully review relevant facts to determine if particular acts constitute racial discrimination, including judgments on the question of whether an action in question "was based on race, colour, descent, or national or ethic origin." In doing so, as described more fully below, U.S. law does not invariably require proof of discriminatory intent.

The United States Supreme Court has held that proof of intentional discrimination is required for race discrimination claims brought against public employers under the Due Process Clause of the Fifth Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment. *See Washington v. Davis*, 426 U.S. 229, 238–39 (1976). Nevertheless, the Supreme Court has distinguished those constitutional claims from those brought under federal civil rights laws. Claims of racial discrimination in employment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*., need not be accompanied by proof of intentional discrimination.

. . . Title VII also prohibits employment actions and practices that are facially neutral but have an unlawful disparate impact upon members of a protected class. . . .

* * * *

Section 2 of the Voting Rights Act strictly prohibits voting practices and procedures . . . that discriminate on the basis of race, color, or membership in a language minority group. It prohibits not only election-related practices and procedures that are intended

to be racially discriminatory, but also those that are shown to have a racially discriminatory impact. . . .

Section 5 of the Voting Rights Act freezes changes in election practices or procedures in certain states until the new procedures have been determined not to have a discriminatory purpose or effect either by a special federal court panel or the Attorney General of the United States. . . .

Additionally, Section 601 of Title VI of the Civil Rights Act . . . provides that no person shall "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The statute applies broadly to important public and private programs. . . .

* * * *

4. Taking into account the declaration entered at the time of ratification that the provisions of the Convention are not self-executing, please provide detailed information on the specific measures adopted by the State party pursuant to the recommendation contained in paragraph 390 of the Committee's previous concluding observations to ensure the effective implementation of the Convention at the federal, state and local levels. (CERD/C/USA/6, paras. 58–134 and 310–311)

Answer:

The statement made by the United States regarding the non-self-executing nature of the Convention, which was included in the U.S. instrument of ratification, is a declaration regarding the domestic implementation of the Convention and does not exclude or modify U.S. rights or obligations under the Convention. At the time of ratification of the Convention, the United States undertook a careful review of federal and state laws and determined that U.S. state and federal law was largely consistent with the Convention. In those few areas where U.S. law and the Convention differed or where the terms of the Convention were arguably vague or ambiguous, the United States adopted reservations or other conditions to clarify the nature of the obligation it was undertaking. As a result of this analysis regarding the consistency of U.S. law with the Convention and its use of limited reservations, understandings,

and declarations, the United States determined that it could fully give effect to its obligations under the Convention through operation of U.S. law. The purpose of the non-self-executing declaration was to clarify that the Convention itself did not give rise to a new private right of action by which individuals could seek direct enforcement of the Convention in U.S. courts. As the United States explained in its Initial Report, "[t]here is, of course, no requirement in the Convention that States Parties make it 'self-executing' in their domestic law, or that private parties be afforded a specific cause of action in domestic courts on the basis of the Convention itself. The drafters quite properly left the question of implementation to the domestic laws of each State Party." (CERD/C/351/Add.1, para. 172).

Accordingly, the United States ensures effective implementation of the Convention through vigorous enforcement of the numerous federal and state laws prohibiting discrimination, including the U.S. Constitution's equal protection guarantees and similar provisions of state constitutions, and civil rights statutes at the federal and state levels. . . . Federal and state courts provide opportunities for effective, independent and impartial review and recourse for those who, despite these protections, nevertheless fall victim to discriminatory acts or practices.

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20. Please provide explanations on the specific requirements imposed on nationals of some countries by the federal legislation on immigration, such as the USA Patriot Act and the National Entry and Exit Registration System, as well as more information on the measures adopted by the State party to ensure that its legislation in this field does not discriminate against nationals of such countries on the basis of race, ethnic or national origin.

Answer:

As a preliminary matter, the United States would like to note that nationality-based distinctions in a country's immigration law are not inherently suspect under the Convention. Under Article 1 of the Convention, the relevant inquiry for determining whether such distinctions amount to prohibited discrimination is whether they have the "purpose or effect of nullifying or impairing

the enjoyment or exercise, . . . of human rights and fundamental freedoms . . ."

Moreover, the United States is not alone in employing nationality-based distinctions in its immigration laws. Countries routinely employ nationality-based distinctions as a basis for determining their requirements for entry into their territories. For example, in the United States, the "Visa Waiver Program" (VWP), authorized by section 217 of the Immigration and Nationality Act, 8 U.S.C. § 1187, authorizes the waiver of visa requirements for aliens who are nationals of countries that satisfy a number of objective criteria and are seeking admission as tourists for 90 days or less. Many of the VWP criteria are security-related, but others are designed to determine the likelihood of immigration-related violations. The statute also requires that U.S. nationals receive reciprocal treatment from VWP countries. Numerous countries have agreed to such reciprocal arrangements and thereby have also recognized the permissibility of nationality-based requirements in the immigration context. Such programs do not constitute racial discrimination and do not fall within the scope of the Convention. [*See* Chapters 1.C.4. and 3.A.2.e. for further discussion of the VWP.]

. . . Although the USA PATRIOT Act also expanded certain terrorism-related definitions in the INA determining the admissibility of non-U.S. citizens to the United States, the United States does not believe the USA PATRIOT Act amends U.S. immigration law to require new nationality-based restrictions.

With respect to the National Security Entry and Exit Registration System (NSEERS), this program was implemented by the former Immigration and Naturalization Service (INS), then part of the Department of Justice, to respond to the 9/11 terrorist attacks. 67 FR 40581, June 13, 2002. . . . As part of this registration, individuals generally are interviewed, fingerprinted and photographed. The special registration requirements are designed to ensure that nonimmigrant aliens comply with the terms of their visas and admission and to ensure that they depart the U.S. at the end of their authorized stay. By operation of the Homeland Security Act of 2002, most immigration enforcement authorities

and programs, including NSEERS, were transferred to the Department of Homeland Security (DHS).

Nonimmigrant aliens are required to register in NSEERS if they are nationals of a country or territory designated in the Federal Register or are determined by consular or DHS officers to meet pre-existing criteria indicating the need for closer monitoring of their compliance with the terms of their visas or admission because of national security or law enforcement interests of the United States. Since its inception, aliens from over 150 countries have been registered as part of the NSEERS program.

The NSEERS registration program is consistent with U.S. obligations under the Convention. The registration requirements are rationally related to national security, public safety, and immigration law enforcement objectives and proportional to the achievement of those objectives, do not subject foreign nationals to arbitrary arrest or detention, and do not pose an undue burden on freedom of movement.

Moreover, the detention and removal procedures applicable to non-US citizens in the United States are consistent with the human rights of non-immigrant aliens. Aliens may be detained and subject to removal proceedings if information collected at any stage in the application process leads to a determination of inadmissibility or deportability under the applicable law. Aliens are accorded ample process of law in any ensuing removal proceedings under section 240 of the INA, 8 U.S.C. § 1229a.

U.S. federal courts have consistently upheld the NSEERS nationality classifications against challenges under the equal protection and due process clauses of the Fifth Amendment to the U.S. Constitution. The same is true with regard to previous nationality-specific alien registration programs.

Recognizing the burdens associated with registration, however, DHS amended the NSEERS regulations in December 2003 to significantly reduce those burdens by, among other things, suspending the requirement for annual registration interviews. DHS has also developed procedures to expedite repeat registrations at time of entry for frequent travelers, such as airline crews. Over the past several years, DHS has examined opportunities to capture the

information needed and perform the security functions through other mechanisms with a view toward further reducing the burdens on non-immigrant aliens. DHS will continue to refine its programs to meet the changing national security needs and interests.

21. Please provide further information on the measures adopted . . . to ensure the equal and effective enjoyment by persons belonging to the American Indian and Alaska Native (AIAN) and Native Hawaiian and Other Pacific Islander (NHPI) populations of their rights under article 5 (e) of the Convention. (CERD/C/USA/6, paras. 18–24)

Answer:

. . . Article 5 requires States parties to guarantee equality and nondiscrimination in the enjoyment of certain enumerated "rights," including economic, social and cultural rights relating, *inter alia*, to employment, housing, public health and medical care, education and training and participation in cultural activities (Article 5(e)). The United States notes that some of the items listed in Article 5(e) are not enforceable "rights" under U.S. law. However, Article 5 does not affirmatively require States parties to provide or to ensure observance of each of the listed rights themselves, but rather to prohibit discrimination in the enjoyment of those rights to the extent they are provided in domestic law.

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As provided for in U.S. law, the federal government recognizes Native American tribes as political entities with powers of self-government. Special rights, benefits, or treatment under these programs are based on this special political relationship between Indian tribes and the federal government, rather than on the ethnic background of tribal members; accordingly the programs related to Native Americans and tribes are in full compliance with equal protection guarantees of U.S. law.

* * * *

27. . . . [P]lease provide further information as to whether treaties signed by the Government and Indian tribes can be abrogated

unilaterally by Congress. . . . (CERD/C/USA/6, para. 343 and Annex II, para. 11)

Answer:

The interpretation and recognition of treaty rights arising from treaties between the United States and tribes are important components of U.S. domestic law. Certain open and transparent processes are in place that provide for the abrogation of such treaty-based rights, where deemed appropriate, by Congress and in conjunction with just compensation for a tribe whose rights under a treaty have been amended. For example, there may be a treaty between the United States and a tribe that provides for the tribe's right to hunt a certain animal. That animal could later be identified as an endangered species and Congress could pass a law limiting all hunting of that animal, including by tribal members. Under such a scenario, the tribe's due process rights under the U.S. Constitution require the United States to justly compensate the tribe for the abrogation of that particular treaty right.

The United States and tribes entered into treaties from 1778 until 1871. Disputes regarding treaty rights arising from conflicting interpretations of the specific language of provisions in treaties between tribes and the United States are heard in federal courts. The United States Supreme Court has adopted three basic principles (commonly referred to as, "canons of construction") to guide courts when interpreting language in treaties between the United States and tribes. The canons of construction first provide that unclear language in treaties with Native Americans should be resolved in favor of Native Americans. Second, treaties with tribes should be interpreted as the Native Americans signing the treaty would have understood them at the time of signing. Third, treaties with tribes are to be liberally construed in favor of the Native Americans involved. These guiding rules for interpreting treaties greatly favor Native Americans, and help to address any inequality in the parties' original bargaining positions.

With respect to the inquiry regarding whether there exists a "general doctrine of encroachment," there is not currently such a generally applied legal doctrine used to deprive Native Americans of their existing land rights by the government or non-Indians in

the United States. The United States recognizes, as a historical matter, that indigenous people throughout the world have been unfairly deprived of the lands they once habitually occupied or roamed. . . .

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On May 8, 2008, the Committee issued concluding observations on the combined U.S. reports. U.N. Doc. CERD/C/USA/CO/6.

b. UN General Assembly resolutions concerning racism and racial discrimination

(1) Elimination of racism and racial discrimination

On November 25, 2008, the United States voted in the Third Committee against a resolution entitled "Global efforts for the total elimination of racism, discrimination, xenophobia and related intolerance, and the comprehensive follow-up to the Durban Declaration and Program of Action." Ambassador McMahan provided an explanation of vote based on concerns about the follow up to the 2001 World Conference in Durban, as excerpted below. The full text of Ambassador McMahan's statement is available at *www.archive.usun.state.gov/press_releases/20081125_357.html*. On December 24, 2008, the General Assembly adopted the resolution by a vote of 109 in favor and 13 opposed, with 45 abstentions. U.N. Doc. A/RES/63/242.

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. . . The United States condemns all forms of racism and is deeply concerned by acts of violence committed on the pretext of racial or ethnic hatred. The United States has long been a party to the Convention on the Elimination of Racial Discrimination and hopes our record of domestic legislation and policies to combat

vigorously such activities and attitudes demonstrates our commitment to this important issue.

Regrettably, we must vote against the resolution as drafted. It devotes significant attention and praise to the World Conference on Racism held in Durban in 2001 and requests resources to implement its resulting Declaration and Program of Action.

The position of the United States regarding the . . . Conference Against Racism is well known. . . .

Unfortunately, the work to date of the follow-up preparatory committee gives us no confidence that the 2009 meeting in Geneva will be any different. The recently issued compilation of proposed paragraphs for use in the drafting process of the outcome document contains dozens of unfair, unbalanced, and often flatly untrue statements about a single country—and once again this country is Israel—with a corresponding lack of emphasis on more serious problems in countries around the world.

We believe that some of the Durban follow-up activities are duplicative of the work done by the Committee on the Elimination of Racial Discrimination. Some also duplicate the work of the Human Rights Committee on the International Covenant on Civil and Political Rights, and work related to the ILO conventions addressing worker's rights. In a time of limited resources and many great needs, we do not support the continuation of such duplicative work.

For these reasons, and as we have stated before, we do not believe the Human Rights Council should act as a preparatory committee for the Durban Review Conference. Nor do we believe that the General Assembly and the Economic and Social Council should engage further in the Durban follow-up process. These bodies should instead be dedicated to the role for which they were created, addressing emerging and ongoing human rights situations in the world. Similarly, we strongly believe that . . . neither the Secretary General nor the Office of the High Commissioner for Human Rights should be asked to devote resources to Durban conference follow-up.

* * * *

(2) Practices fuelling racism

On November 18, 2008, the United States called for a vote in the Third Committee and voted against a resolution on "Inadmissibility of certain practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance." In his statement explaining the U.S. vote, Ambassador McMahan said:

> We share the repugnance felt by the sponsors and other members of the Third Committee at any attempt to glorify or otherwise promote Nazi ideology. Nonetheless, freedom of speech and expression must be protected and this resolution simply goes too far in its attempt to combat intolerant and hateful speech and ideology.
>
> We are concerned that this resolution fails to distinguish appropriately between actions and statements which may be protected by the freedom of expression and actions and statements that incite violence, which should be prohibited.

The full text of Ambassador McMahan's statement is available at *www.archive.usun.state.gov/press_releases/20081118_324.html*. On December 18, 2008, the General Assembly adopted the resolution by a vote of 129 in favor and two opposed, with 54 abstentions. U.N. Doc. A/RES/63/162.

2. Gender

During its Security Council Presidency, the United States sponsored a thematic debate on women, peace, and security on June 19, 2008. After the debate the Security Council adopted Resolution 1820, which among other things expressed the Council's readiness, "when considering situations on the agenda of the Council, to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence." U.N. Doc. S/RES/1820. Secretary of State Condoleezza Rice's remarks are excerpted below and available

at *www.archive.usun.state.gov/press_releases/20080619_154.html*; *see also* the statement of Ambassador Zalmay Khalilzad, U.S. Permanent Representative to the United Nations, at the Security Council's meeting on women, peace, and security on October 29, 2008, available at *www.archive.usun.state.gov/press_releases/20081029_294.html.*

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. . . Rape is a crime that can never be condoned, yet women and girls in conflict situations around the world have been subjected to widespread and deliberate acts of sexual violence. As many of you know, for years, there's been a debate about whether or not sexual violence against women is a security issue for this forum to address.

I am proud that today, we respond to that lingering question with a resounding yes. This world body now acknowledges that sexual violence in conflict zones is indeed a security concern. We affirm that sexual violence profoundly affects not only the health and safety of women, but the economic and social stability of their nations.

Today's resolution establishes a mechanism for bringing these atrocities to light. Specifically, the resolution requests that the Secretary General prepare an action plan for collecting information on the use of sexual violence in situations of armed conflict and then reporting that information periodically to the Council.

We already know of the unimaginable brutality against women that exists in some parts of the world. In Burma, for instance, . . . soldiers have regularly raped women and girls even as young as eight years old. . . .

We're concerned about the issue of women and violence across the world in places like the Democratic Republic of the Congo to Sudan and to many other places. And as an international community, we have a special responsibility to punish perpetrators of sexual violence who are representatives of international organizations. Last year, there were reports of sexual exploitation and

abuse by UN peacekeepers in several UN missions and by staff at the UN Mission in Liberia.

The encouraging news is that steps have been taken to address this. One of the perpetrators is serving a sentence in his country and several other cases remain under investigation. This situation should serve as a model for all countries contributing troops to UN operations. While the individual perpetrator is ultimately responsible for the abuse, member states are responsible for disciplining and holding their troops accountable.

Finally, we must work together to provide the necessary protection and assistance for victims of sexual violence. . . .

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3. Religion

a. Annual Report on International Religious Freedom

On September 19, 2008, the Department of State released the 2008 Annual Report on International Religious Freedom covering the period July 1, 2007 through June 30, 2008, and transmitted the report to Congress pursuant to § 102(b) of the International Religious Freedom Act of 1998, 22 U.S.C. § 6412(b). The report is available at *www.state.gov/g/drl/rls/irf/2008*. In a statement to the press on the release of the report, John V. Hanford III, Ambassador at Large for International Religious Freedom, discussed the governments the report identified that do not allow full enjoyment of religious rights. Ambassador Hanford's comments are available at *http://2001-2009.state.gov/g/drl/rls/rm/2008/110027.htm*.

b. Defamation of religions

On July 11, 2008, the United States submitted a written response to the UN Office of the High Commissioner for Human Rights, excerpted below, for the Secretary-General's report concerning states' implementation of General

Assembly Resolution 62/154 of December 18, 2007. The resolution requested the Secretary-General to submit a report to the General Assembly at its sixty-third session, including discussion "on the possible correlation between defamation of religions and the upsurge in incitement, intolerance and hatred in many parts of the world." U.N. Doc. A/RES/62/288. The United States voted against that resolution, and the Secretary-General submitted his report to the General Assembly on October 21, 2008. U.N. Doc. A/63/365. The full text of the U.S. submission is available at *http://geneva.usmission.gov/Press2008/July/0715DefamationReligions.html*.

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The United States . . . believes that the concept of "defamation of religions" is not supported by international law and that efforts to combat "defamation of religions" typically result in restrictions on the freedoms of thought, conscience, religion, and expression. While appearing in name to promote tolerance, implementation of this concept actually fosters intolerance and has served to justify restrictions on human rights and fundamental freedoms such as the freedoms of religion and expression for all persons, including those who may or may not belong to a particular faith. . . .

At the same time, the [United] States reiterates that it does not support statements intended to insult religious traditions and works to promote a climate of tolerance, respect, and understanding. . . . The United States understands that religion is a central organizing principle for many societies. We sympathize with those who seek to promote tolerance and take a strong stand against offensive speech. Restricting the rights of individuals, however, is not the way to achieve this goal.

Legal Problems with the Concept of Defamation of Religions

From a legal perspective, the "defamation of religions" concept is deeply problematic. Under existing human rights law, individuals—not religions, ideologies, or beliefs—are the holders

of human rights and are protected by the law. However, the concept of "defamation of religions" seeks to convey the idea that a religion itself can be a subject of protection under human rights law, thereby potentially undermining protections for individuals.

In addition, "defamation" carries a particular legal meaning and application in domestic systems that makes the term wholly unsuitable in the context of "religions." A defamatory statement (or other communication) is more than just an offensive one. It is also a statement that is false. Because one defense to a charge of defamation is that the statement is in fact true, the concept does not properly apply to that which cannot be verified as either true or false, such as statements of belief or opinion. Even offensive opinions and beliefs are not defamatory.

It is also unclear how "defamation" could be defined considering that one individual's sincere belief that his or her creed alone is the truth inevitably conflicts with another's sincerely held view of the truth. Even between adherents of the same religion there are divergent views that some might find offensive or "defamatory." How could an international framework or entity properly adjudicate such deeply held individual beliefs as "defamatory" to another belief?

Even if a defamation standard were to be legally enforceable, and even if it could be enforced in an equitable manner, it would lead to numerous legal claims and counterclaims between majority and minority religious communities or dissenting members of a faith. Instead of fostering tolerance, such a standard would almost certainly lead to greater conflict and intolerance. What is considered to be a sacred statement by one may be viewed as sacrilegious to another, and could therefore be legally actionable as a "defamation of religion".

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C. CHILDREN

1. Optional Protocols to the Convention on the Rights of the Child

On May 22, 2008, the United States appeared for the first time before the Committee on the Rights of the Child. The committee met for the purpose of considering initial reports

by several countries on implementation of the two optional protocols to the Convention on the Rights of the Child: (1) the Protocol on the Sale of Children, Child Prostitution and Child Pornography ("Sale of Children Protocol") and (2) the Protocol on the Involvement of Children in Armed Conflict ("Armed Conflict Protocol"). The United States filed its initial reports on both protocols in 2007. *See Digest 2007* at 333–54. On June 25, 2008, the committee issued concluding observations on the U.S. initial reports on both protocols. U.N. Docs. CRC/C/OPSC/USA/CO/1 (Sale of Children Protocol) and CRC/C/OPAC/USA/CO/1 (Armed Conflict Protocol).

U.S. initial reports, additional submissions, and statements, as well as the committee's reports, are available at *www2.ohchr.org/english/bodies/crc/crcs48.htm*.

a. Sale of Children Protocol

(1) U.S. meeting with Committee on the Rights of the Child

Ambassador Mark P. Lagon, Director of the Department of State Office to Monitor and Combat Trafficking in Persons, Deputy Assistant Attorney General Sigal P. Mandelker, Department of Justice, and New Mexico Attorney General Gary K. King addressed the committee in opening remarks at the May 22 meeting. The full texts of the statements, excerpted below, are available at *www2.ohchr.org/english/bodies/crc/docs/statements/48USA_Final_Statements.pdf*.

Ambassador Lagon

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I would like to briefly highlight overall U.S. efforts to address the sale of children, child prostitution and child pornography as well as highlight the path forward for further enhancing our efforts. . . .

The United States has made important strides in combating human trafficking, including all forms of commercial sexual exploitation of children. We have strengthened our laws, starting

with the passage, in 2000, of the Trafficking Victims Protection Act (TVPA). This law recognizes that human trafficking is a crime, and children engaged in commercial sexual activities are by nature victims. The TVPA establishes penalties for trafficking offenses commensurate with the seriousness of the exploitation, control, and dehumanization the crime entails. At the same time, it ensures that victims receive protection, services, and a special visa in the case of foreign trafficking victims. The TVPA, which has been reauthorized twice, now places an additional emphasis on countering demand by authorizing funds to state and local law enforcement agencies to investigate and prosecute brothel owners, pimps, and perpetrators or "customers."

In 2003, the U.S. passed the Prosecutorial Remedies and other Tools to end the Exploitation of Children Today (or "PROTECT") Act. In 2006, Congress also passed the Adam Walsh Child Protection and Safety Act. Together, these statutes enhance protections for children while punishing those who victimize them. For example, those engaged in sex trafficking of children face a minimum ten year sentence and a possible maximum life sentence, while any U.S. citizen or legal permanent resident convicted of traveling abroad and having sex with a minor faces up to 30 years imprisonment.

The U.S. Government has developed multiple resource materials and expanded training at the federal, state, and local level to ensure that law enforcement is aware of the tools at their disposal, including enhanced penalties, and that they understand the meaning and importance of the victim-centered approach to these cases. Training includes instruction in countering sexual exploitation of minors and combating forced child labor.

The U.S. Government continues to expand its assistance to foreign victims of trafficking by authorizing access to social services and through the provision of grants to civil society organizations. With regard to foreign child victims, the U.S. Department of Health and Human Services is the lead agency to issue Letters of Eligibility for these children, which allows them to access services and benefits comparable to those provided to refugees in the United States. A child victim's cooperation with law enforcement is not a prerequisite for receiving a letter of eligibility.

The United States has also worked to protect children from sexual exploitation and pornography through major public awareness and educational efforts. The U.S. Department of Health and Human Services launched a nationwide public awareness campaign, called "Rescue and Restore" which includes the establishment of a National Human Trafficking Resource Center, development of a national hotline, and release of public service announcements, posters, and brochures. Our Department of Education has developed and disseminated resource materials into schools.

Overseas, we funded public awareness campaigns on child sex tourism in Mexico, Brazil, Costa Rica, Thailand, and Cambodia.

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Internationally, the United States has spent over $528 million dollars for international anti-trafficking programs since 2001 in approximately 120 countries. Since the release of the United States' Report to this committee last summer, my office has awarded approximately $2.6 million in new grants to non-governmental organizations, UNICEF and UNIFEM to combat child trafficking in 12 countries. The Department of State's annual Trafficking in Persons Report, compiled by my office, serves as a vehicle to raise global consciousness about the harm of human trafficking, notably of children, and to engage bilaterally with governments to do more to fight it.

We recognize that we have areas for improvement. Just as we assess other governments' anti-trafficking efforts, the United States also evaluates itself through an annual report to Congress, which includes an *Assessment of U.S. Government Efforts to Combat Trafficking in Persons*. This year the Assessment identifies the following needs: 1) we must ensure that all U.S. citizen victims are as vigorously identified, protected, and assisted as foreign national victims; 2) law enforcement agents and service grantees, subcontractors, and partners must work as expeditiously as possible to identify victims, provide care, and secure immigration relief; 3) we must ensure that all child victims of severe forms of human trafficking (both foreign and U.S. citizen) are provided access to services and benefits regardless of their ability and willingness to

assist law enforcement; and 4) we need to expand the development of educational materials on human trafficking for dissemination through education and community-based entities.

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Deputy Assistant Attorney General Mandelker

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At the Department of Justice, we dedicate ourselves to enforcing the expansive U.S. laws related to the sale of children, child prostitution, and child pornography. In each case that we prosecute, we maintain a victim-centered approach. We bring to every case the heavy knowledge and sense of obligation to do everything that we can to bring perpetrators to justice and to stop them from abusing other children in the future.

With this primary goal in mind, the Department has strategically focused and increased its efforts to combat child exploitation. In 2006, for example, the Department, with other law enforcement partners, launched an initiative called Project Safe Childhood, a program designed to protect children from online exploitation and abuse and to enhance the national response to this growing threat. Under this initiative, we have set up task forces, comprised of federal, state, and local law enforcement, in every federal district in the country. In the last fiscal year alone, federal prosecutors charged 2,118 cases involving child pornography, coercion, and enticement offenses against 2,218 defendants, a 28 percent increase over the previous year.

Project Safe Childhood builds upon the Internet Crimes Against Children Task Forces (ICACs) program, which was launched in 1998 and is designed to help state and local law enforcement agencies acquire the knowledge, equipment and personnel resources they need to prevent, investigate and stop sexual crimes against children. There are currently 59 such Task Forces across the United States, with at least one in each state. . . .

The Department has also focused on combating the domestic prostitution of children. In 2003, the Criminal Division of the Department of Justice, the Federal Bureau of Investigation, and

the National Center for Missing & Exploited Children launched the Innocence Lost Initiative to identify and rescue prostituted children. The Innocence Lost Initiative has developed task forces in 23 cities, which take a victim-centered approach to investigating and prosecuting cases involving the sex trafficking of children within the United States. The Initiative holds numerous intensive week-long training programs that bring state and federal law enforcement agencies, prosecutors, and social services providers all from one city to be trained together.

Similarly, there are 42 regional anti-trafficking task forces in 25 states and territories and 21 anti-trafficking coalitions across our country that are galvanizing local communities to reduce demand for the trafficking of children and women from overseas and that are coordinating victim services through local organizations. A crucial element of these task forces involves cooperation between government and civil society actors, because non-governmental organizations can immensely improve the ability to find and help victims.

As part of our victim-centered approach, we also pursue efforts to increase public awareness of child exploitation. Through the Office of Juvenile Justice and Delinquency Prevention, for example, the Department has awarded grants totaling $4 million to raise public awareness of internet safety issues and provide valuable training to adults and children. ICAC Task Forces also provide Internet safety education through schools and other community-based organizations. Project Safe Childhood likewise includes educational programs and community outreach in an effort to enlist the public in the fight against child exploitation.

Additionally, the Department works in close partnership with the National Center for Missing and Exploited Children, which serves as an information clearinghouse; operates a Cyber Tipline; and provides technical assistance in cases involving exploited children. The NCMEC Child Victim Identification Program has, from the inception of its program through the end of calendar year 2007, identified 1,247 children depicted in child pornography.

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New Mexico Attorney General King

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Earlier this year, my office and the office of the attorney general for the Mexican State of Chihuahua joined forces to combat human trafficking on both sides of our shared international border. Our official Agreement of Understanding codified our mutual interest in addressing the problem of what amounts to human slavery of citizens from both of our countries. . . .

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The fight to protect children in New Mexico was also aided by the recent adoption of a law that defines the practice of human trafficking as a felony crime. . . .

Our anti-human trafficking law includes provisions for state services to victims until they can qualify for services under the federal Trafficking Victims Protection Act. Federal authorities have stated they believe, as a result of the New Mexico law, cases of human trafficking will begin to be identified, particularly within the commercial sex industry.

This new law, which was a priority of my administration, allows my state to prosecute violators, whether they are suspected of intra-state or international human trafficking. . . .

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(2) U.S. written responses to issues identified by Committee on the Rights of the Child

On May 13, 2008, the United States responded in writing to a list of issues provided by the committee on February 26, 2008 (U.N. Doc. CRC/C/OPSC/USA/Q/1). The full text of the U.S. response, excerpted below, is available at *http://2001-2009.state.gov/g/drl/rls/105435.htm*.

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3. Please clarify whether sale of children, in all its forms covered by article 3 (1) (a) of the Protocol, is a separate offence from trafficking of children.

Answer: It is not clear what the relationship of this question is to the obligation of State Parties under the Protocol, as article 3 does not refer to an offense designated as "trafficking" of children. As described in the U.S. Initial Report, laws in force in the United States prohibit all of the offenses set forth in article 3(1)(a) of the Protocol. That said, in the United States there are laws concerning the sale of children that are a separate offense from trafficking in children. For example, 18 U.S.C. § 2251A prohibits the sale of children for the purpose of using the children to produce images of sexually explicit conduct. Other laws that prohibit the sale of children also overlap with laws that prohibit trafficking of children, such as 18 U.S.C. § 1584, which prohibits holding any person in involuntary servitude, and 18 U.S.C. § 1589, which prohibits compelling or coercing a person's labor or services.

4. Please update the Committee on any development concerning the reservation entered by the State party on article 4 (1) of the Protocol.

Answer: There have been no developments in U.S. law pertaining to offenses committed on board a ship or aircraft registered in the United States. Thus, the U.S. reservation concerning Article 4(1) of the Protocol continues to be necessary. We emphasize, however, the technical nature of the U.S. reservation and note that as a practical matter, it is unlikely that any case would arise which could not be prosecuted due to the lack of maritime or aircraft jurisdiction. We refer the Committee to paragraphs 49 and 50 of the U.S. Initial Report.

5. With reference the State party's understanding entered on the terms "applicable international legal instruments" and "improperly inducing consent", please update the Committee on any development following the recent State party's ratification of Hague Convention no 33 on Inter-Country Adoption.

Answer: . . . As the Committee notes, the United States is now a State Party to the Hague Convention. Accordingly, the

United States now has an obligation to criminalize conduct proscribed by Article 3(l)(a)(ii) of the Protocol and to take all appropriate legal and administrative measures required by Article 3(5) of the Protocol.

In preparation for becoming a State Party to the Hague Convention, the United States enacted into law the Intercountry Adoption Act (IAA, Public Law 106-279) and a wide range of administrative regulations. These enactments further U.S. implementation of Articles 3(1)(a)(ii) and 3(5) of the Optional Protocol.

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9. Please elaborate on the information received by the Committee that, while sexually exploited children are considered as victims according to Federal legislation, in some states these children may be actually prosecuted and punished as offenders.

Answer: Each of the 50 states and the District of Columbia has its own, unique laws and procedures concerning the prosecution of juveniles for a variety of crimes, including prostitution. The federal government has no authority to enact or enforce state laws.

In the federal system generally, prosecution of juveniles is extremely rare, and there is an extensive review process that must be completed before the case can proceed. Furthermore, while federal laws prohibit coercing someone into prostitution or obtaining someone to engage in prostitution, there are no federal laws that prohibit someone from engaging in prostitution. Therefore, there are no federal laws that could reach a child engaged in prostitution.

That a state may arrest children engaged in prostitution does not necessarily indicate a failure of the victim-centered approach. A frequent challenge in cases involving prostituted children is establishing the age and identity of the victims. They often provide false information about their name and age, or provide fraudulent identification. As such, an officer may not be aware at the time of arrest that the individual is in fact a juvenile.

. . . Finally, there are occasions, for lack of other more appropriate resources, where arresting a child for prostitution may serve as a last resort to place her or him in a secure environment away

from the exploiters. This can allow time for the victim to be stabilized and be provided with treatment and services through the detention facility. In such cases, the arrest would almost certainly be under the relevant state's juvenile system and thus would provide appropriate protections given the arrestee's juvenile status.

The federal government encourages federal, state, and local law enforcement and service providers to adopt the victim-centered approach and to view prostituted children as victims and not criminals. This is done through numerous trainings that take place each year. . . .

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10. Please provide the Committee with updated information on the social reintegration assistance as well as physical and psychosocial recovery measures available for victims of offences covered by the Protocol, and notably for children trafficked domestically for the purpose of sexual exploitation.

Answer: Child victims of trafficking who are foreign nationals are eligible to receive federal benefits and services to the same extent as refugees. . . .

Victims of trafficking who are U.S. citizens may apply for these benefits directly, regardless of whether they are victims of human trafficking, provided they meet basic program eligibility criteria (e.g., income, age, parental status), and victims of trafficking who are Lawful Permanent Residents are also permitted to receive many of the same benefits and services. The U.S. Government is endeavouring to help U.S. citizen victims of human trafficking access comprehensive case management services to help them obtain benefits to which they have rights.

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On May 23, 2008, the United States responded to additional questions from Ms. Rosa María Ortiz, Vice Chair of the committee, as excerpted below (U.N. Doc. CRC/C/OPSC/USA/Q/1/Add.2) and available at *www.state.gov/g/drl/hr/treaties.index.htm*.

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Considering that the U.S. implementing legislation and regulations for the Hague Convention seem to permit pre-natal and other payments to biological mothers in the countries of origin of adoption, how is this consistent with the Optional Protocol's definition of "sale of children" (Article 2) and with Article 3(1)(a)(ii)?

U.S. implementing regulations are fully consistent with these articles of the Optional Protocol. These regulations specifically prohibit improper inducement, including improper inducement of the consent of a parent, a legal custodian, individual, or agency to the adoption of a child. See 8 CFR 204.304(a)(2) ("[n]either the applicant/petitioner, nor any individual or entity acting on behalf of the applicant/petitioner may, directly or indirectly, pay, give, offer to pay, or offer to give any individual or entity or request, receive, or accept from any individual or entity, any money (in any amount) or anything of value (whether the value is great or small), directly or indirectly, to induce or influence any decision concerning [consent]").

Certain other payments are permitted, however, including reasonable "medical, hospital nursing, pharmaceutical, travel, or similar expenses incurred by a mother or her child in connection with the birth or any illness of the child." See 8 CFR 204.304(b)(3). Note however that "a payment is not reasonable if it is prohibited under the law of the country in which the payment is made or if the amount of the payment is not commensurate with the costs for professional and other services in the country in which any particular service is provided." See 8 CFR 204.304(b). Prospective adoptive parents seeking approval to proceed with an adoption covered by the Convention are required to disclose all fees and other expenses paid in relation to the adoption.

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b. Armed Conflict Protocol

(1) U.S. meeting with Committee on the Rights of the Child

Ambassador Lagon and Deputy Assistant Secretary of Defense Sandra L. Hodgkinson addressed the committee in opening remarks on the Armed Conflict Protocol in the

afternoon session of the May 22 meeting. The full texts of the statements, excerpted below, are available at *www2.ohchr.org/english/bodies/crc/docs/statements/48USA_Final_Statements.pdf*.

Ambassador Lagon

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Around the world, the United States seeks to prevent and undo the harms resulting from the involvement of children in armed conflict, which, I would add, can also be a form of trafficking in persons. For example, in the Democratic Republic of Congo, the United States is supporting a UNICEF and International Rescue Committee project to provide care and protection for child returnees from the Lord's Resistance Army.

The coercive use of children in armed conflict is not permitted in the United States or in the US Armed Forces. As the US report identifies, the United States has also taken substantial measures to rehabilitate victims of this practice abroad.

Ms. Hodgkinson

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Since 1973, the US Military has been an all-volunteer force. . . . Through clear rules, recruiter training, and rigorous oversight mechanisms, we have been successful in implementing our obligations under the Optional Protocol to ensure that all feasible measures are taken that no one under the age of 18 engages directly in hostilities.

The overwhelming majority of new recruits are over 18 years of age, and more than 90 percent have at least a high school diploma. As young people in the United States typically begin to consider their career options during their final years of high school, recruiters offer them information about serving in the United States Armed Forces, including information about additional educational opportunities and other lifelong benefits of service.

Individuals who graduate high school prior to their 18th birthday may still enlist. However, in order to begin the enlistment

process, an individual must be at least 17 years old and have written permission from their parents or legal guardian. . . .

In addition to the thorough training recruiters receive, the military services maintain vigilant oversight of recruiter conduct and discipline, and sanction those few who fail to maintain standards of professionalism.

Each military service has policies in place to ensure that all feasible measures are taken that no one under the age of 18 engages directly in hostilities, and the military departments have checks in their personnel systems to ensure adherence to the provisions of the service policies. Currently, the military departments have policies in place that restrict the assignment of 17 year old service members to ensure compliance with this Protocol.

The Department of Defense has conducted internal reviews of the more than 1.7 million service members who have deployed in support of current operations. While there have been 17 year old service members deployed to "hazardous duty pay" or "imminent danger pay" areas, our reviews did not uncover any service member under the age of 18 as having engaged directly in hostilities.

It is unfortunate that children are, and continue to be, recruited into armed conflict around the globe, including in Iraq and Afghanistan. The U.S. does detain juveniles who have engaged our forces on the battlefield—to include planting improvised explosive devices and preparing for suicide attacks—to remove them from the dangerous effect of combat, and to protect our forces and innocent civilians.

Although age is not a determining factor in the initial decision as to whether or not we detain an individual under the law of armed conflict, we go to great lengths to attend to the special needs of juveniles while they are in detention. Young detainees are not only attended to by military personnel who are committed to providing detainees with safe and humane care and custody, but also by medical professionals, who recognize that because of their age they may require special physical and psychological care.

In all cases, juvenile detainees are afforded regular exercise, have access to mental health services; medical services, including dental care; and contact with their families, to the maximum extent possible. In Iraq, families are able to visit young detainees in person.

In Afghanistan, families have the opportunity to maintain contact through video-teleconference calls and plans are underway to facilitate family visits in the future.

Given the numbers of juvenile detainees in Iraq, the US Military has developed a robust program to address their special needs. In consultation with the Iraqi Government, a Juvenile Education Center was opened on August 12, 2007, to provide basic educational instruction for all juvenile detainees up to age 17. The program is designed so that the juveniles can continue their education after their release, and efforts are being made to incorporate the Iraqi Ministry of Education standards and curriculum.

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It is not unprecedented for juveniles to face the possibility of a war crimes trial. In fact, the Geneva Conventions and their Protocols contemplate the prosecution of those under the age of 18 for violations of the laws of armed conflict. Article 77 of Additional Protocol I and Article 6 of Additional Protocol II of the Geneva Conventions prohibit the application of the death penalty to those under 18 at the time the offense was committed, thereby indicating that prosecutions not resulting in the imposition of death are not prohibited. Similar approaches are taken by international tribunals established by the United Nations. The International Criminal Tribunals for Rwanda and the former Yugoslavia have no express age restrictions on prosecutions. And the Special Court for Sierra Leone expressly provides for prosecution of juveniles who are 15 to 17 years old. A juvenile's age and upbringing may be considered by a Military Commission, the Convening Authority, and the Court of Military Commission Review—the latter two of which will review the findings and the sentence.

It is relevant to note in the context of this discussion that recent media reporting has highlighted instances of children being recruited, trained for, and used as suicide bombers, as well as to make and plant improvised explosive devices. Detention of these juveniles removes them from that dangerous environment, and protects other innocent civilians and coalition forces from their attacks. If there is a sense that juveniles cannot be removed from the battlefield, there is a valid concern that the tactic of recruiting

children will be further utilized against coalition forces and innocent civilians in Iraq and Afghanistan. To allow this would further encourage the barbaric practice of using children for missions that could and do result in their deaths.

As in our written report to the committee, I would like to again emphasize that the United States remains committed to the promotion of international cooperation and assistance in the rehabilitation and social reintegration of children who have been victimized by armed conflict. To that end, we have contributed substantial resources to international programs aimed at preventing the recruitment of children and reintegrating former child soldiers into society. For instance, we have contributed over $10 million through USAID toward the demobilization of child combatants and their reintegration in Angola, Afghanistan, Sierra Leone, Sudan and other countries; and $24 million through the Department of Labor toward the prevention of recruitment and economic reintegration of former child soldiers and war affected youth in places like Burundi, Sri Lanka and others. We remain committed to assist in the development of rehabilitation approaches that are effective in addressing this serious and difficult problem.

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(2) U.S. written responses to issues identified by Committee on the Rights of the Child

On May 19, 2008, the United States responded in writing to a list of issues provided by the committee on February 26, 2008 (U.N. Doc. CRC/C/OPAC/USA/Q/1). The full text of the U.S. response (U.N. Doc. CRC/C/OPAC/USA/Q/Add.1/Rev.1) is excerpted below. The U.S. submission included seven annexes, several of which are statistical in nature: I. U.S. war crimes statute; II. Accessions of individuals below age 18 to U.S. armed services (2004–2007); III. Military recruiting and recruiter irregularities (2006); IV. U.S. asylum-seekers from conflict-affected countries: individuals under 18 who filed as principal applicants (2005–2007); V. Unaccompanied minors who were principal applicants for refugee status

(2005–2007); VI. DHS interviews of unaccompanied minors who were principal applicants for refugee status (statistical profile for selected nationalities, 2007); and VII. Defensive asylum applications filed by juveniles in their own right (2005–2007).

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Question 4. Please clarify whether, in a state of emergency or armed conflict, persons under 18 years of age could be required to take direct part in hostilities.

4. Article 1 of the Protocol provides that "States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities." In the view of the United States, Article 1 applies in cases of a state of emergency or armed conflict.

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Question 9. Please explain how the State party ensures that private military and security companies contracted by the Department of Defense and the Department of State are informed of the provisions of the Protocol and the obligations contained therein. Please inform the Committee what sanctions can be applied to private contractors for acts contrary to the Protocol and whether there are examples of such cases.

15. Private security companies contracted by the Departments of State and Defense to protect U.S. Government personnel or others in areas of ongoing combat operations are not part of the U.S. armed forces and are not authorized to engage or participate in offensive combat operations. Nonetheless, at a minimum these armed contractor personnel must be at least 21 years old, and properly vetted, a fact that is verified by the Departments as part of a mandatory resume review and certification process. Such private security companies are also required by their contract to comply with all applicable law and government regulations. In addition, private companies contracted by the Department of State to provide local guards for diplomatic or consular persons or property in non-combat environments are required to obtain all licenses and

permits (both company and individual) required under the laws of the host government to operate as a security company providing guard services. All contractors are required to meet any minimum age, experience, appropriate background check, and training requirements established by the host government prior to performing work under a Department of State or Defense contract.

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Question 11. . . . Please inform the committee how refugee and asylum claims from children who have been recruited or used in situations of armed conflict are considered.

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21. It is conceivable that children who have been recruited or used in situations of armed conflict may be eligible for asylum or refugee protection based on this shared past experience. At least one court has held that where an applicant for asylum can establish that his or her status as a former child soldier is the characteristic for which he or she has been or will be subjected to forms of persecution other than the recruitment itself, a refugee or asylum applicant may be eligible based on the applicant's membership in a particular social group. *See Lukwago v. Ashcroft*, 329 F.3d 157, 178–79 (3d Cir. 2003) (holding that class of former child soldiers who have escaped fits within the statutory definition of a particular social group). But to qualify as a "particular social group" for purposes of the U.S. asylum and refugee laws, the alleged group must, inter alia, "have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them." Matter of A-T-, 24 I. & N. Dec. 296, 303 (BIA 2007) (citing Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74–75 (BIA 2007), aff'd, Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007) (per curiam), and Matter of C-A-, 23 I. & N. Dec. 951, 959–61 (BIA 2006)), aff'd, Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006)). An applicant's status as a child, on the other hand, is not sufficient, on its own, to establish a particular social group, as children are a large and diverse group and such a group does not tend to meet the particularity requirement of a particular social group. *See, e.g., Escobar v. Gonzales*, 417 F.3d 363, 367–68 (3d Cir. 2005); *Lukwago*, 329 F.3d at 171–72.

22. Different considerations come into play when the persecution being considered in an asylum or refugee claim is the forced recruitment itself. Where individuals are targeted for forced recruitment because they are viewed as desirable combatants, there is generally not a nexus between the forced recruitment and a protected characteristic. *See INS v. Elias-Zacarias,* 502 U.S. 478, 482 (1992). If, however, a child was subject to forced recruitment on account of another protected characteristic (such as race, religion, nationality, or political opinion), that child might be eligible for refugee or asylum status, presuming there are no bars to eligibility.

23. Children, like adults, who have been recruited or used in situations of armed conflict, may be inadmissible to the United States for reasons related to national security and terrorism-related activities. *See* Immigration and Nationality Act (INA) § 212(a)(3)(B). Because most armed resistance organizations would meet the definition of a "terrorist organization" under the INA, a child's association with, or activities on behalf of, these organizations may impact that child's eligibility for asylum or refugee protection. Recruitment of children by a state, on the other hand, would not likely raise the terrorism-related grounds of inadmissibility.

24. The INA provides the Secretary of Homeland Security and the Secretary of State with the discretionary authority to determine that certain terrorism-related grounds of inadmissibility will not apply to specific cases. INA § 212(d)(3)(B)(i). A process for exempting the material support ground of inadmissibility has been in place since 2006, when the Secretary of State exercised her exemption authority for refugee resettlement applicants who had provided material support to eight particular organizations. . . .

25. The Secretary of Homeland Security also exercised his exemption authority with respect to material support provided under duress to undesignated terrorist organizations and certain organizations designated by the U.S. Department of State as terrorist organizations, where the totality of the circumstances warrants the favorable exercise of discretion. . . .

26. Under the Consolidated Appropriations Act, 2008 (CAA), signed on December 26, 2007, the ten undesignated groups listed above no longer qualify as terrorist organizations for acts or events that occurred before the date of enactment. As a result, many activities or associations with these groups, including receipt of

military-type training from one of these groups, no longer constitute a bar to asylum or refugee status. . . . The U.S. Government is currently examining whether to issue additional exemptions based on the CAA's changes in law.

27. Additionally, where an applicant for asylum or refugee status, whether a child or an adult, ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion, that applicant is barred from a grant of asylum or refugee status, although they remain eligible for protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Cases involving children who have been recruited or used in situations of armed conflict may require evaluating whether the persecutor bar is applicable.

Question 12. Please inform the Committee of;

(a) the number of children detained at Guantanamo Bay and at other US administered detention facilities abroad since 2002;

28. Since 2002, the United States has held approximately 2,500 individuals under the age of 18 at the time of their capture. Juvenile combatants have been detained at Guantanamo Bay, in Iraq, and in Afghanistan.

29. The United States does not currently detain any juveniles at Guantanamo Bay. In the entirety of its existence, the Guantanamo Bay detention facility has held no more than eight juveniles, their ages ranging from 13 to 17 at the time of their capture.* It remains uncertain the exact age of these individuals, as most of them did not know their date of birth or even the year they were born. Department of Defense medical personnel assessed that three of the juveniles were under the age of 16, but could not determine

* Editor's note: On November 24, 2008, the United States filed a letter with the Committee on the Rights of the Child to correct this answer, stating: "In response to a recent study by the Center for the Study of Human Rights in the Americas, the Department of Defense has reviewed its records and concluded that the correct total number of individuals who were below the age of 18 upon their arrival at Guantanamo is twelve, rather than eight." The full text of the letter is available at *www.state.gov/s/l/c8183.htm*.

their exact age. All three juveniles under the age of 16 held at Guantanamo were transferred back to Afghanistan in January 2004. Three other juveniles were transferred back to their home countries in 2004, 2005, and 2006, respectively.

30. Since 2002, the United States has held approximately 90 juveniles in Afghanistan. As of April 2008, there are approximately 10 juveniles being held at the Bagram Theater Internment Facility as unlawful enemy combatants.

31. Since 2003, the United States has held approximately 2,400 juveniles in Iraq. The juveniles that the United States has detained have been captured engaging in anti-coalition activity, such as planting Improvised Explosive Devices, operating as look-outs for insurgents, or actively engaging in fighting against U.S. and Coalition forces. As of April 2008, the United States held approximately 500 juveniles in Iraq.

* * * *

(c) the charges raised against them;

37. As the committee is aware, the United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. The law of armed conflict allows parties to the conflict to capture and detain enemy combatants without charging them for crimes. The U.S. Supreme Court, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), affirmed that the detention of enemy combatants is a fundamental and accepted occurrence in war, and concluded that the United States is therefore authorized to hold detainees for the duration of the conflict. This is consistent with the Geneva Conventions. The principal rationale for detention during wartime is to prevent combatants from returning to the battlefield to re-engage in hostilities.

In certain cases, the U.S. Government or the host nation may choose to prosecute a detainee for crimes. Both detainees who were picked up as juveniles and who remain at Guantanamo Bay have been charged for prosecution by military commission. Omar Khadr is currently 21 years old and is facing trial by military commission on the following charges: murder in violation of the law of armed conflict, attempted murder in violation of the law of armed conflict, conspiracy, providing material support to terrorism, and spying. Mohammed Jawad, who is approximately 23 now, is being

charged with attempted murder in violation of the law of war and intentionally causing serious bodily injury. Mr. Khadr and Mr. Jawad are currently the only two individuals captured under the age of 18 that the U.S. Government has chosen to prosecute under the Military Commissions Act of 2006.

* * * *

(e) The physical and psychological recovery measures available to them;

47. The Department of Defense recognizes the special needs of young detainees and the often difficult or unfortunate circumstances surrounding their situation. We have procedures in place to evaluate detainees medically, determine their ages, and provide for detention facilities and treatment appropriate for their ages. Every effort is made to provide them a secure environment, separate from the older detainee population, as well as to attend to the special physical and psychological care they may need.

* * * *

54. In Afghanistan, juveniles have access to the Mental Health Unit (MHU) at the Theater Internment Facility (TIF). The MHU is staffed by a psychiatrist, a social worker, and a psychological technician. The MHU offers detainees, including juveniles, the opportunity to participate daily in group therapy sessions with a psychiatrist. Since the program's inception, 45 detainees have participated in these therapy sessions, although no juveniles have requested to participate, or required the care provided.

55. In January 2008, DoD instituted a program that enables detainees at the TIF to visit with family members via video teleconference (VTC). The program operates on a weekly basis. Since its inception, over half of the detainees held at the TIF have participated, many of them multiple times. DoD is currently developing security enhancements that should enable family visits at the TIF sometime in the next few months.

56. In the last several months, the guard force at the TIF has noted an improvement in morale and a sharp decrease in the number of disciplinary problems among detainees. These developments coincided with the creation of the MHU and implementation of the family visit VTC program.

57. Space constraints at the TIF have limited the ability to offer detainees educational, religious, and vocational programs in the past, but plans are underway to establish such programs in the future. As in Iraq, the aim of these programs is to offer all detainees an opportunity for personal growth that will be beneficial upon their eventual release and reintegration into society.

58. Similarly, space constraints at the TIF have limited the frequency, duration, and space available for detainee recreation, but plans are underway to remedy the situation.

* * * *

(g) How Military Commissions take into account the rights of children;

* * * *

65. It is not unprecedented for juveniles to face the possibility of a war crimes trial. . . . [*See* remarks by Ms. Hodgkinson, b.(1) *supra*.]

66. In the event that a Military Commission must call a child (defined as being 16 or younger) as a witness, there are special protections within the Manual for Military Commissions. For instance, the Rule for Military Commission (RMC) 804c permits an accused to absent himself voluntarily in the event a military judge allows the child witness to testify remotely. RMC 914A permits the use of remote live testimony of a child, unless the accused absents himself under 804c. In addition, the Military Commission Rules of Evidence (MCRE) have provisions that deal with children. For example, MCRE 104 identifies children as people the military judge might have to make special provisions for by utilizing protective testimonial procedures. MCRE 611d gives a military judge the authority to permit remote live testimony when a child (as above, defined as being 16 or younger) cannot testify in court because of fear, likelihood of suffering mental trauma as a result of providing testimony in court, mental infirmity, or because of the behavior of the accused (e.g., acts of intimidation). There is no spousal privilege when an accused commits a crime against the spouse or the child of either the spouse or the accused. See MCRE 504c2A.

(h) Remedies available should they not be found guilty of any offense.

67. The purpose of the detention of enemy combatants during wartime is not for prosecution; rather, the principal rationale for such detention is to prevent them from returning to the battlefield to re-engage in hostilities. The overwhelming majority of juveniles held by the United States will not face any charges. Each detained juvenile will have his individual circumstances reviewed at least every six months to determine whether the detainee continues to pose a threat.

68. In Iraq, if it is determined that a detainee can be successfully reintegrated into society and will no longer pose a threat to coalition forces or to innocent civilians, the detainee will be released.

69. In Afghanistan, detainees who still pose a limited threat that can be mitigated with conditions less restrictive than continued detention are transferred to the Government of Afghanistan for participation in the Takhim e-Solik (Peace Through Strength, or PTS) reconciliation program. This program provides for the release of Afghan detainees to their tribal leaders with assurances that they will not return to the fight. The tribal leaders assume responsibility for the former detainees upon their transfer. So far, no juveniles have participated in the PTS program; however, it remains one option available for the Afghans to help reintegrate juveniles into their society.

* * * *

(3) New legislation

(i) Child Soldiers Accountability Act of 2008

The Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735, was signed into law on October 3, 2008. The act establishes a new federal crime, 18 U.S.C. § 2442, for recruiting or using child soldiers, punishable by fine and/or imprisonment up to 20 years (up to life

imprisonment if a death of any person results). The offense applies to whomever knowingly

> (1) recruits, enlists, or conscripts a person to serve while such person is under 15 years of age in an armed force or group; or
>
> (2) uses a person under 15 years of age to participate actively in hostilities

knowing that the person is under 15 years of age. Jurisdiction over the crime extends to offenses committed by offenders who are nationals or lawful permanent residents of the United States or a stateless person, or who are present in the United States, regardless of nationality; or if the offense occurs in whole or in part within the United States. Section 2442(d) defines "participate actively in hostilities" to mean taking part in

> (A) combat or military activities related to combat, including sabotage and serving as a decoy, a courier, or at a military checkpoint; or
>
> (B) direct support functions related to combat, including transporting supplies or providing other services.

"Armed force or group" means "any army, militia, or other military organization, whether or not it is state-sponsored, excluding any group assembled solely for nonviolent political association."

The act also amended the Immigration and Nationality Act to add violations of § 2442 as grounds for inadmissibility and deportation of aliens (8 U.S.C. §§ 1182(a)(3) and 1227(a)(4)). In addition the act requires the Attorney General and the Secretary of Homeland Security to issue regulations establishing that aliens inadmissible or deportable on these grounds are considered to be aliens "with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime." Such a determination renders an alien ineligible for asylum under 8 U.S.C. § 1158(b)(1) and

for protection from removal to a country "if the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion" under 8 U.S.C. § 1231(b)(3)(A).*

(ii) Child Soldiers Prevention Act of 2008

On December 23, 2008, President Bush signed into law the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (*see also* Chapter 3.B.3.c.). Pub. L. No. 110-457, 122 Stat. 5044. Title IV of the act, the "Child Soldiers Prevention Act of 2008," defines the term "child soldier"

> consistent with the provisions of the [Armed Conflict] Protocol to include (1) any person under 18 who takes a direct part in hostilities as a member of or has been compulsorily recruited into governmental armed forces, or has been recruited or used in hostilities by armed forces distinct from the armed forces of a state and (2) any person under 15 who has been voluntarily recruited into governmental armed forces.

Section 404 of the act prohibits, subject to certain exceptions, specified military assistance and licenses for direct commercial sales of military equipment to a country that has been identified "as having governmental armed forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit and use child soldiers." Section 405 of the act also requires U.S. missions abroad to "thoroughly investigate reports of the use of child soldiers" and requires the annual human rights reports under 22 U.S.C. §§ 2151n(f) and 2304(h) to include a description of

* Editor's note: 8 U.S.C. §§ 1158(b)(2)(A)(iii) and 1231(b)(3)(B)(iii) provide an exception to eligibility for asylum and restrictions on removal, respectively, "if the Attorney General decides that . . . there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States."

the use of child soldiers in each foreign country. Section 406 requires training of chiefs of mission and deputy chiefs of mission and certain other Foreign Service officers, to include instruction on "matters related to child soldiers, and the substance of the [act]."

Section 403 of the act sets forth a sense of the Congress that a number of further actions should be taken by the United States such as expanding services for rehabilitating and reintegrating child soldiers into their communities; working with the international community to bring to justice rebel and paramilitary forces that kidnap children for use as child soldiers and assist in the rehabilitation and reintegration of such children; and promoting efforts in foreign countries to end such abuse of human rights and identifying and integrating global best practices.

2. Convention on the Rights of the Child

On May 21, 2008, Ambassador Mark P. Lagon, Director of the State Department Office to Monitor and Combat Trafficking in Persons, and Sandra L. Hodgkinson, Deputy Assistant Secretary of Defense for Detainee Affairs, held a news conference in connection with their appearances before the Committee on the Rights of the Child on the two optional protocols discussed above. In response to a question from a reporter suggesting that detention of children was a violation of the Convention on the Rights of the Child ("CRC"), Ambassador Lagon stated:

> You referred . . . to an obligation under the Convention for the Rights of the Child about detainment of children. Our obligation is the optional protocol on Children in Armed Conflict. We are indeed not a party to the Convention on the Rights of the Child.*

* Editor's note: Article 9 of the Armed Conflict Protocol provides that it is open to any state; under Article 13 of the Sale of Children Protocol, a state that is a party to or has signed the CRC may become a party.

Ambassador Lagon responded to further questions on the CRC, as excerpted below. The full text of the press briefing is available at *www.usmission.ch/Press2008/May/0521BriefLagonHodgkinson.html*. For further discussion of the issue of child detainees, *see* 1.b. *supra*.

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The Convention on the Rights of the Child represents some very attractive principles for looking out for the welfare of children. The United States in practice is enormously active both at home and abroad in trying to fight for children. The United States has made the decision not to become a party to this treaty because of a difficult fit between the treaty's provisions and the nature of the U.S. legal system. In particular, to become a party to this treaty would be very difficult given the federal system of the United States, the provisions related to child custody, adoption, education, and certain areas of criminal justice. It would be very difficult for the United States to implement because it takes seriously when it becomes a party to a treaty that it's not just a moral and rhetorical statement to become a party, but something that we must live up to.

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Senators made it clear to the Executive Branch that it was unlikely that the Senate would support ratification of the Commission on the Rights of the Child. . . .

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The larger question that's less one of the federal system under the U.S. Constitution but one of policy and law is the relative balance of responsibility that is placed on parents. There is, in the United States . . . a strong commitment to parents being the ones

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The United States has signed but not ratified the CRC. In its instrument of ratification for each protocol, the United States stated its understanding that it "does not assume any obligations under the Convention on the Rights of the Child by becoming a party to the Protocol." *See Digest 2002* at 183–84.

themselves responsible for the education, the moral upbringing [and] the welfare of their children. This is no news to the world that the United States has a circumscribed view about the responsibilities of the state with respect to civil society and with respect to citizens and parents. It's one of the considerations about the Convention on the Rights of the Child which heavily places a number of responsibilities on the state. We don't disparage the choice of dozens upon dozens of nations who have decided to become parties to the Convention, but the United States has an approach that tilts more towards the responsibility of the parents themselves and has made this choice on the Convention.

That does not take away at all from our deep commitment to the two protocols. And I'd urge you in the press to look at the protocol that relates to sale of children, child prostitution and child pornography . . . . These are deeply important things. Stopping predators from being sex tourists to prey upon children. All countries believe that children in prostitution are exploited for sexual purposes are, these are problems that are a horrendous affront to humanity to hurt the most vulnerable, and it's good that we have an opportunity to talk here about how we and other nations are trying to fight that problem.

* * * *

3. UN General Assembly Resolution on the Rights of the Child

On November 24, 2008, the United States voted in the General Assembly's Third Committee against a resolution on the rights of the child. Laurie Phipps, Adviser, U.S. Mission to the United Nations, explained the U.S. vote. The full text of the U.S. statement, excerpted below, is available at *www.archive.usun.state.gov/press_releases/20081124_348.html*. The General Assembly adopted the resolution on December 24, 2008, by a vote of 159 in favor and one opposed. U.N. Doc. A/RES/63/241.

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We are disappointed that the cosponsors were unwilling to make minor changes to PP [preambular paragraph] 2 of the resolution, which states that the Convention [on the Rights of the Child ("CRC")] "must constitute the standard in the promotion and protection of the rights of the child."

In addition, we would have strongly preferred for OP [operative paragraph] 2 to urge States to "consider becoming" parties to the CRC. It is the sovereign right of each Member State to decide which treaties it will or will not ratify.*

* * * *

In addition . . . , the resolution contains language that my delegation has repeatedly requested the co-sponsors to eliminate, address elsewhere, revise, or amend.

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D. ECONOMIC, SOCIAL, AND CULTURAL ISSUES

1. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

On December 10, 2008, the United States joined consensus when the General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. On December 18, 2008, Ambassador T. Vance McMahan, U.S. Representative to the Economic and Social Council, provided comments on the Optional Protocol. Ambassador McMahan's explanation of the U.S. position is set forth below and available at *www.archive.usun.state.gov/press_releases/20081218_375.html.*

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* Editor's note: Among other things, paragraph two urged states that had not yet become parties to the CRC to do so.

. . . We recognize and understand that a majority of countries support the elaboration of an Optional Protocol to the ESC Covenant, and for these reasons we did not block consensus on the resolution adopting the Protocol, despite our concerns with the final text.

The proponents of an Optional Protocol have long argued that the absence of a complaints procedure for ESC rights relegates those rights to a kind of second-class status.

These arguments, however, are premised on the view that ESC rights are substantively identical to civil and political rights and therefore must be "justiciable" in the same manner as those rights. While civil and political rights and economic, social and cultural rights are equally important, the nature of these rights in a legal sense is fundamentally different.

The ESC Covenant states that its rights are to be progressively realized, in accordance with available resources[,] significant qualifications that are not contained in the International Covenant on Civil and Political Rights (ICCPR). The ESC Covenant also sets forth rights that are, on their face, difficult to adjudicate; it speaks, for instance, of an "adequate standard of living" and "highest attainable" standard of health. It is not apparent at what point these rights have been violated, or simply not yet satisfactorily achieved.

This fundamental fact, to clarify again, is not to say that the rights set out [in] the ESC Covenant are not important, millions, or even billions, suffer daily from inadequate food, housing, water, sanitation, and other basic needs.

Rather, in our view, it seems apparent that the ESC Covenant takes a different approach to "rights." This approach is confirmed in the texts of the respective Covenants. For instance, the ICCPR contains provisions on remedies and enforcement; the ESC Covenant does not.

. . . [M]y delegation . . . would not stand in the way of those States Parties to the ESC Covenant that may choose to avail themselves of the non-binding communication procedure set out in the Optional Protocol. That said, my delegation continues to believe that an international committee of experts, no matter how qualified, will struggle to adjudicate individual complaints in a manner that is consistent with the provisions of the Covenant itself and

respectful of the sovereign right of governments to make difficult decisions with respect to the allocation of scarce resources to bring basic services to their populations.

* * * *

2. Health-related Issues

On October 15, 2008, the United States submitted observations to the Office of the UN High Commissioner for Human Rights ("OHCHR") and the World Health Organization ("WHO") concerning certain opinions and legal conclusions contained in Fact Sheet No. 31 on the Right to Health, produced by OHCHR and WHO. The fact sheet is available at *www.who.int/mediacentre/factsheets/fs323/en/index.html*. In presenting its observations on the fact sheet, the United States expressed concern that it was "replete with unwarranted legal conclusions and opinions" and stated:

> These observations address a select number of subjects about which the United States holds fundamentally different views from those apparently held by the OHCHR and WHO officials responsible for the "Fact Sheet," rather than discussing all of the substantial issues, statements and conclusions with which it may not agree.

The U.S. observations on the fact sheet's discussion of the "right to health," obligations of "states" versus "states parties," reproductive health, and non-state actors are provided below. U.S. views on the fact sheet's discussion of treaty-monitoring bodies are provided in A.2.e. *supra*. The full text of the U.S. observations is available at *www.state.gov/s/l/c8183.htm*.

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I. Observations on the "Right to Health"

5. There is no international consensus on the nature and scope of health-related rights and obligations. The Universal Declaration

of Human Rights established as one of its aspirations the "right [of everyone] to a standard of living adequate for the health and well-being of himself and of his family." States Parties to the International Covenant on Economic, Social and Cultural Rights obligated themselves to progressive realization of the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health." However phrased, the right is one to be realized progressively. In other words, it is the ultimate goal, not an immediate entitlement. Accordingly, this "right" does not lend itself to the expansive and detailed characterization of its legal content as set forth in the "Fact Sheet."

6. We further observe that not a single resolution of the World Health Assembly, the Commission on Human Rights, nor the Human Rights Council includes any reference to a principle or concept styled as the "Right to Health."

II. Obligations of "States" versus "States Parties"

7. Page 1 clarifies that the "full name" of what the "Fact Sheet" refers to as the "right to health" is the right to the "enjoyment of the highest attainable standard of physical and mental health." This phrasing originates from the International Covenant on Economic, Social and Cultural Rights ("ESC Covenant" or "Covenant"), which was adopted by the United Nations General Assembly in 1966 for ratification or accession by States. Although a number of States have ratified the Covenant, a number of States have decided not to join this instrument. For those non-Parties, which include the United States, the Covenant does not give rise to international legal obligations.

8. However, the "Fact Sheet" conveys the general impression that all States, regardless of whether they have ratified the ESC Covenant, have international obligations to respect, protect, and fulfill the "right to health" to individuals within their respective jurisdictions. Rather than focus on the legal obligations arising from the ESC Covenant in particular, the "Fact Sheet" invokes a wide range of treaties, declarations, non-binding recommendations, general comments by treaty implementation bodies, and other documents to convey the impression that this patchwork

represents a coherent and uniform explanation of the "right to health" obligations applicable to all countries.

9. Section III—entitled "Obligations on States and Responsibilities of Others Towards the Right to Health"—sets forth a detailed and extensive set of opinions on the international legal obligations of States in relation to the right to health. This section begins by discussing the obligations of *States Parties* to the ESC Covenant. However, the discussion changes quickly into an analysis of the obligations of *States*, without distinguishing whether a particular State has ratified the ESC Covenant. This section and others contain dozens of legal assertions as to what States "must" do or are "required" or "obligated" to do. Little care is paid to the basic matter of whether a state is actually bound by any obligations related to the "right to health." Observations elsewhere in the "Fact Sheet" reinforce the general impression that all States are bound by the obligations described therein. For example, the Introduction asserts that "*every State* has ratified at least one international human rights treaty recognizing the right to health." (p. 5, emphasis added).

10. The United States has, of course, ratified the WHO Constitution, which was adopted in 1946. In its preamble, the WHO Constitution [s]tates that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." The United States fully accepts this and the other "principles" outlined in the Preamble. But it cannot reasonably be maintained that the preambular language of the instrument establishing the WHO binds States to the extensive set of obligations described in the "Fact Sheet." Furthermore, when the United States ratified the WHO Constitution it took the following understanding: "nothing in the Constitution of the WHO in any manner commits the United States to enact any specific legislative program regarding any matters referred to in said Constitution."

11. The United States is also a party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the "Fact Sheet" identifies as one of the

"[i]nternational human rights treaties recognizing the right to health" (p. 9). Article 5(e)(iv) of that Convention states that:

> "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . [e]conomic, social and cultural rights, in particular . . . [t]he right to public health, medical care, social security and social services."

12. Although Article 5(e) recognizes the existence of what it terms "[t]he right to public health, medical care, social security and social services," it does not obligate States to respect, protect, or fulfill this right to individuals within its jurisdiction. In its Initial Report to the Committee on the Elimination of Racial Discrimination, the United States stated that:

> "Article 5 obliges States parties to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, without distinction as to race, colour, or national or ethnic origin. . . . Importantly, article 5 goes even further, requiring States Parties to guarantee equality and non-discrimination on this basis 'notably in the enjoyment' of a list of specifically enumerated rights. Some of these enumerated rights, which may be characterized as economic, social and cultural rights, are not explicitly recognized as legally enforceable 'rights' under U.S. law. However, *article 5 does not affirmatively require States Parties to provide or to ensure observance of each of the listed rights themselves, but rather to prohibit discrimination in the enjoyment of those rights to the extent they are provided by domestic law*."[1]

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[1] *Initial Report of the United States of America to the Committee On the Elimination of Racial Discrimination*, Paras. 297–298, Oct. 10, 2000 (emphasis added). Available at: *http://www.state.gov/g/drl/hr/treaties/*.

13. This view makes sense in light of the object and purpose of the ICERD. The ICERD is a treaty focusing on eliminating racial discrimination in all its forms; it does not set forth any substantive health-related obligations.

14. The United States Government is fully committed to improving the health of its citizens and people of all countries. However, for the reasons expressed above, the United States does not agree with the suggestion that *all States*, regardless of their status under the ESC Covenant, have international obligations to respect, protect, and fulfill the "right to health" to individuals within their respective jurisdictions.

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IV. Reproductive Health-Related Wording

21. The United States is concerned about the document's frequent use of terms regarding reproductive health care that have been misinterpreted by others to support rights and obligations that have not been agreed to in international fora. It is the understanding of the United States that the Programme of Action of the International Conference on Population and Development and the Beijing Declaration and Platform for Action did not create any rights and did not purport to create or recognize a right to abortion. . . . The United States objects to the use of the term "reproductive health services" in UN documents because there is ambiguity surrounding the term. . . . As these terms have been so frequently misconstrued in international fora, the U.S. proposes using the term "reproductive health care" exclusively to avoid confusion.

22. The use of the term "right to sexual and reproductive health" in this document is also problematic. The United States is not aware that this term has ever been used in any UN documents—much less in any global multilateral treaty—nor has it any standing in the international community. In general, the United States opposes terms implying that undefined "rights" exist, and can accept the term "reproductive rights" only in the context of explicit references to coercive population control policies. . . .

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V. Non-State Actors

24. The discussion in the "Fact Sheet" of non-state actors begins by stating that "[a] State's obligation to protect human rights includes ensuring that non-State parties do not infringe upon human rights."[7] This statement sweeps too broadly and categorically. The responsibility of a government in relation to non-state actors depends on the nature of legal obligations that a particular country has assumed.

25. As a general matter, with notable exceptions such as slavery, a human rights violation entails state action.[8] In addition, human rights treaties may contain provisions that clearly and specifically impose obligations upon States Parties to prevent, in certain limited circumstances, particular kinds of misconduct by private parties or non-state actors. For instance, the ICERD and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) contain specific provisions that do impose limited obligations upon States Parties, in the specific context of preventing discrimination, to prevent discrimination, respectively, "by any persons, group or organization" and "by any person, organization or enterprise" (ICERD, Article 2(1)(d); CEDAW, Art. 2(e)). Importantly, even in the case of CEDAW and ICERD, where an obligation is spelled out regarding prevention of discrimination by non-state actors or private parties, the obligation is carefully circumscribed (e.g., "all appropriate means" or "all appropriate measures") to reflect the limitations on even well-intentioned States Parties to control the actions of non-governmental actors.

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[7] Fact Sheet at 28. While the phrase "non-State parties" typically refers to States that have not joined a particular treaty, it seems apparent from the context of this discussion that the OHCHR and WHO are intending to refer to non-state actors, such as private individuals, corporations, NGOs, and the like.

[8] A notable example of the state-action requirement is found in the definition of torture in Article 1 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (referring to pain or suffering inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.")

26. As the above examples illustrate, the drafters of the international treaties clearly know how to draft provisions that address the actions of non-state actors. The fact that some human rights obligations do explicitly extend to private actors whereas others do not undermines the sweeping assertion of the OHCHR and the WHO that there is a general obligation in international human rights law—including with respect to the "right to health"—that obligates States to "ensure" the non-infringement on human rights by non-state actors. A much more careful analysis on this question would be needed to determine the factual situation in question, the actual treaty obligations of the country in question, and the extent to which a private entity might be exercising governmental authority before a useful analysis of this complex issue could be undertaken.

In conclusion, the observations contained in this document . . . are animated by the United States longstanding legal views that international obligations are not optional. Where treaty obligations exist, Parties have a solemn duty under international law to fulfill such obligations. The doctrine of *pacta sunt servanda* is one of the oldest principles of international treaty law and certainly the most important. Where customary international law obligations exist, they must be clear and specific, demonstrated by the requisite state practice and *opinio juris*. An attempt to fashion policy objectives into assertions of international legal obligation—especially where such rules are not being implemented, and to some extent cannot be implemented or enforced at the national level—does not foster respect for international law. For this reason, the United States believes it essential that international legal discourse hew closely to long accepted principles of international law. Fact Sheet No. 31 falls short of this standard.

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3. Climate Change

On October 7, 2008, the United States submitted observations to the UN Office of the High Commissioner for Human Rights ("OHCHR"), on the relationship between climate

change and human rights. In accordance with Human Rights Council Resolution 7/23, OHCHR sought views on the issue in order to conduct "a detailed analytical study on the relationship between climate change and human rights." The U.S. observations addressed two sets of issues: (1) climate change, human rights, and good governance; and (2) the relationship between human rights law and climate change, as excerpted below, and expressed the view that, while efforts to reduce climate change and promote human rights have "mutual and reinforcing elements," international law does not provide a right to a "safe environment." (Footnotes are omitted.) The full text of the U.S. observations is available at *www.state.gov/s/l/c8183.htm*.

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I. Climate Change, Human Rights, and Good Governance

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9. The United States considers that the attributes that contribute to climate solutions—good governance, transparency, and rule of law—are also essential to the promotion of democracy and human rights. Democracies are built on a foundation of representative, accountable institutions of government, including an independent judiciary. Rule of law includes legal and administrative measures and regulations that apply equally to all individuals and elements of society; equal access to justice and due process; fair and effective enforcement of penalties; and an intolerance for official corruption. Vibrant civil societies, including independent non-governmental groups and a free media, also are essential to the success of democracies, helping to bring issues, such as environmental concerns, to the forefront and holding authorities to account to ensure that they are addressed.

10. The United States will continue its aggressive efforts to promote human rights and address climate change, including through our ongoing efforts to build capacity and strengthen governance and the rule of law worldwide.

II. Relationship between human rights law and climate change

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12. The United States does not share the view that an environment-related human right exists under international law, and indeed the sheer number [of] different formulations of this "right" is indicative of the fact that it does not have a basis in international law. This view is informed by a review of the relevant instruments of international law. Such a right is not found in the UDHR. Even with respect to human rights obligations that may exist with respect to particular countries under treaty law, neither the International Covenant on Economic, Social, and Cultural Rights nor any other universal human rights treaty of which the United States is aware provides for such rights. Likewise, international climate change agreements, such as the UNFCCC, do not speak of individual rights or human rights obligations, nor do they create private rights of action. Rather, the focus of such agreements is on achieving international cooperation to advance policies and measures to both mitigate and adapt to climate change.

13. The United States is similarly unaware of any analysis demonstrating the general and consistent practice of states and *opinio juris* . . . that would be necessary for such a right to exist as a matter of customary international law. Indeed, such a right would be inconsistent with the domestic law and practice of the United States, and many other states.

14. While there is no direct formal relationship between the two issues as a legal matter, the United States agrees that "climate change . . . has implications for the full enjoyment of human rights." This view was expressed in March 2008 by the Human Rights Council in its resolution 7/23. This observation is similar to the one expressed in resolution 2005/60 of the Commission on Human Rights, which stated more broadly that "environmental damage . . . can have potentially negative effects on the enjoyment of human rights. . . ." Previous resolutions of the Commission dating back more than a decade contain similar expressions. It should be noted, of course, that these statements are factual observations rather than statements of international law.

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16. The recognition that climate change can have implications on the enjoyment of human rights has led increasingly to calls for a human rights-based "approach" to addressing climate change, including a statement by the OHCHR to this effect. From a practical standpoint, the meaning of such suggestions is not clear. Certainly, governments should be mindful of their international human rights obligations when considering any significant domestic policy initiatives; but the United States does not consider that human rights law provides an optimal framework for addressing climate change internationally. Instead, the United States believes that climate change can be more effectively addressed through traditional systems of international cooperation, including through the UNFCCC process and its Bali Action Plan and regional cooperation such as the Asia Pacific Partnership on Clean Development and Climate.

17. As outlined below, the United States considers that moving toward a human rights-based approach to climate protection would be impractical and unwise. The basic characteristics of climate change suggest that this challenge is not especially amenable to human rights-based solutions.

18. First, climate change is a highly *complex* environmental issue, characterized by a long chain of steps between the initial human activities that produce greenhouse gas emissions and the eventual physical impacts that may result from those emissions. . . .

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20. Second, as suggested above, climate change is a *global* phenomenon. . . . Consequently, as the Intergovernmental Panel on Climate Change (IPCC) has described, ". . . . Any individuals' or nations' actions to address the climate change issue, even the largest emitting nation acting alone, can have only a small effect. . . ."

21. Third, climate change is a *long-term* challenge. Emissions of carbon dioxide, on average, remain in the atmosphere for about 100 years. (Some other greenhouse gases persist in the atmosphere for thousands of years.) Accordingly, the impacts of climate change today are caused not by recent emissions but the accumulation of greenhouse gases over long periods of time by a diffuse set of actors, most of whom would have been unaware of any potentially

adverse future impact of the greenhouse gas emissions associated with their activities.

22. Fourth, greenhouse emissions that contribute to climate change are linked to a *broad array of human activities*. . . . [M]any of these activities contribute to the advancement of human rights, and indeed the individual actors contributing to these emissions are themselves rights holders.

23. A complex global environmental problem with these characteristics does not lend itself to human rights-based solutions. A central purpose of human rights law, whether at the domestic or international level, is providing remedies for the victims of specific rights violations. For instance, Article 2, paragraph 3 of the International Covenant on Civil and Political Rights states that "Each State Party to the present Covenant undertakes . . . [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . . . [and] that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."

24. This framework requires identifiable violations, identifiable harms attributable to the violations, and for remedies to be provided *by the government to individuals within its territory and jurisdiction*. This approach is also reflected in the various individual complaints procedures found under international human rights law. These mechanisms permit victims of alleged violations to bring complaints against their own government. Furthermore, regional human rights systems similarly permit individuals to bring claims against their own governments. Further still, other international human rights mechanisms and institutions, such as the UN "special procedures" and treaty bodies, are primarily oriented toward improving the compliance of states with their international human rights obligations. All of these systems illustrate that human rights law is primarily concerned with how a government treats its own citizens and others living within its territory and under its jurisdiction. As such, human rights law attempts to ensure that

individuals have the ability to petition their government to redress alleged violations.

25. The human rights systems described above are ill-equipped to address a problem with the characteristics of global climate change and provide virtually no guidance or insight on how to mitigate and adapt to climate change. Overall, . . . it will be difficult and problematic to identify any particular party as being uniquely responsible for any particular impairment of the enjoyment of human rights caused by climate change or even any particular harm as being proximately caused by any particular act or omission by a particular government or governmental actor. Considering that greenhouse gases are closely related to the social and economic advancement of societies, it will similarly be infeasible to identify any particular "wrongful" act as having caused an impairment in the enjoyment of human rights. Accordingly, there is no legal basis under human rights law for holding national governments accountable for climate change impacts that have primarily extraterritorial and long-term origins. In short, an impairment of the enjoyment of human rights is not the same as a violation of human rights, which involves a government's failure to abide by its international human rights obligations.

26. Even if novel theories of responsibility are devised and climate-related human rights claims—either in domestic or international fora—gain traction, the overall results are not likely to meaningfully contribute to the underlying need to slow, stop, and reverse worldwide emissions and reduce societal vulnerabilities to climate change or generally advance the broader cause of human rights internationally. Justice would be distributed in a profoundly uneven and arbitrary manner, as remedies would be confined to those that suffered a particular harm and had access to a particular forum. Those that prevailed may not even be those most adversely affected by climate change. The process of pursuing human rights claims would be adversarial and require affixing blame to particular entities; this contrasts with the efforts to achieve international cooperation that have thus far been pursued through the international climate change negotiations. At the same time, governments—which would not accept a legal basis for such actions or

complaints against them—would almost certainly not enforce human rights-based determinations against them. This, ironically, would harm the enjoyment and enforcement of international human rights law as it would corrode the critical common understanding that human rights law provides a real and immediate set of legal obligations that states are compelled to follow and enforce. In short, any attempt to invent or impose a legalistic human rights approach to climate change will not help address this complex global environmental problem or the enforcement and respect for human rights internationally.

27. In conclusion, it is worth emphasizing that both the UNFCCC and IPCC processes have placed a strong emphasis on the human and societal dimensions of climate change. . . . [T]he UNFCCC process has long recognized the critical importance of sustainable development and the need to improve the adaptive capacities of those societies particularly vulnerable to climate change. The United States fully supports this process and recognizes that improving human well-being has been, and will continue to be, at the center of domestic and international efforts to address climate change.

4. Development

On November 24, 2008, the United States called for a vote and voted against a Third Committee resolution on the right to development. The explanation of vote that Ambassador Vance McMahan delivered is excerpted below and available at *www.archive.usun.state.gov/press_releases/20081124_342.html*. On December 18, 2008, the General Assembly adopted the resolution by a vote of 182 in favor and four opposed, with two abstentions. U.N. Doc. A/RES/63/178.

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Our position on this resolution is well-known—the United States understands the term "right to development" to mean that each

individual should enjoy the right to develop his or her intellectual or other capabilities to the maximum extent possible through the exercise of the full range of civil and political rights.

Moreover, the resolution before us contains reference to the same initiatives that we have found objectionable in years past, such as the consideration of a legally binding instrument on the Right to Development.

The United States will continue our long-standing commitment to international development and maintain, as a major goal of our foreign policy, helping nations achieve sustainable economic growth. Our delegation, however, does not believe this resolution helps to advance these goals and will therefore vote "no."

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5. Food

a. Food and Agriculture Organization's Right to Food Forum

On October 1, 2008, Robert K. Harris, Assistant Legal Adviser for Human Rights and Refugee Affairs, Department of State, delivered a statement at the opening session of the Food and Agriculture Organization's Right to Food Forum, held October 1–3 in Rome, Italy. Mr. Harris discussed the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, which the United States joined consensus in adopting in 2004. Mr. Harris stressed the need for any outcome documents to avoid "an articulation of the underlying nature of the progressive realization of the right to food under international law," which would be controversial. Excerpts from Mr. Harris's statement follow; the full statement is available at *www.state.gov/s/l/c8183.htm*. For the U.S. statement on the voluntary guidelines, *see Digest 2004* at 287–88.

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As reflected in Preface paragraph 6, "[t]he objective of these Voluntary Guidelines is to provide practical guidance to States in their implementation of the progressive realization of the right to adequate food in the context of national food security in order to achieve the goals of the Plan of Action of the World Food Summit."

As reflected in Preface paragraph 9 and elsewhere, the Voluntary Guidelines did not establish legally binding obligations for States or international organizations, nor did it adopt or promulgate any universally applicable interpretation of international law. Instead, it offered governments a cross-sectoral "tool kit" of policy, economic, administrative and legal measures that States might choose from in order to more effectively implement the progressive realization of the right to adequate food and establish long-term food security.

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. . . While the Voluntary Guidelines do have provisions in guidelines 3 and 7 inviting countries to consider adopting a rights-based approach to the right to food, the Guidelines expressly did not instruct states how they might accomplish this or what was the precise underlying nature of the right under international law that States might implement at the national level.

This reflected a lack of consensus on the precise nature of how States should progressively realize the right to adequate food in their domestic legal systems. My government, for example, is not a State Party to the International Covenant on Economic, Social and Cultural Rights, so formulations of the right arising in that treaty do not apply to the United States. . . .

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Let me begin by saying that a rights-based approach, including adoption by States at the national level of an individually enforceable right to food, is one potential tool in the international tool kit for advancing the progressive development of the right to food and achieving food security. We recognize that there are a number of countries that have adopted national laws and even Constitutions that create such a domestic legal right.

This forum can provide a useful discussion of how those countries can better implement such laws and polices. Although the United States does not have such laws, we look forward to learning from the experience of countries and other experts as to how such a system can be implemented for those countries that adopt such laws.

In this context, our concern with the discussion papers prepared for the Conference is their consistent articulation of the point of view that the progressive realization of the right to food necessarily entails individual rights that are enforceable by individuals at the national level.

As this is only one of several competing points of view, my delegation asks that any outcome documents from this forum—like the guidelines themselves—avoid an articulation of the underlying nature of the progressive realization of the right to adequate food under international law. These questions are by their nature highly controversial and would distract from the practical, results-oriented objectives that this Forum seems to be directed to achieve.

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b. Interim report of the Special Rapporteur on the right to food

On October 27, 2008, Kristen McGeeney, Foreign Affairs Officer, Department of State Bureau of Democracy, Human Rights, and Labor, summarized U.S. concerns about the legal errors and policy recommendations in the interim report of Olivier De Schutter, the UN Special Rapporteur on the right to food (U.N. Doc. A/63/278), as excerpted below.

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- My government agrees with the special rapporteur that much more needs to be done at both the national and international levels to improve the lives of the hundreds of

millions of people around the world who suffer from hunger. We are disturbed, however, that his report contains many erroneous assertions of law and an assemblage of policy pronouncements that, ironically, if ever implemented, would actually increase hunger and suffering in the world.

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- A central problem is its assertion that States have a legal, rather than moral, obligation to help other countries in need.
- Having asserted an international legal obligation, the special rapporteur takes the additional step of arguing that States are required under international law to adopt the policy directives set out in the report.
- It is fair for the special rapporteur to argue in support of his policy preferences, even if we disagree on their content. It is not fair or productive to style his policy preferences as requirements that States must adopt as a matter of international legal obligation.
- In fact, a number of policy proposals made by the special rapporteur are unsound and may actually increase food insecurity. To cite two examples:
  - First, the assumption that food aid violates the right to food and that countries must switch from in-kind transfers to cash is wrong. Our challenge today is not where in-kind food aid is produced or procured, but rather that protracted and complex emergencies are increasingly absorbing the limited food aid resources available. In many situations, the provision of in-kind food aid is critical to save lives and sustain human health, while withholding it would be catastrophic.
  - A second example is the author's argument against free agricultural trade in order to protect domestic producers. To the contrary, concluding an ambitious Doha Round would generate new trade flows and help lift millions out of poverty worldwide. It would give consumers relief by reducing tariffs and trade restrictions that raise food prices,

and would help developing world farmers by cutting subsidies that distort markets and discourage agricultural development.

c. General Assembly resolution on the right to food

In a statement to the Third Committee on November 24, 2008, excerpted below, Ambassador McMahan explained the U.S. decision to vote against a resolution on the right to food. The full text is available at *www.archive.usun.state.gov/press_releases/20081124_340.html*. The General Assembly adopted the resolution on December 18, 2008, by a vote of 184 in favor and one against. U.N. Doc. A/RES/63/187.

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. . . [T]he United States has consistently taken the position that the attainment of any "right to adequate food" or "right to be free from hunger" is a goal or aspiration to be realized progressively that does not give rise to any international obligation nor diminish the responsibilities of national governments to their citizens.

In light of our long-standing views on this issue, we find that the current resolution, as did previous resolutions, contains numerous objectionable provisions, including inaccurate textual descriptions of the underlying right.

Moving beyond concept to action to address this issue, the United States has demonstrated its profound commitment to promoting food security around the world. By a large margin, the United States is the largest food donor in the world of humanitarian food aid. We will continue and intensify our work both bilaterally and in many different multilateral fora to help combat poverty and hunger and to help bring food security to all. We recognize that there is much more work to be done.

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6. Protection of Migrants

a. General Assembly

On November 21, 2008, the United States joined consensus when the Third Committee adopted a resolution on the protection of migrants. Ambassador McMahan delivered an explanation of position, outlining U.S. concerns about the resolution, as excerpted below. The full text of the statement is available at *www.archive.usun.state.gov/press_releases/20081121_334.html*. The General Assembly adopted the resolution without a vote on December 18, 2008. U.N. Doc. A/RES/63/184.

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. . . [I]mplicit in this and any other discussion of international migration is the well-settled principle under international law that all states have the sovereign right to control admission to their territory and to regulate the admission and expulsion of foreign nationals. At the same time, we recognize that States must respect the human rights of migrants, consistent with their obligations under international law, including international human rights law. The United States fulfills these obligations by providing substantial protections under the U.S. Constitution and other domestic laws to aliens within the territory of the United States, regardless of their immigration status.

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. . . [W]e strongly support and endorse the responsibility of States to protect the human rights of all people, including migrants, in their territories. The United States takes this responsibility very seriously and urges other States to do so.

Similarly, we call attention to the well-established principle that States have an affirmative duty to accept the return of their nationals who have been expelled from the territory of another state. The expeditious return of irregular migrants to their countries

of origin would contribute significantly to decreasing detention periods as called for in this resolution.

With respect to concerns regarding the detention of migrants, I would like to emphasize that although international law does not prohibit the detention of persons who have violated a country's immigration or criminal laws, we share concerns that when States enforce such laws, they must do so in a manner consistent with established principles of international law, including as Parties to relevant international human rights treaties.

This resolution addresses the topic of migration on a global scale and seeks to find common ground among Member States with regard to the protection of human rights. . . . The UN's approach to this global concern should not be sidetracked by undue focus on bilateral issues that are being addressed through respectful discussions and actions between the affected states. In this spirit, we believe it is inappropriate to make specific reference to a bilateral legal matter between two member states which has been previously addressed by this body. The case cited in pp8 is not the only one of this nature and referring to it alone diverts attention from the serious multilateral reflection and action required.[*] Doing so does not promote constructive cooperation toward advancing the protection of human rights of migrants.

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b. Special Rapporteur's mission to the United States

On March 5, 2008, Jorge Bustamante, Special Rapporteur on the Human Rights of Migrants, submitted a report to the

* Editor's note: Preambular paragraph 8 took note "of the Judgment of the International Court of Justice of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals*, and recall[ed] the obligations of States reaffirmed therein and subsequent rulings of the International Court of Justice following that Judgment . . . ." *See* Chapter 5.A.1. for discussion relating to U.S. implementation of the ICJ's decision; *see also Digest 2004* at 44–47.

UN Human Rights Council concerning the human rights of migrants to the United States. U.N. Doc. A/HRC/7/12/Add.2. Mr. Bustamante's report discussed his mission to the United States from April 30–May 18, 2007. On March 7, 2008, Jan Levin, Senior Human Rights Officer at the U.S. Mission to the United Nations, Geneva, expressed concern that the report "contains significant misstatements and misinterpretations of U.S. law and policy." As Ms. Levin stated:

> We believe this to be the result, at least in part, of the Special Rapporteur's failure to collect and take into consideration the information available to him through U.S. Government channels.
>
> The Special Rapporteur's report focuses only on a narrow slice of the migrant population in the United States and makes no effort to recognize notable, positive aspects of U.S. migration policy. This results in an incomplete and biased picture of the human rights of migrants in my country.

In March 2008 the United States also submitted written comments on Mr. Bustamante's report, as excerpted below. Ms. Levin's statement and the U.S. written comments are available at *http://geneva.usmission.gov/Press2008/March/0301HRofMigrants.html* and *http://geneva.usmission.gov/Press2008/March/USCommentsBustamanteReport.pdf*.

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. . . The Special Rapporteur makes a number of inaccurate or misleading claims. His conclusions, in general, appear to be based on anecdotal evidence from a small sample of individuals. He makes many claims for which he does not provide appropriate evidence and reasoning, which makes it difficult for the United States to respond directly to his charges. In these cases we have provided additional substantive detail that we hope will correct several misimpressions.

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IV. INTERNATIONAL LAW AND STANDARDS

The United States protects the human rights of migrants and is committed to do so under U.S. law and in a manner consistent with its obligations under international law. The United States takes seriously any allegation that it is violating its treaty obligations. The U.S. has fulfilled its human rights treaty reporting obligations and considers it the responsibility of anyone making an allegation of non-compliance to provide evidence and reasoned analysis as to how United States policy or practice is inconsistent with its treaty obligations.

Paragraph 10—Deportation Procedures:

This paragraph states that the "mandatory deportation" policies of the United States violate the right to fair deportation procedures, in particular Article 13 of the International Covenant on Civil and Political Rights (ICCPR). Article 13, which the Special Rapporteur quotes in paragraph 11 of the Report, does not support this claim. When facing removal or deportation, an alien lawfully present in the United States is, in accordance with ICCPR Art. 13, "allowed to submit the reasons against his detention and expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority. . . ."

The United States has in place extensive administrative procedures and opportunity for judicial review to challenge deportation and detention. In addition to claims challenging their deportability, criminal aliens continue to have access to the federal courts to raise other substantial legal or constitutional challenges relating to their removal orders. *See* Immigration and Nationality Act § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, § 106(a), 119 Stat. 305, 310.

Moreover, there is nothing in ICCPR Article 13 that precludes a State party from establishing criminal conduct as a ground for removal of aliens. Although we do not regard its views as legally binding interpretations of the ICCPR, even the Human Rights Committee's views on this matter are consistent with those of the United States. *See* CCPR General Comment No. 15 (Position of Aliens Under the Covenant) ¶ 10 (Nov. 4, 1986) ("Article 13 directly regulates only the procedure and not the substantive

grounds for expulsion."); *see also id.* ¶ 9 ("The particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions.").

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Paragraphs 15–19—Private Life:

Paragraph 15 accuses the U.S. of failing to protect the "right to private life," allegedly provided for in international human rights law. However, rather than creating a "right to private life," Article 17(1) of the ICCPR states that "no one shall be subjected to arbitrary or unlawful interference with his privacy . . ." The report does not explain how U.S. policies interfere with privacy in a manner that is either "arbitrary" or "unlawful."

ICE [U.S. Immigration and Customs Enforcement] tries to promote family unity whenever possible, even as it enforces United States immigration law. For example, ICE agents are instructed to exercise prosecutorial discretion and avoid separating nursing mothers from their children.

Likewise, in order to promote family unity and discourage smuggling networks from exploiting children to create fictitious families for the purpose of avoiding detention, ICE maintains two residential facilities, . . . specifically reserved for families with children.

* * * *

Contrary to the Report's assertion that United States immigration laws impose mandatory deportation without a discretionary hearing where family and community ties are considered, the Immigration and Nationality Act (INA) provides numerous grounds for discretionary waiver of criminal grounds of removal, including extreme hardship to an immediate relative who is a United States citizen or lawful permanent resident. *See*, *e.g.*, 8 U.S.C. §§ 1182(a)(9)(B)(v) (permitting waiver of inadmissibility for aliens seeking readmission after having accrued more than

180 days' unlawful presence in U.S. where refusal of admission would cause "extreme hardship" to U.S. citizen or lawful permanent resident spouse or parent); 1182(h) (allowing for waiver of inadmissibility for certain criminal activity if removal would cause "extreme hardship" to U.S. citizen or lawful permanent resident spouse, parent, or child); 1227(a)(1)(E)(iii) (allowing for waiver of alien smuggling ground of deportability "for humanitarian reasons, to assure family unity, or when it is otherwise in the public interest"); 1229b (permitting cancellation of removal for certain permanent and nonpermanent resident aliens); 8 C.F.R. § 236.10–.18 (Family Unity Program).

Contrary to the Report's statements, the United States immigration laws are designed to promote family unity. The largest percentage of immigrant visas issued by the United States are reserved for close family members of citizens and lawful permanent residents in order to allow them to legally join their relatives in this country. And numerous provisions in the immigration laws provide for derivative lawful immigration status for immediate family members of aliens granted lawful status in the United States, including adjustment of status to lawful permanent residence, asylum, and "T" nonimmigrants (certain trafficking victims).

At the same time, the United States has a legitimate interest in removing aliens who have committed serious crimes or otherwise violated the law, notwithstanding the existence of family members who may be U.S. citizens or lawful permanent residents. The Report fails to acknowledge that international law also allows a state as part of its fundamental right of sovereignty in accordance with principles of international law the privilege to determine which aliens shall be admitted into its territory and under what conditions. . . . Every nation has the power to control the admission and expulsion of foreign nationals as an aspect of the executive power to protect the integrity of the state and promote comity among nations. A nation's legitimate interests in controlling the admission of aliens, their departure, and their conditions and duration of stay within the country has long been recognized universally from the earliest of times.

Of course, the exercise of the state's prerogatives in that regard must be exercised in due recognition of the human rights of aliens.

But U.S. courts, for sound reasons, have uniformly rejected arguments that the lawful removal of a parent of a U.S. citizen child would violate due process by incidentally infringing on a purported "right to family unity" or any right of the U.S. citizen child. . . .

Paragraph 20—Exclusion from Eligibility for Asylum and Withholding of Removal:

The Report incorrectly concludes that U.S. immigration law barring serious criminals from eligibility for asylum or withholding of removal is inconsistent with U.S. obligations under the 1967 Refugee Protocol. To the contrary, U.S. law implementing articles 32 and 33 of the 1951 Refugee Convention are fully consistent with U.S. obligations under the 1967 Refugee Protocol.

Article 33(2) of the Convention Relating to the Status of Refugees provides, in relevant part, that the non-refoulement protections under section 1 of that Article may not be claimed by a refugee "who having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community" of the country he/she is in. By its terms this exception clearly applies to an individual specifically *by virtue of* their conviction *for* a particularly serious crime, which in and of itself establishes that he or she is a danger to the community.

The provision does not require a two part assessment whereby the individual be both convicted of a particularly serious crime and then otherwise also be found to be a danger to the community by some other measure. It therefore does not, as the Special Rapporteur suggests, require that someone who has in fact been convicted of a particularly serious crime, be given the opportunity to argue that nonetheless he or she is somehow less of a danger to the community than someone else convicted of the same exact crime.

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Only a small number of the most serious offenders, *i.e.,* those convicted of aggravated felonies as defined in 8 U.S.C. § 1101(a)(43) and sentenced to five years of imprisonment or more do not receive such a hearing. That formulation is fully consistent with U.S. treaty obligations.

* * * *

Paragraph 24—The deportation of an alien with a final order of removal:

The Report alleges that the U.S. detention and deportation system for migrants lacks safeguards to prevent "arbitrary" (as conceived under article 13 of the ICCPR) detention and removal determinations within the meaning of ICCPR. ICE's authority to detain an alien with a final order of removal is limited by regulation and the decisions of the U.S. Supreme Court. Generally, any alien who is not removed within a reasonable time period after the issuance of a final order of removal is eligible for a review of the custody status until such time as that alien's removal can be effected. Under U.S. Supreme Court precedent, after six months of detention following the issuance of a final order of removal, with limited exceptions, an alien may be ordered released if he can establish that there is no significant likelihood of his removal in the reasonably foreseeable future. *See Clark v. Martinez*, 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001). The decision to maintain an alien in detention is not arbitrary. . . .

Paragraph 25—Labour "Rights":

. . . [T]he Special Rapporteur cites various "rights" that the U.S. government allegedly committed itself to protect. The Rapporteur's claims are incorrect.

Neither the ICCPR nor the Universal Declaration on Human Rights (UDHR) establishes a "right to a safe and healthful workplace" or to "compensation for workplace injuries and illnesses." Article 23 of the UDHR instead provides for the right to "just and favourable conditions of work," and the only labor specific provision in the ICCPR is Article 22 which relates to the right to form and join trade unions. Under our domestic law in the United States, workers do have a right to a safe and healthful workplace, and employers are required to provide their employees workplaces free from serious hazards and to comply with occupational safety and health standards. The Occupational Safety and Health Act of 1970 protects workers by setting and enforcing workplace safety and health standards and by providing safety and health information, training and assistance to workers and employers.

Neither the ICCPR nor the UDHR provides for the "equality of conditions and rights for immigrant workers" based upon their migration status specifically. Article 26 of the ICCPR provides, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 2 provides that State Parties to the Convention "undertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Apart from these protections, however, the ICCPR does not guarantee equality of conditions and rights specifically for migrant workers.

Similarly, the UDHR provides in Article 2 that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," and Article 7 provides, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Apart from these general protections, however, the UDHR does not guarantee equality of conditions and rights for immigrant workers.

* * * *

Paragraph 26—Mandatory detention of arriving aliens, including asylum seekers and refugees:

The Report notes that "under current U.S. immigration law, individuals arriving in the United States without the necessary visas or other legal permission to enter, including asylum seekers and refugees, are subject to mandatory detention." The Report, however, fails to recognize that only a limited subclass of arriving

aliens—those subject to expedited removal—are subject to mandatory detention, and even aliens in that subclass generally may be paroled into the United States and released from detention . . . . Laws and regulations are in place to determine which aliens may be paroled or released on a case-by-case basis. 8 U.S.C. §§ 1182(d)(5), 1226, 8 C.F.R. §§ 236.1–.3, 212.5.

Arriving aliens who express a fear of persecution or torture and have been determined by a trained asylum officer to have a credible fear of persecution or torture may be considered for parole. . . .

* * * *

Paragraph 104—Racial Discrimination:

This paragraph moves away from the subject of migrant workers to deal with racial discrimination. We should caution against confusing issues of discrimination on the basis of alienage and race. Article 3 (2) of the Convention on the Elimination of All Forms of Racial Discrimination specifically states, "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."

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7. Social Responsibility

The International Organization for Standardization ("ISO"), a nongovernmental organization that develops and publishes international standards, created a Working Group on Social Responsibility in 2005 to prepare a document, "ISO 26000," that would provide guidelines on social responsibility. *See http://isotc.iso.org*. The working group included representatives of nongovernmental organizations, labor and business groups, and governments.

On March 28, 2008, Mary McKiel, a U.S. government member of the ISO's government stakeholder group, provided preliminary comments on ISO's working draft document on social responsibility. Ms. McKiel's initial comments,

excerpted below, expressed the concern that the draft document contained numerous misrepresentations of international law and that the working group's procedures did not adequately take into account stakeholders' views. The full text of the U.S. submission is available at *www.state.gov/s/l/c8183.htm*.

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As a general matter, we consider that promoting social responsibility around the world contributes to the important goals of democracy, free trade, international development and human rights. The U.S. Government has many programs that regulate and promote practices for protecting and improving environment, health and safety. The U.S. Government also plays a role in recognizing and promoting good labor and business practices. U.S. authorities are similarly committed to upholding and promoting international trade agreements to which the United States and the ISO 26000 WG member countries are parties. Insofar as the work of the ISO 26000 is consistent with and helpful in administering our own laws and the agreements we have with other countries, we welcome the output of the WG. We believe that our international partners are likely to have a similar view.

However, the U.S. Government has serious concerns on both the overall content of the . . . document and the ongoing process in the WG. Although we are submitting responses to the questions in the format you provided as well as in this letter, we note that these are our preliminary responses, as the time period to respond to the stakeholders' questionnaire was unduly short. . . .

* * * *

We remain very concerned that stakeholders' comments are not being given due consideration . . . . Presently, each stakeholder group leader will compile the responses from within their respective group and send them on to the Drafting Team. While it is not known how these responses will be handled, it is even more disconcerting that there is no process by which substantive issues

raised in the responses can be discussed before release of a subsequent draft. . . .

. . . We have serious concerns regarding the evolution of this exercise, including but not limited to the following observations:

- . . . [T]he document is written throughout in an overly prescriptive manner that will inevitably invite such inappropriate conformity assessments by certification or other bodies (e.g., stating that an organization is ISO 26000 "compliant"). We are likewise concerned that local jurisdictions may adopt all or part of this "ISO standard" into positive law—an outcome clearly not intended but one that is foreseeable in light of the policy and legal content in the document. We strongly recommend that ISO look to an alternate form such as a Technical Report.
- We note the document is replete with innumerable misstatements and mischaracterizations of international law. At present, it delves into complex and controversial subject matter over which the drafters have inadequate expertise and no authority. The document presents novel or controversial interpretations of international law as settled matters. Statements of opinion or belief by the authors could incorrectly be taken as established fact. It would be deeply problematic, and unbefitting of ISO's role and reputation, to use the content here as part of an international "standard" or guidance on human rights, the environment, or other subjects. We strongly urge ISO to reconsider the approach taken to this content.
- The current draft sets out to establish the so-called "Principles of Social Responsibility" and includes several principles on which there is no international consensus. Several such "principles" are at odds with both existing international treaties and standards and could have a significant commercial impact. References to so-called "principles" and "fundamental principles" require significant reframing. For example, the so-called "precautionary approach" and "polluter pays" concept do not rise to the status of principles of international

law. The use of the term "principle" is an effort to elevate these and other concepts to a higher status in the context of international governance and circumvent ongoing discussions or decisions taken in other fora.

- Legal characterizations are particularly problematic with respect to the human rights content. In the absence of considerable re-thinking, it is not appropriate to transplant state responsibilities to non-state actors because states are the subject of international human rights law. Depending on the context and the rights in question, governments may have international legal obligations to abstain from particular conduct (e.g., to not take measures that impair freedom of expression) or take particular positive actions (e.g., to provide due process protections). Replacing "government" with "organization" may be entirely inappropriate, or even nonsensical, as the rights and obligations were not crafted with non-governmental entities in mind. The approach is fundamentally flawed.
- We note that international standards play an important role in the WTO Agreement on Technical Barriers to Trade (TBT Agreement). They are often the basis for technical regulations promulgated by countries. Technical regulations that are in accordance with relevant international standards are presumed not to create an unnecessary obstacle to trade. The fact that the draft standard is couched as voluntary guidance does not alleviate our concerns. If a government references a standard in its regulations and mandates compliance with it, it is binding. ISO 26000 could therefore be misused with a view to undermining the purpose, effect, and operation of the TBT Agreement, with the result of creating—rather than preventing—unnecessary obstacles to trade.

In summary, we believe that both the WG and ISO need to take a serious look at the current content of the draft of ISO 26000 and the procedures that have been used to date. . . .

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E. INDIGENOUS ISSUES

North American Free Trade Agreement: *Grand River Enterprises Six Nations v. United States of America*

As discussed in Chapters 4.E. and 11.B.1.c.(2), on December 22, 2008, the United States filed its counter-memorial in *Grand River Enterprises Six Nations v. United States of America*, an arbitration proceeding under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). Among other challenges, the claimants, a Canadian corporation that exports cigarettes to the United States and certain members of Canadian First Nations, alleged that the United States had violated the minimum standard of treatment obligation in Article 1105 of the NAFTA. The claim concerned measures adopted by U.S. states relating to the 1998 Master Settlement Agreement between the states and major tobacco companies. The claimants alleged that those states had an obligation to consult with them, as indigenous peoples, before adopting measures that could negatively impact their economic interests. The claimants' allegations specifically concerned amendments to escrow statutes that altered the formula for obtaining releases of escrow deposits made by tobacco manufacturers under the statutes. Article 1105 obligates Parties to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

Excerpts follow from the U.S. counter-memorial, providing U.S. views on whether two instruments pertaining to indigenous peoples reflect customary international law. (Some footnotes and citations to other submissions in the case are omitted.) The counter-memorial (with confidential information redacted) is available at *www.state.gov/s/l/c11935.htm*.

* * * *

b. The International Instruments And Documents On Which Claimants Rely Do Not Reflect Customary International Law

Claimants invoke certain provisions of the UN Indigenous Declaration [UN Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295] and ILO 169,* as well as other UN documents, to support the proposition that there is a general "customary international law obligation to avoid discrimination" against indigenous tribes by requiring States to proactively consult with those tribes prior to taking legislative actions that might have a substantial impact on them.[479] As the United States has demonstrated, however, the minimum standard of treatment cannot be construed to include particular protections for certain classes of aliens and not for others. Furthermore, as the NAFTA Parties have confirmed, "[a] determination that there has been a breach . . . of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." Finally, the international instruments on which Claimants rely do not reflect customary international law binding upon the United States, and thus cannot be relied on to supplement the existing obligations under Article 1105(1).

On September 13, 2007, at its sixty-first session, the General Assembly of the United Nations adopted the UN Indigenous Declaration by a vote of 143–4 (opposed)–11 (abstained), with more than 30 countries absent. Of those voting in favor of the Declaration, numerous countries took the position that they did not have indigenous populations and, therefore, the Declaration

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* Editor's note: *See* International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Sept. 5, 1991), available at *www.ilo.org/ilolex/cgi-lex/convde.pl?C169*.

[479] Article 38 of the UN Indigenous Declaration provides: "States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration." *See United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, art. 38 (Sept. 13, 2007). Article 19 of the UN Indigenous Declaration provides: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." *Id.* art. 19.

did not apply to them.[482] Other[] countries with recognized indigenous populations, however, including Australia, Canada, New Zealand and the United States, voted against it or abstained, including the Russian Federation and Colombia.[483] Many countries highlighted the aspirational nature of the document.[484] Other countries, such as Mexico, were clear that either all or significant

[482] *See, e.g.*, China Concerned with Protection of Indigenous Peoples, Chinese Embassy, *available at http://ch.china-embassy.org/eng/ztnr/rqwt/t138829.htm* (last visited Dec. 19, 2008) (The article notes that the adviser of the Chinese delegation stated at the 53rd session of the United Nations Commission on Human Rights that "[t]he indigenous issues are a product of special historical circumstances. By and large, they are the result of the colonialist policy carried out in modern history by European countries in other regions of the world, especially on the continents of America and Oceania. As in the case of other Asian countries, the Chinese people of all ethnic groups have lived on our own land for generations . . . . In China, there are no indigenous people and therefore no indigenous issues."); Statement of Indonesia, Transcript of the Sixty-First Session of the United Nations General Assembly, 108th Plenary Meeting, A/61/PV.108, at 4 (Sept. 13, 2007) (relying on the ILO definition of indigenous peoples, and noting that because "Indonesia is a multicultural and multi-ethnic nation that does not discriminate against its people on any grounds, the rights stipulated in this Declaration accorded exclusively to indigenous peoples are not applicable in the context of Indonesia"); Statement of Turkey, *id.* at 5 ("Turkey does not have any group within its territory that falls with the scope of indigenous peoples to which the United Nations Declaration on the Rights of Indigenous Peoples applies.").

[483] *See* Transcript of the Sixty-First Session of the United Nations General Assembly, 107th Plenary Meeting, A/61/PV.107, at 10–19 (Sept. 13, 2007). Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine abstained.

[484] *See* Statement of Australia, *id.* at 12 ("it is the clear intention of all States that it be an aspirational declaration with political and moral force but not legal force."); Statement of Canada, *id.* ("We have sought for many years, along with others, an aspirational document . . . ."); Statement of New Zealand, *id.* at 14 ("The Declaration is explained by its supporters as being an aspirational document intended to inspire rather than to have legal effect."); Statement of United Kingdom, *id.* at 22 ("it will be an important policy tool. . . ."); Statement of Norway, *id.* ("The Declaration sets a standard of achievement to be pursued in a spirit of partnership and mutual respect."); Statement of Guyana, *id.* at 26 ("We also take note of the fact that the Declaration is political in character. . . ."); Statement of Suriname, *id.* at 27 ("the Republic of Suriname recognizes this document as a political

portions of the Declaration would only be interpreted in accordance with their Constitution and domestic legislation.[485]

In voting against the UN Indigenous Declaration, the United States, Australia, Canada and New Zealand (as well as the Russian Federation and Colombia when abstaining from it), expressly stated their view that its provisions are not reflective of uniform State practice and thus, do not create any customary international law obligations.[486] Each of these countries has large indigenous

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document to express and demonstrate the goodwill of the State. . . ."); Statement of Myanmar, Transcript of the Sixty-First Session of the United Nations General Assembly, 108th Plenary Meeting, A/61/PV.108, at 2 (Sept. 13, 2007) (The nature and the scope of the measures to be taken to give effect to the Declaration will be determined in a flexible manner. . . ."); Statement of Nepal, *id.* at 3 ("It is Nepal's understanding that the principles mentioned in this Declaration are collective reflections of the good intentions of the international community as guidelines for the protection and promotion of the rights of indigenous peoples and therefore do not create and binding legal or political obligations on the part of the States that voted in favour of it."); Statement of Turkey, *id.* at 5 ("The Declaration is not legally binding. However, it can constitute an important policy tool for those States that recognize indigenous peoples within their national territories.").

[485] *See* Statement of Mexico, *id.* at 23 ("The right of indigenous peoples to self-determination, autonomy and self-government, as set out in articles 3, 4 and 5 of the Declaration, *shall be exercised in accordance with the constitution*, so as to ensure the national unity and territorial integrity of our State. The provisions of articles 26, 27 and 28 relating to ownership, use, development and control of territories and resources shall not be understood in a way that would undermine or diminish the forms and procedures relating to land ownership and tenancy *established in our constitution and laws* relating to third-party acquired rights. The procedures set out in article 27 and 28 *are subordinate to national legislation*.") (emphasis added). *See also* Statement of Paraguay, *id.* at 4–5 (It "will be interpreted in accordance with the relevant provisions of our national constitution and the normative framework of our national legal order."); Statement of Namibia, *id.* at 3 ("Namibia understands that the exercise of the rights set forth in this Declaration are subject to the limitations determined by the constitutional frameworks and other national laws of States.").

[486] *See* Transcript of the Sixty-First Session of the United Nations General Assembly, 107th Plenary Meeting, A/61/PV.107, at 10–19 (Sept. 13, 2007). While abstaining from voting on the Declaration, the Russian Federation stressed that the "text clearly does not enjoy consensus support" and Colombia articulated its view that it "in no way constitutes the establishment of conventional or customary provisions." *Id.* at 16–17.

populations which they seek to protect.[487] For this reason, the Tribunal should give particular weight to their objections when analyzing whether the rule of consultation which Claimants propose has actually matured into a rule of customary international law.

The United States clearly rejected "any possibility that [the Declaration] is or can become customary international law" and emphasized that because the Declaration "does not describe current State practice or actions that States feel obliged to take as a matter of legal obligation, it cannot be cited as evidence of the evolution of customary international law."[489] The United States further emphasized that "[t]he flaws in this text run through all of its most significant provisions" and because "these provisions are fundamental to interpreting all of the provisions in [the] text, the text as a whole is rendered unworkable and unacceptable. The United States specifically observed, with respect to the consultation obligation under Article 19 of the Declaration, that the obligation "could be misread to confer upon a sub-national group a power of veto over the laws of a democratic legislature by

[487] *See id.* at 15 ("Under United States domestic law, the United States Government recognizes Indian tribes as political entities with inherent powers of self-government as first peoples."); *id.* at 13 ("In New Zealand, indigenous rights are of profound importance. They are integral to our identity as a nation-State and as a people. . . . Today, we have one of the largest and most dynamic indigenous minorities in the world."); *id.* at 13 ("The recognition of indigenous rights to lands, territories and resources is important to Canada. Canada is proud of the fact that aboriginal and treaty rights are given strong recognition and protection in Canada's constitution."); *id.* at 11 (referencing various Australian laws designed specifically to protect indigenous property rights and cultural heritage); *id.* at 16 ("The Russian Federation attaches great importance to the protection of the rights of indigenous peoples and to the strengthening of international cooperation in that area.").

[489] *Observations of the United States with Respect to the Declaration on the Rights of Indigenous Peoples*, in United States Mission to the United Nations, USUN Press Release No. 204(07), *Explanation of vote by United States, Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, September 13, 2007*, *available at [www.archive.usun.state.gov/press_releases/20070913_204.html]*. [Editor's note: *See also Digest 2007* at 368–73.]

requiring indigenous peoples[’] free, prior and informed consent before passage of any law that ‘may’ affect them.

When similarly objecting to the UN Indigenous Declaration, Canada stated its view that the Declaration was “not a legally binding instrument”; had “no legal effect in Canada”; and that its provisions did “not represent customary international law.”[492] Australia emphasized in its vote against the UN Indigenous Declaration that the Declaration “does not describe current State practice or actions States consider themselves obliged to take as a matter of law” and thus, “cannot be cited as evidence of the evolution of customary international law.”[493] New Zealand explained its “no” vote by contending that the UN Indigenous Declaration “does not state propositions which are reflected in State practice or which are or will be recognized as general principles of law.”[494]

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[492] Transcript of the Sixty-First Session of the United Nations General Assembly, 107th Plenary Meeting, A/61/PV.107, at 13 (Sept. 13, 2007). Like the United States, Canada specifically objected to the Declaration’s provisions “on free, prior and informed consent when used as a veto” on the grounds that they are “unduly restrictive.” *Id.* at 12–13. Canada explained specifically with respect to Article 19 that, “[w]hile there are already strong consultation processes in place, and while Canadian courts have reinforced these as a matter of law, the establishment of a complete veto power over legislative and administrative action for a particular group would be fundamentally incompatible with Canada’s parliamentary system.” *Id.* at 13.

[493] *Id.* at 12. Like the United States, Australia emphasized that the Declaration’s articles “with regard to free, prior and informed consent” are overly broad, and focused, in part, on the discriminatory nature of the provision. *Id.* at 11. Australia was concerned that these provisions “could mean that States are obliged to consult with indigenous peoples about every aspect of law that might affect them” and it “would apply a standard for indigenous peoples that does not apply to others in the population.” *Id.* It emphasized that the UN Indigenous Declaration’s principles of informed consent could not be reflective of state practice, because they were also “potentially inconsistent with, and go well beyond, any concept of free and informed consent that may be developing in other international forums.” *Id.*

[494] *Id.* at 15. Like the United States, New Zealand observed that “the Declaration, in particular its article 19 and paragraph 2 of article 32, implies that indigenous peoples have a right of veto over a democratic legislature,” which was untenable because those articles would create “different classes of citizenship, where indigenous peoples have a right of veto that other groups or individuals do not have.” *Id.* at 14. New Zealand noted further that other

Claimants' reliance on the consultation provisions in Article 6 of ILO 169 to prove the existence of such a norm is equally unavailing. Despite having been open for signature since 1989, only twenty of the more than 190 States in the world have ratified ILO 169 and the United States is not among them. Furthermore, the ILO Convention does not purport to reflect customary international law, and, moreover, a convention with so few parties cannot be suggested credibly to be reflective of customary international law. . . .

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F. TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

1. Observations on UN Committee Against Torture General Comment No. 2

On November 3, 2008, the United States submitted observations to the UN Committee Against Torture ("Committee") concerning certain opinions and recommendations expressed in General Comment No. 2: Implementation of Article 2 by States Parties, adopted by the Committee on January 24, 2008. U.N. Doc. CAT/C/GC/2. In submitting its observations, the United States stated:

> . . . [T]he United States is concerned that the Committee has expressed many of its policy recommendations in the form of treaty obligations on States Parties. These Observations of the United States focus on those recommendations of the Committee that, while not necessarily unacceptable as a matter of policy, do not reflect the actual legal obligations of States Parties under the Convention.

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provisions of the Declaration "are all discriminatory in the New Zealand context" because the implication of their implementation would be to grant indigenous peoples preferential status over other citizens. *Id.*

> . . . There are a substantial number of legal statements and conclusions in General Comment 2 with which the United States does not agree. These Observations, however, only address a select number of issues, which the United States views as particularly concerning.
>
> The U.S. observations addressed six topics: I. The Distinction between "Torture" and "Other Cruel, Inhuman and Degrading Treatment or Punishment;" II. Torture; III. Obligations Pertaining to Private Conduct; IV. Non-Derogability; V. Non-State Actors; and VI. Authority and Role of the Committee. U.S. views on the first five topics are provided below (most footnotes omitted); *see* A.2.f. *supra* for U.S. views on the Committee's role and authority. The full text of the U.S. observations is available at *www.state.gov/l/c8183.htm*.

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I. The Distinction between "Torture" and "Other Cruel, Inhuman and Degrading Treatment or Punishment"

5. As an initial matter, the United States notes that the stated subject of General Comment 2—Article 2 of the Convention—concerns torture rather than other acts of cruel, inhuman and degrading treatment or punishment that do not amount to torture (termed "ill-treatment"[2] in the General Comment). Nevertheless, as discussed below, General Comment 2 contains extensive commentary and some conclusions pertaining to ill-treatment that are both surprising and without legal basis.

6. General Comment 2, paragraphs 3 and 6 state:

> Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and *therefore*

[2] The term "ill-treatment" is not a term of art under international law. For the sake of similarity, these Observations will use that term when describing "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." CAT, Article 16.

> the measures required to prevent torture must be applied to prevent ill-treatment . . . . The Committee considers that articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment. (Emphasis added.)

7. There is no basis or support for this assertion in international treaty law. While the United States does not doubt the Committee's conclusion that conditions giving rise to ill-treatment could also facilitate torture, such a finding does not give rise to the creation of new legal obligations of States Parties. As a legal matter, the plain text of the Convention makes clear that Articles 3 to 15 are not all "obligatory" with respect to ill-treatment. Indeed, the treaty expressly provides that only Articles 10 to 13 are obligatory with respect to ill-treatment, in express contradiction to the Committee's views. Specifically, Article 16 states that "[i]n particular, the obligations contained in *articles 10, 11, 12 and 13* shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment." (Emphasis added.) The Committee's unsupported assertion on this matter is thus directly inconsistent with the express language of the Convention. In reaching this conclusion, the Committee purports to substitute the conclusory opinions of its appointed experts for the plain text of the treaty negotiated and ratified by States Parties.

8. The Committee seems to reach the conclusion above in part by characterizing the relationship between torture and ill-treatment as "indivisible" (Paragraph 3). This approach, regrettably, casts aside the decision taken by the Convention's drafters to fashion distinct and only partially overlapping legal obligations relating to these two separate categories of acts: (1) those that amount to torture as defined under Convention Article 1; and (2) those that constitute "*other acts* of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," as described in Article 16. While the United States agrees with the Committee that the "definitional threshold between ill-treatment and torture

is often not clear," this does not provide a basis for dispensing with the plain language of the Convention and the clear intent of the drafters.

9. Pursuant to customary international law regarding the interpretation of treaties, as reflected in the Vienna Convention on the Law of Treaties, a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." In the case of the Convention, the States Parties made a thoughtful and express decision with respect to which articles of the treaty would apply to ill-treatment. There is no basis in international treaty law for the Committee to rewrite, in effect, the clear provisions of the treaty under the guise of interpretation.

II. Torture

10. General Comment 2, paragraph 11, discusses the distinctiveness of the offense of torture, including the need for "naming and defining this crime" as distinct from "common assault or other crimes." To the extent that Paragraph 11 expresses the Committee's policy recommendation for States Parties, the United States has no objections to this paragraph. However, to the extent that the Committee believes that the Convention contains a requirement to codify the crime of torture as such in domestic law, the United States does not agree.

11. Article 4 of the Convention requires that States Parties "ensure that *all acts of torture* are offenses under its criminal law" and that they "make these offences punishable by appropriate penalties which take into account their grave nature." (Emphasis added.) Thus, the treaty requires that all acts that constitute torture under the Convention be made criminal under a State Party's laws and subject to appropriately serious criminal penalties. The treaty does not require that States Parties ensure that the *crime of torture* is itself styled as a stand-alone and separate offense under their criminal law or that all acts that satisfy the definition of torture be characterized as such under domestic law. . . . Article 4 does not preclude the use of traditional elements of a State Party's criminal code including criminal offenses, such as aggravated battery or maiming—to satisfy its obligations under Article 4. Indeed, Article 1, paragraph 2 of the Convention states that

the definition of torture is "without prejudice to any . . . national legislation which does or may contain provisions of wider application."

12. What is critical as a matter of treaty law is that every State Party ensure that every act that falls within Convention's definition of torture is punishable under its criminal laws by appropriately severe penalties. The precise manner in which a State Party accomplishes this obligation of result, as a matter of its internal domestic law, is left for each State Party to decide for itself, mindful of its general obligation under international law to implement its treaty obligations in good faith. In this context, the United States considers that a State Party's criminal laws, many of which will long pre-date the Convention, may play an important role in fulfilling a State Party's obligations. . . . Accordingly, the United States considers the views of the Committee on this matter to be policy recommendations for consideration by States Parties.

13. Paragraph 10 states that "it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present."

14. As an initial matter, it is possible that this conclusion is based on an assumption that countries have enacted laws with criminal offenses separately styled as "torture" subject to grave penalties and "ill-treatment" subject to less serious penalties. This model has no application for a country like the United States, whose domestic laws typically do not style criminal offenses as torture or ill-treatment.

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III. Obligations Pertaining to Private Conduct

17. Paragraphs 15 and 18 of General Comment 2 address the issue of the Convention's protection in relation to privately-inflicted abuses. Paragraph 15 states, *inter alia*, that ". . . each State party should prohibit, prevent and redress torture and ill-treatment in . . . contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm." Paragraph 18 states:

> [W]here State authorities or others acting in official capacity or under colour of law, know or have reasonable

> grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.

18. While the United States does not necessarily disagree with these views, they are nonetheless confusing and unclear. The definition of torture found in Article 1 of the Convention contains a "state-action" requirement, namely that for an act of torture to take place, it must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Article 16 similarly provides a similar state-action requirement for ill-treatment. Of course, torture and ill-treatment can, under certain circumstances, involve acts by "private" or "non-State" actors; however, recognition of this fact is not derived from any interpretation or understanding of Article 2—the subject of General Comment 2—and without the state action requirement found in Articles 1 and 16, such action is beyond the scope of the Convention.

19. The Committee's statements seem to speak to the scope of the state-action requirements in the Convention and could be understood as broadening them beyond what is supported in the text of the Convention. Specifically, it is unclear whether the Committee is purporting to comment upon the matter of what constitutes a state actor's "consent," "acquiescence," or "instigation" within the meaning of CAT Articles 1 and 16. If the Committee's statement uses the terms torture and ill-treatment to include, as they must, the state-action requirements contained in

the Convention, then its description is confusing but not particularly problematic. If this statement refers to purely private conduct that does not include the state-action requirements for such conduct to constitute torture or ill-treatment, then it would suggest an array of new obligations that do not have a basis in what States Parties have assumed under the Convention.

20. There could certainly be circumstances under which a State official "consents" or "acquiesces" to an abuse, thereby meeting the requirement for state-action in the definition of torture. However, the United States does not consider that the concept of "due diligence" advanced by the Committee furthers an understanding of the scope of state responsibility under the Convention. The Committee's use of the word "should" in Paragraphs 15 and 18 suggests to the United States that the Committee may not view the concept of "due diligence" as giving rise to requirements *per se* under the Convention. This use of "should" seems appropriate, as the concept of "due diligence" is not included in the Convention itself, and cannot as a matter of international treaty law reasonably be inferred to be within in the meaning of the words "acquiescence" or "consent" in Articles 1 or 16.

21. Accordingly, the Committee's treatment of this issue appears to be in the nature of a general policy recommendation. In this respect, the United States agrees with the general proposition that States owe a moral and political responsibility to their populations to prevent and protect them—including through the use of positive measures—from private acts of physical abuse by private individuals. However, governmental action in these areas has been and will remain a matter of criminal law in the fulfillment of a state's general responsibilities incident to ordered government, rather than as a requirement derived from their obligations under the Convention.

IV. Non-Derogability

22. Paragraphs 1, 3, 5, 6, 7, 17, 25 and 26 refer variously to the "principle of non-derogability" and the "non-derogable" nature of certain Convention obligations.

23. The concept of "derogation" entails a procedure which may be expressly provided for in some treaties under which a State,

after it becomes Party to such a treaty, is permitted to be excused from certain treaty obligations it assumed at the time it became a party, generally for a particular period of time. As the Committee is aware, some treaties, such as the International Covenant on Civil and Political Rights (ICCPR), include provisions that expressly permit a State Party, pursuant to procedures set forth in those treaties, to excuse itself from fulfilling specific treaty obligations through formally "derogating" from certain articles, while prohibiting the derogation from certain other obligations. Though not styled as "derogations," many treaties also provide for exceptions to general rules that are permissible, but only in the circumstances specified in the treaty itself.

24. The Convention, however, provides for neither an explicit derogation procedure along the lines of the ICCPR nor any specified exemptions to general obligations. Accordingly, it is not clear what the Committee means when it repeatedly invokes this terminology.

25. The United States does not consider it permissible for a State Party to "derogate" from *any* of its obligations under the Convention. In other words, the United States does not read into the Convention an implied right of derogation. Upon consenting to be bound by a treaty, a State takes on a solemn obligation to abide by the terms of that treaty, taking into account any permissible reservations, understandings, or declarations that accompany treaty ratification. After the treaty ratification process is complete, the failure of a State Party to abide by the obligations it has assumed would not be a "derogation," but rather a violation of its treaty obligations. It may be that the Committee's phrasing is intended merely to amplify and emphasize the importance of the obligations set forth in the Convention. This would be a matter on which the United States and the Committee are in agreement.

V. Territory and Jurisdiction

26. General Comment 2, paragraph 7 states:

> The Committee also understands that the concept of 'any territory under its jurisdiction,' linked as it is with the principle of non-derogability, includes any territory or facilities

> and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party. The Committee emphasizes that the State's obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party.

27. Article 2, paragraph 1 of the Convention states that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in *any territory under its jurisdiction*." (Emphasis added.) This important phrase, which clarifies the scope of certain Convention obligations, also appears in Convention Articles 5, 11, 12, 13, and 16.

28. As explained to the Committee in 2006, the United States does not agree that "'de facto control' equates to 'territory under its jurisdiction.' There is nothing in the text or the *travaux* of the Convention that indicates that the two are equivalent." The Committee offers no textual or historical support for its proposition in General Comment 2 that the words "any territory under its jurisdiction . . . includes any territory or facilities . . . subject to the de jure or de facto control of a State party." The Committee has made similar assertions in its communications to the United States. In these communications, the Committee has likewise not provided a reasoned explanation of how the scope of the Convention's obligations supposedly depart from the plain meaning of its text.

29. The Committee does state, however, that the phrase "any territory under its jurisdiction" is "linked . . . with the principle of non-derogability. . . ." The meaning of this statement is unclear. As described in Section IV above, the United States finds the repeated references to "non-derogability" to be inapposite and confusing. Whether or not obligations under the Convention are properly characterized as "non-derogable," there can be no doubt about the importance of . . . preventing acts of torture and ill-treatment wherever they may occur. But if the Committee intends to suggest that the "principle of non-derogability"—which appears nowhere in the text of the Convention—somehow expands the carefully considered scope of legal obligations assumed by States Parties, the United States cannot agree. The drafters of the

Convention were capable of devising legal obligations with a more expansive reach, as is demonstrated by Convention Article 5, which applies to offenses "committed in any territory under [a State Party's] jurisdiction *or on board a ship or aircraft registered in that State*." (Emphasis added.) If the drafters had intended for Article 2 to extend beyond the territory under a State Party's jurisdiction, they would have reflected that intent in the words of the Convention.

* * * *

38. The United States Government concludes these Observations with a statement of its appreciation for the work of the Committee Against Torture. Although the United States does not agree with a significant number of the Committee's views on the interpretation of the Convention, it fully shares the Committee's absolute opposition to torture and ill-treatment and appreciates the Committee's continuing efforts to advise States Parties on effective means to prevent and punish acts of torture and ill-treatment. The United States looks forward to its continuing dialogue with the Committee on these issues.

2. Diplomatic Assurances

On June 10, 2008, Department of State Legal Adviser John B. Bellinger, III, testified before the Subcommittee on International Organizations, Human Rights, and Oversight of the House of Representatives Committee on Foreign Affairs about the Department of State's practice of seeking diplomatic assurances in certain cases arising in three contexts: (1) extradition of fugitives; (2) immigration removal proceedings initiated by the Department of Homeland Security; and (3) the transfer of terrorist combatants from the Department of Defense detention facility in Guantanamo Bay, Cuba. Excerpts follow from Mr. Bellinger's prepared statement, which is available in full at *www.state.gov/s/l/c8183.htm*.

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Article 3 and the Related Policy Against Transfers to Torture

First, it is important to understand the United States' legal obligations and related policies with respect to the sending of individuals to countries where . . . there is a risk they may be tortured. The touchstone of our legal obligations is Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ("Convention" or "Convention Against Torture"). As a party to the Convention, the United States has undertaken an international legal obligation under Article 3 not to expel, return ("refouler") or extradite a person from the territory of the United States to a country where there are substantial grounds for believing that person would be subjected to torture. Pursuant to the formal treaty understanding approved by the Senate and included in the U.S. instrument of ratification, the United States interprets 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 Against Torture, to mean "if it is more likely than not that he would be tortured." According to the August 30, 1990 Report from the U.S. Senate Committee on Foreign Relations, this understanding sought to apply the same legal standard under Article 3 that is used in determinations under the 1967 Protocol Relating to the Status of Refugees ("Refugee Protocol"). Under the Refugee Protocol, an individual may not normally be expelled or returned if it is more likely than not that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. It is important to note that, by expressing the "more likely than not" standard as an Understanding to Article 3, the United States deemed it to be merely a clarification of the definitional scope of Article 3, rather than a standard that would modify or restrict the legal effect of Article 3 as it applied to the United States.

The non-refoulement obligations in Article 3 apply only with respect to individuals who are *in the territory of the United States*. This accords with our interpretation of similar language in the Refugee Protocol. Neither the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 of the Convention applies to persons outside the territory

of the United States. By its terms, Article 3 applies only to expulsion, to what is described as "returns ('refouler')", and to extradition. "Expulsion" and "extradition" clearly describe conduct taken to remove individuals from a State Party's territory.

Likewise, the U.S. Supreme Court has concluded that the term "return ('refouler')," in the context of Article 33 of the Convention Relating to the Status of Refugees (incorporated by reference into the Refugee Protocol), "was not intended to have extraterritorial effect."[1] There is no basis for attaching a different meaning to "refouler" in Article 3 of the Convention Against Torture. This reading is further supported by the Convention's negotiating record.[2] In addition, the record of proceedings related to U.S. ratification of the Convention demonstrates that at the time of ratification in 1994, the United States did not interpret Article 3 to impose obligations with respect to individuals located outside of U.S. territory.

Although the reach of Article 3 itself is limited, it is nevertheless the policy of the United States not to send *any* person, no matter where located, to a country in which it is more likely than not

[1] *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 179 (1993). In examining the text of Article 33, the Supreme Court found that the legal meaning of the term "return," as modified by reference to the French "refouler" (English translations of which included "repulse," "repel," "drive back," and "expel"), implied that "'return' means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination."

[2] The original Swedish proposal spoke only of expulsion or extradition, and did not employ the term "return ('refouler')." However, when the draft was revised to expand the prohibition to include "return ('refouler')," considerable discussion ensued over the advisability of including the term, including references to ambiguity surrounding the extraterritorial reach of the provision. At no point was there agreement that the term was intended to apply to individuals located outside the territory of a State Party. Additionally, both the text and the negotiating history make clear that negotiators used explicit language applying certain provisions of the Convention extraterritorially when they intended those provisions to have extra-territorial effect (See, *e.g.* Articles 2(1), 5, 12, 13, and 16). The negotiators' failure to do so in Article 3 further confirms that there was no express intent to apply Article 3 extraterritorially.

that the person would be subjected to torture. This policy applies to all components of the U.S. Government and applies with respect to individuals in U.S. custody or control regardless of where they may be detained. It has been set forth in statute and articulated at the highest levels of the United States Government. *See* Section 2242 of the 1998 Foreign Affairs Reform and Restructuring Act (PL 105-277).

. . . U.S. commitments under Article 3 and our related policy are absolute. There are no exceptions based on national security or the criminality of an individual, as there are regarding the non-refoulement obligation under the Refugee Protocol. Nor is the likelihood that an individual will be tortured weighed against the threat he or she poses to the safety and security of the American people.

The Role of Diplomatic Assurances

Let me now explain where diplomatic assurances fit in the context of our obligations under Article 3 and related policies. When confronted with a dangerous foreign national—such as a serious criminal or terrorist—our Article 3 obligations may seriously constrain our options for removing or extraditing that individual from the United States. On the one hand, we may not have the ability to detain the individual. For example, even though we have reliable information that the individual poses a terrorist threat, we might lack admissible evidence to support charging the individual with anything more than a minor crime or immigration violation. Even if we could detain the individual under the laws of war or in immigration detention, there are legal restrictions on holding the individual for an extended period of time. A better option might therefore be to send the individual to his home country, or to a third country that is seeking to have him extradited for prosecution. But as I have explained, the Article 3 prohibition is categorical: no matter how dangerous the individual, he cannot be sent from the United States to any country if it is more likely than not that the individual will face torture there. In fact, it is often the case that very dangerous individuals may be nationals of, or sought for prosecution by, States with poor human rights records, giving rise to a concern about torture. This presents the

United States—and all governments that, like ours, respect the rule of law—with a serious problem.

In such situations, diplomatic assurances can be a way to protect U.S. national security and public safety while still complying with relevant international law and policy not to send people to countries where they will be tortured. Credible diplomatic assurances from the receiving state may *reduce the risk of torture* such that the individual can be safely and appropriately transferred consistent with our Article 3 obligations. In other words, diplomatic assurances and the senior level communications with the foreign government on which they are based can be the vehicle by which the United States Government can reasonably find that it would not be more likely than not that the individual would be tortured by the receiving country if transferred.

To reduce the risk of torture, it is of course essential that diplomatic assurances be credible. This requires direct engagement with the potential receiving country. In such cases, where appropriate, the U.S. Government can change the facts on the ground by directly engaging with the receiving country regarding the treatment that a particular individual will receive and securing explicit, credible assurances that the individual will not be tortured.[3]

The seeking of diplomatic assurances is, of course, not appropriate in all cases. We would not rely upon assurances unless we were able to conclude that with those assurances, an individual could be expelled, returned, extradited, or otherwise transferred consistent with our treaty obligations and stated policy. The efficacy of assurances must be assessed on a case-by-case basis and can depend on a number of factors related to the particular country involved, including the extent to which torture may be a

[3] Of course, the United States also engages in bilateral and multilateral efforts to assist other countries in improving their human rights records. This policy is fully consistent with longstanding U.S. human rights policy, which strives to encourage countries around the world to improve their human rights performance to protect a broad array of civil and political rights. While we hope that such efforts will produce sustainable improvements in the conditions in those countries over the long term, they are inadequate for addressing the immediate problem of removing a charged or convicted criminal or suspected terrorist alien who is unlawfully present in the United States.

pervasive aspect of its criminal justice, prison, military or other security system; the ability and willingness of that country's government to protect a potential returnee from torture; and the priority that government would place on complying with an assurance it would provide to the United States government (based on, among other things, its desire to maintain a positive bilateral relationship with the United States government). But in cases where credible assurances could be effective in permitting removal or extradition consistent with our non-refoulement obligations, such assurances are a critical and valuable tool.

Procedures for Implementing Article 3 and the Related Policy

In 1999, the United States government promulgated regulations to implement its Article 3 obligations, including regulations addressing diplomatic assurances. In the extradition context, the Secretary of State is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country and decisions on extradition where there is a potential issue of torture are presented to the Secretary (or, by delegation, to the Deputy Secretary) pursuant to regulations at 22 C.F.R. Part 95. The decision to surrender a fugitive occurs only after a fugitive has been found extraditable by a United States judicial officer. In order to implement our Article 3 obligations, in cases where the issue arises, the Secretary or Deputy Secretary, in making the determination whether to surrender, considers the question of whether a person facing extradition from the U.S. 'is more likely than not' to be tortured in the State requesting extradition. In each case in which allegations relating to torture are made or the issue is otherwise brought to the Department's attention, appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary or Deputy Secretary as to whether or not to sign the surrender warrant. Based upon the analysis of the relevant information, surrender may be conditioned on the requesting State's provision of specific assurances relating to torture or aspects of the requesting State's criminal justice system that protect against mistreatment. In addition to assurances related to torture, such assurances may include, for example, that the fugitive will have regular access to counsel and the full

protections afforded under that state's constitution or laws. Assurances specifically against torture have been sought in only a small number of extradition cases. In this regard it is important to note that prior to negotiating new extradition treaties the United States undertakes a review of the potential treaty partner's human rights record to determine if they will respect both the rule of law and an extradited individuals human rights, including protections against torture. Consequently, extradition cases generally do not pose legitimate concerns about torture and such claims are rare. The use of assurances, however, is part of a longstanding and effective international practice in the extradition context, and assurances are often directly referenced in extradition treaties themselves.

In the immigration context, regulations codified at 8 C.F.R. 208.18(c) and 8 C.F.R. 1208.18(c) provide that the Secretary of State may forward to the Secretary of Homeland Security assurances that the Secretary of State has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country. In practice, the Department of State seeks assurances upon the request of the Department of Homeland Security and exercises discretion in deciding in particular cases whether or not to seek assurances upon receiving such a request. Under these regulations, if the Secretary of State obtains and forwards such assurances to the Secretary of Homeland Security, the Secretary of Homeland Security shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention. If the Secretary of Homeland Security determines that the assurances are sufficiently reliable, he or she may then terminate any deferral of removal the alien had been granted as to that country and the alien's torture claim may not be considered further by an immigration judge, the Board of Immigration appeals or an asylum officer.

Section 2242(c) of the 1998 Foreign Affairs Reform and Restructuring Act, the statute pursuant to which these regulations were promulgated, expressed Congress' concern with the possibility that terrorists, persecutors, and serious criminals will be released on our streets, and mandated that the regulations issued by the

Executive Branch to implement the Convention against Torture provide for the removal of such aliens to the maximum extent possible consistent with our Art[icle] 3 obligations. The regulations regarding the use of diplomatic assurances in the immigration context are a reasonable and permissible response to this congressional mandate.

Since these regulations were promulgated in 1999, they have been used in less than a handful of cases. This is in contrast to the approximately five thousand individuals who have enjoyed protection in immigration proceedings through the withholding or deferral of removal on grounds that it was more likely than not that they would be tortured. This is in addition to the approximately 300,000 individuals who were granted asylum . . . during that same time period. . . . [I]n the vast majority of immigration cases where our obligations under Article 3 of the CAT are implicated, diplomatic assurances are never even considered, let alone pursued.

The issue of diplomatic assurances also arises in the context of the transfer of enemy combatants from detention at the Department of Defense detention facility at Guantanamo Bay, Cuba. Although Article 3 of the CAT does not as a matter of treaty law apply to Guantanamo transfers, the United States government nevertheless adheres to a policy that we will not transfer individuals from Guantanamo to countries where we determine that it is more likely than not that they would be tortured. With regard to Guantanamo transfers, the Department of State is also involved in seeking diplomatic assurances from a potential receiving government as to the treatment the individual will receive if transferred or returned to that country. . . .

In all contexts, evaluations as to the likelihood of torture require a particularized determination in each individual case. Generalizations about the overall human rights situation in a country or even a country's record with respect to torture do not necessarily provide a clear or obvious answer. Likewise, evaluations as to whether assurances should be sought and whether any assurances that are obtained are sufficiently reliable such that with such assurances it is more likely than not that the individual would not be tortured are also made on a case-by-case basis. . . .

As part of an assurance we receive from a foreign government, the Department may obtain arrangements by which U.S. officials or an agreed upon third party will have physical access to the individual during any period in which he or she is in the custody of the foreign State for purposes of verifying the treatment he or she is receiving. In addition, in instances in which the United States extradites, removes, returns, or transfers an individual to another country subject to assurances, we have and will continue to pursue any credible report and take appropriate action if we have reason to believe that those assurances will not be, or have not been, honored.

In many cases, the Department's ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat dealings with the foreign government with discretion. The very fact that the United States would not consider removing an individual in the absence of an assurance on torture can itself be an embarrassment to the country in question. The delicate diplomatic exchange that is often required in these contexts typically cannot occur effectively except in a confidential setting. In such cases, consistent with the sensitivities that surround the Department's official diplomatic communications, the Department typically does not make public the details of the communications involved. If such details were regularly divulged, countries would likely prove far less willing to provide reliable assurances. In addition, making the details of these communications public would be inconsistent with the expectations of the government that have provided us assurances in the past, and would seriously undermine our ability to obtain similar assurances in the future.

Criticisms

Several criticisms have been made of our practice of obtaining assurances. Some have claimed that the confidentiality of assurances renders them suspect, or that assurances are inherently unreliable. Such challenges, to assurances *as such*, have been rejected by courts in the both the United States and in Europe. Rather, courts have found that, in appropriate circumstances, diplomatic assurances may be sufficient to enable a State to return an alien to

a country, in compliance with its Article 3 obligations, even if that country has a recent history of human rights abuses. . . .

Another criticism often leveled against the practice of utilizing diplomatic assurances is that the practice undermines the international human rights framework. We find the opposite to be true. Seeking assurances does not mean ignoring or condoning torture. On the contrary, when they seek assurances, countries signal the importance of, and their commitment to, their international human rights obligations and directly confront the country in question with their concerns. These discussions serve to bolster, not undermine, the international human rights framework. If successful, they lead to renewed commitments to and compliance with international human rights obligations by the country from which assurances are sought. In some cases, interest in reinforcing bilateral law enforcement relationships may serve as an incentive for receiving countries to improve their practices. Bilateral discussions regarding assurances may also lead to improved access to detention facilities in the receiving country on the part of the requesting state, or to a greater role for a particular domestic human rights institution and/or independent human rights group in the receiving country.

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G. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES

1. Death Penalty

On November 20, 2008, the United States voted in the General Assembly's Third Committee against a resolution on the death penalty. Laurie Phipps, U.S. Advisor, U.S. Mission to the United Nations, explained the U.S. vote, as set forth below. The U.S. statement is also available at *www.archive.usun.state.gov/press_releases/20081120_326.html*. On December 18, 2008, the General Assembly adopted the resolution by a vote of 106 in favor and 46 opposed, with 34 abstentions. U.N. Doc. A/RES/63/168.

The United States recognizes that the supporters of this resolution have principled positions on the issue of the death penalty. Nevertheless, the United States urges the supporters of this initiative to focus any future death penalty resolutions on actual human rights violations.

As the United States and other delegations have previously pointed out, international law does not prohibit capital punishment.

The International Covenant on Civil and Political Rights permits countries to impose the death penalty for the most serious crimes, carried out pursuant to a final judgment rendered by a competent court and in accordance with appropriate safeguards and observance of due process.

In this respect, the United States urges all governments that employ the death penalty to do so in conformity with their international human rights obligations and to ensure that it is not applied in an extrajudicial, summary or arbitrary manner.

2. Extrajudicial, Summary, or Arbitrary Executions

On November 24, 2008, the United States abstained when the General Assembly's Third Committee voted to adopt a resolution on extrajudicial, summary, or arbitrary executions. Ambassador T. Vance McMahan, U.S. Representative to the Economic and Social Council, explained the U.S. vote, as excerpted below. The full text of Ambassador McMahan's statement is available at *www.state.gov/s/l/c8183.htm*. On December 18, 2008, the General Assembly adopted the resolution by a vote of 127 in favor and none opposed, with 58 abstentions. U.N. Doc. A/RES/63/182.

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. . . [W]e wish to join the sponsors of the text in condemning extrajudicial, summary or arbitrary executions against all persons, irrespective of their status. We agree that all States have the obligation to protect the human rights and fundamental freedoms of all persons in their territory and should take effective action to

combat extrajudicial killings and punish the perpetrators. We agree that countries such as ours, which have capital punishment, should abide by their international obligations, including those related to due process, fair trial, and use such punishment for only the most serious of crimes.

Indeed, we agree with much of the text of this resolution, although there are paragraphs that could be improved to be consistent with the language of pp [preambular paragraph] 3 which notes that there are two bodies of law that regulate unlawful killings of individuals by governments—international human rights law and international humanitarian law. The different bodies of law apply to different circumstances. As noted in pp7, there are situations in the context of armed conflict where terrorist groups and governmental actors use that conflict as an excuse for widespread killings. And, as confirmed in PP6, the two bodies of law, human rights law and international humanitarian law, are complementary and mutually reinforce one other. But because the resolution's focus is, as stated in PP9, those extrajudicial, summary or arbitrary executions which violate human rights, we do not believe that the resolution needs to touch upon situations where international humanitarian law is applicable. Under the Geneva Conventions of 1949, it is a grave breach to kill prisoners of war or protected persons willfully or to sentence them without appropriate judicial process. Thus, the law of war provides a related but different framework for addressing that abhorrent conduct. Although we believe that OP [operative paragraph] 8 and some other paragraphs could be improved to clarify that there are two different bodies of applicable law, we appreciate the co-sponsor's willingness to work on problematic language on this issue in this resolution and recognize that this resolution is an improvement in this respect over previous versions.

* * * *

Finally, we are dismayed that the resolution has become unduly politicized with a reference to foreign occupation in a highly charged paragraph. . . . We hope that in coming years we can continue to work with sponsors on removing such unacceptable text, as well as on textual clarifications to paragraphs pertaining to

international humanitarian law, in order to be in a position to vote affirmatively in support of the text.

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H. DETENTION AND MISSING PERSONS

1. Declaration on Prisoners of Conscience

On June 17, 2008, the United States joined 63 other countries in sponsoring a Declaration on Prisoners of Conscience, which was circulated to all 192 UN member states. U.N. Doc. A/62/858. Excerpts below from a media note from the State Department's Office of the Spokesman describe the initiative. The full text of the media note is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/jun/105995.htm*.

. . . The Prisoners of Conscience Declaration . . . calls on all nations to work for the freedom of prisoners of conscience throughout the world in accordance with the principles set forth sixty years ago in the Universal Declaration on Human Rights. The declaration commits co-sponsor nations to work for the freedom of all individuals who have been imprisoned for peacefully exercising fundamental rights to gather in public and to speak and publish opinions, including opinions that are critical of governments. Co-sponsors of the declaration also commit themselves to making the release of such prisoners a key priority in their relations with other states.

We stand in solidarity with the courageous individuals around the globe who are imprisoned, often times in deplorable conditions, for exercising these inalienable rights, and we urge all United Nations Member States to work for the freedom of these individuals.

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2. Forced Disappearances

On November 21, 2008, the United States joined consensus in the General Assembly Third Committee on a resolution on the "International Convention for the protection of all persons from enforced disappearances." Ambassador T. Vance McMahan, U.S. Representative to the Economic and Social Council, provided an explanation of the U.S. position, noting:

> The United States has not signed or ratified the International Convention for the Protection of All Persons from Enforced Disappearance mentioned in the resolution due to a number of serious problems with the Convention. We have noted these problems in our General Statement regarding the Convention, which were made part of the travaux, and in our 2006 Submission to the Human Rights Council.

The full text of Ambassador McMahan's statement is available at *www.archive.usun.state.gov/press_releases/20081121_329.html*. The General Assembly adopted the resolution without a vote on December 18, 2008. U.N. Doc. A/RES/63/186.

Cross References

Refugee issues, **Chapter 1.D.**
Trafficking in persons, **Chapter 3.B.3.**
International and hybrid tribunals, **Chapter 3.C.**
Detainees at Guantanamo, **Chapter 18.A.4.**

Chapter 7

International Organizations

A. GENERAL: RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

On October 31, 2008, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixtieth session, U.N. Doc. A/63/10, available at *http://untreaty.un.org/ilc/reports/2008/2008report.htm*. Mr. Simonoff's comments on the ILC's draft articles concerning the responsibility of international organizations are excerpted below; *see also Digest 2007* at 399–401. The full text of Mr. Simonoff's statement is available at *www.state.gov/s/l/c8183.htm*.

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. . . As noted in our previous statements on this topic, we have serious reservations regarding a key assumption that appears to guide the Commission's work in this area: the notion that the Commission's articles on State Responsibility establish a model template for articles on the responsibility of international organizations. States and international organizations are fundamentally different. . . . These differences make applying the Commission's

articles on State Responsibility to international organizations problematic.

Our comments on the first 45 draft articles highlighted concerns regarding the problems of treating international organizations as if they are States for purposes of holding such organizations responsible for internationally wrongful acts. Several commentators have noted that the treatment of reparations may have different implications when applied to international organizations than would be the case in the traditional context as applied to States. For example, the general obligation to make reparations for an injury, whether material or moral, caused by an internationally wrongful act of an international organization, may have the effect of steering the resources of international organizations away from funding the internationally agreed functions of the organization toward protecting against unquantifiable litigation risks; creating reasons for States to reconsider the extent to which they want to continue to participate in such organizations and undermining the independence of international organizations that must now deal with unquantifiable litigation risks. We believe that the same concerns are implicated by the articles considered and adopted by the Commission this summer pertaining to the admissibility of claims, the invocation of responsibility of international organizations and countermeasures.

We recognize the significant challenges that this topic presents and appreciate the Commission's efforts to transcend those challenges. As the Commission continues its work, however, we would encourage it to pay particular attention to pressing problems that arise in the existing practice of international organizations. States could benefit from the Commission's expanded study of practical examples that illustrate the relevance and application of these draft articles.

* * * *

B. UNITED NATIONS

1. UN Reform

a. Security Council

(1) Open-Ended Working Group

On June 17, 2008, Ambassador Zalmay Khalilzad, U.S. Permanent Representative to the United Nations, addressed the Open-Ended Working Group on the question of equitable representation on the Security Council, an increase in its membership, and other matters related to the Security Council. Ambassador Khalilzad's statement, including U.S. views on Security Council expansion, is excerpted below. The full text of the statement is available at *www.archive.usun.state.gov/press_releases/20080617_151.html*.

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. . . [T]he United States remains open to a modest expansion of the Security Council. We believe to preserve the effectiveness of the Security Council in responding to threats to international peace and security, that the expansion should be modest, new "extended" or permanent members must be uniquely qualified to assume their duties, and the expansion of the Council cannot be separated from a broader package of reforms to ensure the entire UN system is able to meet the challenges of the 21st century. We underscore, however, that adding fifty percent more seats on the Council is not a modest expansion.

We believe that Japan is qualified for permanent membership on the Security Council, and that other nations should be considered, as well.

* * * *

We attach great importance to the role of the OEWG because we believe an issue as consequential as reform of the United Nations, which requires an amendment to the Charter, must be

done only with the broadest possible support from member states. We must not proceed in a way that alienates a significant portion of the membership.

We also believe that adopting a fixed timeline for these negotiations could be counter-productive. A timeline could lead to pressure to achieve the lowest common denominator expansion, rather than an expansion that preserves the Council's effectiveness.

We agree . . . that there should be an improvement in the working methods of the Council. But we continue to believe that the Council itself must address its own working methods, just like other principal organs of the UN should address theirs. The Council has made progress in this regard, and its efforts should continue.

Lastly, I would like to make a point about the need for comprehensive reform of the UN in areas such as financing of the organization, decision-making in the General Assembly, and oversight and accountability. . . .

We cannot continue to pay lip service to the need for comprehensive reform while trying to expand the Security Council. The two issues cannot be separated from each other. Success or failure in a comprehensive reform of the UN will also affect the ratification process for any amendment to the Charter.

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(2) Security Council annual report

On November 18, 2008, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, addressed the General Assembly on Security Council expansion during the Assembly's debate on the Security Council's annual report. Ambassador Wolff's statement, which elaborated on Ambassador Khalilzad's earlier statement to the Open-Ended Working Group (*see* a.(1) *supra*), is excerpted below. The full text of Ambassador Wolff's remarks is available at *www.archive.usun.state.gov/press_releases/20081118_317.html.*

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. . . [T]he United States believes that qualified candidates for Security Council permanent membership must have demonstrated their ability to act as responsible stakeholders in addressing global, not just local or regional, challenges to peace and security. They must maintain strong commitments to democracy, human rights, and non-proliferation and provide substantial peacekeeping or financial contributions to the United Nations. . . .

. . . [A]lthough the charter is clear on the two-thirds requirement for amendment of the charter, we continue to believe that it is politically wise and important to achieve the broadest possible support for Council expansion, to ensure that no significant portion of the membership is alienated by the result and that it constitutes an improvement over the status quo . . . . Achieving the "widest possible political acceptance" will greatly ease the ratification process by Member States, including by all of the permanent members of the Council.

. . . [T]he United States strongly believes that any reform of the Security Council must be undertaken in a manner consistent with the provisions of the charter and as part of a comprehensive effort to enhance the effectiveness of the entire UN system—including areas that are clearly in much greater need of reform than the Security Council.

A comprehensive package must include reforms in other areas such as General Assembly financing and decision-making. We have yet to see significant movement on these issues and urge that . . . a parallel process be started that can accompany our efforts related to the Security Council.

* * * *

b. Internal justice system

During 2008 the United States participated actively in the work of the General Assembly's Sixth (Legal) and Fifth (Administrative and Budgetary) committees to reform the UN's internal justice system. The committees' discussions followed the General Assembly's decision on April 4, 2007, to establish a new, reformed internal system of administration of justice. U.N. Doc. A/RES/61/261. On October 6, 2008,

Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the Sixth Committee on U.S. views on the reform effort. Mr. Simonoff's statement is excerpted below and available at *www.state.gov/s/l/c8183.htm*.

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The United States takes seriously our work to create a more effective and efficient internal justice system for the United Nations. We are committed to ensuring the establishment of the new two-tier formal system by January 1, 2009, including a new United Nations Dispute Tribunal and a United Nations Appeals Tribunal. We are confident that the establishment of these bodies will have a significant positive impact on the transparency, efficiency, and accountability of the system.

* * * *

We continue to believe that it will be of vital importance that the new system prove itself efficient and effective from its inception and that it inspire confidence from day one. We therefore maintain our view that the consideration of certain proposals be deferred until suitable experience is gained in the operation of the system. The United States will remain open to revisiting these proposals at an appropriate later date, but believes it will be easier to expand the system than to contract it in the future.

Furthermore, we must remain mindful that the system must be both legally effective and cost effective. . . .

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In addition, the United Nations Dispute Tribunal should remain the sole body that takes evidence. Of course, we are always open to considering new proposals for bridging the differences between our ideas and those of others. . . .

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On December 24, 2008, the United States joined consensus when the General Assembly adopted a resolution on the reform of the UN's system of internal justice. U.N. Doc.

A/RES/63/253. Among other things, the resolution attached statutes for the two new tribunals that will constitute the UN's new formal system of justice, the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, and decided that those bodies would be operational as of July 1, 2009.

c. Criminal accountability of UN officials and experts on mission

On October 10, 2008, James B. Donovan, Counselor, U.S. Mission to the United Nations, addressed the General Assembly's Sixth (Legal) Committee on promotion of accountability for crimes committed by UN officials and experts on mission, including those individuals serving on peacekeeping missions. Excerpts follow from Mr. Donovan's comments, which are available in full at *www.state.gov/s/l/c8183.htm*.

* * * *

The United States believes that UN officials and experts on mission should be held accountable for crimes they commit. We recognize that more can and should be done by Member States and the United Nations to curb such abuses.

We read with great interest the Secretary-General's August 11, 2008 report on Criminal Accountability of United Nations officials and experts on mission [U.N. Doc. A/63/260 and U.N. Doc. A/63/260/ADD.1].

We note the broad range of practical measures that the United Nations has undertaken in an effort to address this important issue. We especially welcome UN efforts to train UN peacekeepers on what constitutes proscribed activity for such personnel, with an emphasis on current rules, guidance and procedures relevant to conduct and discipline.

We appreciate the UN's efforts to refer credible allegations against UN officials and experts on mission to the State of the alleged offender's nationality. We urge the States to which such individuals were repatriated to take appropriate actions with

regard to those individuals and report to the United Nations on the disposition of the cases. We strongly believe that States must play a key role in curbing abuses and that all UN Member States can benefit from the Secretariat's reporting on efforts taken by States to investigate and prosecute referred cases.

* * * *

d. International Telecommunication Union

On April 8, 2008, President George W. Bush transmitted to the Senate for its advice and consent to ratification the amendments to the Constitution and Convention of the International Telecommunication Union (Geneva, 1992) ("ITU Constitution and Convention"), as amended by the Plenipotentiary Conference (Kyoto, 1994) and the Plenipotentiary Conference (Marrakesh, 2002), together with the declarations and reservations by the United States, all as contained in the Final Acts of the Plenipotentiary Conference (Antalya, 2006). S. Treaty Doc. No. 110-16 (2008). The President's transmittal letter discussed the significance of the treaty as follows:

> The Plenipotentiary Conference (Antalya, 2006) adopted amendments that, among other things: clarify the functions of certain International Telecommunication Union (ITU) officials and bodies; reduce the frequency of certain ITU conferences; clarify eligibility for re-election to certain ITU positions; enhance oversight of the ITU budget and provide for results-based (as well as cost-based) budget proposals; expand the scale of available contribution levels for Member States and Sector Members; and, clarify the definition of and role of observers participating in ITU proceedings.
>
> . . . These amendments will contribute to the ITU's ability to adapt to changes in the global telecommunications sector and, in so doing, serve the needs of the United States Government and United States industry.

Excerpts below from the State Department report, transmitted in S. Treaty Doc. No. 110-16, set forth the U.S. declarations and reservations contained in the Final Acts of the Antalya conference.

* * * *

ITU practice provides for declarations and reservations to be submitted by governments prior to signature of the Final Acts of the Plenipotentiary Conference. In 2006, the United States submitted six declarations and reservations that are included in the 2006 Final Acts. The six declarations and reservations made by the United States require Senate advice and consent.

Consistent with long-standing U.S. practice at ITU treaty-making conferences, the first of these declarations and reservations (No. 70(1)) makes three key points: (1) The United States reserved the right to make additional reservations or declarations at the time of deposit of its instruments of ratification of the amendments to the Constitution and Convention; (2) The United States reiterated and incorporated by reference all reservations and declarations made at earlier ITU conferences; and (3) The United States reiterated the position that the United States cannot be considered bound by the Administrative Regulations adopted previously, or revisions thereto adopted subsequently, without specific notification to the ITU of its consent to be bound. The U.S. statement also makes reference to concerns expressed at the Plenipotentiary Conference regarding procedures followed in certain committee proceedings. The relevant text reads as follows:

> The United States of America refers to the provisions on reservations of Article 32B of the Convention of the International Telecommunication Union (Geneva, 1992), and notes that in considering the Final Acts of the Plenipotentiary Conference (Antalya 2006), the United States of America[] may find it necessary to make additional reservations or declarations. The United States of

> America also wishes to reiterate its concerns, as reflected in the summary minutes of the Plenary, with respect to certain procedures that were followed during committee proceedings. Accordingly, the United States of America reserves the right to make additional reservations or declarations at the time of deposit of its instrument of ratification of the amendments to the Constitution and the Convention (Geneva, 1992) which are adopted by the Plenipotentiary Conference (Antalya, 2006).
>
> The United States reiterates and incorporates by reference all reservations and declarations made at world administrative conferences and world radiocommunication conferences prior to signature of these Final Acts.
>
> The United States of America does not, by signature to or by any subsequent ratification of the amendments to the Constitution and the Convention adopted by the Plenipotentiary Conference (Antalya, 2006), consent to be bound by the Administrative Regulations adopted prior to the date of signature of these Final Acts. Nor shall the United States of America be deemed to have consented to be bound by revisions of the Administrative Regulations, whether partial or complete, adopted subsequent to the date of signature of these Final Acts, without specific notification to the International Telecommunication Union of its consent to be bound.

The second of these declarations and reservations (No. 70(2)) states the view of the United States that the ITU, in carrying out the mandates of the Plenipotentiary Conference, should adhere to the principles of accountability, responsibility, and transparency. It reads as follows:

> The United States of America, recalling the principles of accountability, responsibility, and transparency that are fundamental to United Nations reform, notes that it is essential that the International Telecommunication Union,

> in carrying out the mandates of the Plenipotentiary Conference (Antalya, 2006) adhere to those principles in order to achieve lasting reform.

The third of these declarations and reservations (No. 70(3)), referring to a related statement made by the United States at an earlier Plenipotentiary Conference, provides that the United States will interpret the Resolution on the "Status of Palestine in the ITU," as revised at the Plenipotentiary Conference in Antalya, in accordance with relevant international agreements. It reads as follows:

> The United States of America refers to its Statement 92 made at the Plenipotentiary Conference (Minneapolis, 1998) and states that it will interpret Resolution 99 (Rev. Antalya, 2006) in accordance with relevant international agreements, including agreements between Israel and the Palestinians.

In keeping with prior U.S. practice in the ITU, the fourth of these declarations and reservations (No. 104(1)) preserves the right of the United States to take such actions as it deems necessary in response to actions taken by other Member States that are detrimental to U.S. telecommunication interests. It reads as follows:

> The United States of America refers to declarations made by various Member States reserving their right to take such action as they may consider necessary to safeguard their interests with respect to application of provisions of the Constitution and Convention of the International Telecommunication Union (Geneva, 1992), and any amendments thereto. The United States of America reserves the right to take whatever measures it deems necessary to safeguard U.S. interests in response to such actions.

Also in keeping with prior U.S. practice in the ITU, the fifth of these declarations and reservations (No. 104(2)) responds to a statement by Cuba reserving its right to take any steps that it may

deem necessary against U.S. radio and television broadcasting to Cuba and denouncing U.S. use of radio frequencies at Guantanamo, Cuba. The U.S. response, which is similar to those made by the United States at previous ITU conferences, reads as follows:

> The United States of America, noting Statement 80 entered by the delegation of Cuba, recalls its right to broadcast to Cuba on appropriate frequencies free of jamming or other wrongful interference and reserves its rights with respect to existing interference and any future interference by Cuba with U.S. broadcasting. Furthermore, the United States of America notes that its presence in Guantanamo is by virtue of an international agreement presently in force and that the United States of America reserves the right to meet its radiocommunication requirements there as it has in the past.

The sixth of these declarations and reservations (No. 106), in which the United States joined with eight other Member States, responds to statements by other countries concerning the use of the geostationary-satellite orbit or related claims. It reads as follows:

> The delegations of the above-mentioned States, referring to the declarations made by the Republic of Colombia (No. 58), Mexico (No. 34), and Ecuador (No. 55), inasmuch as these and any similar statements refer to the Bogota Declaration of 3 December 1976 by equatorial countries and to the claims of those countries to exercise sovereign rights over segments of the geostationary-satellite orbit, or to any related claims, consider that the claims in question cannot be recognized by this Conference.
>
> The above-mentioned delegations also wish to state that the reference in Article 44 of the Constitution to the "geographical situation of particular countries" does not

imply recognition of a claim to any preferential rights to the geostationary-satellite orbit.

On July 10, 2008, Richard C. Beaird, Senior Deputy Coordinator for International Communications and Information Policy at the Department of State, testified before the Senate Committee on Foreign Relations in support of the 2006 amendments to the ITU Constitution and Convention, as well as four additional treaties relating to the ITU. Two of those treaties were amendments to the ITU Constitution and Convention adopted by plenipotentiary conferences in Minneapolis, Minnesota, in 1998 (S. Treaty Doc. No. 108-5) and Marrakesh, Morocco, in 2002 (S. Treaty Doc. No. 109-11). The other two, the 1992 partial revision and the 1995 revision to the ITU's Radio Regulations, are discussed in Chapter 4.B. Excerpts from Mr. Beaird's testimony below provide background on the ITU and its organizational structure, as well as the significance to the United States of the three sets of amendments to the ITU Constitution and Convention. The full text of Mr. Beaird's testimony is available at *http://foreign.senate.gov/hearings/2008/hrg080710p.html*.

These treaties flow from the work of the International Telecommunication Union (ITU), the United Nations' (UN) specialized agency for telecommunication matters. . . .

* * * *

The International Telecommunication Union was formed in 1865 . . . .Today, the ITU is involved in every phase of global telecommunications, working to maintain international cooperation among its 191 Member States for management of global spectrum use, and the adoption of international telecommunication standards, and to foster the expansion of telecommunication systems and services in developing countries. ITU's purposes and activities are governed by several international instruments, including the Constitution, the Convention, and the Administrative Regulations.

The organization is unusual among UN agencies in that its membership also includes 715 Sector Members (86 of which are from the United States) and 164 Associates, representing companies and organizations with an interest in telecommunications. This feature is particularly vital to U.S. interests, in view of our reliance on the private sector for the provision of telecommunications networks and services on both the national and international levels, and in view of the dependence of many U.S. companies on effective communications to support their multinational operations.

As a result of the 1992 Plenipotentiary Conference, the ITU was reorganized to give it greater flexibility to adapt to today's increasingly complex, interactive, and competitive environment. Consequently, the Union is organized into three Sectors, corresponding to its three main areas of activity: (1) Telecommunication Standardization (ITU-T); (2) Radiocommunication (ITU-R); and (3) Telecommunication Development (ITU-D). The reorganization also introduced a regular cycle of conferences to help the Union rapidly respond to new technological advances.

The Union's three sectors represent an extremely diverse community, ranging from regulators to users, manufacturers to service providers, as well as consumers. In one form or another, international telecommunications involve every government agency and touch most aspects of American business and the public in general. Hence, the work of the ITU is of great importance and interest to the United States.

The Union convenes Plenipotentiary Conferences to set the Union's general policies, which often are reflected in amendments to the ITU Constitution and Convention, and World Radiocommunication Conferences (WRCs) to revise international Radio Regulations. . . .

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The . . . treaties are proposed amendments to the ITU Constitution and Convention which are the result of ITU Plenipotentiary Conferences, which are the principal administrative and policy conferences of the ITU. In 1998, the United States hosted its first Plenipotentiary Conference since 1947. The United

States achieved several objectives at this Conference, including enhancing the status of public and private companies that participate in ITU activities, adding a provision in the Constitution to convene WRCs every two to three years to meet the challenges of a dynamic telecom environment, and improving the ITU's accountability through changes in the budget process. All of these changes improved the function of the ITU and strengthened the role of the private sector within the ITU.

The 2002 Plenipotentiary Conference in Marrakesh, Morocco, adopted several amendments supported by the United States to improve management, functioning and finances of the ITU. Because of ITU's serious budget shortfalls, the United States led in the effort to develop a financial plan that balanced the ITU budget and reduced 10% of program expenditures. One of the U.S. proposed amendments allows private companies to be represented as observers at ITU Council meetings. Another broadened the field of potential candidates to the ITU's Radio Regulation Board (RRB). These and other amendments approved by the 2002 Plenipotentiary Conference have made it easier for the ITU to respond to changes in the telecommunications environment.

. . . The United States achieved many of its objectives at this Conference [the 2006 Plenipotentiary Conference held in Antalya, Turkey], including enhancing Member State oversight of ITU financial and administrative activities, promoting budgetary transparency, and preserving the role of the private sector in the ITU.

* * * *

On September 25, 2008, the Senate provided its advice and consent to the 1998, 2002, and 2006 amendments to the ITU Constitution and Convention. 154 Cong. Rec. S9557 (2008).

Each of the three resolutions of advice and consent conditioned the Senate's advice and consent on the U.S. declarations and reservations contained in the Final Acts of the plenipotentiary conference at which the amendments were adopted, with limited exceptions. Each resolution also contained a declaration that the treaty "is not self-executing."

See Digest 2003 at 426–31 and *Digest 2006* at 682–84, 770–74 for additional background.

2. U.S. Support for the UN Office of Drugs and Crime

On December 5, 2008, David T. Johnson, Assistant Secretary, Department of State Bureau for International Narcotics and Law Enforcement, spoke in support of the UN Office of Drugs and Crime's ("UNODC") Medium Term Strategy and stressed that the United States continued to need to be able to earmark funds for UNODC programs and projects. Excerpts follow from Mr. Johnson's statement to UNODC's major donors; the full text is available at *http://vienna.usmission.gov/081205donors.html*. *See www.unodc.org/unodc/en/frontpage/unodc-strategy.html* for background on UNODC's Medium Term Strategy.

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. . . I would like to start by emphasizing support for UNODC's efforts to implement the Medium Term Strategy.

This strategy and the development of programs and projects in accordance with it, as well as the confidence we have in UNODC's professional staff, has encouraged my government to increase our funding in 2008 by more than 50%, providing a record contribution of $26 million.

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The ability to earmark funds for programs and projects endorsed by the Medium Term Strategy is critical. We must inform the U.S. Congress where taxpayer funds are destined. This level of detailed reporting is required under U.S. law.

That said, we will continue to provide unearmarked resources to UNODC with a view to ensuring the proper infrastructure and staff is in place.

* * * *

C. OTHER INTERNATIONAL ORGANIZATIONS

International Hydrographic Organization

On July 21, 2008, the Senate provided its advice and consent to ratification of the Protocol of Amendments to the Convention on the International Hydrographic Organization, done at Monaco on April 14, 2005. 154 Cong. Rec. S6980 (2008). The underlying convention was done at Monaco on May 3, 1967, and entered into force for the United States on September 22, 1970 (21 U.S.T. 1857; T.I.A.S. 6933; 751 U.N.T.S. 42). The protocol provides the authority for the International Hydrographic Organization ("IHO"), a technical and consultative organization that facilitates safe and efficient maritime navigation, to reorganize itself to become more efficient and effective. Specifically, the reorganization is intended to streamline the IHO's decision-making process, simplify current membership procedures, allow the organization to keep pace with technological developments, and solidify the IHO's role as the leading international hydrographic organization in the world. The protocol was not yet in force as of the end of 2008.*

Cross References

International Telecommunication Union Radio Regulations, **Chapter 4.B.**
Jurisdiction of the International Court of Justice, **Chapter 5.A.1.b.**
Sexual exploitation and abuse by UN peacekeepers, **Chapters 6.B.2. and 17.B.2.**
EU Rule of Law Mission to Kosovo, **Chapter 9.A.1.c.**
Immunities of the United Nations and UN officials, **Chapter 10.C.**
North Atlantic Treaty Organization protocols, **Chapter 18.A.1.d.**

* Editor's note: The United States deposited its instrument of ratification on June 3, 2009.

Chapter 8

International Claims and State Responsibility

A. U.S.–LIBYA CLAIMS SETTLEMENT AGREEMENT

1. *Libyan Claims Resolution Act*

On August 4, 2008, the Libyan Claims Resolution Act ("Act") was signed into law in anticipation of the President entering into a comprehensive claims settlement with the Government of Libya to provide fair compensation to U.S. nationals with terrorism-related claims in furtherance of the process of restoring normal relations between the two countries. Pub. L. No. 110-301, 122 Stat. 2999 (2008). Section 4(a) authorizes the Secretary of State, after consultation with the appropriate congressional committees, to designate entities "to assist in providing compensation to nationals of the United States" pursuant to a claims agreement. Section 4(b) provides, among other things, that, notwithstanding any other provision of law, property that relates to the claims agreement and is held by or transferred to or from an entity designated by the Secretary "shall be immune from attachment or any other judicial process. Such immunity shall be in addition to any other applicable immunity."

Section 5(a), excerpted below, provides for the restoration of Libya's sovereign immunity from terrorism-related claims in U.S. federal and state courts, upon certification by the Secretary of State that the United States has received adequate funds pursuant to the claims agreement. Pursuant

to § 5(b), this provision applies only "with respect to any conduct or event occurring before June 30, 2006 . . . ." The Act thus provides Libya with legal protection from terrorism-related claims predating the rescission of Libya's designation as a state sponsor of terrorism, upon certification by the Secretary. (For President George W. Bush's rescission of Libya's designation as a state sponsor of terrorism, *see* Presidential Determination 2006-14, 71 Fed. Reg. 31,909 (June 1, 2006).) The Act makes § 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 343, and other terrorism-related exceptions to immunity inapplicable to Libya, its agencies and instrumentalities, officials, employees, or agents, and its assets. The Secretary made the required certification on October 31, 2008, as discussed in A.3. below. For a discussion of provisions relating to the terrorism exception to sovereign immunity under the Foreign Sovereign Immunities Act, *see* Chapter 10.A.1.a.(2)(i).

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* * * *

(a) IMMUNITY.—

(1) IN GENERAL.—Notwithstanding any other provision of law, upon submission of a certification described in paragraph (2)—

(A) Libya, an agency or instrumentality of Libya, and the property of Libya or an agency or instrumentality of Libya, shall not be subject to the exceptions to immunity from jurisdiction, liens, attachment, and execution contained in section 1605A, 1605(a)(7), or 1610 (insofar as section 1610 relates to a judgment under such section 1605A or 1605(a)(7)) of title 28, United States Code;

(B) section 1605A(c) of title 28, United States Code, section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 122 Stat. 342; 28 U.S.C. 1605A note), section 589 of the Foreign Operations, Export Financing, and Related Programs

Appropriations Act, 1997 (28 U.S.C. 1605 note), and any other private right of action relating to acts by a state sponsor of terrorism arising under Federal, State, or foreign law shall not apply with respect to claims against Libya, or any of its agencies, instrumentalities, officials, employees, or agents in any action in a Federal or State court; and

(C) any attachment, decree, lien, execution, garnishment, or other judicial process brought against property of Libya, or property of any agency, instrumentality, official, employee, or agent of Libya, in connection with an action that would be precluded by subparagraph (A) or (B) shall be void.

(2) CERTIFICATION.—A certification described in this paragraph is a certification—

(A) by the Secretary to the appropriate congressional committees; and

(B) stating that the United States Government has received funds pursuant to the claims agreement that are sufficient to ensure—

(i) payment of the settlements referred to in section 654(b) of division J of the Consolidated Appropriations Act, 2008 (Public Law 110–161; 121 Stat. 2342);* and

(ii) fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending on the date of enactment of this Act against Libya arising under section 1605A of title 28, United States Code (including any action brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (28 U.S.C. 1605 note), that has been given effect

* Editor's note: Section 654 prohibited certain assistance to Libya unless the Secretary of State certified that Libya had "made the final settlement payments to the Pan Am 103 victims' families, paid to the LaBelle Disco bombing victims the agreed upon settlement amounts, and is engaging in good faith settlement discussions regarding other relevant terrorism cases."

as if the action had originally been filed under 1605A(c) of title 28, United States Code, pursuant to section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 122 Stat. 342; 28 U.S.C. 1605A note)).

2. Claims Settlement Agreement

On August 14, 2008, the United States and Libya signed the Claims Settlement Agreement between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya ("Agreement") in Tripoli, Libya. The Agreement was entered into with the support of the U.S. Congress as reflected in the Libyan Claims Resolution Act ("Act"), discussed *supra*, and implemented in part by Executive Order 13477, discussed in 4. below. 73 Fed. Reg. 65,965 (Oct. 31, 2008). These documents together provided the framework to resolve claims against Libya brought in U.S. courts by family members of victims of the bombing of Pan Am Flight 103 over Lockerbie, Scotland, and other claims related to other alleged terrorist acts. For further discussion of Libya's involvement with and renunciation of terrorism, *see Digest 2006* at 173–77; *Digest 2004* at 927–31, 1158–63; *Digest 2003* at 160–67, 1068–69; and *Cumulative Digest 1991–1999* at 457–80, 1921–24.

In a press statement dated August 14, Robert Wood, Acting Deputy Spokesman for the Department of State, described the Agreement and the Act:

> The agreement is designed to provide rapid recovery of fair compensation for American nationals with terrorism-related claims against Libya. It will also address Libyan claims arising from previous U.S. military actions.*

* Editor's note: On April 16, 1986, President Ronald Reagan notified Congress that the United States had attacked certain targets in Libya. He explained that the strikes had been an "exercise of our right of self-defense

The agreement is being pursued on a purely humanitarian basis and does not constitute an admission of fault by either party. Rather, pursuant to the agreement an international Humanitarian Settlement Fund will be established in Libya to collect the necessary resources for the claims on both sides. No U.S. appropriated funds will be contributed, and any contributions by private parties will be voluntary. Each side will be responsible for distributing the resources it receives to its own nationals and to ensure the dismissal of any related court actions.

The U.S. Congress has supported this initiative by passing the Libyan Claims Resolution Act . . . . The law authorizes the Secretary of State to immunize the assets of the Humanitarian Settlement Fund so they will reach the intended recipients. The law also provides that Libya's immunity from terrorism-related court actions will be restored when the Secretary of State certifies that the United States has received sufficient funds to pay the Pan Am 103 and La Belle Discotheque** settlements and to provide fair compensation for American deaths and physical injuries in other pending cases against Libya. The resources under the agreement are expected to be sufficient to fulfill further purposes such as additional recoveries for death and physical injury because of special circumstances, claims for emotional distress, and terrorism-related claims by commercial parties.

The full text of the press statement is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/aug/108251.htm*.

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under Article 51 of the United Nations Charter. This necessary and appropriate action was a preemptive strike, directed against the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya, such as the Libyan-ordered bombings of [the La Belle] discotheque in West Berlin on April 5. Libya's cowardly and murderous act resulted in the death of two innocent people—an American soldier and a young Turkish woman—and the wounding of 50 United States Armed Forces personnel and 180 other innocent persons. . . . " 22 WEEKLY COMP. PRES. DOC. 499 (Apr. 21, 1986).

** Editor's note: *See* Editor's note * *supra*.

The Agreement, excerpted below, provided that the United States would receive $1.5 billion to distribute to compensate U.S. nationals with terrorism-related claims against Libya for acts that occurred before June 30, 2006. In addition, the Agreement provided for the termination of all litigation relating to claims covered by the Agreement. The full text of the Agreement is available at *www.state.gov/documents/organization/109771.pdf*.

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* * * *

Article I

The objective of this Agreement is to:

(1) reach a final settlement of the Parties' claims, and those of their nationals (including natural and juridical persons);
(2) terminate permanently all pending suits (including suits with judgments that are still subject to appeal or other forms of direct judicial review); and
(3) preclude any future suits that may be taken to their courts

if such claim or suit is against the other Party or its agencies or instrumentalities, or against officials, employees, or agents thereof (whether such officials, employees, or agents are sued in an official and/or personal capacity), or (where the claim or suit implicates in any way the responsibility of any of the foregoing) against the other Party's nationals; and such claim or suit is brought by or on behalf of a Party's nationals (including natural and juridical persons) or such suit is brought by or on behalf of others (including natural and juridical persons); and such claim or suit arises from personal injury (whether physical or non-physical, including emotional distress), death, or property loss caused by any of the following acts occurring prior to June 30, 2006:

(a) an act of torture, extrajudicial killing, aircraft sabotage, hostage taking or detention or other terrorist act, or the

provision of material support or resources for such an act; or

(b) military measures.

* * * *

Article III

1. Each Party shall accept the resources for distribution as a full and final settlement of its claims and suits and those of its nationals as specified in Article I.
2. Upon receipt of resources from the Fund in accordance with the Annex, each Party shall:
   (a) Secure, with the assistance of the other Party if need be, the termination of any suits pending in its courts, as specified in Article I (including proceedings to secure and enforce court judgments), and preclude any new suits in its courts, as specified in Article I.
   (b) Provide the same sovereign, diplomatic and official immunity to the other Party and its property, and to its agencies, instrumentalities, officials and their property, as is normally provided within its legal system to other states and their property and to their agencies, instrumentalities, officials and their property.
   (c) Refrain from presenting to the other Party, on its behalf or on behalf of another, any claim specified in Article I. If any such claim is presented directly by a national of one of the Parties to the other Party, the other Party should refer it back to the first Party.

* * * *

Annex

1. The Parties have agreed to authorize the establishment of a humanitarian settlement fund (the "Fund") in furtherance of their Claims Settlement Agreement (the "Agreement"), of which this Annex is an integral part.

* * * *

3. Each Party directly, or through its authorized representative, will direct the opening of an account for the purpose of depositing money received from the Fund Account. Account A will hold funds for distribution by the United States of America. . . .

4. Once contributions to the Fund Account reach the amount of U.S. $1.8 billion . . . , the amount of U.S. $1.5 billion . . . shall be deposited into Account A and the amount of U.S. $300 million . . . shall be deposited into Account B, which in both cases shall constitute the receipt of resources under Article III (2) of the Agreement.

* * * *

3. Secretary of State's Designation and Certification

Effective August 26, 2008, acting pursuant to § 4(a)(1) of the Libyan Claims Resolution Act ("Act"), discussed *supra*, Secretary of State Condoleezza Rice designated five entities to assist in providing compensation to U.S. nationals, pursuant to the U.S.–Libya Claims Settlement Agreement: the Humanitarian Settlement Fund, Tripoli, Libya; Citibank, N.A., New York, NY; the Federal Reserve Bank of New York; the U.S. Department of the Treasury; and the Libyan Foreign Bank, Tripoli, Libya. 73 Fed. Reg. 50,666 (Aug. 27, 2008). The designated entities "shall be accorded the immunity provided for in section 4(b) of the Libyan Claims Resolution Act in addition to any other applicable immunity notwithstanding any other provision of the law, and the entities and any other person acting [for] or on behalf of them shall not be liable in any Federal or State court for any action to implement The Claims Settlement Agreement between the United States and Libya of August 14, 2008."

On October 31, 2008, Secretary Rice certified to Congress, pursuant to § 5(a) of the Act, that the United States had received $1.5 billion pursuant to the U.S.–Libya Claims

Settlement Agreement. In keeping with the Act, Secretary Rice certified that:

> . . . [T]he United States Government has received funds pursuant to the United States-Libya Claims Settlement Agreement that are sufficient to ensure:
>
> (1) payment of the settlements referred to in section 654(b) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 (Div. J., P. L. 110-161; 121 Stat. 2342) and;
>
> (2) fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending on the date of enactment of the Act against Libya arising under section 1605A of title 28, United States Code (including any action brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (28 U.S.C. 1605 note), that has been given effect as if the action had originally been filed under 1605A(c) of title 28, United States Code, pursuant to section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 342; 28 U.S.C. 1605A note)).

The memorandum of justification included in the Secretary's certification stated in part:

> This amount is sufficient to ensure the remaining payment of $536 million for the Pan Am 103 settlement and $283 million for the La Belle settlement, the two settlements referred to in section 654(b) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 (Div. J, P. L. 110-161; 121 Stat. 2342). The remaining $681 million is sufficient to ensure fair compensation for the claims of nationals of the United States for wrongful death or physical injury in those cases

described in the Act which were pending against Libya on the date of enactment of the Act (August 4, 2008) as well as other terrorism-related claims against Libya.

The full texts of the Secretary's certification and memorandum of justification are available at *www.state.gov/s/l/c8183.htm*. *See also* the October 31 press briefing by C. David Welch, Assistant Secretary of State for Near Eastern Affairs, available at *http://2001-2009.state.gov/p/nea/rls/rm/111493.htm*, and the Department of State's October 31 press statement, available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/111600.htm*.

4. Executive Order 13477

On October 31, 2008, President Bush issued Executive Order 13477, "Settlement of Claims Against Libya." 73 Fed. Reg. 65,965 (Nov. 5, 2008). Among other things, the executive order declared that claims of U.S. nationals coming within the terms of the U.S.–Libya Claims Settlement Agreement "are espoused by the United States," and directed the Secretary of State to establish procedures governing applications by U.S. nationals with claims coming within the terms of the Agreement. Excerpts from the executive order follow.

By the authority vested in me as President by the Constitution and the laws of the United States of America, and pursuant to the August 14, 2008, claims settlement agreement between the United States of America and Libya (Claims Settlement Agreement), and in recognition of the October 31, 2008, certification of the Secretary of State, pursuant to section 5(a)(2) of the Libyan Claims Resolution Act (Public Law 110-301), and in order to continue the process of normalizing relations between the United States and Libya, it is hereby ordered as follows:

Section 1. All claims within the terms of Article I of the Claims Settlement Agreement (Article I) are settled.

(a) Claims of United States nationals within the terms of Article I are espoused by the United States and are settled according to the terms of the Claims Settlement Agreement.

(i) No United States national may assert or maintain any claim within the terms of Article I in any forum, domestic or foreign, except under the procedures provided for by the Secretary of State.

(ii) Any pending suit in any court, domestic or foreign, by United States nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of Article I shall be terminated.

(iii) The Secretary of State shall provide for procedures governing applications by United States nationals with claims within the terms of Article I for compensation for those claims.

(iv) The Attorney General shall enforce this subsection through all appropriate means, which may include seeking the dismissal, with prejudice, of any claim of a United States national within the terms of Article I pending or filed in any forum, domestic or foreign.

(b) Claims of foreign nationals within the terms of Article I are settled according to the terms of the Claims Settlement Agreement.

(i) No foreign national may assert or maintain any claim coming within the terms of Article I in any court in the United States.

(ii) Any pending suit in any court in the United States by foreign nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of Article I shall be terminated.

(iii) Neither the dismissal of the lawsuit, nor anything in this order, shall affect the ability of any foreign national to pursue other available remedies for claims coming within the terms of Article I in foreign courts or through the efforts of foreign governments.

(iv) The Attorney General shall enforce this subsection through all appropriate means, which may include seeking the dismissal, with prejudice, of any claim of a foreign national within the terms of Article I pending or filed in any court in the United States.

* * * *

B. IRAN–U.S. CLAIMS TRIBUNAL

Attempt to Assign Claims Against the United States to Satisfy Judgment in U.S. Court

In 2006 family members of Judith Greenbaum, who was murdered in a 2001 Hamas-orchestrated terrorist attack in Jerusalem, won a $19,879,023 default judgment against Iran. *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp. 2d 90 (D.D.C. 2006). The court found that the claims satisfied the terrorism exception to the Foreign Sovereign Immunities Act, *see* Chapter 10.A.1.a.(2), and that state law provided a basis for liability. In 2008, in an attempt to satisfy that judgment, the plaintiffs in *Greenbaum* filed motions in the U.S. District Court for the Central District of California under U.S. federal and state law for assignment of rights, restraining order, and turnover related to monies allegedly owed by the United States to Iran, now or in the future, pursuant to several claims before the Iran–U.S. Claims Tribunal ("Tribunal").

On June 9, 2008, the United States filed a Statement of Interest arguing that the court should deny the motions. The United States summarized its position as follows:

> Plaintiffs seek an order from this Court assigning any monies due Iran from hypothetical future awards by the Tribunal.[6] According to Plaintiffs, an assignment of the

[6] Plaintiffs also seek assignment of current Tribunal awards, but . . . there are no outstanding awards by the Tribunal against the United States. Grosh Decl. ¶ 6. [Editor's note: In their motions, the plaintiffs identified

Tribunal's future awards to Iran is warranted under CCP [California Code of Civil Procedure] § 708.510, the Foreign Sovereign Immunities Act ("FSIA") [28 U.S.C. §§ 1330, 1602–1611], and the Terrorism Risk Insurance Act ("TRIA") [28 U.S.C. § 1610 note]. However, California law does not control in a claim against the United States. Instead, for a plaintiff to obtain relief against the United States, he or she must identify a waiver of sovereign immunity that allows the specific relief sought. Neither the FSIA nor the TRIA contains an applicable waiver of sovereign immunity, and Plaintiffs have failed to identify any other source of waiver. Plaintiffs' assignment motions must therefore be denied.

Additionally, even if a waiver existed, Plaintiffs' requested assignments are contrary to the precepts underlying the Assignment of Claims Act [31 U.S.C. § 3727(a)(1) & (b)]. Finally, and of paramount importance, an assignment of Iran's Tribunal awards would undermine the United States' position at the Tribunal and could lead Iran to assert a violation of U.S. obligations under the Algiers Accords. Were California law to be interpreted in such a manner that it interfered with important U.S. foreign policy objectives in claims before the Tribunal, as provided for in the Algiers Accords,* its application would be preempted.

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potential monetary awards in Tribunal Cases Nos. A15 (regarding obligation under the Algiers Declarations to compensate Iran for personal property allegedly impounded by the United States), B1 (concerning claims due Iran arising out of the Foreign Military Sales Program), and B7 (concerning funds allegedly derived from enriched uranium service contracts). The United States explained that there were no outstanding awards in any of these cases and that, as to B7, the United States paid the award of nearly $8 million to Iran in 1985.]

* Editor's note: The Algiers Accords comprise two declarations of the Government of Algeria embodying an international executive agreement between the United States and Iran, which brought about the release of American hostages seized in Tehran on November 4, 1979, and established the Tribunal. They are available at 20 I.L.M. 223 (1981).

> Plaintiffs also seek a "turnover order of the entire catalogue of the Shah's assets." . . . However, none of the assets identified in Plaintiffs' motion have ever been determined to be Iranian. There is therefore no basis for the Court to order the turnover of non-Iranian assets (as Plaintiffs' judgment is only against Iran).

Excerpts follow from the U.S. Statement of Interest addressing the issue of U.S. sovereign immunity, including the limited U.S. waiver of sovereign immunity before the Tribunal, and its argument that an assignment order would "seriously undermine substantial foreign policy interests of the United States," so that relevant California law is pre-empted. (Footnotes and citations to other submissions in the case have been omitted.) The full texts of the U.S. Statement of Interest and the accompanying Declaration of Lisa J. Grosh, Acting Assistant Legal Adviser of International Claims and Investment Disputes in the Office of the Legal Adviser, are available at *www.state.gov/s/l/c8183.htm*.

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* * * *

A. Assignment of Iran's Tribunal Claims to Plaintiffs Would Violate U.S. Sovereign Immunity

"An assignment order [pursuant to CCP § 708.510] may not be issued with respect to assets which are immune from execution." *Quaestor Investments, Inc., v. State of Chiapas*, 1997 WL 34618203, *6 (C.D. Cal. 1997) (citing CCP § 708.510(f)). Plaintiffs' requested assignments are precluded because any assignment of Iran's rights to Tribunal awards, and subsequent direction to the United States to make payment directly to Plaintiffs, would violate U.S. sovereign immunity. Plaintiffs incorrectly suggest that because they do not seek to levy or execute directly against U.S. funds, the requested assignments do not run afoul of the principles of sovereign immunity. However, funds to pay any future awards would be drawn from the U.S. Treasury (as with past awards) and remain the property of the United States until actually transferred to Iran.

See, e.g., Weinstein [*v. Islamic Republic of Iran*], 274 F. Supp. 2d [53,] 58 [(D.D.C. 2003)] ("It is undisputed that this [FMS] account represents a fund held by the U.S. Treasury."). No applicable waiver of sovereign immunity permits the assignment of payment (present, future or contingent) from U.S. Treasury funds.

1. Sovereign Immunity Principles in the Attachment, Garnishment, and Lien Context are Controlling

The sovereign immunity principles that have been clearly articulated by courts in the attachment, garnishment, and lien context provide a roadmap for the Court, and are dispositive of Plaintiffs' assignment motions.

It is axiomatic that "[absent] a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Dep't of the Army v. Blue Fox*., 525 U.S. 255, 260 (1999) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)). . . .

For purposes of sovereign immunity in the collection context, the relevant inquiry does not depend upon whether the funds or property sought are subject to claims by another party. Instead the analysis turns upon whether the funds or property sought are in the possession or under the control of the U.S. government. *See e.g. Blue Fox,* 525 U.S. at 263 . . . .

. . . [C]rucial to the analysis is the understanding that it is not the funds themselves that are immune from suit, but the United States and its "power of control and disposition." *Haskins* [*Bros. & Co. v. Morgenthau*, 85 F. 2d 677, 681 (D.C. Cir. 1936)]. . . . Illustrative of this point is the decision issued in *Flatow* [*v. Islamic Republic of Iran*, 74 F. Supp. 2d 18 (D.D.C. 1999)]. The *Flatow* plaintiffs sought to attach the $5 million award issued by the Tribunal to Iran in Case No. A27. Specific monies were earmarked to pay the award from U.S. Treasury funds. Nonetheless, citing the foregoing principles, the *Flatow* court granted the United States' motion to quash the writ of attachment for these "earmarked" funds, finding that sovereign immunity barred the writ as a suit against the United States, and that those funds remain the property of the United States "until the government elects to pay them to whom they are owed." *Id*. at 21–22.

2. An Assignment of Claims Against the United States Likewise Requires a Waiver of Sovereign Immunity

. . . An assignment of any hypothetical future award, which would have the effect of requiring the United States to pay funds from the U.S. Treasury directly to Plaintiffs (rather than Iran), would . . . be no different from the attachment or garnishment of a pending payment from the U.S. Treasury. Both are clearly barred by sovereign immunity. *Blue Fox, Inc.*, 525 U.S. at 263. . . . No statute authorizes the relief sought here.

* * * *

. . . [I]n the few cases where sovereign immunity has been raised as a defense to an assignment, courts have accepted that sovereign immunity principles were in fact applicable, but analyzed whether the original (and undisputed) waiver of sovereign immunity extended to the claims of the assignee. . . . Here, . . . the United States has only waived its sovereign immunity before an international tribunal in very limited and constrained circumstances, and only for certain claims brought by Iran and Iranian nationals, in furtherance of specific foreign policy interests. 20 I.L.M. at 231. The Algiers Accords contain no "express waiver of sovereign immunity that would permit a third-party to assign U.S. funds owed to Iran." *Flatow*, 74 F. Supp. 2d at 25.

* * * *

3. Recent Revisions to the FSIA do Not Waive Sovereign Immunity For Assignment of Tribunal Awards

* * * *

Plaintiffs argue that recent amendments to the FSIA have removed prior impediments to obtaining alleged funds that may be owed to Iran. Specifically, they assert that the new provisions of 28 U.S.C. § 1605A(a)(1) and § 1610(g) have "stripped away all immunities previously enjoyed by a terrorist state." In making these claims, Plaintiffs rely upon 28 U.S.C. § 1605A, and more particularly 28 U.S.C. § 1610(g)(2).

Sec. 1610(g) provides in relevant part:

(g) Property in certain actions.—

> (1) **In general.**—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, . . .
>
> (2) **United States sovereign immunity inapplicable.**—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act [TWEA] or [IEEPA].

As a preliminary matter, section 1610(g) only applies to judgments entered under 28 U.S.C. § 1605A. That statute was enacted nearly 18 months after Plaintiffs obtained the judgment they seek to enforce. Therefore, by its terms, this provision is inapplicable to Plaintiffs. In addition, by its express terms, this provision only impacts the *property of a foreign state*. Nothing in the text indicates that Congress contemplated that the United States might be liable for third-party judgments against Iran. Nor does the text of this provision waive U.S. sovereign immunity with respect to U.S. property or funds. Simply put, any future Tribunal awards would be paid from U.S. property—specifically, U.S. Treasury funds—and not from foreign property "regulated by the United States by reason of action taken against the foreign state under [TWEA] or [IEEPA]." *See e.g. Blue Fox*, 525 U.S. at 263; *Buchanan* [*v. Alexander*], 45 U.S. [20,] 21 [(1846)] . . . . Regardless of any "stripp[ing] away [of the] immunities previously enjoyed by a terrorist state" by these provisions, the United States' immunity over monies in the U.S. Treasury remains.

* * * *

. . . The United States' decision to arbitrate claims before the Iran–U.S. Claims Tribunal through the Algiers Accords cannot be read to waive immunity for claims by any entity or person other than Iran and Iranian nationals before the Tribunal, and certainly cannot be understood to be a waiver of sovereign immunity over U.S. Treasury funds or consent to jurisdiction over such funds by United States courts.

* * * *

C. An Assignment Order Would Seriously Undermine Substantial Foreign Policy Interests of the United States, and California Law Allowing Any Such Assignment is Therefore Preempted

An assignment of Iran's claims against the United States would impact significant foreign policy interests and undermine the United States' position before the Tribunal. Grosh Decl. ¶ 3. Not only could an order from this Court assigning the payment of Tribunal awards against the United States lead Iran to assert a violation of international obligations, Iran might also argue that the United States should be required to pay Iran directly. Such an order could lead Iran to assert new claims against the United States before the Tribunal.

In this regard, the Tribunal has previously found the United States liable to Iran for the failure of U.S. courts to enforce Tribunal awards against U.S. nationals. In 1983, the Tribunal resolved a dispute between Iran Aircraft Industries (an Iranian governmental entity), and Avco Corporation, a U.S. company, and awarded several million dollars to the Iranian company. *Avco Corp. v. Islamic Republic of Iran* (Partial Award No. 377-261-3), 19 Iran–U.S. Cl. Trib. Rep. 200 (1988). Avco refused to pay the award, and Iran brought suit in the District Court for the District of Connecticut. The Connecticut district court denied enforcement of the Avco award, and the Second Circuit affirmed. *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992) Iran returned to the Tribunal, where it then asserted a claim directly against the United States for the failure of its courts to enforce the Tribunal award. Grosh Decl. ¶ 4. The Tribunal found the United States liable for damages to Iran because the United States had violated its

obligation under the Algiers Declarations to ensure that a valid award of the Tribunal against a U.S. national be treated as final, binding, valid, and enforceable, in the jurisdiction of the United States. *See Islamic Republic of Iran v. United States*, 1998 WL 1157733, Case No. A27, Award No. 586-A27-FT, at 32, ¶ 71 (Iran–U.S. Claims Tribunal, June 5, 1998). Accordingly, the Tribunal awarded Iran the sum of $5,042,481.65 "on its claim related to the enforcement of the Tribunal's award in Avco." *Id.* at 34, ¶ 78. In a separate but related case, the Tribunal noted that its award in Case A27 was "final and binding . . . and must be carried out without delay." *See United States v. Iran*, Order at 2, Case No. A28 (Doc. 62) (Iran–U.S. Claims Tribunal, Aug. 5, 1998). The Tribunal expressed its expectation that the United States would pay that amount "promptly and *directly* to Iran." *Id.* (emphasis added).

Were the Court to order the assignment of any future Tribunal awards to Iran, effectively ordering the U.S. to pay Plaintiffs directly, rather than Iran, the United States could find itself subject to claims by Iran before the Tribunal seeking that the United States again "pay [the award] amount promptly and directly to Iran," notwithstanding the fact that the United States had already made payment to Plaintiffs. *Id.* Further subsequent awards could again be assigned by courts to the Plaintiffs, or any other judgment creditor. Such an endless cycle could potentially subject the United States taxpayer to liability for all U.S. Court judgments entered against Iran in favor of third-party plaintiffs.

The Supreme Court has found that state law that conflicts with foreign policy agreements (such as the Algiers Accords) of the United States is preempted. *American Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413–414 (2003). The United States entered into the Algiers Accords, in part, to settle the claims by the Government of the United States of America and the Government of the Islamic Republic of Iran through arbitration. 20 I.L.M. 223. In entering into the Accords, the United States agreed that Tribunal awards against the governments would be final and binding and enforceable in the courts of any nation in accordance with its laws. *Id.* at 232.

Any entry of an order by the Court assigning payment of Tribunal awards in Iran's favor would therefore impermissibly infringe on United States foreign policy. In light of the "imperative[] . . . that federal power in the field affecting foreign relations be left entirely free from local interference," *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941), state "regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 440 (1968). To the extent CCP § 708.510 provides for the involuntary assignment of Iran's future Tribunal awards (which it does not, *see supra*), it is preempted. *Garamendi*, 539 U.S. at 396 (finding that state law requiring certain insurers to disclose information about Holocaust-era policies impermissibly interfered with the President's conduct of foreign affairs and was preempted on that basis).

* * * *

C. NAZI ERA CLAIMS

1. *In re Assicurazioni Generali*

On October 30, 2008, in response to the court's request for U.S. views on whether adjudication of the claims in *In re Assicurazioni Generali*, Nos. 05-5602, et al., "would conflict with the foreign policy of the United States," the United States submitted a letter brief to the U.S. Court of Appeals for the Second Circuit. The U.S. letter brief summarized U.S. views as follows:

> It has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the exclusive forum and remedy for claims within its purview. The fact that ICHEIC has now concluded its operations does not alter the foreign policy of the United States. Claims against defendant Assicurazioni Generali ("Generali"), one of the original ICHEIC companies and an active participant in its operations, fall within the category United States policy seeks to address.

> The United States takes no position on whether plaintiffs' claims are preempted by its foreign policy in light of *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), except to the extent that these claims arise under state statutes such as the California Holocaust Victims Insurance Relief Act (HVIRA), which, as the Supreme Court held in *Garamendi,* impermissibly impede the conduct of foreign policy and are thus preempted.

The case was pending at the end of 2008.

Further excerpts below set forth U.S. views in more detail. The full text of the U.S. letter brief is available at *www.state.gov/s/l/c8183.htm*. *Digest 2003* discusses the Supreme Court's decision in *Garamendi* at 462–68; *Digest 2002* discusses the U.S. brief as *amicus curiae* supporting the petition for a writ of certiorari in *Garamendi* at 415–29.

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* * * *

I. The Foreign Policy of the United States Has Been That ICHEIC Should Be Regarded As the Exclusive Forum and Remedy For Claims Within Its Purview.

A. The ICHEIC Process.

The United States Government has long been involved in efforts to resolve claims arising out of Nazi-era harms, and obtaining reparations for these harms was a principal object of postwar Allied diplomacy. *See generally Garamendi*, 539 U.S. at 401–408. Although restitution laws enacted by the West German Government provided compensation to many victims, they also left out many claimants and certain types of claims.

In 1998, a number of insurance companies jointly agreed with U.S. state insurance regulators and Jewish and Holocaust survivor organizations to create ICHEIC. Their aim was to establish "a just process . . . that will expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust." Velie Dec., Exh. A ¶ 1, *In re Assicurazioni Generali*, No. MDL 1374 (M21-89) (S.D.N.Y. filed May 25, 2001).

Generali was one of ICHEIC's founding members and participated actively in its operations throughout the life of the organization. The company contributed $100 million to ICHEIC's overall settlement amount and also made its records available to ICHEIC, enabling researchers to match claimants to Generali policies even when the claimants were unaware or unsure that they were beneficiaries of a Generali policy. From ICHEIC's inception, the United States has participated in the organization as an observer and has sought to support its efforts. In dealing with Holocaust-era claims, the United States has followed a policy of supporting non-adversarial mechanisms of resolving such claims as opposed to litigation. Such mechanisms, the United States believes, provide benefits to more victims, and do so faster and with less uncertainty, than does litigation. Non-adversarial mechanisms thus facilitate the two primary goals of U.S. policy in this area—justice and urgency.

Consistent with this policy, the United States has publicly recognized the importance of Generali and other companies' voluntary participation in ICHEIC. As Stuart Eizenstat explained in congressional testimony in 2000, the Executive Branch commend[s] the five European insurance companies that have joined [ICHEIC] and strongly encourage[s] all insurers that issued policies during the Holocaust era * * * to join [ICHEIC] and participate fully in its program * * * * This is the best and most expeditious vehicle for resolving insurance claims from this period. And we support giving those companies who do join ICHEIC and cooperate with it, safe haven from sanctions, subpoenas and hearings in the United States relative to the Holocaust period. *The Legacies of the Holocaust*, *Hearing Before the S. Comm. on Foreign Relations*, 106th Cong.16 (2000) [hereinafter Eizenstat Senate Testimony].

B. The Executive Agreements.

While ICHEIC was being created and beginning its work, the United States was involved in facilitating complicated negotiations among European governments and companies, survivor groups, and claimants' representatives. Those negotiations were conducted against the backdrop of numerous class-action lawsuits filed in

United States courts following German reunification. The negotiations resulted in the signing of an executive agreement with Germany, and a joint statement by all the participants in the negotiations, that recognized the establishment of a German foundation funded with 10 billion DM. *Garamendi*, 539 U.S. at 405. The German government and German companies contributed to a fund that would be used to make payments to individuals who had suffered at the hands of German companies during the Nazi era, including those with unpaid insurance policies. *Id.* at 406–07; *see also* Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.–F.R.G., July 17, 2000, 39 I.L.M. 1298 (2000) [hereinafter German Foundation Agreement]. Germany also agreed that, insofar as insurance claims were concerned, the Foundation would process claims according to ICHEIC procedures. German Foundation Agreement, 39 I.L.M. at 1299; *see also Garamendi*, 539 U.S. at 406–07.

The United States committed in the Foundation Agreement to file a statement of interest in cases in which Holocaust-era claims against German companies were pending in U.S. courts, declaring that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy" for the resolution of all claims brought "against German companies arising from their involvement in the National Socialist era and World War II." German Foundation Agreement, 39 I.L.M. at 1303; *see also Garamendi*, 539 U.S. at 406. The Foundation Agreement noted that plaintiffs in pending suits "face[d] numerous legal hurdles, including, without limitation, justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs." 39 I.L.M. at 1304. The Agreement and statements of interest filed by the United States in conformity with that Agreement stated that they did not take a position on the legal contentions of the parties on those issues. *Id.* The Agreement further stated that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal," but it also stated that United States policy interests "favor dismissal on any valid legal ground." *Id.*

Shortly after entering into its agreement with the German government, the United States entered into two similar agreements with Austria. *See* Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Oct. 24, 2000, 40 I.L.M. 523 [hereinafter Austrian Fund Agreement]; Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund Reconciliation, Peace and Cooperation," U.S.–Austria, Jan. 23, 2001, 2001 WL 935261. Like the German agreement, the Austrian agreements allocated funds to cover (among other things) insurance claims against Austrian insurance companies, providing that such claims would be handled through Austrian entities that would largely follow ICHEIC procedures.

Additionally, the United States pledged that if an Austrian insurance company were sued in U.S. courts over its Holocaust-era policies, the United States would file a statement of interest recommending that the suit be dismissed on any valid legal ground but also stating that the United States did not suggest that its foreign policy interests concerning the Austrian agreements in themselves provide an independent legal ground for dismissal. Austrian Fund Agreement, 40 I.L.M. at 525, 528–29. . . . The United States did not conclude any agreement with Italy.

C. The *Garamendi* Decision.

In *Garamendi,* the Supreme Court considered a constitutional challenge to a provision of California law that required each insurance company doing business in the State to publicly disclose detailed information concerning Nazi-era European policies issued by the company or its affiliates. The United States, as amicus curiae, urged the Court to invalidate the California statute. The Supreme Court held that the statute impermissibly intruded into the conduct of U.S. foreign policy. . . .

The Court explained that the executive agreements were not themselves preemptive; instead, the state statute was preempted because it conflicted with the federal foreign policy embodied and reflected in those agreements. *Id.* at 415–417, 420–22. . . .

Consistent with the Supreme Court's explanation that U.S. foreign policy (and not any particular executive agreement) had preemptive force in *Garamendi*, the Supreme Court's decision in *Garamendi* made no distinctions between the insurance companies from Germany and Austria challenging the state statute, and Generali, which also was a petitioner in the *Garamendi* litigation, even though, as discussed, the United States had entered into executive agreements with Germany and Austria, but not with Italy. . . . And, as in *Garamendi*, the pertinent U.S. foreign policy interest is not diminished, for purposes of this case, by the absence of an executive agreement with Italy.

II. United States Foreign Policy Is Not Altered by the Conclusion of the ICHEIC Process.

That ICHEIC has now concluded its operations does not alter the foreign policy of the United States. It was never the foreign policy of the United States that claims should merely be held in abeyance pending conclusion of the ICHEIC process. The policy, as noted, was to encourage all insurance claims to be brought before ICHEIC, thereby promoting not only expeditious and fair resolution of such claims, but also closure for European companies. The obligations of the executive agreements with Germany and Austria still apply, and, as State Department officials have noted, it would undermine future efforts to secure voluntary compensation agreements if ICHEIC participants became subject to litigation as soon as ICHEIC had concluded. *See The Holocaust Insurance Accountability Act of 2007 (H.R. 1746): Holocaust Era Insurance Restitution After ICHEIC, the International Commission on Holocaust Era Insurance Claims*, *Hearing Before the H. Comm. On Fin. Servs.*, 110th Cong. 11 (2008) (statement of Amb. J. Christian Kennedy, Special Envoy for Holocaust Issues, U.S. Dept. of State) (explaining that if ICHEIC participants are subjected to post-ICHEIC litigation, the result could discourage new countries from establishing compensation systems).

* * * *

For these reasons, to answer the Court's question, it is contrary to settled United States foreign policy for plaintiffs' claims to

be adjudicated in the courts of the United States. The United States takes no position, however, on the legal impact of that foreign policy on the Court's disposition of the claims, except with regard to those claims that arise under California's HVIRA or similar state statutes or state-law principles that single out claims involving events in a foreign country for special treatment. . . .

2. *Gross v. German Foundation*

On December 10, 2008, the U.S. Court of Appeals for the Third Circuit affirmed a district court's dismissal of claims brought by beneficiaries of the German Foundation "Remembrance, Responsibility, and the Future" ("Foundation") for interest owed on German company contributions to the Foundation. *Gross v. German Foundation Industrial Initiative*, 549 F.3d 605 (3d Cir. 2008). The plaintiffs alleged that an association of major German companies who agreed to fund the Foundation in exchange for "legal peace," owed interest on company contributions to the Foundation, as called for in a Joint Statement issued on July 17, 2000, at the conclusion of negotiations to establish the Foundation. Excerpts follow from the court's opinion summarizing its analysis in holding that the Joint Statement "does not constitute or confer a privately enforceable cause of action . . . ."

For discussion of the factual background of the case and the district court's opinion, whose rationale the Third Circuit adopted with minor additions, *see Digest 2007* at 421–26; *see also Digest 2006* at 507–17. On May 18, 2009, the Supreme Court denied certiorari. *Gross v. German Foundation*, 2009 U.S. LEXIS 3480 (2009).

* * * *

III. Application of the Law of International Agreements

* * * *

[A] As Judge Debevoise noted, "July 17, 2000, was the occasion of one of the most remarkable diplomatic achievements since the end of World War II." [*Gross v. German Foundation Industrial Initiative*,] *Gross III*, 499 F. Supp. [2d 606,] 608 [(D.N.J. 2007)]. It was on that day that eight sovereign nations, a consortium representing numerous German companies, an international organization devoted to Nazi-era claims, and U.S. plaintiffs' attorneys together signed the Joint Statement . . . .

We recognize that the Joint Statement is not a formal treaty; nevertheless, it constitutes part of the understanding reached among sovereign nations and private parties. Negotiations occurred during plenary sessions comprising high-level executives of foreign nations. The signatories of the Joint Statement itself include[] the representatives of eight different nations. Further, the Joint Statement has meaning only in the context of the entire [negotiation]. Indeed, the Joint Statement by itself is incomplete, as it talks of the Foundation, but understanding what the Foundation is requires resort to the Foundation Law. In sum, the Joint Statement appears to be a unique document, the objectives of which are to memorialize the efforts of the diplomatic talks resolving both political and legal issues. Thus, for at least these reasons, we agree with the district court that the law of international agreements provides the appropriate jurisprudential guidance in the analysis of whether the Joint Statement creates a private cause of action.

B.

* * * *

Our examination of the text of the Joint Statement . . . supports the district court's rationale and conclusion. We discern a strong intent on the part of the participants to enter into an agreement that is not enforceable through a private cause of action. First, the Joint Statement . . . aspires to something other than simply the creation of a private, bargained-for exchange. One specific objective was to send "a conclusive, humanitarian signal, out of a sense of moral responsibility, solidarity and self-respect." Joint Statement, pmbl. ¶ 5. Another clear purpose was for the German

companies to receive "all-embracing and enduring legal peace." *See* Executive Agreement, pmbl. ¶ 10, and arts. 2(1), 2(2), 3(1); Joint Statement, pmbl. ¶ 13, and ¶ 4(b); Foundation Law, pmbl. ¶ 6. Even without any presumptive approach, this language strongly connotes an intent not to create a right of private action for only some of the Joint Statement's participants.

Second, as the district court noted, the Joint Statement uses language that is generally consistent with a non-binding political document. The signatories of the Joint Statement refer to themselves as "participants," not as "parties." Joint Statement ¶¶ 1–4. The participants "declare" rather than "agree" or "undertake." *Id.* ¶ 1. The title of the document itself suggests a non-binding arrangement. *See* Staff of S. Comm. on Foreign Relations, 106th Cong., Print No. 106-71, *Treaties and Other International Agreements: The Role of the United States Senate* 60 (Comm. Print 2001) ("Joint statements of intent are not binding agreements unless they meet the requirements of legally binding agreements, that is, that the parties intend to be legally bound."). Each of these textual clues points towards a document without privately enforceable rights.

It is true, as Appellants point out, that some language of the Joint Statement can be read as suggesting binding obligations. For instance, Paragraph 4(d) does use the terms "will" and "shall" when describing the steps that the German companies intend to take. . . . But these few examples cannot overcome the contrary language indicating a non-binding nature. The Joint Statement contains insufficient rights-granting language to confer on Appellants a private cause of action.

* * * *

Appellants also propose that the district court erred by not severing the last sentence of Paragraph 4(d) from the rest of the Joint Statement. According to their argument, severability permits that sentence to be the grant of private enforceability. . . . In this case, the Joint Statement's language does not lend itself to the dichotomous approach urged by Appellants. Excision of a single sentence from the body of the Joint Statement . . . invites departure from the participants' intentions.

At oral argument, Appellants' counsel repeated their contention that it would "have been an act of temporary insanity for experienced counsel to have agreed to dismiss sixty cases with prejudice prior to payment, without the existence of a judicially enforceable means of insuring compliance." But we think this assertion is tenuous and overstates the situation. As the district court recognized, Appellants' counsel were not dismissing the actions with only the slim hope or gamble that the German companies might proceed with their payments. Counsel dismissed the complaints, in part, because the Joint Statement had the support and backing of the governments of both the United States and the Federal Republic of Germany. Indeed, but for the actions of President Clinton and Chancellor Schroeder, it is questionable whether the negotiations would have been fruitful. . . . Had the German companies opted to not complete their payments to the Initiative, serious political consequences and executive discomfiture would have resulted.

. . . In our view, the district court correctly construed the terms of the Joint Statement and the arduous negotiations leading to the Joint Statement as manifestations of all participants' intentions to implement a non-judicial procedure for resolving further disputes.

* * * *

D. AGENT ORANGE LITIGATION

On February 22, 2008, the U.S. Court of Appeals for the Second Circuit affirmed a district court judgment dismissing claims related to the use of herbicides during the Vietnam War. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008). The United States filed an *amicus curiae* brief in the case on February 15, 2006, arguing among other things that the political question doctrine barred the court from reviewing the executive's military judgment that the use of herbicides during the Vietnam war was a necessary and lawful means of war. The text of the U.S. brief is

available as document 58 for *Digest 2006* at *www.state.gov/s/l/c8183.htm*; for other prior history in the case, *see Digest 2006* at 522–26 and *Digest 2005* at 491–97. As excerpted below, the Second Circuit held in part that the plaintiffs' claims did not satisfy the standard set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), for recognition of a tort in violation of international law and therefore were not cognizable under the ATS.*

* * * *

The sources of international law relied on by Plaintiffs do not support a universally-accepted norm prohibiting the wartime use of Agent Orange that is defined with the degree of specificity required by *Sosa*. Although the herbicide campaign may have been controversial, the record before us supports the conclusion that Agent Orange was used as a defoliant and not as a poison designed for or targeting human populations. Inasmuch as Agent Orange was intended for defoliation and for destruction of crops only, its use did not violate the international norms relied upon here, since those norms would not necessarily prohibit the deployment of materials that are only secondarily, and not intentionally, harmful to humans. In this respect, it is significant that Plaintiffs nowhere allege that the government intended to harm human beings through its use of Agent Orange. . . .

There is a lack of consensus in the international community with respect to whether the proscription against poison would apply to defoliants that had possible unintended toxic side effects, as opposed to chemicals intended to kill combatants. The prohibition on the use of "poison or poisoned weapons" in Article 23(a) of the 1907 Hague Regulations is certainly categorical, *see* 36 Stat. 2277, 2301, but its scope is nevertheless undefined and has remained so for a century. . . .

* * * *

* Editor's note: The Supreme Court denied the plaintiffs' petition for a writ of certiorari on March 2, 2009. 129 S. Ct. 1524 (2009).

Plaintiffs' reliance upon the trials at Nuremberg is inapposite for the same reasons. As the District Court correctly noted, the individuals who were found guilty in those criminal proceedings were found to have supplied poisonous Zyklon B gas in World War II concentration camps when "the accused knew that the gas was to be used for the purpose of killing human beings." *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d [7,] 94 [(E.D.N.Y. 2005)]. Because Agent Orange was "not used as [a] means of directly attacking enemy troops," it was not prohibited by Article 23(e)'s proscription of the calculated use of lethal substances against human beings and its use is distinguishable from the context in which Zyklon B gas was used in World War II.

Other sources of United States policy lend additional support to that conclusion. In 1961, the Secretary of State wrote to President Kennedy to recommend the use of herbicides in Vietnam because "successful plant-killing ops in [Vietnam], carefully coordinated with and incidental to larger ops, can be of substantial assistance in the control and defeat of the [Vietcong]." In 1969, the United States objected to a proposed United Nations resolution that would have "ma[d]e a clear affirmation that the prohibition contained in the Geneva Protocol applied to the use in war of all chemical, bacteriological and biological agents (including tear gas and other harassing agents) which presently existed or which might be developed in the future." The following year, after the United States ceased its use of Agent Orange upon a study revealing its deleterious effects on humans, the Secretary of State wrote a letter to President Nixon recommending that the President transmit to the Senate for advice and consent the ratification of the 1925 Geneva Protocol. In his letter, the Secretary stated that "[i]t is the United States' understanding of the Protocol that it does not prohibit the use in war of riot-control agents and chemical herbicides." When President Ford ratified the Geneva Protocol in 1975, he clarified that "[a]lthough it is our position that the [P]rotocol does not cover riot control agents and chemical herbicides, I have decided that the United States shall renounce their use in war as a matter of national policy." Moreover, in ratifying the 1925 Geneva Protocol in 1973, the Senate made clear its understanding that the United States' prior use of herbicides in Vietnam had not violated

that treaty and that the government intended the Protocol to be only prospective in effect. *See Prohibition of Chemical and Biological Weapons: Hearing on S. Res. 48 Before the Senate Comm. On Foreign Relations*, 93d Cong. 3 (1974) (statement of Senator Humphrey reassuring the Executive Branch that Congress' adoption of the 1925 Geneva Protocol "would in no way reflect on our past practice with regard to chemical agents. The manner in which herbicides and riot control agents were used in Vietnam was fully in accordance with the U.S. [sic] prevailing interpretation of the protocol"). Although Plaintiffs rely on the 1907 Hague Regulations instead of the 1925 Geneva Protocol, it is significant that several nations used poisonous gases during World War I and the contracting parties to the Geneva Protocol found it necessary to adopt such a resolution despite the 1907 Hague Regulations that were in effect.

Plaintiffs' claims that the use of Agent Orange violated the norm of proportionality and caused unnecessary suffering rely upon international agreements requiring intentionality that Plaintiffs cannot establish. Article 23(e) prohibits the use of "arms, projectiles, or material calculated to cause unnecessary suffering." Article 6 of the Nuremberg Charter proscribes "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, Charter of the Int'l Military Tribunal, Aug. 8, 1945, pt. I, art. 6, 59 stat. 1544, 1574, 82 U.N.T.S. 279 ("Nuremburg Charter"). Article 147 of the Fourth Geneva Convention defines "grave breaches" as "willfully causing great suffering or serious injury to body or health," as well as "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." These norms are all simply too indefinite to satisfy *Sosa*'s specificity requirement. . . . Because Plaintiffs do not allege, nor could they on this record prove, the required mens rea, they fail to make out a cognizable basis for their ATS claim. The purpose behind spraying Agent Orange was only to destroy crops and "to [s]ave the lives of Americans and those of our allies," and not to injure human populations.

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Cross References

Alien Tort Statute litigation, **Chapter 5.A.2.**
U.S. sovereign immunity in foreign relations, **Chapter 5.A.3.**
Differences between responsibility of states and of international organizations, **Chapter 7.A.**
Amendments to terrorism exception to Foreign Sovereign Immunity Act, **Chapter 10.A.1.a.(2)(i)**
Litigation relating to issues before Iran–U.S. Claims Tribunal, **Chapter 10.A.2.**
Claims under NAFTA, **Chapter 11.B.**
Claims under WTO dispute settlement, **Chapter 11.C.**
Arbitration with Canada relating to compliance with Softwood Lumber Agreement, **Chapter 11.D.4.**

Chapter 9

Diplomatic Relations, Succession, and Continuity of States

A. STATUS ISSUES

1. Kosovo

a. Recognition of Kosovo

In January and early February 2008, Kosovo's status, which had been left for future resolution in 1999, remained unresolved. In 1999, after a NATO military campaign forced Slobodan Milosevic to withdraw his forces from Kosovo, the UN Security Council adopted Resolution 1244, which put Kosovo under an interim UN administration and precluded Belgrade from exercising governing authority in Kosovo. U.N. Doc. S/RES/1244. In November 2005, Martti Ahtisaari was appointed UN Special Envoy with a mandate to conduct a "political process" to determine the future status of Kosovo. Ahtisaari held intensive negotiations with leaders in Serbia and Kosovo for over a year, but, in a report submitted to the Security Council in March 2007, concluded that the parties' positions on Kosovo's future status were "irreconcilable" and that there was no possibility of their reaching agreement. U.N. Doc. S/2007/168. Instead, Ahtisaari recommended that Kosovo should be independent and proposed a settlement involving, *inter alia,* detailed measures to protect the rights of minority communities and their members, a decentralized government, and temporary international supervision of Kosovo's implementation of the terms of the settlement.

U.N. Doc. S/2007/168.Add.1. From August to December 2007, the United States, with the European Union and Russia, participated in a final but unsuccessful diplomatic effort to determine whether any agreement between Serbia and Kosovo was possible. At the end of 2007, Belgrade and Pristina remained at an impasse. *See Digest 2007* at 429–33 for background.

On February 17, 2008, Kosovo declared independence, and on February 18 the United States recognized Kosovo as an independent and sovereign state and accepted Kosovo's request to establish diplomatic relations. In his letter to President Fatmir Sejdiu of Kosovo, which is set forth below and available at 44 WEEKLY COMP. PRES. DOC. 236 (Feb. 18, 2008), President George W. Bush noted that the United States would rely upon assurances contained in Kosovo's declaration of independence. In that declaration, the Kosovo government pledged to assume the obligations for it under the Ahtisaari plan, including by adopting legislation Ahtisaari had proposed to protect minority communities and their members and a constitution that would protect human rights and fundamental freedoms and reflect the principles of Ahtisaari's plan. The declaration also pledged Kosovo's cooperation with international supervision to ensure compliance with the Ahtisaari plan. *See www.assembly-kosova.org/?cid=2,128,1635*. As of December 31, 2008, 53 states had recognized Kosovo.

On behalf of the American people, I hereby recognize Kosovo as an independent and sovereign state. I congratulate you and Kosovo's citizens for having taken this important step in your democratic and national development.

On this historic occasion, I note the deep and sincere bonds of friendship that unite our people. This friendship, cemented during Kosovo's darkest hours of tragedy, has grown stronger in the 9 years since war in Kosovo ended. Kosovo has since worked to

rebuild its war-shattered society, establish democratic institutions, hold successful elections for a new government, and foster prosperity. As an independent state, Kosovo now assumes responsibility for its destiny. As in the past, the United States will be your partner and your friend.

In your request to establish diplomatic relations with the United States, you expressed Kosovo's desire to attain the highest standards of democracy and freedom. I fully welcome this sentiment. In particular, I support your embrace of multi-ethnicity as a principle of good governance and your commitment to developing accountable institutions in which all citizens are equal under the law.

I also note that, in its declaration of independence, Kosovo has willingly assumed the responsibilities assigned to it under the Ahtisaari Plan. The United States welcomes this unconditional commitment to carry out these responsibilities and Kosovo's willingness to cooperate fully with the international community during the period of international supervision to which you have agreed. The United States relies upon Kosovo's assurances that it considers itself legally bound to comply with the provisions in Kosovo's Declaration of Independence. I am convinced that full and prompt adoption of the measures proposed by U.N. Special Envoy Ahtisaari will bring Kosovo closer to fulfilling its Euro-Atlantic aspirations.

On the basis of these assurances from the Government of Kosovo, I am pleased to accept your request that our two countries establish diplomatic relations. The United States would welcome the establishment by Kosovo of diplomatic representation in the United States and plans to do likewise in Kosovo.

As Kosovo opens a new chapter in its history as an independent state, I look forward to the deepening and strengthening of our special friendship.

On February 18, 2008, Under Secretary for Political Affairs Nicholas Burns held a teleconference briefing on the U.S. recognition of Kosovo. Excerpts of his remarks concerning the legality of Kosovo's declaration of independence in the context of UN Security Council Resolution 1244 are set forth

below. The full text of the briefing is available at *http://2001-2009.state.gov/p/us/rm/2008/100976.htm*.

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* * * *

. . . Resolution 1244, which was passed in June '99, is the basis of the Kosovo situation itself. It envisioned a final status process for Kosovo, but it did not determine what the outcome would be . . . .

There is nothing in Resolution 1244 that would prevent or make illegal a declaration of independence. There is nothing in 1244 that would prevent the establishment of a new state. In fact, 1244 . . . essentially says there has to be a UN-led presence to decide the future status of Kosovo, and that's what we've seen over the last two years with President Martti Ahtisaari, the former president of Finland, leading that. He recommended to the United Nations . . . that independence come to Kosovo and that it be supervised . . . . He recommended the EU go in. He recommended that NATO stay.

* * * *

On March 4, 2008, Daniel Fried, Assistant Secretary of State for European and Eurasian Affairs, testified before the Senate Committee on Foreign Relations about the events that led to and followed Kosovo's declaration of independence. Among other things, Ambassador Fried discussed the attack on the U.S. Embassy in Belgrade on February 21, 2008, four days after Kosovo's declaration of independence. *See* Chapter 10.B.2.a. for details on the incident and the U.S. response.

Ambassador Fried also reviewed UN Security Council Resolution 1244 and its relationship to Kosovo's independence. As Ambassador Fried explained:

> UNSCR 1244 specifically envisioned a UN-facilitated process to address Kosovo's future status, a way forward which the U.S. actively supported. Additionally, while 1244 sought an agreement between the parties, it did not require one. Its drafters did not rule out any possible

> options for status and the resolution itself even contemplates the possibility of independence as an outcome.
>
> . . . The resolution also placed Kosovo, for a limited time, under international administration. . . . The UN helped the people of Kosovo build local governments, a Kosovo Assembly and a multi-ethnic police force. . . .
>
> Nevertheless, the unresolved question of Kosovo's status continued to cast a dark shadow. . . . Although UNMIK, the interim UN mission in Kosovo, had done much to help Kosovo recover from war and build democratic institutions, the UN administration was never meant to be a permanent or even long-term solution for Kosovo.

The excerpts below provide the U.S. view that the recognition of Kosovo's independence should not set a precedent for other conflicts. The full text of Ambassador Fried's testimony is available at *http://foreign.senate.gov/testimony/2008/FriedTestimony080304a.pdf*. *See* Chapter 17.A.1. for Ambassador Fried's comments on the impact of Kosovo's declaration of independence on other states of the former Yugoslavia.

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. . . The Kosovo situation includes factors simply not found elsewhere. These include the violent, non-consensual breakup of Yugoslavia; the ethnic cleansing that accompanied Yugoslavia's collapse; brutal crimes against and the forced expulsion of civilians in Kosovo; the UN Security Council's decision in 1999 to remove without doubt any remaining Belgrade governance of Kosovo; the establishment of a UN interim administration; and the political process, as envisioned in Resolution 1244, designed to determine final status. Again, these factors are not found elsewhere. Foreign governments which claim to worry about precedent should refrain from speaking as if there is one. Governments and separatists should refrain from hijacking Kosovo for their own ulterior motives and interests. Each conflict in Eurasia will be

handled on its own unique conditions, and the United States will continue to work with partners in the region seeking to peacefully resolve these separatist conflicts.

* * * *

Ambassador Rosemary DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, made similar points on November 26, 2008, in response to a reporter's question about why the United States welcomed other states' recognition of Kosovo, yet opposed other states' recognitions of Abkhazia. Ambassador DiCarlo's comments are excerpted below and available at *www.archive.usun.state.gov/press_releases/20081126_346.html.*

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* * * *

. . . Kosovo is a very different case from other conflicts. We have a situation that resulted from the violent and non-consensual break-up of Yugoslavia. We had unfortunately years of repression, ethnic cleansing, that necessitated the International Community to intervene, first NATO . . . in '99 and then the United Nations with Resolution 1244. If you read Resolution 1244 carefully, it's quite clear that ties with Serbia are broken. Serbia no longer, in 1244, has the right to governance over Kosovo. That situation carried on for eight, nine years. During that period the UN, as mandated by the Security Council, helped to develop new institutions in Kosovo. . . . We had a political process. It was called for in Resolution 1244, led by a UN envoy, Martti Ahtisaari. He produced a comprehensive proposal. A good part of that proposal was negotiated between the two sides, and accepted by the two sides. The status was not, but a lot of the provisions were. We tried very hard to bring the two sides together. That was not possible. It became very clear to those in Europe, those in the United States, that to ensure long-term stability in the Balkans that we . . . had to proceed with something that was already on its path and that was Kosovo's independence.

* * * *

b. Request for an ICJ advisory opinion

On October 8, 2008, the United States voted against a General Assembly resolution to request the International Court of Justice ("ICJ") to provide an advisory opinion on the question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The General Assembly adopted the resolution by a vote of 77 in favor and six against, with 74 abstentions. U.N. Doc. A/RES/63/3.

Ambassador Rosemary DiCarlo made a statement explaining the U.S. vote, which stated in part:

> The United States firmly believes that our common concern should be to focus our efforts to help shape this European future for Serbia and Kosovo. Specifically, we are extending economic and political support to both of these countries. We hope they will integrate further into international markets and structures that will guarantee peace and prosperity for all of the region's peoples.
>
> We do not think the resolution proposed by the Republic of Serbia advances that goal.

The full text of Ambassador DiCarlo's statement is available at *www.archive.usun.state.gov/press_releases/20081126_346.html*.

c. U.S. participation in EU rule of law mission

On October 22, 2008, the Agreement on the Participation of the United States of America in the European Union Rule of Law Mission in Kosovo ("EULEX") entered into force. Pursuant to the agreement, which was the first of its kind between the United States and the European Union, the United States would contribute 80 police officers and as many as eight judges and prosecutors to EULEX. According to its mission statement (*see www.eulex-kosovo.eu/?id=2*),

EULEX will assist the Kosovo authorities, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability. It will further develop and strengthen an independent and multi-ethnic justice system and a multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices. The mission . . . will implement its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities.

In a joint press statement on October 22, 2008, the United States and the European Union explained the goals of the agreement:

> The European Union and the United States have a common desire to work together to support the development of Kosovo's democratic standards, in particular the strengthening of an independent and multi-ethnic rule of law system. The deployment of the European Union Rule of Law Mission (EULEX) throughout Kosovo is of benefit to all the communities in Kosovo. It is critical for international efforts to deepen rule of law in Kosovo in order to contribute to greater stability in the region. . . .

See *http://2001-2009.state.gov/p/eur/rls/or/111132.htm*. Excerpts follow from the agreement, which is available in full at *www.state.gov/documents/organization/120992.pdf*.

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* * * *

Article 1
Participation in the operation

1. The United States shall associate itself with Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo [available at *http://consilium.europa.eu/showPage.aspx?id=1459&lang=en*], EULEX KOSOVO and with any Joint Action

or Decision by which the Council of the European Union decides to extend EULEX KOSOVO, in accordance with the provisions of this Agreement and any implementing arrangements.

2. The contribution of the United States to EULEX KOSOVO is without prejudice to the decision-making autonomy of the European Union. The Committee of Contributors, made up of EU Member States, the United States and other non-EU States participating in EULEX KOSOVO, will play a key role in the day-to-day management of the mission; the views of the Committee will be taken into account by the Political and Security Committee which exercises political control and strategic direction over EULEX KOSOVO.

3. The United States shall ensure that persons made available as part of its contribution to EULEX KOSOVO (hereinafter "seconded personnel") undertake their mission consistent with:

— Joint Action 2008/124/CFSP and possible subsequent amendments,
— the EULEX KOSOVO Operation Plan,
— possible implementing arrangements, and
— this Agreement.

* * * *

Article 4
Chain of command

1. The Civilian Operations Commander shall exercise command and control over EULEX KOSOVO at the strategic level. The Head of Mission shall assume responsibility for and exercise command and control over EULEX KOSOVO at theatre level.

2. The Head of Mission shall exercise command and control over seconded personnel, teams and units from contributing States as assigned by the Civilian Operations Commander . . . .

3. The United States shall have the same rights and obligations in terms of the day-to-day management of the operation as participating Member States of the European Union taking part in the operation . . . .

4. The Head of Mission shall be responsible for disciplinary control over the personnel of EULEX KOSOVO. Any disciplinary action shall be the responsibility of the United States.

5. A National Contingent Leader (NCL) shall be appointed by the United States . . . . The NCL shall report to the Head of Mission on national matters and shall be responsible for day-to-day contingent discipline.

6. The decision to end the operation shall be taken by the European Union, following consultation with the United States, provided that the United States is still contributing to EULEX KOSOVO on the date of that decision.

* * * *

At a Security Council meeting on November 26, 2008, the presidents of Serbia and Kosovo both said they would welcome EULEX's deployment. The Council also discussed the Secretary-General's report, which highlighted his decision to accelerate the process of reconfiguring UNMIK to enable EULEX to deploy throughout Kosovo and reflect developments since Kosovo's declaration of independence. U.N. Doc. S/2008/692. In her remarks, as excerpted below, Ambassador Rosemary DiCarlo stressed the need to ensure EULEX's speedy deployment. The full text of Ambassador DiCarlo's statement is available at *www.archive.usun.state.gov/press_releases/20081126_345.html.*

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* * * *

The Secretary-General's report notes the changed reality in Kosovo and highlights the progress made: the adoption of a modern and progressive constitution that ensures the rights of all ethnic groups, the establishment of institutions of governance, including a Ministry of Foreign Affairs; steps to provide for Kosovo's basic security needs through the establishment of a civilian-controlled security force; and the issuance of Kosovo passports.

* * * *

Mr. President, it is appropriate that UNMIK should adapt its role in response to changed realities in Kosovo. We welcome the Secretary General's decision to accelerate reconfiguration of UNMIK to allow for the deployment of the EU's Rule of Law Mission, EULEX, throughout Kosovo.

* * * *

Mr. President, The United States underscores the importance of respecting Kosovo's sovereignty and territorial integrity. In this context, we welcome the commitment of the Secretary General to consult and coordinate continuously with Kosovo authorities on the implementation of these interim arrangements.

The Secretary-General's decision will accelerate the transfer of UNMIK's residual rule of law responsibilities to EULEX throughout Kosovo. The Government of Kosovo, of course, also has a major and complementary responsibility for exercising rule of law-related functions in the country. EULEX's deployment under the mandate specified in the EU's Joint Action of February 4 will ensure a unified customs regime and a single police chain of command. It will help address the problem of parallel institutions that currently hinder economic and political development. . . .

Mr. President, we urge all stakeholders, especially the governments of Serbia and Kosovo, to ensure that EULEX is deployed without delay.

* * * *

2. U.S. Relations with Taiwan

On March 18, 2008, the U.S. District Court for the District of Columbia granted a U.S. motion to dismiss a case brought by individuals residing on Taiwan who sought a declaratory judgment that they were U.S. nationals and asserted that the United States was exercising sovereignty over Taiwan. *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.C. 2008). Excerpts follow from the district court's opinion, holding that the political question doctrine barred it from considering the plaintiffs' claims. For a discussion of the U.S. motion

to dismiss filed on April 5, 2007, *see Digest 2007* at 1–3, 433–37.

* * * *

. . . The Plaintiffs would have the Court address a quintessential political question and trespass into the extremely delicate relationship between and among the United States, Taiwan and China. This it is without jurisdiction to do.

* * * *

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court enumerated six factors that may render a case nonjusticiable under the Political Question doctrine . . . . *Baker*, 369 U.S. at 217 . . . . In the instant matter, at least four of the factors counsel against the exercise of jurisdiction over Plaintiffs' claims.

A. Textually Committed to Coordinate Branches

Plaintiffs' suit raises policy questions that are textually committed to coordinate branches of government.

> As the Supreme Court suggested in *Marbury* [*v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)] and made clear in later cases, "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. *Oetjen* [*v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)]. . . .

. . . Article I, Section 8 of the Constitution "is richly laden with delegation of foreign policy and national security powers" to the legislature. [*Schneider v. Kissinger*, 412 F.3d 190, 412 (D.C. Cir. 2005).] "Article II likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive. . . . Indeed, the Supreme Court has described the President as possessing 'plenary and exclusive power' in the

international arena and 'as the sole organ of the federal government in the field of international relations . . . .'" *Id.* at 413 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

As the sources cited by Plaintiffs make plain, at the end of World War II, the sovereignty of Taiwan was an undecided question. It remains a very delicate issue in international relations. Plaintiffs want the Court to ignore intervening events and catapult over the Executive and Legislative Branches, which have obviously and intentionally *not* recognized any power as sovereign over Taiwan. That inaction is as much committed by the Constitution to those "political" branches as their actions are. . . . Thus, the Court is without jurisdiction to adjudicate Plaintiffs' Complaint.

B. Judicially Discoverable and Manageable Standards

The second criterion of the *Baker* six brings under the nonjusticiable umbrella of political question any case as to which there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217. Plaintiffs argue that the Court need only perform a traditional judicial task: interpret treaties, laws and the Constitution. Certainly the Plaintiffs have identified a traditional judicial task but they misapprehend the nature of their own Amended Complaint. Fundamentally, they assert that General Order No. 1 made Chiang Kai-shek an agent for the principal occupying Power, *i.e.*, the United States, and that nothing since has withdrawn that agency or substituted any other Power over Taiwan. In order to examine the bases for Plaintiffs' claims, the Court would be required to interpret the *meaning* of General Order No. 1, the *authority* for the issuance of General Order No. 1, whether it had or has any *binding nature* on the Allies' and/or the United States' foreign policy, and its *continued viability*.

Judges are not soldiers or diplomats. General Order No. 1 was entered very shortly after Japan signed the Instrument of Surrender and long before all Japanese soldiers actually laid down their arms. During the course of the 14-year Japanese invasion of China (1931–45), Chiang Kai-shek . . . had continued to wage war against Mao Zedong . . . . It was not until 1949 that Chiang Kai-shek fled with the remnants of his KMT government and military to

Taiwan . . . . Thus, the purpose, language, and intentions behind General Order No. 1 might have been entirely blunted by later events. What is clear is that the judiciary is not equipped to interpret and apply, 50 years later, a wartime military order entered at a time of great confusion and undoubted chaos.

C. Initial Policy Determination for Nonjudicial Discretion

Plaintiffs have essentially been persons without a state for almost 60 years. . . .

That Plaintiffs remain in an international limbo is not, however, because they have been ignored by the United States or the rest of the world. The ascendency of Mao Zedong . . . dramatically changed the situation in the Taiwan Straits and created a long-standing tension between mainland China and the United States. . . . Not until President Richard Nixon traveled to Beijing in February 1972 did the two nations pledge to work toward full normalization of diplomatic relations. . . . With passage of the Taiwan Relations Act, 22 U.S.C. § 3301, *et seq*., and establishment of the American Institute of Taiwan, the United States has maintained unofficial relations with Taiwan.

In the face of these years and years of diplomatic negotiations and delicate agreements, it would be foolhardy for a judge to believe that she had the jurisdiction to make a policy choice on the sovereignty of Taiwan. The foreign relations of the United States are conducted by the President of the United States and the Executive and Legislative Branches will decide whether and under what circumstances the United States will recognize a sovereign government over Taiwan.

D. Respect for Coordinate Branches of Government

This Court could not decide Plaintiffs' case without addressing the intentional and careful way in which the Executive Branch has *not* pressed forward on Taiwanese sovereignty, over these many years. Any effort on the part of the judiciary to declare Plaintiffs' rights under the U.S. Constitution, if any, would be impossible "without expressing a lack of respect due to [the Court's] coequal Branches of Government." *Schneider*, 412 F.3d at 198.

* * * *

On March 31, 2008, the plaintiffs filed a notice of appeal in the U.S. Court of Appeals for the District of Columbia Circuit. *Lin v. United States*, D.C. Cir. Civil Action No. 08-5078. On December 3, 2008, the United States filed its brief in the D.C. Circuit in support of affirmance of the district court's decision. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. At the end of 2008, the appeal was pending.*

B. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORT ISSUANCE

Litigation continued in 2008 in a lawsuit brought on behalf of a U.S. citizen child born in Jerusalem to compel the Department to record "Israel" (rather than "Jerusalem") as the child's birthplace in his passport and Consular Report of Birth Abroad. *Zivotofsky v. Secretary of State*, D.C. Cir. No. 07-5347. The plaintiffs relied on § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002). Section 214(d) of the Act provides that the Secretary of State "shall, upon the request of the citizen [born in Jerusalem] or the citizen's legal guardian, record the place of birth as Israel." In 2007 the U.S. District Court for the District of Columbia dismissed the case for the second time, finding that it presented a nonjusticiable political question (511 F. Supp. 2d 97 (D.D.C. 2007)). The plaintiffs appealed to the U.S. Court of Appeals for the District of Columbia Circuit. For prior history in the case, *see Digest 2006* at 530–47.

On April 4, 2008, the United States filed a brief in the D.C. Circuit, arguing that the court should uphold the district court's decision because the complaint presented a nonjusticiable political question. As the brief argued, the power to

* Editor's note: On April 9, 2009, the D.C. Circuit affirmed the district court's judgment of dismissal. *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009). The Supreme Court denied certiorari on October 5, 2009. 2009 U.S. LEXIS 6061.

recognize foreign sovereigns and disputed foreign territory is constitutionally committed to the President and is not subject to override by the courts or Congress. In that context, the brief explained that the executive branch's longstanding decision not to recognize sovereignty over Jerusalem is based on its determination of the foreign policy interests of the United States:

> . . . For over fifty years, it has been the consistent policy of the United States not to recognize any nation as having sovereignty over Jerusalem, leaving that issue to be decided by the parties through negotiations. . . .
>
> * * * *
>
> . . . [T]he United States has refrained from taking any position or action that could be interpreted as prejudging the status of Jerusalem in order to maintain its ability to work with the Israelis, Palestinians, and others toward a peaceful resolution of the Middle East Conflict. . . .

The U.S. brief then argued that if the D.C. Circuit decided to reach the merits of the case, it should find that § 214(d) is advisory, not mandatory. If the D.C. Circuit determined § 214(d) is mandatory, however, the brief argued that the court should find the legislation unconstitutional.

Excerpts follow from the brief's discussion of the constitutional commitment of the recognition power to the Executive, which rendered the case a nonjusticiable political question (footnotes, citations to the Joint Appendix, and some internal citations omitted); the full text is available at *www.state.gov/s/l/c8183.htm*. The litigation was pending at the end of 2008.*

* * * *

* Editor's note: On July 6, 2009, the D.C. Circuit affirmed the district court's judgment of dismissal. *Zivotofsky v. Secretary of State,* 571 F.3d 1227 (D.C. Cir. 2009). *Digest 2009* will discuss relevant aspects of the decision.

. . . This case implicates the power to recognize foreign sovereigns. As the district court recognized, that power is constitutionally committed to the Executive Branch alone and is not subject to judicial override. . . .

1. The Power to Recognize Foreign Sovereigns and Disputed Foreign Territory Is Constitutionally Committed to the President.

For at least 150 years, it has been settled law that recognition of foreign sovereigns is a constitutional power vested exclusively in the President. *Baker* [*v. Carr*], 369 U.S. [186,] 212 [(1962)] ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing.'"); *see also, e.g.,* [*Banco Nacional de Cuba v.*] *Sabbatino*, 376 U.S. [398,] 410 [(1964)]; [*United States v.*] *Pink*, 315 U.S. [203,] 229 [(1942)]; *Williams* [*v. Suffolk Ins. Co.*], 38 U.S. (13 Pet.) [415,] 420 [(1839)]; *see also Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 438 (D.C. Cir. 1981) (Supreme Court has recognized the "President's plenary power to recognize foreign sovereigns.").

It is equally well-established that the President's power to establish diplomatic relations "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *Pink*, 315 U.S. at 229. A necessary incident of the "power to determine the policy" of recognition is the authority to determine the circumstances under which the United States will recognize a foreign state's territorial claims. *See Baker*, 369 U.S. at 212 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory."); *Williams*, 38 U.S. (13 Pet.) at 420 (when the President, "in the exercise of his constitutional functions" has decided "a fact in regard to the sovereignty of any island or country" the determination is "conclusive on the judicial department").

2. Identification of Zivotofsky's Place of Birth on His Passport Implicates the Recognition Power.

In deciding to record only "Jerusalem" in the passports of American citizens born in that city, the Executive Branch exercised

its constitutional power to determine the circumstances under which it will recognize the territorial claims of a foreign sovereign. Zivotofsky nevertheless argues that "designation of a passport-holder's place of birth does not involve the 'recognition of foreign sovereigns.'" And he contends that his suit does not "request[] any formal declaration of Israel's sovereignty over any particular area." That argument is wrong.

A passport is a travel document issued by the United States showing the bearer's origin, identity, and nationality, if any, which is valid for the admission of the bearer into a foreign country. *See* 8 U.S.C. § 1101(a)(30). As the Supreme Court has recognized, a United States passport is an official government document, which is a communication from the United States to foreign governments, made on behalf of the bearer. *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("A passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer."); *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835) ("[A passport is] in the character of a political document."). The Executive Branch regulates which countries or geographic location may be recorded as a United States citizen's place of birth, based on the Executive's determination of which foreign state has sovereignty over the territory. . . .

The provisions implementing this policy are set out in the Foreign Affairs Manual—a collection of department organizational and functional policies, standards, and procedures derived from statutes, executive orders, and other agencies' directives—and are binding on State Department officials responsible for the preparation of the relevant United States Government documentation. As concerns Jerusalem specifically, the relevant FAM provision states explicitly that "Israel" may not be recorded as the place of birth of a United States citizen born in Jerusalem.

In its response to Zivotofsky's interrogatories, the State Department explained that "an official decision by the United States to begin to treat Jerusalem as a city located within Israel at the present time would represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century, with severe adverse consequences for U.S. national security interests." . . .

The State Department explained in jurisdictional discovery on remand that, if "Israel" "were to be recorded as the place of birth for a person born in Jerusalem, such a reversal of U.S. policy on Jerusalem's status would be immediately and publicly known" . . . . The effect of such "unilateral action" by the United States on one of the most highly sensitive issues in the peace negotiations between Israelis and Palestinians "would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress on the [peace process]". . . .

Because of the "highly sensitive, and politically volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel or as a city located within the sovereign territory of Israel." If the Secretary of State were to adopt a policy of identifying "Israel" in official documents as the place of birth of United States citizens born in Jerusalem, this act would invariably be seen as a recognition of Israeli sovereignty over Jerusalem in an official government document. . . .

* * * *

The Executive Branch has determined that it is in the United States' foreign policy interest to leave resolution of the issue of sovereignty over Jerusalem to the Israelis and Palestinians and, consequently not to recognize any nation's sovereignty over that city at present. Under longstanding Supreme Court precedent, that determination is "conclusive on the judicial department" and "obligatory on the people and government of the Union." *Williams*, 38 U.S. at 420.

3. Congress' Enactment of Section 214(d) Does Not Make Zivotofsky's Complaint Justiciable.

Zivotofsky contends that "the court's only role" in this case is "to construe and apply a federal statute"—Section 214(d). Because

Congress purportedly directed the Executive Branch to record "Israel" on the passports of United States citizens born in Jerusalem, Zivotofsky contends that the political question of Jerusalem's status "was decided *by the Congress*." For that reason, he contends, the case does not present any political question. That argument is mistaken.

As we have explained above, the Constitution exclusively assigns to the Executive the authority to recognize foreign states and to decide which foreign state has sovereignty over disputed foreign territory. . . . [B]ecause Congress does not share the recognition power and lacks authority to decide which foreign state has sovereignty over disputed foreign territory, Zivotofsky is wrong to suggest that enactment of Section 214(d) makes his complaint justiciable.

* * * *

Zivotofsky further argues that the State Department must comply with Section 214(d) because it previously acquiesced in a similar requirement regarding Taiwan. In 1994, Congress enacted a provision stating that the Secretary of State shall record the place of birth in a passport of a United States citizen born in Taiwan as "Taiwan." Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382 (1994), *as amended by* State Dep't: Technical Amendments, Pub. L. No. 103-415, § 1(r), 108 Stat. 4299 (1994). The Secretary subsequently decided to permit such citizens to record "Taiwan" as their place of birth. Zivotofsky contends that the State Department "should not be permitted to pick and choose among statutes" and should be forced to record "Israel" as the place of birth in the passports of United States citizens born in Jerusalem.

That argument lacks merit. Recognition decisions, like all questions of foreign policy, are inherently fact-based. *See, e.g.*, *Bancoult* [*v. McNamara*], 445 F.3d [427,] 433 [(D.C. Cir. 2006)] (foreign policy decisions "are delicate, complex, and involve large elements of prophecy" (quotation marks omitted)). The State Department determined that alteration of its passport policy concerning Taiwan was consistent with the United States' recognition that the People's Republic of China is the "sole legal government

of China" and "Taiwan is a part of China." By contrast, the State Department determined that recording Israel as the place of birth in passports of United States citizens born in Jerusalem would not be consistent with the United States' policy not to prejudge sovereignty over that city. These are quintessential foreign policy judgments.

The Constitution contains an exclusive, "textually demonstrable * * * commitment" of the recognition power to the President. *Baker*, 369 U.S. at 217. The Executive Branch has exercised that power by determining that the passports of American citizens born in Jerusalem will record only the city as the citizen's place of birth. Because neither the courts nor Congress has constitutional authority to second-guess that foreign-policy determination, this case in non-justiciable.

B. There Are No Judicially Manageable Standards for Resolving this Case.

* * * *

Zivotofsky suggests that Section 214(d) provides the standard by which the courts may resolve this case. As we have explained, that provision cannot supply the standard because Congress lacks the constitutional power to recognize foreign sovereigns. But even if the recognition power were shared between the political branches, this case would still be non-justiciable for lack of any judicially manageable standards. . . . [I]f a constitutional power is shared by the political branches, and if the judiciary has no independent standard by which to resolve an inter-branch dispute involving exercise of the power, then the court must dismiss the case as involving a nonjusticiable political question.

Even assuming that Congress shares with the Executive the power to decide the United States' recognition of disputed foreign territory, and assuming that Congress has directed the Executive Branch to recognize Israel's sovereignty over Jerusalem by recording "Israel" as the place of birth of United States citizens born in that city, there is still no basis for a court to review the Executive Branch's contrary decision. "The conduct of the foreign relations of our government is committed by the Constitution to the

executive and legislative—'the political'—departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (quotation marks omitted). Any dispute between the political branches on this inherently political matter should be resolved solely through the political process. . . . For these additional reasons, Zivotofsky's complaint is not justiciable.

* * * *

Cross References

Passports, **Chapter 1.B.**
Kosovo's independence and other states in Europe, **Chapter 17.A.1.**
UN Interim Administration Mission in Kosovo following Kosovo's independence, **Chapter 17.B.5.**
Russia/Georgia, **Chapter 18.A.1.c.**(3)

Chapter 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITY

1. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–1611, provides that, subject to international agreements to which the United States was a party at the time of enactment in 1976, a foreign state is immune from the jurisdiction of courts in the United States unless one of the specified exceptions in the statute applies. A foreign state is defined to include its agencies and instrumentalities. The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). Before the enactment of the FSIA, courts abided by "suggestions of immunity" from the State Department. When no suggestion was filed, however, the courts would make the determination by applying principles derived from State Department practice.

In the FSIA Congress codified the "restrictive" theory of sovereign immunity, under which a state is entitled to immunity with respect to its sovereign or public acts, but not those that are private or commercial in character. The United States had previously adopted the restrictive theory in the "Tate Letter" of 1952, reproduced at 26 Dep't State Bull. 678 at 984–85 (1952). *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711–15 (1976).

From the beginning the FSIA has provided certain other exceptions to immunity, such as by waiver or commercial activity. Over time, amendments to the FSIA incorporated additional exceptions, including one enacted in 1996 for acts of terrorism in certain circumstances, which was repealed in 2008 and replaced with a more expansive provision (discussed in A.1.a.(2) below). The FSIA's various statutory exceptions, set forth at 28 U.S.C. §§ 1605(a)(1)–(6) and § 1605A, have been subject to significant judicial interpretation in cases brought by private entities or persons against foreign sovereigns. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and participates, if at all, as *amicus curiae*.

The following items represent a selection of the relevant decisional material during 2008.

a. Exceptions to immunity

(1) Rights in immovable property: Permanent Mission of India to the United Nations v. City of New York

On February 8, 2008, the U.S. District Court for the Southern District of New York issued a decision in three related cases brought by the City of New York against the Permanent Mission of India to the United Nations, the Republic of the Philippines, and the Principal Resident Representative to the United Nations of the Mongolian People's Republic for failure to pay local property taxes on certain properties owned by the respective governments. *Permanent Mission of India to the United Nations v. City of New York*, 533 F. Supp. 2d 457 (S.D.N.Y. 2008). For discussion of the court's order, *see* B.3. below.

The district court's order followed several years of litigation that culminated in the U.S. Supreme Court's 2007 decision on jurisdiction in the India and Mongolia cases. On June 14, 2007, the Supreme Court held that the FSIA did not immunize the two governments and found jurisdiction pursuant to

28 U.S.C. § 1605(a)(4), which provides an exception to immunity under the FSIA where "rights in immovable property situated in the United States are in issue." *See Digest 2007* at 455–62; *Digest 2006* at 592–603.

(2) Acts of terrorism

(i) New legislation

On January 28, 2008, President George W. Bush signed into law the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 343. Section 1083(b) of the NDAA repealed 28 U.S.C. § 1605(a)(7), and § 1083(a) replaced it with a new exception to immunity under the FSIA relating to support of terrorism, 28 U.S.C. § 1605A. Section 1605A(a)(1) retains the earlier exception to the immunity of foreign sovereigns in claims "for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." The new provision also retains the exception's applicability only to a foreign state that "was designated as a state sponsor of terrorism at the time the act . . . occurred, or so designated as a result" but clarifies that the state must be so designated when the claim is filed or have been designated within six months before the claim is filed, subject to a provision concerning actions that are related to a pending action or are refiled as a result of the statutory amendment.

The new statute includes provisions expanding the types of actions that can be brought, expanding foreign states' liability for damages, and making it easier for plaintiffs to collect judgments. For example, § 1605A(a)(2) expands the category of individuals eligible to bring suit. Section 1605A(c) creates a new private cause of action for claims under § 1605A, and permits punitive damages awards in cases brought under

that cause of action. This subsection also makes a foreign state "vicariously liable for the acts of its officials, employees, or agents." Section 1605A(d) permits actions for "reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies" under certain circumstances.

Section 1605A and the conforming amendments contained in § 1083(b) of the NDAA also make it easier for plaintiffs to collect damages. Section 1605A(g) permits the filing of a notice of pending action with the district court, having the effect of establishing a lien of lis pendens "upon any real property or tangible personal property that is—(A) subject to attachment in aid of execution, or execution, under section 1610 [of the FSIA]; (B) located within that judicial district; and (C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity." Section 1083(b) of the NDAA also adds a new subparagraph (g) to § 1610 of the FSIA (exceptions to the immunity from attachment or execution), providing, subject to a separate provision concerning third-party joint property holders, that

> the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
> (B) whether the profits of the property go to that government;
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
> (D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

With respect to third-party joint property holders, the statute provides that "nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment."

Section 1083(c)(4) also provides that "[n]othing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) [EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States." Section 1503 of the EWSAA had authorized the President to suspend the application of any provision of the Iraq Sanctions Act of 1990 and also authorized the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 and any other provision of law that applies to countries that have supported terrorism." The President exercised that authority in 2003 to make inapplicable with respect to Iraq any provision of law that applies to countries that have supported terrorism, including, among others, then-§ 1605(a)(7).

Concerns about the effect of § 1083 of the NDAA on Iraq led President Bush to withhold his approval of the bill on December 28, 2007. President Bush expressed concern that § 1083 "would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts and because it would undermine the foreign policy and commercial interests of the United States." Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008," 43 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007).

Reflecting a compromise the Administration and Congress subsequently reached, § 1083(d) of the NDAA also contains a specific provision concerning applicability to Iraq. It authorizes the President to "waive any provision of [Section 1083] with respect to Iraq" if the President first determines that:

(A) the waiver is in the national security interest of the United States;
(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and
(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

On January 28, 2008, the same day the President signed the NDAA, discussed *supra*, he made the requisite findings and exercised his full authority under § 1083(d) by "waiv[ing] all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (Feb. 5, 2008).*

Excerpts follow from the memorandum of justification accompanying the President's determination. The full text of the memorandum is available at 73 Fed. Reg. 6573 (Feb. 5, 2008).

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* Editor's note: On December 22, 2008, the Security Council adopted Resolution 1859, which among other things extended the immunities the Security Council initially had provided for certain Iraqi funds in 2003. U.N. Doc. S/RES/1859. In a statement to the Security Council following the adoption of Resolution 1859, Ambassador Zalmay Khalilzad, U.S. Permanent Representative to the United Nations, stated that the resolution "helps facilitate more progress in Iraq by allowing immunities for Iraqi funds so that these funds are available for the Iraqi Government to implement its economic development plans and its plans for the additional or other sectors of Iraq." The full text of Ambassador Khalilzad's statement is available at *www.archive.usun.state.gov/press_releases/20081222_378.html*.

. . . Immediately upon enactment, Section 1083 would put at risk substantial Iraqi assets in the United States that are crucial to Iraq's recovery efforts—including the Development Fund for Iraq, the assets of the Central Bank of Iraq held by the Federal Reserve Bank of New York, and assets of Iraqi agencies or instrumentalities used in commercial transactions in the United States. Section 1083 would also expose Iraq to potential new liability by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq has relied, and by creating a new Federal cause of action backed by punitive damages. Any and all provisions of section 1083 may adversely affect Iraq or its agencies or instrumentalities, by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation. Such burdens would undermine the national security and foreign policy interests of the United States, including by weakening the ability of the democratically-elected government of Iraq to use Iraqi funds to promote political and economic progress and further develop its security forces.

* * * *

A waiver of all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof, is in the national security interest of the United States and will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq. In particular:

- Absent a waiver, section 1083 would have a potentially devastating impact on Iraq's ability to use Iraqi funds to expand and equip the Iraqi Security Forces, which would have serious implications for U.S. troops in the field acting as part of the Multinational Force-Iraq and would harm anti-terrorism and counter-insurgency efforts.
- Application of section 1083 to Iraq or any agency or instrumentality thereof will hurt the interests of the United States by unacceptably interfering with political and economic progress in Iraq that is critically important to bringing U.S. troops home.

- If applied to Iraq or any agency or instrumentality thereof, the provisions of section 1083 would redirect financial resources from the continued reconstruction of Iraq and would harm Iraq's stability, contrary to the interests of the United States. A waiver will ensure that Iraqi assets of the Central Bank of Iraq, the government and commercial entities in which Iraq has an interest, remain available to maintain macroeconomic stability in Iraq and support private sector development and trade.
- By providing for the maintenance of macroeconomic stability, the waiver of section 1083 will promote the consolidation of democracy in Iraq.
- Absent a waiver of section 1083, Iraq's ability to finance employment alternatives, vocational training, and job placement programs necessary to promote community reintegration and development efforts contributing to counterterrorism efforts would be harmed.
- By ensuring that Iraq and its agencies and instrumentalities are not subject to litigation or liability pursuant to section 1083, waiver of section 1083 will promote the close relationship between the United States and Iraq.

In addition, Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism. The November 26, 2007 Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship between the Republic of Iraq and the United States of America confirmed the commitment of the United States and Iraq to build an enduring relationship in the political, diplomatic, economic, and security arenas and to work together to combat all terrorist groups and international terrorism, including al-Qaida. This Declaration reinforced the crucial actions Iraq is taking against terrorist[] groups, including al-Qaida.

On August 3, 2008, President Bush signed into law the Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999. Among other provisions, the legislation contained language to make inapplicable to Libya the terrorism-related exceptions to immunity enacted by the NDAA, as well as in

28 U.S.C. § 1605(a)(7) and 28 U.S.C. § 1610 (insofar as § 1610, which sets out certain exceptions to immunity to attachment, relates to a judgment under § 1605A or § 1605(a)(7)).

(ii) Applicability of § 1605(a)(7) to Iraq

On January 9, 2009, the Supreme Court granted petitions for writs of certiorari in two cases, discussed below, and consolidated them for review of whether courts continued to have jurisdiction over claims against Iraq under § 1605(a)(7) following the President's 2003 waiver pursuant to § 1503 of the EWSAA, discussed *supra*, and the enactment of the NDAA. *Iraq v. Simon*, 129 S. Ct. 894 (2009) and *Iraq v. Beaty*, 129 S. Ct. 893 (2009).*

(A) Simon v. Iraq

On June 24, 2008, the U.S. Court of Appeals for the District of Columbia Circuit ruled that claims brought by U.S. citizens and their family members for torture and hostage-taking by Iraq during the 1990-91 Gulf War could proceed under the terrorism exception set forth in § 1605(a)(7). *Simon v. Iraq*, 529 F.3d 1187 (D.C. Cir. 2008). The court concluded that "notwithstanding the enactment of the NDAA, a court still may enter a judgment on the merits in such a case, which it could not do if it did not have jurisdiction over the case. . . . Because new § 1605A is inapplicable, that jurisdiction over pending

* Editor's note: On June 8, 2009, the Supreme Court issued its opinion reversing the two court of appeals decisions and concluding that "[w]hen the President exercised his authority [in 2003] to make inapplicable with respect to Iraq all provisions of law that apply to countries that have supported terrorism, the exception to foreign sovereign immunity for state sponsors of terrorism became inoperative as against Iraq. As a result, the courts below lacked jurisdiction; we therefore need not reach Iraq's alternative argument that the NDAA subsequently stripped jurisdiction over the cases." *Iraq v. Beaty*, 129 S. Ct. 2183, 2195 (2009). Relevant aspects of the Supreme Court's decision will be addressed in *Digest 2009*.

cases can be founded only upon former § 1605(a)(7)." The court also determined that the suits filed in 2003, alleging actions occurring in 1990-91, were not barred by the ten-year statute of limitations because "[t]he Congress first amended the FSIA to add a terrorism exception in 1996, before which Iraq was 'immune from suit'; hence the limitation period in § 1605(f) began to run in 1996 and expired in 2006." Finally, the court rejected Iraq's argument that the cases were barred by the political question doctrine, stating ". . . [t]he present actions undoubtedly present questions fit for judicial determination under Article III [of the U.S. Constitution]—to wit, whether in 1990-91 Iraq committed the torts alleged—regardless whether their resolution might affect the foreign relations of the Nation."

(B) Iraq v. Beaty

In December 2008 the United States filed a brief as *amicus curiae* at the invitation of the Supreme Court in support of a petition for writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit in *Iraq v. Beaty*, 480 F. Supp. 2d 60 (D.D.C. 2007), *aff'd*, 2007 U.S. App. LEXIS 27256 (D.C. Cir. 2007). The question presented was "[w]hether the Republic of Iraq continues to be amenable to suit under the exception to foreign sovereign immunity contained in 28 U.S.C. 1605(a)(7)." The U.S. brief argued that the question should be answered in the negative because President Bush had made § 1605(a)(7) inapplicable to Iraq in 2003. Presidential Determination 2003-23 "ma[d]e[] inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 ["FAA"] . . . and any other provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. 26,459 (May 7, 2003). In a formal message to Congress, the President specifically identified § 1605(a)(7) as one of the statutes made inapplicable to Iraq. 39 WEEKLY COMP. PRES. DOC. 647 (May 26, 2003). In making his determination, the President relied on the authority provided in § 1503 of the EWSAA.

As explained in the U.S. *amicus* brief:

> On March 19, 2003, a United States-led coalition began military operations to disarm Iraq and remove the Hussein regime from power. . . . In response to the dramatically changed circumstances in Iraq, Congress and the President took various steps to stabilize Iraq and reconstruct it as quickly as possible. On April 16, 2003, Congress enacted the [EWSAA]. In EWSAA Section 1503, Congress authorized the President to "suspend the application of any provision of the [Iraq Sanctions Act of 1990]" and further provided, *inter alia*, that "the President may make inapplicable with respect to Iraq section 620A of the [FAA] or any other provision of law that applies to countries that have supported terrorism." 117 Stat. 579.

In its *amicus* brief, the United States argued that the D.C. Circuit had erred in relying on its earlier precedent, holding that the statutory authority under EWSAA § 1503 did not encompass § 1605(a)(7). *See Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), finding that § 1503's applicability "was implicitly limited to 'provisions of law that call for economic sanctions and prohibit grants of assistance to state sponsors of terrorism.'" As the United States noted in its brief, *Beaty* provided the opportunity to review the holding in *Acree*, which had been dismissed on other grounds:

> . . . Because the *Acree* plaintiffs' claims were dismissed on other grounds, the government was not in a position to seek review of the majority's erroneous construction of EWSAA in that litigation. The present case provides an appropriate opportunity for the Court to review and correct the deeply flawed decision in *Acree*, because the District of Columbia Circuit summarily resolved this case on the basis of *Acree*.

The U.S. brief in *Beaty* argued that, contrary to the analysis of the court in *Acree* and *Beaty*, EWSAA § 1503 "unambiguously authorized the President to render inoperative as to Iraq any and all laws that apply specifically to countries

designated as state sponsors of terrorism. . . . The *Acree* majority's conclusion that Section 1503 should be confined to a narrower set of 'provisions that present obstacles to assistance and funding for the new Iraqi Government,' . . . imposes an atextual and unwarranted limitation on that statute." Furthermore,

> [i]n any event, Section 1605(a)(7) *is* a statute that, to use the words of the *Acree* majority, "present[s] obstacles to *** funding for the new Iraqi Government." As his Message to Congress explained, the President concluded that the "threat of attachment or other judicial process" against Iraqi assets necessary to stabilize and rebuild Iraq posed an "unusual and extraordinary threat *** to the national security and foreign policy of the United States." 39 Weekly Comp. Pres. Doc. at 647. It was for this reason that the President singled out Sections 1605(a)(7) and 1610 of the FSIA and Section 201 of the TRIA, all of which pertain to the entry and execution of judgments against terrorist states, as among those rendered inapplicable to Iraq by the President's exercise of his authority under the second proviso in Section 1503. Thus, even under the majority's implied limitation on the scope of Section 1503, it erred in refusing to defer to the President's determination that the prospect of billions of dollars in judgments would seriously undermine funding for the essential tasks of rebuilding and stabilizing Iraq.

Excerpts below from the U.S. brief address the further argument that *Acree* did not accord the proper deference to the President's authority to implement § 1503 and that the Court should grant the petition for writ of certiorari because "that decision threatens important national priorities with respect to the reconstruction of Iraq" (citations to other submissions in the case omitted). The full text of the U.S. brief is available at *www.usdoj.gov/osg/briefs/2008/2pet/6invit/toc3index.html*.

* * * *

C. To the extent there is any doubt whether Section 1503 encompasses Section 1605(a)(7), the President has made clear his judgment that it does. The President fully exercised his Section 1503 authority in Presidential Determination No. 2003-23, in which he made inapplicable to Iraq FAA Section 620A "and any other provision of law that applies to countries that have supported terrorism." 3 C.F.R. at 320. In his formal report to Congress, the President explicitly stated his conclusion that both Section 1503 and the Presidential Determination encompass "28 U.S.C. 1605(a)(7)." 39 Weekly Comp. Pres. Doc. at 647–648. Indeed, the President specifically referred to only three provisions as among the "other provision[s] of law" rendered inapplicable by his determination: Section 1605(a)(7); the FSIA's attachment provision, 28 U.S.C. 1610; and Section 201 of TRIA, 116 Stat. 2337, which creates especially favorable rules for the execution of judgments issued under Section 1605(a)(7). 39 Weekly Comp. Pres. Doc. at 647–648.

Because Congress entrusted implementation of Section 1503 to the President, and because the President has independent constitutional authority in the area of foreign affairs, the *Acree* majority erred in failing to accord any deference to his construction of that provision. The majority recognized that 28 U.S.C. 1605(a)(7) falls within the literal terms of EWSAA Section 1503, 370 F.3d at 52, and believed that the case presented "an exceedingly close question," *id.* at 51. In such circumstances, as then-Judge Roberts observed, well-established principles of judicial deference to the Executive's construction of ambiguous statutes should make this "an easy case." *Id.* at 64 n.2 (concurring). The majority, however, gave no such deference to the President's construction of Section 1503, apparently because there is some question in the District of Columbia Circuit as to "[t]he applicability of *Chevron* to presidential interpretations," as opposed to those made by his subordinates, which would undoubtedly have been entitled to deference. *Ibid.* (citing *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1325 (D.C. Cir. 1996)). But there is no sound basis to refuse deference to the President's reasonable exercise of a statutory authority entrusted to him, especially in the foreign affairs context, where the President generally enjoys great leeway under our Constitution and laws. See *Jama v. ICE*, 543 U.S. 335, 348 (2005) (noting the

Court's "customary policy of deference to the President in matters of foreign affairs"); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (Presidential action in foreign affairs context, authorized by Congress, "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation") (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

D. The Court should grant the petition for a writ of certiorari to resolve the EWSAA's effect on the continued availability of Section 1605(a)(7) as a basis for jurisdiction over claims against Iraq. The EWSAA reflected the dramatic changes in the United States' foreign policy with respect to Iraq following the successful removal of the Hussein regime. The President determined that the threat of litigation seeking to hold post-Saddam Iraq liable for billions of dollars in damages attributable to Hussein's support of terrorism presented a grave threat to the reconstruction of Iraq and establishment of a new, stable government and society, which are critically important foreign policy interests of the United States. 39 Weekly Comp. Pres. Doc. at 647–648. Therefore, in the exercise of authority granted him by the plain language of Section 1503, the President rendered Section 1605(a)(7) inapplicable to Iraq. The *Acree* majority's holding that the President's action was *ultra vires* is contrary to the statute's plain text and fails to accord the President the great deference he is due in the exercise of statutory authority conferred on him in connection with the conduct of the Nation's foreign affairs. Moreover, that decision threatens important national priorities with respect to the reconstruction of Iraq.

As demonstrated by the President's recent and extraordinary decision to withhold his approval of the initial version of the entire NDAA because of Section 1083 of that bill, the significant threat posed to Iraq's stability and redevelopment by terrorism-related lawsuits and enforcement actions has not diminished in the intervening years since the *Acree* decision. See 43 Weekly Comp. Pres. at 1641. Indeed, numerous suits asserting billions of dollars in damages against Iraq from the Hussein era remain pending in light of the *Acree* decision. . . .

* * * *

Responding to arguments by both claimants and Iraq, the U.S. brief also argued that the new legislation enacted in 2008, discussed in a.(2)(i) *supra*, had no effect on the outcome in *Beaty* "because when Congress enacted the NDAA in 2008, the courts had already been deprived of jurisdiction over respondent's claims by the President's 2003 exercise of his authority under the EWSAA," as excerpted below, and because that provision had been waived, along with the rest of § 1083 of the NDAA, with respect to Iraq.

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* * * *

A. The sole reason respondents give for denying certiorari is their contention that "Congress and the President have recognized the propriety of the *Acree* decision by establishing in federal law that § 1503 of the EWSAA of 2003 did not grant the President the authority to remove the jurisdiction of any court of the United States." In support of that assertion, respondents cite NDAA Section 1083(c)(4), which states that "[n]othing in section 1503 of [EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States." § 1083(c)(4), 122 Stat. 343. Respondents' reliance on Section 1083(c)(4) is mistaken. Section 1083(c)(4), which was adopted by a different Congress five years after the President exercised his authority under EWSAA Section 1503 and after the provision had expired, and which was immediately waived by the President, should be afforded no weight in interpreting EWSAA Section 1503.

This Court has frequently explained that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) . . . . Moreover, Section 1083(c)(4) does not create or modify any substantive law because the authorities contained in Section 1503 expired on September 30, 2005. . . . Section 1083(c)(4) therefore is merely a statement through which the 110th Congress sought to give its gloss on a no-longer-effective statute enacted five years earlier by a different Congress. But even assuming that

Section 1083(c)(4) as conceived had some substantive effect, it does not "establish[] * * * federal law" because it applies only to Iraq and the President immediately waived it, along with the rest of Section 1083, as to Iraq.

B. In its reply brief, Iraq urges the Court to consider as well whether the courts lack jurisdiction over respondents' claims for the independent reason that Section 1083 of the NDAA, combined with the President's waiver under that provision, deprived the courts of jurisdiction. The NDAA, however, has no effect on the courts' jurisdiction over respondents' claims. For the reasons stated above, the President's exercise of his authority under EWSAA Section 1503 had already permanently rendered Section 1605(a)(7) inapplicable to Iraq. To the extent NDAA Section 1083 purported to allow those claims to be asserted against Iraq under the newly enacted Section 1605A, the President's exercise of his waiver authority under Section 1083(d) precludes that course as well. See Presidential Determination No. 2008-9, 73 Fed. Reg. at 6571.

* * * *

C. The question of the NDAA's effect on respondents' lawsuit was not addressed by the court of appeals in this case because the NDAA was enacted after the court of appeals' decision. In *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), petition for cert. pending, No. 08-539 (filed Oct. 22, 2008), the court of appeals did address that issue and held, as a matter of statutory construction, that the NDAA's repeal of Section 1605(a)(7) was not intended to deprive the courts of jurisdiction over pending cases. See *id.* at 1192–1193 (relying on NDAA § 1083(c)(1), 122 Stat. 342, which provides that Section 1083 applies only to "any claim arising under section 1605A," and NDAA 1083(c)(3), 122 Stat. 343, which permits plaintiffs with pending 1605(a)(7) cases to refile a "[r]elated action[]" within 60 days of the later of "the date of the entry of judgment in the original action" or the date of the NDAA's enactment). For the reasons stated above, however, whether the *Simon* court correctly resolved the applicability of NDAA Section 1083 to pending cases as a general matter (e.g., for suits against other defendant countries) is irrelevant with respect

to this suit or any other against Iraq, because the President waived Section 1083 in its entirety with respect to Iraq.

* * * *

(iii) No unconstitutional delegation of congressional power under § 1605(a)(7): Owens v. Sudan

On July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a district court holding that "§ 1605(a)(7) includes no unconstitutional delegation of Congress's power to define the jurisdiction of the lower federal courts and that the Third Amended Complaint sufficiently alleges causation to meet § 1605(a)(7)'s jurisdictional requirement." *Owens v. Sudan*, 531 F.3d 884 (D.C. Cir. 2008). The case was brought by U.S. nationals who were injured in the August 7, 1998 bombings of the U.S. embassies in Nairobi and Dar es Salaam, and family members of those injured. *See also Digest 2006* at 578–81 and *Digest 2005* at 517–21.

The D.C. Circuit noted that it had already resolved the continuing applicability of § 1605(a)(7) following enactment of the NDAA in *Simon v. Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), discussed in a.(2)(ii)(A) *supra*. Excerpts follow from the court's conclusion that, contrary to Sudan's assertion, the role of the executive branch in designating a country as a state sponsor of terrorism, thus satisfying one of the bases of jurisdiction under § 1605(a)(7), does not violate separation of powers under the U.S. Constitution.

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. . . [The] exception to foreign sovereign immunity applies only where the foreign state has been "designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. § 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371) at the time the act occurred." 28 U.S.C. § 1605(a)(7)(A) (Supp. V. 2005). The Export

Administration Act of 1979 ("EAA") and the Foreign Assistance Act of 1961 ("FAA") assign to the Secretary of State the power to determine whether the government of a country "has repeatedly provided support for acts of international terrorism." 50 U.S.C. App. § 2405(j)(1)(A); 22 U.S.C. § 2371(a) (identical language).

Therefore, the jurisdiction of the court under this statute is dependent upon the designation of the foreign state (in this case, Sudan) as a state sponsor of terrorism by the Secretary. It is undisputed that on August 12, 1993, Secretary of State Warren Christopher exercised his authority under the EAA and designated Sudan a state sponsor of terrorism:

> In accordance with section 6(j) of the [EAA], I hereby determine that Sudan is a country which has repeatedly provided support for acts of international terrorism. The list of 6(j) countries as of this time therefore includes Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria.

Determination Sudan, 58 Fed. Reg. 52,523 (Oct. 8, 1993).

* * * *

. . . The Constitution assigns to Congress the power to define the jurisdiction of the lower federal courts. This power derives from Congress's power in Article I "[t]o constitute tribunals inferior to the Supreme Court," U.S.CONST. art. I, § 8, and in Article III to "ordain and establish" inferior courts, U.S. CONST. art. III, § 1. . . . Sudan's argument depends upon the proposition that the authority constitutionally apportioned to Congress to define the jurisdiction of the federal courts has been unconstitutionally delegated to the Executive by the statutory device allowing a department of the Executive Branch to make findings upon which the effectiveness of the jurisdictional grant partially depends.

We note at the outset that the delegation by Congress to the Executive is not nearly so broad as Sudan's styling of it might suggest. In the state sponsor of terrorism exception, Congress did not empower the Executive to create a statute-like definition or delineation of an area of jurisdiction within which the Article III courts might exercise judicial authority over otherwise immune foreign

sovereign states. Rather, Congress delineated the area of immunity and the exception to the immunity, delegating to the Executive only the authority to make a factual finding upon which the legislatively enacted statute and the judicially exercised jurisdiction would partially turn.

* * * *

A statute that delegates factfinding decisions to the President which rely on his foreign relations powers is less susceptible to attack on nondelegation grounds than one delegating a power over which the President has less or no inherent Constitutional authority. As the Supreme Court explained in *Zemel v. Rusk*, 381 U.S. 1 (1965),

> [i]t is important to bear in mind, in appraising this [delegation] argument, that because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.

Id. at 17. And as the Court noted in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), "requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed" may be unwise because in matters involving foreign relations the President must sometimes rely on confidential information and must also consider "the effect which his action may have upon our foreign relations." *Id.* at 321–22. . . .

* * * *

Section 1605(a)(7), like the statutes at issue in *Jones* [*v. United States*, 137 U.S. 202 (1890)] and *Curtiss-Wright*, predicates its operation on an Executive factfinding in an area in which he has considerable constitutional authority—foreign affairs. And unlike

the prior cases, the particular factfinding delegated to the Executive Branch by § 1605(a)(7) is just one of many preliminary conditions upon which this Court's jurisdiction is based. In order to exercise jurisdiction, we must also ensure that the plaintiffs seek money damages for personal injury or death, that the injury was caused by "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act," that the act was perpetrated by an official, employee, or agent of the foreign (terrorist) state "while acting within the scope of his or her office, employment, or agency," that the foreign state had a chance to arbitrate the claim "if the act occurred in the foreign state[,]" and that the claimant or victim was a United States national when the act occurred. 28 U.S.C. § 1605(a)(7). Thus it is well within the Supreme Court's precedent to hold that the delegation of the particular factfinding authority in § 1605(a)(7) does not violate the separation of powers inherent in the Constitution.

Finally, we note that § 1605(a)(7) is not the only component of the FSIA that predicates our jurisdiction, in part, upon an Executive factfinding. The FSIA in its entirety depends upon the President's decision to recognize an entity as a foreign nation because the FSIA only applies to recognized nations.

Sudan does not dispute this delegation of factfinding authority, presumably because it is settled that the decision to recognize a foreign state "is exclusively a function of the Executive." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964). The President's power to recognize foreign sovereignties not only impacts our jurisdiction under the FSIA; it also directly impacts the alienage jurisdiction of the federal courts, which requires that a civil action be between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. § 1332(a)(2); *see, e.g.*, *Bank of Hawaii v. Balos*, 701 F. Supp. 744, 747 (D. Haw. 1988) (holding that the Republic of the Marshall Islands is a foreign state for the purpose of alienage jurisdiction, relying on the fact that "both the Congress and the President have indicated that the RMI is henceforth to be treated as an independent sovereign."). A delegation to the Executive Branch to determine whether a foreign sovereign "has repeatedly provided support for acts of international terrorism,"

50 U.S.C. App. § 2405(j)(1)(A), is certainly a narrower conferrence of authority than one that permits the President to determine whether an entity is a recognized nation at all.

b. Effect of dismissal on grounds of immunity in case to settle ownership of assets: Republic of the Philippines v. Pimentel

On June 12, 2008, the Supreme Court reversed a judgment of the U.S. Court of Appeals for the Ninth Circuit and remanded the case with instructions to order the lower court to dismiss an interpleader action brought to settle ownership of certain assets allegedly misappropriated by Ferdinand Marcos when he was President of the Republic of the Philippines ("Philippines" or the "Republic"). *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180 (2008). Merrill Lynch, Pierce, Fenner & Smith, which held the assets at issue in the name of Arelma S.A., created by Marcos in 1972, brought the interpleader action in 2000 against various defendants with claims to the assets, including the Philippines and the Philippine Presidential Commission on Good Governance ("PCGG" or "Commission"). The lower court found that the Philippines and the PCGG were immune but denied their motion to dismiss the action on the grounds that they were not indispensable parties under the federal rules of procedure concerning compulsory joinder. The Ninth Circuit then held that the action could proceed without the Philippines and the PCGG as parties.

In October 2007 the United States filed a brief as *amicus curiae* supporting the petition by the Philippines and others for writ of certiorari in the U.S. Supreme Court. *See Digest 2007* at 470–77. The Supreme Court granted the petition on December 3, 2007, and in January 2008 the United States filed an *amicus* brief on the merits. The U.S. brief argued that "[t]he lower courts' Rule 19(b) analysis failed to afford adequate weight to the Republic's immunity" and critiqued the Ninth Circuit's analysis of each of the Rule 19(b) factors. *See www.usdoj.gov/osg/briefs/2007/3mer/1ami/2006-1204.mer.ami.html*.

Excerpts below from the Court's opinion provide a brief background and explain the basis for the Court's conclusion that the Ninth Circuit "gave insufficient weight to the foreign sovereign status of the Republic and the Commission," in allowing the interpleader action to proceed without the Republic and the Commission and that "the court further erred in reaching and discounting the merits of their claims."

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* * * *

B

In 1972, Ferdinand Marcos, then President of the Republic, incorporated Arelma, S. A. (Arelma), under Panamanian law. Around the same time, Arelma opened a brokerage account with Merrill Lynch, Pierce, Fenner & Smith Inc. (Merrill Lynch) in New York, in which it deposited $2 million. As of the year 2000, the account had grown to approximately $35 million. Alleged crimes and misfeasance by Marcos during his presidency became the subject of worldwide attention and protest. A class action by and on behalf of some 9,539 of his human rights victims was filed against Marcos and his estate, among others. The class action . . . resulted in a nearly $2 billion judgment for the class. See *Hilao v. Estate of Marcos*, 103 F. 3d 767 (CA9 1996). We refer to that litigation as the Pimentel case and to its class members as the Pimentel class. . . . The Pimentel class claims a right to enforce its judgment by attaching the Arelma assets held by Merrill Lynch. The Republic and the Commission claim a right to the assets under a 1955 Philippine law providing that property derived from the misuse of public office is forfeited to the Republic from the moment of misappropriation. . . .

After Marcos fled the Philippines in 1986, the Commission was created to recover any property he wrongfully took. . . . In 1991, the Commission asked the Sandiganbayan, a Philippine court of special jurisdiction over corruption cases, to declare forfeited to the Republic any property Marcos had obtained through misuse of his office. That litigation is still pending in the Sandiganbayan.

. . . Facing claims from various Marcos creditors, including the Pimentel class, Merrill Lynch . . . filed an interpleader action under 28 U.S.C. § 1335. . . .

* * * *

After being named as defendants in the interpleader action, the Republic and the Commission asserted sovereign immunity under the . . . FSIA . . . They moved to dismiss pursuant to Rule 19(b), based on the premise that the action could not proceed without them. . . .

* * * *

We turn to the question whether the interpleader action could proceed in the District Court without the Republic and the Commission as parties.

Subdivision (a) of Rule 19 [Required Joinder of Parties] states the principles that determine when persons or entities must be joined in a suit. The Rule instructs that nonjoinder even of a required person does not always result in dismissal. Subdivision (a) opens by noting that it addresses joinder "if Feasible." Where joinder is not feasible, the question whether the action should proceed turns on the factors outlined in subdivision (b). . . .

* * * *

The District Court and the Court of Appeals failed to give full effect to sovereign immunity when they held the action could proceed without the Republic and the Commission. Giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine. See, *e.g., id.,* at 486 ("[F]oreign sovereign immunity is a matter of grace and comity"); *National City Bank of N. Y. v. Republic of China*, 348 U.S. 356, 362, and n.7 (1955) (foreign sovereign immunity derives from "standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign" (quoting *Schooner Exchange* [*v. McFaddon*, 7 Cranch, 116,] 136–137, 143–144 [(1812)])).

Comity and dignity interests take concrete form in this case. The claims of the Republic and the Commission arise from events

of historical and political significance for the Republic and its people. The Republic and the Commission have a unique interest in resolving the ownership of or claims to the Arelma assets and in determining if, and how, the assets should be used to compensate those persons who suffered grievous injury under Marcos. There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause. Then, too, there is the more specific affront that could result to the Republic and the Commission if property they claim is seized by the decree of a foreign court. Cf. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36 (1945) (pre-FSIA, common-law doctrine dictated that courts defer to executive determination of immunity because "[t]he judicial seizure" of the property of a friendly state may be regarded as "an affront to its dignity and may . . . affect our relations with it").

* * * *

Though this Court has not considered a case posing the precise question presented here, there are some authorities involving the intersection of joinder and the governmental immunity of the United States. . . . These cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.

The Court of Appeals accordingly erred in undertaking to rule on the merits of the Republic and the Commission's claims. . . . Here, the claims of the absent entities are not frivolous; and the Court of Appeals should not have proceeded on the premise that those claims would be determined against the sovereign entities that asserted immunity.

* * * *

. . . Rule 19 cannot be applied in a vacuum, and it may require some preliminary assessment of the merits of certain claims. . . . [I]t was improper to issue a definitive holding regarding a nonfrivolous, substantive claim made by an absent, required entity that was entitled by its sovereign status to immunity from suit. That privilege is

much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection.

* * * *

. . . [T]he decision to proceed in the absence of the Republic and the Commission ignored the substantial prejudice those entities likely would incur. This most directly implicates Rule 19(b)'s first factor, which directs consideration of prejudice both to absent persons and those who are parties. We have discussed the absent entities. As to existing parties, we do not discount the Pimentel class' interest in recovering damages it was awarded pursuant to a judgment. Furthermore, combating public corruption is a significant international policy. The policy is manifested in treaties providing for international cooperation in recovering forfeited assets. See, *e.g.,* United Nations Convention Against Corruption, G.A. Res. 5814, chs. IV and V, U.N. Doc. A/RES/58/4, pp. 22, 32 (Dec. 11, 2003) (reprinted in 43 I.L.M. 37 (2004)); Treaty on Mutual Legal Assistance in Criminal Matters Art. 16, Nov. 13, 1994, S. Treaty Doc. No. 104-18 (1995). This policy does support the interest of the Pimentel class in recovering damages awarded to it. But it also underscores the important comity concerns implicated by the Republic and the Commission in asserting foreign sovereign immunity. The error is not that the District Court and the Court of Appeals gave too much weight to the interest of the Pimentel class, but that it did not accord proper weight to the compelling claim of sovereign immunity.

* * * *

As to the second Rule 19(b) factor—the extent to which any prejudice could be lessened or avoided by relief or measures alternative to dismissal, Fed. Rule Civ. Proc. 19(b)(2)—there is no substantial argument to allow the action to proceed. No alternative remedies or forms of relief have been proposed to us or appear to be available. . . . If the Marcos estate did not own the assets, or if the Republic owns them now, the claim of the Pimentel class likely fails; and in all events, if there are equally valid but competing

claims, that too would require adjudication in a case where the Republic and the Commission are parties. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 534, and n.16 (1967); *Russell v. Clark's Executors*, 7 Cranch 69, 98–99 (1812) (Marshall, C. J.); *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F. 2d 765, 774 (CADC 1986) ("Conflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence" (citing *Williams v. Bankhead*, 19 Wall. 563, 570–571 (1874))).

C

As to the third Rule 19(b) factor—whether a judgment rendered without the absent party would be adequate, Fed. Rule Civ. Proc. 19(b)(3)—the Court of Appeals understood "adequacy" to refer to satisfaction of the Pimentel class' claims. But adequacy refers to the "public stake in settling disputes by wholes, whenever possible." *Provident Bank* [*v. Patterson*], 390 U.S. [102,] 111 [(1968)]. . . . Going forward with the action without the Republic and the Commission would not further the public interest in settling the dispute as a whole because the Republic and the Commission would not be bound by the judgment in an action where they were not parties.

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D

As to the fourth Rule 19(b) factor—whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder, Fed. Rule Civ. Proc. 19(b)(4)—the Court of Appeals made much of what it considered the tort victims' lack of an alternative forum should this action be dismissed. This seems to assume the plaintiff in this interpleader action was the Pimentel class. It is Merrill Lynch, however, that has the statutory status of plaintiff as the stakeholder in the interpleader action.

* * * *

Any prejudice to Merrill Lynch in this regard is outweighed by prejudice to the absent entities invoking sovereign immunity.

Dismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity. See, *e.g.*, *Verlinden*, 461 U.S., at 497 ("[I]f a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States").

* * * *

The balance of equities may change in due course. One relevant change may occur if it appears that the Sandiganbayan cannot or will not issue its ruling within a reasonable period of time. Other changes could result when and if there is a ruling. If the Sandiganbayan rules that the Republic and the Commission have no right to the assets, their claims in some later interpleader suit would be less substantial than they are now. If the ruling is that the Republic and the Commission own the assets, then they may seek to enforce a judgment in our courts; or consent to become parties in an interpleader suit, where their claims could be considered; or file in some other forum if they can obtain jurisdiction over the relevant persons. . . .

* * * *

c. Service of process requirements for suits against foreign sovereigns

On December 31, 2008, in response to a request for its views from the U.S. District Court for the District of Columbia, the United States submitted a Statement of Interest in a case brought by a U.S. plaintiff against the People's Republic of China and Citibank, N.A. *Dorsey v. Gov't of China*, Civil Action No. 1:08-CV-01276 (PLF) (D.D.C.). The plaintiff sought damages and injunctive relief in connection with $130 in overcharges he alleged he paid to a teahouse in Beijing in 2007. The U.S. Statement of Interest, excerpted below, set forth the position that the record did not reflect that the plaintiff had satisfied the requirements for service of process in suits against foreign sovereigns under the FSIA. (Most footnotes

are omitted.) The full text of the Statement of Interest is available at *www.state.gov/s/l/c8183.htm.*[*]

* * * *

Discussion

The FSIA provides the sole basis for securing jurisdiction over a foreign sovereign in a United States court. . . . Personal jurisdiction exists under the FSIA where there is both subject matter jurisdiction and proper service. See 28 U.S.C. § 1330(a)–(b); Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1548 n.11 (D.C. Cir. 1987) ("In other words, under the FISA, subject matter jurisdiction plus service of process equals personal jurisdiction.") (internal quotation omitted). . . . Section 1608(a) outlines several methods for serving process upon a foreign state or its political subdivisions, and § 1608(b) provides methods for service on agencies or instrumentalities of a foreign state.

Because the PRC is a "foreign state" as that term has consistently been defined by courts applying § 1608, . . . service in this case is governed by § 1608(a). Section 1608(a) outlines, in hierarchical order, four alternative procedures for serving process on a foreign state. See 28 U.S.C. § 1608(a)(1)–(4). The first two procedures allow for service according to a special arrangement between the parties or "an applicable international convention on service of judicial documents." Id. § 1608(a)(1)–(2). If neither of these methods is feasible, service of process may be accomplished under § 1608(a)(3),

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

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* Editor's note: The court dismissed the case on May 14, 2009. *Dorsey v. Gov't of China*, 2009 WL 1370937 (D.D.C. 2009).

If service cannot be made in that fashion within thirty days, it must be done under § 1608(a)(4), which provides for service

> by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

28 U.S.C. § 1608(a)(3)–(4).

None of these procedures appears to have been followed here. The record does not reflect any special arrangement between the PRC and plaintiff, id. § 1608(a)(1), or that service was attempted through the only international convention that might be applicable to this case, id. § 1608(a)(2).[3] . . . Mailing a copy of the summons and complaint to the Chinese Embassy does not satisfy any of the service requirements of the FSIA, much less the statutory mandate that the methods of service be pursued serially when necessary.

* * * *

[3] The only such convention that might govern service of process in this situation is the Hague Service Convention, a multilateral treaty formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law. See Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 ("Hague Service Convention"). Each signatory of the Hague Service Convention has established a Central Authority that receives the papers and effects service on the named party unless the Authority determines that such service would offend the nation's sovereignty or security. Some states make such a determination when confronted with a lawsuit against the state itself. See id., arts. 3, 5, 13, and 15. Here, the record is devoid of any indication that plaintiff delivered service papers to the PRC's designated Central Authority, the Ministry of Justice in Beijing.

2. Execution of Judgments: Attachment Under the Terrorism Risk Insurance Act

In September 2008, at the invitation of the Supreme Court, the United States filed a brief as *amicus curiae* supporting reversal of the 2007 decision of the U.S. Court of Appeals for the Ninth Circuit that the holder of a wrongful death default judgment against Iran could enforce that judgment against certain property of the Iranian Ministry of Defense under the terms of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 28 U.S.C. § 1610 note. *Ministry of Def. & Support v. Cubic Def. Sys.*, 495 F.3d 1024 (9th Cir. 2007). *See Digest 2007* at 477–85; *see also Digest 2006* at 612–21; *Digest 2005* at 549–55; and *Digest 2004* at 516–17. In its 2007 opinion, the Ninth Circuit held that the Iranian property at issue—a $2.8 million judgment obtained in a contract dispute against an American company—satisfied the criteria for attachment under § 201(a) of TRIA.

The U.S. brief expressed the view that the Ninth's Circuit's decision should be reversed because when the respondent accepted a payment of $2.3 million under TRIA in 2003, in partial satisfaction of his judgment against Iran, he relinquished any right to attach property "at issue in claims against the United States" before the Iran–U.S. Claims Tribunal. The United States asserted that the property the respondent sought to attach was "at issue" in a pending Iranian claim before the tribunal.

Excerpts below provide the U.S. analysis concerning the proper interpretation of TRIA. (Footnotes, references to other submissions, and cross references are omitted.) The full text of the brief is available at *www.usdoj.gov/osg/briefs/2008/3mer/1ami/2007-0615.mer.ami.html*.*

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* Editor's note: On April 21, 2009, the U.S. Supreme Court reversed the Ninth Circuit's judgment, finding, among other things, that Elahi had waived his right to attach the Judgment. *Ministry of Def. v. Elahi*, 129 S. Ct. 1732 (2009). Relevant aspects of the Court's opinion will be discussed in *Digest 2009*.

I. BY ACCEPTING PAYMENT FROM THE UNITED STATES, RESPONDENT RELINQUISHED HIS RIGHT TO ATTACH THE CUBIC JUDGMENT

A. The Cubic Judgment Is "At Issue" Before The Claims Tribunal

To help ensure that American victims of state-sponsored terrorism would receive "some measure of justice," 148 Cong. Rec. 23,121 (2002) (statement of Sen. Harkin), TRIA expands the class of judgment creditors eligible to receive payments from the United States for judgments awarded against "terrorist part[ies]." TRIA § 201(a), 116 Stat. 2337. . . . TRIA requires those who accept payment under that statute to relinquish the right to attach any property "at issue in claims against the United States before an international tribunal." TRIA § 201(c)(4), 116 Stat. 2339.

The threshold question presented by this case is whether the Cubic judgment is "at issue" in a claim against the United States in the Claims Tribunal.** That boils down to a matter of statutory interpretation. Although neither VPA [Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386] nor TRIA defines the term "at issue," its "ordinary meaning," *United States v. Santos*, 128 S. Ct. 2020, 2024 (2008), and statutory context, *Dolan v. USPS*, 546 U.S. 481, 486 (2006), make clear that the phrase encompasses, at the very least, situations in which the claim before the Tribunal relates to the same subject matter as the property attached, such that the Tribunal could be called upon to make rulings with respect to the property. The filings of Iran and the United States in *Case B/61* demonstrate that the Cubic judgment is at issue in that proceeding.***

** Editor's note: As noted elsewhere in the U.S. brief, the Algiers Accords of January 19, 1981, 20 I.L.M. 224, which resolved the crisis between the United States and Iran caused by the seizure of American hostages in Teheran in 1979, established a Claims Tribunal in the Hague "to resolve, inter alia, claims of the United States and Iran concerning the other's performance under the Accords."

*** Editor's note: As noted elsewhere in the U.S. brief, "Iran and the Ministry of Defense filed *Case B/61 (Islamic Republic of Iran v. United States, No. B/61)* before the Claims Tribunal on January 19, 1982, seeking a decree requiring the United States to issue export licenses for the military goods the Ministry of Defense had contracted to purchase from Cubic before the 1979 Iranian revolution. Alternatively, Iran and the Ministry of Defense

1. The phrase "at issue" is commonly understood, when used in connection with litigation, to describe matters that the tribunal may find it necessary to resolve in its decision in a contested proceeding. . . . Accordingly, property is "at issue" before the Claims Tribunal if it might reasonably be expected to be addressed in its decision.

That conclusion is further supported by the broader context of the relinquishment provision. A person who receives less than full payment under TRIA for his compensatory damages against Iran need not relinquish all the rights that the VPA required a recipient of full compensation to waive. See TRIA § 201(c)(4), 116 Stat. 2339. Significantly, however, TRIA *does* continue to require the recipient of partial payment to waive his right of "enforcement against property that is at issue in claims against the United States before an international tribunal or is the subject of awards by such tribunal." *Ibid.*

Congress's use of the phrase "subject of awards" to describe the scope of relinquishment with respect to matters already adjudicated by the Tribunal is also significant. After the Tribunal has issued its award, the award's scope is fixed and determines what matters it actually resolved. . . . In contrast, when a claim is still in litigation, it is impossible to predict with certainty what the "subject of" the award will be, and so care must be taken not to interfere with anything that is "at issue" in the proceedings that the Tribunal may find it necessary to address in its decision.

* * * *

2. . . . Both Iran and the United States have recognized that the Cubic judgment and *Case B/61* relate to the same injury claimed by Iran and that the Tribunal must therefore consider the *ICC Award*[****] and Cubic judgment in deciding *Case B/61*.

* * * *

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sought compensation for what Iran had paid to Cubic and consequential damages. . . ."

**** Editor's note: As noted elsewhere in the U.S. brief:

> In 1991 petitioner sought arbitration against Cubic in Switzerland before the International Court of Arbitration of the International Chamber of Commerce (ICC). See *Ministry of Def. & Support for*

Most significantly here, the parties have repeatedly stated that the Cubic judgment could affect the extent of Iran's damages and, in the view of the United States, whether Iran even has a valid claim in *Case B/61*. . . .

* * * *

3. Moreover, allowing respondent to attach the Cubic judgment would frustrate the evident purposes of Congress in adopting the relinquishment provision.

VPA and TRIA provide a mechanism by which certain judgment creditors of Iran may choose to accept payment from the United States for the value (or a pro rata share of the value) of their compensatory damages. VPA § 2002(a), 114 Stat. 1541; TRIA § 201(c)(4), 116 Stat. 2337. While some of the funds for such payments come from rents on Iranian diplomatic and consular properties, the vast majority of the funds comes from the United States Treasury. VPA § 2002(b)(2)(A) and (B), 114 Stat. 1543. Congress insisted that those who receive payments under VPA or TRIA should forego—in exchange for the funds they received—the right to engage in attachment proceedings that could increase the United States' liability to Iran in claims before the

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the Armed Forces of the Islamic Republic of Iran v. Cubic Int'l Sales Corp., No. 7365/FMS at 7, *reprinted in* 13 Mealey's Int'l Arbitration Report (Oct. 1998) at G-4 (ICC Award).

* * * *

The ICC rendered its award in May 1997. The arbitration panel found that in mid-1979, before Iran's assets were blocked and before Iran made the final payments for the ACMR, the parties reached a "common understanding that the Contracts would be discontinued and that Cubic would try to resell the equipment," with a later "settlement of the accounts." *ICC Award* 30, 37. "Depending on the result of the attempt to resell the System, either [petitioner] became entitled to be (partly) reimbursed for the payments it had made to Cubic, or Cubic became entitled to claim, in balance, an additional payment from [petitioner]." *Id.* at 48. In September 1981, Cubic sold to Canada a modified version of the ACMR, which was installed by October 1982. *Id.* at 52. After crediting petitioner's advance payments and Cubic's claims for compensation, the arbitrators awarded petitioner the balance, approximately $2.8 million, plus interest. *Id.* at 81, 84. . . .

Tribunal or frustrate the United States' ability to recoup its payments through appropriate offsets. VPA § 2002(c), 114 Stat. 1543. Otherwise, the United States could be put in the position of paying twice, once directly, under TRIA, and once indirectly, by compensating Iran for the attached property.

Congress understood, as this Court also observed, that the treatment of "foreign assets" was a central feature of the Algiers Accords and that allowing individual claimants to impose "attachments, garnishments, or similar encumbrances" could create serious problems for the Nation's ability to implement its foreign policy. *Dames & Moore*, 453 U.S. at 673. Whereas *Dames & Moore* discussed how attachments could frustrate the President's ability to *negotiate* a resolution to the hostage crisis, TRIA reflects Congress's understanding that they can also frustrate the *implementation* of that resolution.

This case exemplifies the concerns that motivated Congress to insist that Iran's judgment creditors relinquish attachment rights to property at issue before the Tribunal as a quid pro quo of accepting payment under TRIA. Respondent applied for and accepted $2.3 million in TRIA funds. If respondent is permitted to successfully execute on the Cubic judgment, he could deprive the United States of a defense against liability and would, at the very least, eliminate an offset and thereby increase by millions of dollars the amount the United States might be found to owe Iran. . . .

In addition, the legal arguments respondent advances in support of the attachment could, if adopted, undermine the United States' position before the Tribunal.

Respondent urges this Court to rule, as the court of appeals did, that the Cubic judgment is "blocked" on the ground that the judgment represents Iran's liquidated "interest in the blocked military asset, *i.e.*, the ACMR [Air Combat Maneuvering Range]." But, as noted below, the United States has argued before the Tribunal that Iran had no ownership interest in the ACMR as of January 19, 1981. And, because Iran had no title to the ACMR in January 1981, "the United States had no obligation to return that property to Iran under the Algiers Accords." Acceptance by this Court of respondent's contrary arguments could undermine the United States' litigation position in *Case B/61*.

More broadly, petitioner states that it would regard a holding that its interest in the Cubic judgment is blocked (because it was never *un*blocked) as a "treaty default" by the United States under the Algiers Accords with respect not only to "the Cubic judgment, but a whole host of assets 'at issue' in *Cases B1*, *B61* and *A15* before the Claims Tribunal." Congress's purpose in requiring relinquishment was precisely to prevent those who had accepted payment under TRIA from undertaking further attachments that might create such international disputes. Cf. *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 198 (1857) (avoiding interpretation of statute that would confer "a right which would in any degree impair the constitutional powers of the legislative or executive departments of the Government, or which might put it in [individuals'] power to embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations").

B. The Court Of Appeals' Reasons For Finding The Cubic Judgment Not "At Issue" Are Without Merit

In concluding that the Cubic judgment was not "at issue" before the Claims Tribunal, the Ninth Circuit relied on the fact that "Claim B/61 addresses what liability the United States incurred by failing to restore * * * the ACMR, as required under the Algiers Accords," whereas the Cubic judgment "resolved Cubic's liability to Iran for non-delivery of the ACMR" based on Cubic's "contractual obligations." But TRIA's relinquishment provision depends not on an identity of parties or theories of liability, but on whether there is a substantive overlap between the attached property and the Tribunal proceeding.

The rule against double recoveries demonstrates that, contrary to the view of the court below, there need not be an identity of parties and legal theories for the judgment in one action to be at issue in a second proceeding. . . .

As *Futura Trading* [*v. National Iranian Oil Co.*, 13 Iran–U.S. C.T.R. 99 (1986)] demonstrates, the Claims Tribunal follows the double-recovery rule. . . .

* * * *

3. Foreign Officials

a. Immunity of members of special (ad hoc) diplomatic missions

On August 1, 2008, the U.S. District Court for the District of Columbia dismissed for lack of jurisdiction a suit brought by practitioners of the Falun Gong movement in the People's Republic of China ("PRC") against Bo Xilai ("Minister Bo"), the former PRC Minister of Commerce. *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008). The plaintiffs brought their claims under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 note, for human rights violations that Chinese government personnel under Minister Bo's supervision allegedly committed against Falun Gong members. The plaintiffs handed a summons and complaint to Minister Bo while he was in Washington, D.C., at the invitation of the United States to participate as a member of the official PRC diplomatic delegation to the annual meeting of the U.S.–China Joint Commission on Commerce and Trade.

On July 24, 2006, in response to a request from the court for its views, the United States submitted a Suggestion of Immunity and Statement of Interest. The United States asked the court to find Minister Bo, as a member of a special diplomatic mission, immune from service of process and thus not subject to the court's jurisdiction in this case. On December 6, 2006, the United States filed a Further Statement of Interest in Support of the United States' Suggestion of Immunity; *see Digest 2006* at 662–80.

On June 30, 2008, the United States made a third submission, which responded to the plaintiffs' assertion that Minister Bo was no longer immune from service of process because he was no longer a Chinese government official. The U.S. submission stated:

> The issue before the Court is whether Defendant Bo Xilai was immune from service *at the time the service was attempted*. As set forth in our Suggestion of Immunity,

> the Department of State determined that, at the time of that attempt, Minister Bo was in the United States on a special diplomatic mission. Minister Bo was therefore immune from U.S. jurisdiction for the duration of his special diplomatic mission in this country, and could not lawfully be served with compulsory process. . . .
>
> It is well established that a foreign diplomat's immunity from process is determined based upon diplomatic status at the time of attempted service.

The full text of the 2008 U.S. submission is available at *www.state.gov/s/l/c8183.htm*.

In its August 2008 opinion dismissing the suit, the district court stated in part:

> Here, the Department of State has concluded that during the course of his official visit as part of the PRC's formal delegation, Minister Bo functioned "as an official diplomatic envoy of the PRC." Moreover, the Legal Advisor of the Department of State considers the visit of Minister Bo in April 2004 to have been a "special diplomatic mission to the United States that rendered Minister Bo immune from service of process." According due deference to the Executive Branch, the Court will therefore defer to the Executive's determination that Minister Bo was immune from service of process for the duration of the special diplomatic mission. As a result, any service of process upon Minister Bo was legally void.

b. Immunity of foreign officials from criminal jurisdiction

On November 3, 2008, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixtieth session. With respect to the ILC's

consideration of the issue of immunity of state officials, Mr. Simonoff stated:

> The assertion of criminal jurisdiction over the officials of other states implicates some of the most basic principles of international law, notably the sovereign equality of States. A clear and comprehensive set of rules to govern the immunity of State officials from foreign criminal jurisdiction could prove of enormous benefit to the international community. It must be born in mind, however, that a set of such rules that does not strike the right balance between one State's interest in having its officials fulfill their duties free from fear of subsequent prosecution for doing so and another State's interest in prosecuting those whose unlawful conduct causes harm to itself, its citizens, or its territory, or, in the case of properly asserted universal jurisdiction, the international community as a whole, is unlikely to receive wide support. We urge the Commission to continue in this endeavor with caution and great care.

The full text of Mr. Simonoff's statement and the ILC report are available at *www.state.gov/s/l/c8183.htm* and *http.untreaty.un.org/ilc/reports/2008/2008report.htm*, respectively.

B. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

1. Persona Non Grata

On September 11 and 12, 2008, the United States sent separate diplomatic notes to the embassies of Bolivia and Venezuela, advising each embassy that, in accordance with Article 9(1) of the Vienna Convention on Diplomatic Relations, the United States had declared its ambassador to be persona non grata. Article 9(1) permits a receiving state "at any time and without having to explain its decision, [to] notify the sending State that

the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. . . ." The U.S. note to the Embassy of the Republic of Venezuela provided:

> The Department of State informs the Embassy of the Republic of Venezuela that in accordance with Article 9(1) of the Vienna Convention on Diplomatic Relations, the Department declares Mr. Bernardo Alvarez Herrera, Venezuelan Ambassador to the United States, to be persona non grata. As such, he and all dependents must depart the United States no later than 72 hours from 6:00 p.m. EST Friday, September 12, 2008.
>
> Prior to his departure, Ambassador Alvarez and his dependents must return all Department of State-issued documents to the Office of the Chief of Protocol and the Office of Foreign Missions.

2. Protection of Diplomatic Property and Diplomats

a. U.S. Embassy in Belgrade

On February 21, 2008, three days after the United States recognized Kosovo as an independent and sovereign state (*see* Chapter 9.A.1.a.), Serbian police charged with protecting the U.S. Embassy in Belgrade withdrew from the front of the embassy and allowed rioters to attack it. The police returned only after the rioters had started a large fire that killed a rioter and caused considerable damage to the embassy's windows, facade, buildings, and equipment. The embassy sustained $540,000 in damages.

In testimony before the Senate Committee on Foreign Relations on March 4, 2008, excerpted below, Daniel Fried, Assistant Secretary of State for European and Eurasian Affairs, discussed the incident and stressed the Serbian government's

obligations under the Vienna Convention on Diplomatic Relations. Article 22 of the convention provides: "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 full text of Ambassador Fried's testimony is available at *http://foreign.senate.gov/testimony/2008/FriedTestimony080304a.pdf.*

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* * * *

. . . [E]motions have run high over this issue in Serbia. Serbia strongly opposed Kosovo's independence. We have understood that, and have tried to reach out to Serbians diplomatically during what has been a painful period for them.

This makes the mob attack on our embassy and other embassies in Belgrade all the more disgraceful. What happened was reprehensible and some Serbian authorities bear full responsibility. The role of some of Serbia's leaders in the mob violence against our Embassy and other Embassies in Belgrade is not clear and may never be. But beyond doubt, some Serbian leaders incited the population with nationalist rhetoric, creating the environment of hostility that led directly to the attack. We therefore hold the Serbian government responsible for what happened on February 21 as well as for any future incidents. I want to use this forum, as I have used others, to remind the Serbian authorities of their responsibilities to provide for the security of embassies under the Vienna Convention.

* * * *

On May 8, 2008, the U.S Embassy in Belgrade submitted a diplomatic note to the Ministry of Foreign Affairs of the Republic of Serbia, seeking a formal explanation of the events that led to the February 21 attack on the embassy. The note reminded the ministry of the "special duty under Article 22(2) of the Vienna Convention on Diplomatic Relations (VCDR) to take all appropriate steps to protect the Embassy's premises" and requested compensation for the damages to the embassy

"in line with Serbia's obligations with the VCDR . . . and the Government of Serbia's public statements accepting responsibility for compensation." The full text of the diplomatic note is available at *www.state.gov/s/l/c8183.htm*.

b. U.S. Embassy staff in Zimbabwe

On June 5, 2008, five U.S. diplomats and two locally employed staff of the U.S. Embassy were detained, harassed, and threatened by government forces and mob elements at a roadblock outside the town of Mazowe, Zimbabwe. On that same day, the United States called for Security Council consultations on the incident. As Jeffrey A. DeLaurentis, Minister-Counselor for Political Affairs at the U.S. Mission to the United Nations, told the press afterward, "The council expressed concerns about the reports and also urged respect for the Vienna Convention, in particular, the protection of diplomats and property." Mr. DeLaurentis's comments are available at *www.archive.usun.state.gov/press_releases/20080605_138.html*.

3. Taxation of Consular and Diplomatic Property

As discussed in A.1.a.(1), *supra*, on February 8, 2008, the U.S. District Court for the Southern District of New York determined that India, Mongolia, and the Republic of the Philippines were subject to New York City real estate taxes for certain properties they owned in New York. *Permanent Mission of India to the United Nations v. City of New York*, 533 F. Supp. 2d 457 (S.D.N.Y. 2008). The court held that parts of buildings India and Mongolia used to house consular and diplomatic staff were taxable under the applicable provisions of the Vienna Convention on Consular Relations ("VCCR") and the Vienna Convention on Diplomatic Relations ("VCDR"). The court also found that the parts of a Philippines-owned building that had housed offices of a bank and an airline were taxable by New York. The court dismissed New York's claims concerning the part of the Philippines-owned building that

had housed a restaurant from 1974 to 1982, finding that it "was . . . used exclusively for a consular purpose, and so is [tax] exempt under the VCCR."

On March 17, 2008, the district court entered a final judgment ordering India, Mongolia, and the Philippines respectively to pay $42,451,769.35, $4,395,003.13, and $10,902,895.81 in taxes and interest to New York. *Permanent Mission of India to the United Nations v. City of New York*, 538 F. Supp. 2d 701 (S.D.N.Y. 2008). The foreign governments appealed the judgment and New York City filed a cross appeal with respect to the Philippines. The appeal was pending at the end of 2008.*

On March 28, 2008, Michael A. Cardozo, Corporation Counsel, the City of New York Law Department, wrote Secretary of State Condoleezza Rice concerning the court's March 17 order and the city's understanding of its consequences under § 643 of the Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2334. Section 643 provides:

> (a) Subject to subsection (c), of the funds appropriated under titles II through V by this Act** that are made available for assistance for a foreign country, an amount equal to 110 percent of the total amount of the . . . unpaid property taxes owed by the central government of such country shall be withheld from obligation for assistance for the central government of such country until the Secretary of State submits a certification to the Committees on Appropriations stating that such . . . unpaid property taxes are fully paid.

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* Editor's note: On January 29, 2009, the Office of the Mayor of the City of New York announced that New York had dismissed its lawsuit against the Philippines, pursuant to a settlement agreement under which the Philippines had paid $9 million in taxes and interest to the city. *See www.nyc.gov:80/portal/site/nycgov/menuitem.b270a4a1d51bb3017bce0ed101c789a0/index.jsp?doc_name=/html/om/html/2009a/events_01.html.*

** Editor's note: Titles II through V concern export and investment assistance, bilateral economic assistance, military assistance, and multilateral economic assistance, respectively.

> (b) Funds withheld from obligation pursuant to subsection (a) may be made available for other programs or activities funded by this Act, . . . , provided that no such funds shall be made available for assistance for the central government of a foreign country that has not paid the total amount of . . . unpaid property taxes owed by such country.
>
> * * * *
>
> (d) (2) The Secretary of State may waive the requirements set forth in subsection (a) with respect to the unpaid property taxes if the Secretary of State determines that it is in the national interests of the United States to do so.

The Corporation Counsel's letter asked the State Department to inform the city when foreign assistance to India, Mongolia, and the Philippines is withheld. Among other things the letter also asked the State Department to use the withheld funds to reimburse the city for costs the New York City Police Department had incurred to provide protection to foreign missions and officials.

Patrick Kennedy, Under Secretary of State for Management, responded on behalf of the Secretary of State in a letter dated April 30, 2008. "The Department does not consider the statutory obligation [to withhold foreign assistance] to be triggered at this time," the letter stated, "as the countries in question have appealed the decision of the district court. Until the relevant appeals have been exhausted, withholding of foreign assistance is not required." Ambassador Kennedy responded to the Corporation Counsel's request that the Department use any withheld foreign assistance funds to reimburse New York City for certain expenses as follows:

> . . . We are not in a position to make funds withheld under section 643 available for such purposes, as those expenses are funded out [of] a different appropriation, the "Protection of Foreign Missions and Officials" appropriation, the "Protection of Foreign Missions and Officials" appropriation in the Act.

> . . . Any funds withheld pursuant to section 643 would remain in the original foreign assistance appropriation account and would be made available only for reprogramming within that account for foreign assistance to another foreign country.

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

4. Taxation Exemption for Certain Consular Employees

In an exchange of notes dated April 15, 2008, and June 28, 2007, respectively, the United States and Spain agreed to exempt from taxation the official compensation of certain consular employees at the other country's consular posts, effective from January 1, 2007. The governments agreed that locally hired consular employees who are not host-state nationals or who, if they are host-state nationals, are also sending state nationals, are afforded exemption from taxation on their government salaries. On May 9, 2008, the Spanish Ministry of Economy and Finance published a resolution by the Directorate General for Taxation, which domestically implemented the agreement for Spain.

The two governments entered into the agreement on the basis of Article XXVIII of the Treaty between the United States and Spain of Friendship and General Relations ("Friendship Treaty"), which was signed July 3, 1902, and entered into force April 14, 1903. That article of the Friendship Treaty provides that certain consular personnel "shall reciprocally enjoy . . . all the rights, immunities and privileges" granted to the same categories of personnel of the "most favored Nation" ("MFN"). Spain invoked the MFN provision and, confirming that it would provide reciprocal treatment to the United States, asserted the right of certain of its consular personnel in the United States to enjoy the favorable income tax exemption accorded by the United States to consular personnel of the United Kingdom under the Consular Convention Between the United States and the United Kingdom of Great Britain

and Northern Ireland, which was signed June 6, 1951, and entered into force September 7, 1952. That convention exempts from taxation the official income of consular employees who are local residents or dual citizens.

The Spanish government invoked the MFN clause to secure an exemption from income tax for certain of its locally hired consular employees in the context of an Internal Revenue Service "Settlement Initiative," launched in 2007 and aimed at securing the compliance with their income tax obligations of U.S. citizens and lawful permanent residents who were locally hired to work in foreign missions. The Vienna Convention on Diplomatic Relations (Article 37(2)) and the Vienna Convention on Consular Relations (Article 71(2)) do not exempt from taxation the official income of employees who are "nationals of or permanently resident in" the host state.

The U.S. diplomatic note is excerpted below. The full text of the U.S. diplomatic note and the Spanish resolution (translated by the Department of State) are available at *www.state.gov/s/l/c8183.htm.*

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* * * *

The Friendship Treaty provides in Article XXVIII for "most favored nation" ("MFN") treatment on a reciprocal basis as follows:

> "The Consuls-General, Consuls, Vice-Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries or Clerks of the High Contracting Parties shall reciprocally enjoy in both countries all the rights, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored Nation."

. . . The U.S.–UK Consular Convention in Article 13(3) exempts from taxes on compensation for services at a consulate a person

who is a "consular employee," unless that person "is a national of the receiving state and is not also a national of the sending state." In Article 2(7) the U.S.–UK Consular Convention defines the term "consular employee" to mean "any person employed at a consulate for the performance of executive, administrative, clerical, technical or professional duties, or as a consular guard, messenger or driver of a vehicle whose name has been duly communicated", while excluding from the definition "any person employed on domestic duties." . . .

. . . [T]he Department agrees that Article XXVIII consular employees are within the definition of "consular employees" as that term is defined in the U.S.–UK Consular Convention. The Department considers the exclusion from the definition of persons "employed on domestic duties" to be an exclusion of persons who constitute "service staff" as defined in Article 1(f) of the Vienna Convention on Consular Relations, that is, of persons employed in the domestic service of the consular post. The Department similarly understands that Article XXVIII consular employees do not include service staff.

The Department confirms that, under the U.S.–UK Consular Convention, persons employed at consular posts of the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom") in positions corresponding to those of Article XXVIII consular employees enjoy an exemption from taxation on their official compensation. The Department further advises that, at present, the consular section of the Embassy of the United Kingdom is treated as a consular post, on the understanding that persons employed by the Embassy and benefiting from the exemption are employed exclusively in the performance of consular functions. Further, the tax exemption is not accorded to persons who are nationals of the United States, unless they are also nationals of the United Kingdom.

The United States . . . is prepared, subject to reciprocity, to exempt from taxation the official compensation of Article XXVIII consular employees employed at Spanish consular posts in the United States, on the understanding that the exemption will not be enjoyed by a person who is a national of the United States unless that person is also a national of Spain, and that the consular section of the Embassy of Spain shall for these purposes be regarded as a

consular post for so long as the consular section of the Embassy of the United Kingdom is similarly so regarded for income tax purposes.

* * * *

C. INTERNATIONAL ORGANIZATIONS

On April 29, 2008, the U.S. District Court for the Southern District of New York dismissed a lawsuit brought against the United Nations and several former UN officials, finding the defendants immune from the court's jurisdiction. *Brzak v. United Nations*, 551 F. Supp. 2d 313 (S.D.N.Y. 2008). The plaintiffs, both UN employees, alleged sex discrimination and other causes of action relating to sexual harassment one of the plaintiffs allegedly suffered. On October 2, 2007, the United States submitted a letter brief explaining the immunities of the United Nations and its officials and relaying the UN Secretary-General's position on the application of those immunities to the plaintiffs' allegations. The United States did not take a position on the applicability of official acts immunity to any of the allegations in the case. Excerpts from the court's opinion follow, discussing the U.S. interest in the case and providing the court's analysis in concluding that the remaining individual defendants had official acts immunity. The U.S. submission is available at *www.state.gov/s/l/c8183.htm.* The plaintiffs' appeal to the U.S. Court of Appeals for the Second Circuit was pending at the end of 2008.

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The United States' interest arises from the nation's treaty obligations to respect the applicable immunities of the U.N. and its officials. *See generally Tachiona v. United States*, 386 F.3d 205, 212 (2d Cir. 2004) ("A corollary to the executive's power to enter into treaties is its obligation to ensure that the United States complies with them."). These immunities arise from the U.N. Charter and the Convention on Privileges and Immunities of the United Nations,

Feb. 13, 1946, 21 U.S.T. 1418 (the "General Convention"), both treaties to which the United States is a party.

According to the submission on behalf of the United States, pursuant to the foregoing treaties, the U.N. itself is absolutely immune from suit and legal process absent an express waiver. The U.N. has not expressly waived its immunity with respect to this case. To the contrary, it has explicitly affirmed its immunity by letters addressed to the United States' Ambassador to the U.N. dated May 15, 2006, and October 19, 2006.

The United States asserts that the General Convention also grants the Secretary-General and all Assistant Secretaries-General, which include both the High Commissioner and Deputy High Commissioner for Refugees, "the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law." General Convention art. V, § 19. The privileges and immunities accorded to diplomatic envoys are specified in turn by the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 ("VCDR"). Under the VCDR, diplomatic officials sued after leaving office continue to receive immunity "with respect to acts performed . . . in the exercise of [their] functions." *Id*. art. 39(2).

The United States further argues that, beyond these treaty provisions specifically applicable to the Secretary General and Assistant Secretaries-General, the General Convention also provides that U.N. officials generally, whether current or former, are immune from suit and legal process "in respect of words spoken or written and all acts performed by them in their official capacity." General Convention art. V, § 18(a).

Finally, the United States argues that under the International Organizations Immunities Act, 22 U.S.C. §§ 288 et seq. ("IOIA"), the officers and employees of any international organization covered by the statute, including the U.N., receive immunity from suit and legal process as to "acts performed by them in their official capacity and falling within their functions as such . . . officers, or employees." 22 U.S.C. § 288d(b).

In accordance with its treaty obligations to communicate the views of the Secretary-General, *see* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of

Human Rights, 1999 I.C.J. 62, 87 (Apr. 29), the United States has conveyed to the Court the position of the Secretary-General that the three remaining Individual Defendants are entitled to immunity in this matter. . . .

* * * *

The Claims Against the Remaining Individual Defendants are Dismissed

Under Article V § 19, of the General Convention, the Secretary-General and all high officials serving at the level of Assistant Secretary-General and above are granted the same "privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." General Convention § 19. As a result, Annan, Chamberlin and Lubbers, as former high officials of the United Nations, are subject to the immunity provisions accorded to diplomatic envoys under the VCDR, and thereby enjoy continuing immunity "with respect to acts performed . . . in the exercise of [their] functions." *See* VCDR Art. 31, 39.

Annan, Chamberlin, and Lubbers also enjoy the protections afforded by the Diplomatic Relations Act, which requires dismissal of any case where immunity is conferred by the VCDR, and thereby enjoy continuity immunity "with respect to acts performed . . . in the exercise of [their] functions." *See* 22 U.S.C.A. § 254d. Even if these instruments did not apply, these defendants would enjoy immunity under § 18(a) of the General Convention.

Furthermore, the three remaining individual Defendants are entitled to immunity under the IOIA, which extends to officers and employees of the U.N. immunity from legal process "relating to acts performed by them in their official capacity and falling within their functions," unless such immunity is waived. *See* 22 U.S.C. 288d(b).

. . . [T]he Secretary-General has determined that the Individual Defendants named in the . . . case are immune. As such there is no waiver.

The question of whether the suit "relates to" acts performed by the Individual Defendants in their official capacity is determined on the basis of whether the acts alleged occurred in the course of an official's exercise of functions, and not on the nature of the

underlying conduct. *See, e.g.*, *Donald v. Orfila*, 788 F.2d 36, 37 (D.C. Cir. 1986); *De Luca v. United Nations Org.*, 841 F. Supp. 531, 534–35 (S.D.N.Y. 1994).

The courts have consistently held that employment-related issues lie at the core of an international organization's immunity. . . .

For similar reasons, the courts have consistently found that functional immunity applies to employment-related suits against officials of international organizations. . . .

The Secretary-General's determination that the Individual Defendants are immune from suit is dispositive. . . .

The allegations of sexual harassment and "indecent battery" against Lubbers are allegations of abuse of authority in the workplace. Whether Lubbers' alleged acts were intended or perceived as sexual in nature may be relevant to their wrongfulness, but not to the determination of functional immunity. In *De Luca*, the court rejected the notion that immunity did not apply to U.N. officials' alleged forgery and other wrongful conduct in the workplace—acts clearly outside the scope of the officials' job descriptions. The court held that, "[n]otwithstanding how improper any of these actions may have been they represent precisely the type of official activity which § 7(b) of the IOIA was intended to immunize." *De Luca*, 841 F. Supp. at 535. . . .

If the rule were otherwise, routine allegations of wrongful conduct or improper motive would defeat the immunity, and "the solid protection" that "Congress intended to afford" international organizations and their officials "would indeed be evanescent." *Donald v. Orfilla*, 788 F.2d 36, 37 (D.C. Cir. 1986).

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Cross References

U.S. sovereign immunity, **Chapter 5.A.3.**
Criminal accountability for UN officials and experts on mission, **Chapter 7.B.1.c.**
Cultural property protected under 22 U.S.C. § 2459 and FSIA immunity, **Chapter 14.B.**

Chapter 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Open Skies Agreements and Related Issues

a. U.S.–EU Air Transport Agreement

(1) First-stage agreement

On March 30, 2008, the United States and the European Community and its member states began to apply provisionally the comprehensive first-step U.S.–EU Air Transport Agreement. The agreement had been signed on April 25 and 30, 2007. *See Digest 2007* at 529–31.

The agreement extends to all 27 EU member states the principles common to the bilateral open skies agreements the United States has concluded (*see* 1.b. below), including liberal international route rights; rights to enter into cooperative marketing arrangements, such as code-shares; and provisions for the fair and equal opportunity to compete. As a Department of State media note, issued March 28, stated:

> Under the Agreement, all U.S. and EU airlines may fly between any point in the EU and any point in the U.S. without restrictions on routes, the number of flights, or prices charged. Already, Aer Lingus is offering non-stop flights from Ireland to Washington, San Francisco, and

> Orlando that were not authorized under the old U.S.–Ireland agreement. At London's Heathrow Airport, five new airlines are offering service between the United States and Heathrow . . . . At least five additional United States cities will have non-stop service to Heathrow: Atlanta, Dallas, Denver, Houston, and Raleigh.

The full text of the media note is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/mar/102778.htm*. The agreement also allows EU investors to own and control certain third-country airlines without placing at risk those airlines' rights to fly to the United States.

On May 8, 2008, John R. Byerly, Deputy Assistant Secretary of State for Transportation Affairs, elaborated on what he called the agreement's "astonishingly positive results for consumers, shippers, and communities on both sides of the Atlantic" in a speech at the Institute of International and European Affairs in Dublin, Ireland. Mr. Byerly discussed the agreement's benefits, including the following three:

- The U.S. Department of Transportation, for the first time, has given a green light to U.S. airlines to use foreign aircraft with crew on international air service, including aircraft from European airlines.
- The U.S. General Services Administration has promulgated guidance that allows EU airlines direct access to certain U.S.-Government procured air transport, so-called Fly America traffic.
- As a final example, the U.S. Transportation Security Administration and the European Commission have recently signed a formal "Working Arrangement" on airport assessments that moves us an important step forward on the path to one-stop aviation security.

Mr. Byerly's speech is available at *http://2001-2009.state.gov/e/eeb/rls/rm/2008/104512.htm*.

(2) Second-stage air transport agreement

On May 15–16, 2008, the United States and the European Union began negotiations on a second-stage air transport agreement, as Article 21 of the U.S.–EU Air Transport Agreement requires. Excerpts from Mr. Byerly's remarks at the Institute of International and European Affairs (*see* a.(1) *supra*), concerning U.S. negotiating objectives, are excerpted below.

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. . . [T]he United States approaches the second-stage negotiations with commitment and enthusiasm. We see the talks as an opportunity to deepen and to broaden the scope of aviation liberalization. We're aware of the challenges, of course, and no one should expect results overnight. The negotiations will require both sides to focus on what matters most and what's achievable. . . .

I'd like to mention some of the issues that will be on the table . . . . In the area of traffic rights, we start from the fact that the first-stage agreement already secures for both sides' airlines unrestricted first, second, third, fourth, fifth, and sixth freedom rights. EU airlines have unrestricted cargo seventh-freedom rights while U.S. carriers enjoy more limited opportunities. That's an imbalance in the Agreement that we will aim to address.

Environmental constraints on the exercise of traffic freedoms may well be matters we'll have to tackle in the second stage. For now, we believe that the active discussions underway in the International Civil Aviation Organization (ICAO) are the right place to tackle the question of aviation greenhouse gas emissions. This is a global issue in a global industry that calls for a global solution.

* * * *

How about another environmental issue, airport noise? We had hoped to put this matter to bed in the first-stage agreement, where both sides committed explicitly to implement the so-called "balanced approach" to noise management.

Endorsed by consensus at ICAO and incorporated in a European Community directive, the "balanced approach" requires a careful evaluation, including cost-benefit analysis, of the full range of measures for dealing with airport noise *before* a decision is made on operational restrictions such as night curfews. Alternative measures include land-use planning, alternate flight paths, and the use of insulation for homes near airports.

Unfortunately, our concerns are growing about the commitment in parts of the EU to good-faith compliance with the "balanced approach." Night flight restrictions at the airports in Oporto, Frankfurt, and Brussels, for example, appear to have been implemented or proposed based on political considerations, not the "balanced approach."

For the present, we have raised our concerns in the Joint Committee that is overseeing the implementation of the Air Transport Agreement. But I can't preclude that the United States may seek more systemic, procedural commitments from the EU in the second stage. These could include a requirement to change EU legislation to replace the noise directive with a more easily enforceable noise regulation.

The negotiations may well consider a range of other issues, but let me focus on the issue that consistently garners the most attention: the question of liberalizing opportunities for the ownership and control of airlines.

There are, from our perspective, two distinct aspects of investment liberalization. The one most commonly mentioned—certainly here in Europe—involves liberalizing the rules that limit the ownership and control of European and American air carriers. . . .

But I first wish to draw attention to a second objective of investment liberalization that we can and should advance in the second stage. The longstanding bilateral system for exchanging aviation rights is built around the so-called "nationality clause": the standard provision in bilateral air services agreements whereby the rights that one country grants to airlines of the other country are limited solely to airlines that are "substantially owned and effectively controlled" by nationals of that other country. For example, only airlines substantially owned and effectively controlled by nationals of India are entitled to operate to the United States under

the U.S.–India Open Skies air transport agreement, and *vice versa*.

This fundamental—indeed, almost defining—element of the bilateral system has long been recognized as a major legal barrier to significant cross-border investment, not to mention cross-border airline mergers. In the first-stage Air Transport Agreement, we took a first step toward dismantling this barrier. Specifically, the United States pledged not to exercise its right to bar air services under bilateral agreements with 10 countries in Europe that are *not* members of the EU as well as 18 African countries on the grounds that control of airlines designated by these 28 countries is vested in EU nationals.

In the second-stage negotiations, we should go much further in pulling down the "nationality clause" barrier to cross-border investment and airline management. This should be done on a reciprocal basis to the benefit of EU, U.S., and third-country airlines and investors.

Finally, what about the expected European proposal to change U.S. laws that today limit foreign ownership of U.S. carriers to 25% of voting stock and prohibit "actual control" by foreign citizens? We approach this issue with an open mind. There are potential plusses for both sides' economies in expanding investment opportunities on a reciprocal basis and enhancing the ability of airlines to serve a global market. The Department of Transportation made this clear in December 2006 when withdrawing the rulemaking on the interpretation of the "actual control" requirement in U.S. law. DOT wrote:

"[T]here are significant benefits to be realized by liberalizing and rationalizing our domestic investment regime for U.S. air carriers. . . . [W]e need a way to enable strategic investors 'interested in long-term gain, not short-term arbitrage' to participate more meaningfully in the decision-making of U.S. carriers. . . . [This] would permit our carriers to catch up with increasingly competitive and financially stronger foreign airlines."

If, however, the U.S. Government, including the U.S. Congress, is to be persuaded to amend the law, the proponents of change—including the European Union but also private sector

stakeholders—will need to make the case and explain the benefits in clear and convincing terms.

The negotiations will also need to tackle several serious concerns. These include:

- the role that U.S. airlines play in America's national defense under the Civil Reserve Air Fleet (CRAF) program;
- homeland security issues made all too real on September 11, 2001, when terrorists used four U.S. civilian aircraft as their weapons of choice; and
- the concerns of airline labor about upsetting the balance of power between management and unions.
- Moreover, there is a serious question whether rights on paper for U.S. citizens to invest in European airlines would be guaranteed in the real world . . . .

Are the second-stage negotiations an impossible task? In my view: no, they are not. But the task will be challenging. Luckily, we have the invaluable experience of the first-stage agreement where four years of hard work, commitment, and vision allowed us to achieve a miracle. . . .

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b. Other instruments

The texts of recent U.S. open skies and air transport agreements and related information, by country, are available at *www.state.gov/e/eeb/tra/c661.htm*. During 2008 the United States engaged in negotiations with a number of countries, including:

The United States and the Russian Federation initialed a protocol with six attached annexes to replace the expired annexes to the 1994 Air Transport Agreement on January 24, 2008. The two countries initialed the text of a new Annex V, "Co-operative Marketing Arrangements," on July 22, 2008, to replace the previous Annex V to the 1994 agreement.

The United States and Australia concluded an Air Transport Agreement on March 31, 2008. Upon its entry into force, the agreement will supersede the 1946 Air Transport Agreement, as amended. In that regard, paragraph 20 of the Memorandum of Consultations issued in connection with the two countries' discussions stated: "[T]he delegations indicated the intent that the Agreement also supersede the agreement relating to capacity, effected by an exchange of notes at Washington March 23, 1989, and the Memorandum of Consultations of December 14, 1999, concerning all-cargo transport."

The United States and Croatia initialed an Air Transport Agreement on March 13, 2008. Upon its entry into force the agreement will supersede, as between Croatia and the United States, the 1977 Air Transport Agreement between Yugoslavia and the United States, and the 1973 Nonscheduled Air Service Agreement between Yugoslavia and the United States, as amended. In the Memorandum of Consultations issued in connection with the two states' discussions, "both delegations expressed their anticipation that, following Croatia's accession to the EU, the bilateral agreement between the Republic of Croatia and the United States will be replaced by the U.S.–EU Air Transport Agreement (U.S.–EU agreement) in a manner to be agreed within the U.S.–EU agreement framework."

The United States and Kenya concluded an Air Transport Agreement on June 18, 2008, which entered into force upon signature.

The United States and Brazil initialed an amendment to Article 8 of the 1989 Air Transport Agreement, as well as revised Annexes 1 and 2, on June 26, 2008.

The United States and Switzerland initialed a new Air Transport Agreement on July 18, 2008. When it enters into force the agreement will supersede the 1995 Air Transport Agreement between the two countries.

The United States and Laos reached agreement in principle on an Air Transport Agreement on October 3, 2008.

The United States and Vietnam initialed an agreement to amend the 2003 Air Transport Agreement on October 7, 2008.

The United States and Jamaica concluded an Air Transport Agreement on October 30, 2008, which entered into force upon signature and superseded three agreements.

The United States and Armenia concluded an Air Transport Agreement on November 21, 2008. When it enters into force, the agreement will supersede the 2007 Civil Aviation Security Agreement between the two countries.

c. Air transport preclearance agreements

In 2008 the United States concluded two agreements with the Kingdom of the Netherlands and Ireland to expand or initiate aviation preclearance operations at airports in Aruba and Ireland, respectively. In general, bilateral preclearance agreements enable U.S. authorities to screen individuals, goods, and aircraft for entry or admission to the United States at airports outside the United States.

On May 22, 2008, Homeland Security Secretary Michael Chertoff and Aruba Prime Minister Nelson O. Oduber, for the Kingdom of the Netherlands, signed a preclearance agreement amending the Agreement between the Government of the United States of America and the Government of the Kingdom of the Netherlands in respect of Aruba on preclearance, done at Washington on December 2, 1994. The 1994 agreement set out procedures for U.S. officials to carry out preclearance under U.S. immigration, customs, and public health laws and regulations of "passengers, crew, baggage, aircraft, and aircraft stores" on "[a]ny flight by an authorized scheduled or charter air carrier destined non-stop from Aruba to the United States." Among other things, the new agreement expands the scope of the 1994 agreement to cover preclearance of private aircraft and to permit U.S. officials to conduct screening to detect radiological and nuclear threats. The agreement, which is available at *www.state.gov/s/l/*

c8183.htm, entered into force on January 7, 2009. *See also* Dutch Ministry of Foreign Affairs press releases, available at *www.minbuza.nl/verdragen/en/news?page=7*;*www.minbuza.nl/verdragen/en/news?page=3*.

On November 17, 2008, Homeland Security Secretary Chertoff and Irish Minister of Transport Noel Dempsey signed an aviation preclearance agreement. When it enters into force, the agreement will supersede a 1986 preinspection agreement, which was supplemented by an exchange of notes in 1988, and provide for preclearance activities. The new agreement permits full preclearance of U.S.-bound commercial and private aircraft under U.S. customs, immigration, and agricultural laws. It also authorizes screening for radiological and nuclear threats. The agreement is available at *www.state.gov/s/l/c8183.htm*. *See also* Department of Homeland Security press release, available at *www.dhs.gov/xnews/archives/2008_novarch.shtm*.

2. Montreal Convention: Availability of *Forum Non Conveniens*

In 2007 the U.S. District Court for the Southern District of Florida dismissed litigation brought by the family members of 160 passengers and crew members who were killed when West Caribbean Airways flight 708 crashed in Venezuela en route from Panama. *In re: West Caribbean Airways, S.A.*, No. 06-cv-22748, Order, R. 184 (S.D. Fla. Nov. 13, 2007). In so holding, the court found that *forum non conveniens* applied where the plaintiffs brought claims under the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal, May 28, 1999 ("Montreal Convention"). The plaintiffs appealed to the U.S. Court of Appeals for the Eleventh Circuit.

On May 14, 2008, the United States filed an *amicus curiae* brief in the Eleventh Circuit, setting out the view that U.S. courts may apply the *forum non conveniens* doctrine to claims brought under Article 33 of the Montreal Convention. *Pierre-Louis v. Newvac*, Appeal No. 07-15828. Excerpts from the U.S.

brief, addressing the plain language of the convention, the history of its negotiation and ratification by the United States, and the executive branch's interpretation of the convention, follow. (Footnotes and citations to other submissions in the case are omitted.) The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. The case was pending at the end of 2008.*

The Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal May 28, 1999 ("Montreal Convention"), establishes an international legal framework for resolving claims arising out of international air carriage. The Montreal Convention is the exclusive means by which passengers can seek damages for death or personal injury in cases covered by it. *See* Montreal Convention, Article 27; *see also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161, 174–176, 119 S. Ct. 662, 668, 674–675 (1999) (construing predecessor agreement to Montreal Convention). The United States is a party to the Montreal Convention, which came into force in 2003.

* * * *

A. The Text Of The Montreal Convention Supports The Availability Of *Forum Non Conveniens* In Cases Governed By The Convention.

* * * *

Article 33 of the Montreal Convention prescribes the grounds for jurisdiction over claims encompassed by the Convention. . . . Article 33(4) provides that "[q]uestions of procedure shall be governed by the law of the court seised of the case."

The plain language of this last provision—Article 33(4)—supports application of *forum non conveniens* in cases governed by the Convention and brought in U.S. courts. Moreover, the rule

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* Editor's note: On October 8, 2009, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court judgment. *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009). *Digest 2009* will provide relevant details.

articulated in Article 33(4) is consistent with the background international law principle, which the Supreme Court has endorsed, that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard v. Greene*, 523 U.S. 371, 375, 118 S. Ct. 1352, 1354 (1998) (per curiam); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669, 2682–2683 (2006).

. . . As a well-established procedural doctrine of general application in U.S. courts, *forum non conveniens* clearly falls within Article 33(4).

B. The Negotiating History Of The Montreal Convention Makes Clear That It Was Not Intended To Preclude Application Of *Forum Non Conveniens.*

The plain language of Article 33(4) of the Montreal Convention is sufficient to resolve the question addressed in this amicus brief. Even if that text were ambiguous, however, an examination of the drafting history of the Convention would make clear that it permits application of the *forum non conveniens* doctrine. As we next set out in detail, the drafters of the Montreal Convention chose not to explicitly codify the doctrine in the treaty, but they envisioned that it would continue to apply in countries, such as the United States, that had previously applied *forum non conveniens* under the Warsaw Convention.

The Warsaw Convention, which was superseded by the Montreal Convention as between parties to both treaties, did not provide for claims for death or injury to be brought in the country of the passenger's permanent residence. *See* Warsaw Convention, Art. 28(1). At the conference at which the Montreal Convention was negotiated and adopted, the United States delegate pressed strongly for inclusion of this fifth ground for jurisdiction. *See, e.g.*, International Civil Aviation Organization, International Conference on Air Law, Montreal, 10–28 May 1999, Volume I: Minutes ("Minutes"), at 9. In making this proposal, the United States delegate reassured the other delegates that "the doctrine of forum non-convenien[s] would provide discipline against unwarranted forum shopping." *Id.*; *see also* International Civil Aviation Organization, International Conference on Air Law, Montreal,

10–28 May 1999, Volume II: Documents ("Documents"), at 108 (United States comments) (explaining that fifth basis for jurisdiction "could well result in fewer 'forum shoppers' winding up in U.S. courts" because, *inter alia*, "U.S. courts are far more likely to dismiss lawsuits brought by non-U.S. residents on the grounds of *forum non conveniens* if a convenient homeland court is available to the plaintiff"). At the time the United States delegate made those statements, the relevant provision of the draft Convention was identical to the final version of Article 33(4). *See* International Conference on Air Law, Draft Convention for the Unification of Certain Rules for International Carriage by Air, Reference Text, DCW Doc. No. 4, 5/3/99, Documents at 45.

Other delegates continued to express concerns that the addition of a fifth ground of jurisdiction would encourage forum shopping. . . .

* * * *

The draft Convention article on jurisdiction was subsequently examined in depth by a smaller group of delegates (the "Friends of the Chairman's Group") that included delegates from the United States and a number of other major countries. *See* Minutes at 109. . . .

* * * *

Multiple countries objected to the proposal to codify and make mandatory the application of *forum non conveniens*, . . . on the ground that the doctrine was not recognized in their domestic legal systems. . . .

* * * *

. . . [T]he Friends of the Chairman's Group presented a consensus package to the full conference that contained a jurisdictional provision that was unchanged from the earlier draft and provided that "Questions of procedure shall be governed by the law of the Court seised of the case." *See* Minutes at 199 (presenting consensus package); Documents at 271, 274 (DCW Doc. No. 50, Consensus Package, Art. 27(4)). Notably, there were no objections to this proposal—including none from the United States delegate, who had repeatedly indicated that the United States would not

agree to any text that would foreclose application of the *forum non conveniens* doctrine in Montreal Convention cases. *See, e.g.*, Minutes at 159, 180. In these circumstances, the clear implication is that the delegates understood that application of *forum non conveniens* in cases covered by the Montreal Convention would depend upon the procedural law of the forum state in which the suit was initiated, and, in particular, that the doctrine would be available in suits brought in the courts of the United States.

C. In Signing The Montreal Convention And Giving Advice And Consent, The President And The Senate Intended To Continue Past Practice Under the Warsaw Convention, Which Included Application Of *Forum Non Conveniens*.

Forum non conveniens was well established in U.S. courts as a procedural doctrine at the time the Montreal Convention was drafted, signed, and presented by the President to the Senate for its advice and consent. Specifically, the doctrine had repeatedly been employed in cases governed by the Warsaw Convention, and no U.S. court had held that the Convention foreclosed its application. *See . . . In re Air Crash Off Long Island, N.Y., on July 17, 1996*, 65 F. Supp.2d 207, 210–217 (S.D.N.Y. 1999) (holding that *forum non conveniens* is procedural doctrine that applies under jurisdictional provision of Warsaw Convention). The historical record of the Convention's transmittal by the President to the Senate and of its approval by the Senate shows that no change from this past practice was intended.

In submitting the Montreal Convention to the Senate for its advice and consent, the President attached an explanation of the treaty prepared by the Department of State. Sen. Treaty Doc. 106-45 . . . . The State Department explained that Article 33(4) of the Montreal Convention, like the provision of the Warsaw Convention from which it derived, "provides that procedural questions are to be determined by the law of the forum." *Id.* at 19. The State Department also explained that, while some provisions in the Montreal Convention were new or different from the Warsaw Convention and related protocols, "efforts were made in the negotiations and drafting to retain existing language and substance of other provisions to preserve judicial precedent relating to other

aspects of the Warsaw Convention, in order to avoid unnecessary litigation over issues already decided by the courts under the Warsaw Convention and its related protocols." See S. Exec. Rpt. No. 108-8, at 68 (2003) . . . .

The Senate Executive Report recommending that the Senate give its advice and consent to the Montreal Convention also reflected the understanding that prior judicial precedent under the Warsaw Convention would continue to apply, as relevant, under the Montreal Convention. S. Exec. Rpt. No. 108-8, at 3. . . . This evidence that the Executive and the Senate intended to continue in force this prior precedent under the Warsaw Convention provides yet another reason to conclude that Article 33(4) of the Montreal Convention permits application of *forum non conveniens*. . . .

D. The Executive's Construction Of Article 33(4) As Permitting Application Of *Forum Non Conveniens* Is Entitled To Great Weight.

Any ambiguity in the text or negotiating history of the Montreal Convention should be resolved in favor of the Executive's construction of Article 33(4) to permit application of *forum non conveniens*. As the Supreme Court has repeatedly recognized, in interpreting international treaties, courts should give "great weight" to "the meaning given them by the departments of government particularly charged with their negotiation and enforcement.'" *Sanchez-Llamas*, 548 U.S. 331, 126 S. Ct. at 2685 (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S. Ct. 922, 926 (1961)); *accord United States v. Stuart*, 489 U.S. 353, 369, 109 S. Ct. 1183, 1193 (1989). Not only did the State Department negotiate the Montreal Convention, but "when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice. That voice is the voice of the State Department, which in such matters speaks for and on behalf of the President." *United States v. Li*, 206 F.3d 56, 67 (1st Cir.) (en banc) (Selya and Boudin, JJ., concurring), *cert. denied*, 531 U.S. 956, 121 S. Ct. 379 (2000); *see also Mora v. People of the State of N.Y.,* No. 06-0341, 2008 WL 1820836, at *13 (2d Cir. Apr. 24, 2008) (views of *United States* set out in amicus brief filed by Department of Justice and

Department of State "constitute another very powerful reason" for accepting construction of treaty).

* * * *

3. Application of the Tokyo and Warsaw Conventions: *Eid v. Alaska Airlines*

On July 18, 2008, the United States submitted an *amicus curiae* brief to the U.S. Court of Appeals for the Ninth Circuit, providing views on the application of the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo, Sept. 14, 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941 (entered into force for the United States Dec. 4, 1969) ("Tokyo Convention") and the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (entered into force for the United States Oct. 29, 1934) ("Warsaw Convention"), reprinted in 49 U.S.C. § 40105 note. *Eid v. Alaska Airlines*, No. 06-CV-16457 (9th Cir. 2008). The two conventions limit the liability of airlines for certain incidents occurring during international travel.

The case arose after a mid-air incident on an international flight to Las Vegas, involving some of the plaintiffs, led a flight attendant to inform the captain that she had "lost control" of the cabin. The captain diverted the flight. Subsequently, the captain asked the police to arrest the plaintiffs and charge them with interfering with the flight crew. After further questioning, the plaintiffs were released, and they boarded a different flight. No charges were ever filed.

The plaintiffs sought damages under Article 19 of the Warsaw Convention for the delay in their travel and various state-law claims that included defamation. The plaintiffs based their state-law claims on the statements the captain and the other flight crew made to the police, as well as a flight attendant's statements about them to the remaining passengers after the flight resumed. All but one of the plaintiffs were

Muslims of Arab origin, and they asserted that the flight crew had discriminated against them.

The district court held that the Warsaw Convention preempted the plaintiffs' state-law claims and dismissed them on the pleadings. The district court later granted summary judgment, holding that the Tokyo Convention rendered Alaska Airlines immune from the plaintiffs' Warsaw Convention claim. The plaintiffs appealed to the Ninth Circuit, which issued orders dated April 23, 2008, and May 12, 2008, inviting the United States to provide its views on the proper application of the Tokyo and Warsaw conventions.

The U.S. *amicus curiae* brief argued that review of actions a pilot takes pursuant to the Tokyo Convention must be deferential but took no position on whether, in applying that standard, the court should affirm the judgment. The U.S. brief also stated that the Tokyo Convention provided no support for the plaintiffs' contention that the captain's failure to conduct an independent investigation before diverting the flight entitled them to reversal. Finally, the brief argued that the Tokyo Convention barred the plaintiffs' state-law claims with respect to the pilot's statements to the police but recommended that the court remand the case to the district court for further proceedings concerning the claims based on the flight attendant's statements after the flight resumed.

Excerpts follow from the U.S. brief, explaining the broad immunities the Tokyo Convention grants to flight crews and setting forth the Warsaw Convention's standard for preempting state-law claims. (Footnotes and citations to other submissions in the case are omitted.) The full text of the brief is available at *www.state.gov/s/l/c8183.htm.* The case was pending at the end of 2008.

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* * * *

I. The Tokyo Convention Immunizes Actions Taken Within a Broad Range of Discretion.

A. The Tokyo Convention renders the captain of a flight and the air carrier immune from suits based on actions authorized by the

Convention. Tokyo Convention, arts. 1, 6–10. The Convention gives the captain authority to disembark a passenger in the territory of "any State in which the aircraft lands," if there are reasonable grounds to believe that person has committed, or is about to commit, an act that may jeopardize the safety, good order, or discipline aboard the aircraft. *Id.* art. 8. The captain may take the further measure of delivering a passenger to competent authorities in a Contracting State if he believes the passenger has committed a "serious offence." *Id.* art. 9.

In reviewing whether the actions of the captain are immunized by the Tokyo Convention, due regard must be given to the broad discretion afforded the captain in determining when to act. The captain is not only permitted to respond to threats to safety, but may take reasonable measures to maintain "good order and discipline on board." *Id.* arts. 1(1)(b), 6(1)(b). The captain's authority extends not simply to acts that in fact jeopardize safety, but to all "acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft * * * or the good order and discipline on board." Tokyo Convention art. 1(1)(b). The captain need not wait until a passenger acts; he may respond with "reasonable measures" even if there are only reasonable grounds to believe a person "is about to commit" those acts. *Id.* art. 6(1) (emphasis added). The broad scope of authority afforded the captain is a strong indication that the treaty signatories intended the captain's exercise of that authority to be reviewed with great deference, whatever the precise articulation of the standard.

That understanding of the treaty is confirmed by its negotiating history. . . . The parties to the Tokyo Convention rejected an Argentine proposal that would have required the aircraft commander to have an objective basis—"concrete" and "specific external facts"—for his actions in restraining and disembarking a passenger who had not yet committed an actual disorderly act. Minutes, International Convention on Air Law, Tokyo 1963, ICAO Doc. 8565-LC/152-1 ("Tokyo Conference Minutes") at 178–179. Several representatives opposed the proposal because, as one representative said, it conflicted with the Convention's goal "to give powers of judgment to the aircraft commander." *Ibid.* The defeat of the Argentine proposal serves to highlight the broad

discretion afforded the aircraft commander: the Convention permits a captain to rely on his reasonable judgment, without searching out "concrete" facts on which to base that judgment.

Moreover, engaging in searching review of decisions made by the captain would hinder the central goal of the broad immunity conferred by the Tokyo Convention—to encourage captains to take decisive action, often under chaotic circumstances, to preserve the safety of the plane and its passengers without fear of having those actions second-guessed in the relative calm of a courtroom. *See* Tokyo Convention, art. 10; [Gerald] FitzGerald, [The Development of International Rules Concerning Offenses and Certain Other Acts on Board Aircraft], 1 Can. Y.B. In'tl L. [230,] 247 [(1963)]. The parties consistently rejected proposals to water down or eliminate the Convention's grant of immunity. The parties rejected a draft of the immunity provision that would have required captains to "strictly" adhere to the treaty terms in order to qualify for the immunity provision. Tokyo Conference Minutes 317–24. The delegate who proposed deletion of the word "strictly" from the draft article stated that if the word were "given a restrictive interpretation, [it] could reduce the protection which [the Convention has] sought to give to the persons concerned." *Id.* at 317. The French delegation proposed eliminating the immunity provision altogether, but that proposal also was rejected. *Id.* at 219, 231. One delegate remarked that absent an explicit immunity provision "the aircraft commander might have to hesitate and might, perhaps, do nothing in circumstances in which he should have acted." *Id.* at 223. The delegate expressed concern that a court would second-guess the decisions of an aircraft commander: "The urgent conditions that might arise on board an aircraft would have to be examined by a court and that might lead to the discovery of arguments which had escaped the attention of the aircraft commander." *Ibid.*

The parties also rejected a proposal to limit immunity to civil proceedings. *See* Tokyo Conference Minutes 232; Boyle & Pulsifer, [The Tokyo Convention on Offenses and Certain Other Acts Committed On Board Aircraft,] 30 J. Air L. & Com. [301,] 344 [(1964)]. The Convention thus grants the immunity from liability in "any proceeding," whether criminal, administrative, or civil.

Tokyo Convention art. 10; see Boyle & Pulsifer, supra, 30 J. Air L. & Com. at 344. . . .

* * * *

B. Plaintiffs urge that immunity under the Tokyo Convention is premised on the captain's undertaking a personal investigation into all available facts, even if, based on the information obtained from other crew members alone, there were plainly "reasonable grounds to believe" that the safety or good order of the flight was jeopardized.

Nothing in the Tokyo Convention requires the captain to conduct an independent investigation before taking any of the actions specified in the treaty. That understanding of the Convention is confirmed by the contemporaneous understanding of the phrase "reasonable grounds to believe" as used in certain federal statutes. As the United States representative to the Tokyo Conference explained, "the phrase 'reasonable grounds' had a substantial legal significance" in U.S. law. Tokyo Conference Minutes 155.

* * * *

Even when the plane is on the ground, the Tokyo Convention imposes no obligation on a pilot to undertake a personal investigation. Given the scheduling constraints on the flight crew, it would be impractical to require a flight to be held while the pilot undertakes a thorough investigation. If anything, the Convention contemplates that any investigation will be done by competent authorities who, unlike pilots, are trained to investigate such incidents and sort out competing stories. A captain is permitted to deliver to competent authorities "any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence." Tokyo Convention, art. 9(1). This provision was crafted to give a captain the authority to turn a passenger over to competent authorities when in his or her subjective belief, informed by the facts at hand, the acts committed are penal offenses. The provision does not require the captain to conclusively determine whether the actions were actually substantive offenses. *See* S. Exec. Rep. No. 90-L (Article-By-Article Analysis) at 8. Article 17, in turn, contemplates that the State

parties are responsible for "taking any measures for investigation or arrest" and requires that in doing so the State "shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo." Tokyo Convention art. 17.

A court applying the Tokyo Convention should not simply ask whether the captain's actions were correct with the benefit of hindsight, but must consider whether the information known to the captain at the time supports the exercise of the broad discretion afforded to him or her by the Tokyo Convention. In sum, plaintiffs' contention that the captain should be required to conduct an independent investigation in order to qualify for immunity under the Tokyo Convention is inconsistent with the text and purpose of the Convention. . . .

C. Plaintiffs do not dispute that a flight attendant made a frantic call to the captain while the plane was in flight . . . . Nor do they challenge the captain's testimony that he and the first officer both heard shouting in the cabin. When viewed against the backdrop of those undisputed facts and the legal standards outlined above, there were plainly reasonable grounds supporting the captain's decision to divert the airplane to Reno. . . . The government takes no position on whether a dispute of fact exists with respect to the decisions to disembark and deliver. . . .

II. Plaintiffs' State-Law Tort Claims.

* * * *

A. Claims Based On Statements Made To Police.

* * * *

2. Even if extending Tokyo Convention immunity to the captain and flight crew's statements to police is inappropriate (because the captain's actions were, for whatever reason, not in accordance with the Tokyo Convention), the Warsaw Convention preempts state-law claims based on those statements. . . . [T]he Warsaw Convention displaces all state-law claims based on personal injury (including those for non-physical injury) arising during international air travel. [*El Al Israel Airlines, Ltd. v.*] *Tsui Yuan Tseng*,

525 U.S. [155,] 168–69, 176 [(1999)]. The preemptive force of the Warsaw Convention, however, extends "'no further than the Convention's own substantive scope.'" *Id.* at 172 (quoting Brief of the United States as Amicus Curiae 16). The Warsaw Convention only extends to injuries suffered "'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,'" and an air carrier "is indisputably subject to liability under local law for injuries arising outside of that scope." *Id.* at 171–72 (quoting Warsaw Convention art. 17).

Here, the events causing injury to plaintiffs are within the scope of the Warsaw Convention, because the events giving rise to plaintiffs' claims took place "in the course of any of the operations of . . . disembarking." Warsaw Convention art. 17. . . .

* * * *

B. NORTH AMERICAN FREE TRADE AGREEMENT

1. Investment Dispute Settlement Under Chapter 11

a. Allocation of costs: Tembec v. United States

On August 15, 2008, the U.S. District Court for the District of Columbia granted a U.S. motion to dismiss a suit brought by Tembec Inc., Tembec Investments Inc., and Tembec Industries Inc. ("Tembec") to vacate an arbitral award, finding that the petition was barred on the grounds of collateral estoppel and res judicata. *Tembec v. United States*, 570 F. Supp. 2d 137 (D.D.C. 2008). In this case, Tembec sought to vacate a July 19, 2007 order issued by a tribunal constituted under Article 1126 of the North American Free Trade Agreement ("NAFTA Tribunal"), requiring Tembec to pay attorney fees and costs to the United States. Tembec also renewed its earlier challenge to the constitution of the NAFTA Tribunal, which the parties had previously agreed to dismiss "with prejudice, subject to the terms and conditions of the Softwood Lumber Agreement of 2006" between the United States and Canada. *See Digest 2006* at 763–64; D.4. below.

Tembec received $242 million pursuant to the terms of the 2006 Softwood Lumber Agreement. For additional history *see Digest 2007* at 549–51.

b. Timeframe for bringing claims: U.S. Article 1128 submission in Merrill & Ring Forestry v. Gov't of Canada

On July 14, 2008, in an arbitration brought against Canada under NAFTA Chapter 11, the United States made a submission pursuant to Article 1128 on a question of interpretation of the NAFTA. *Merrill & Ring Forestry v. Gov't of Canada*. In doing so, the United States took no position on how its interpretative position applied to the facts of the case. Excerpts follow from the U.S. submission, arguing that "[a]ll claims under NAFTA Chapter 11 must be brought within the three-year limitations period set out in Article 1116(2) and Article 1117(2)" and that, "[a]lthough a legally distinct injury can give rise to a separate limitations period, a continuing course of conduct does not renew the limitations period." The full text of the U.S. submission is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

3. Article 1116(2) reads as follows:

> An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

4. Article 1116(2) requires an investor to submit a claim to arbitration within three years of the date on which the investor *first* acquired knowledge (either actual or constructive) of: (i) the alleged breach, and (ii) loss or damage incurred by the investor. Knowledge of loss or damage incurred by the investor under Article 1116(2) does not require knowledge of the extent of loss or damage.

5. An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular "date." Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.

* * * *

17. . . . [O]nce an investor first acquires knowledge of breach and loss, subsequent transgressions by the state arising from a continuing course of conduct do not renew the limitations period under Article 1116(2).

c. Lack of investment in the territory of the host state and other issues

(1) In Re NAFTA Chapter 11/UNCITRAL Cattle Cases

On January 28, 2008, a tribunal established under Chapter 11 of the NAFTA dismissed a claim brought against the United States by more than 100 Canadians who operated cattle-related businesses in Canada. *In Re NAFTA Chapter 11/ UNCITRAL Cattle Cases*. The claimants sought more than $235 million for damages they allegedly sustained when the United States prohibited imports of Canadian cattle after a cow in Canada developed bovine spongiforum encephalophy ("BSE" or "mad cow disease"). The tribunal dismissed the claims for lack of jurisdiction, accepting the U.S. argument that Chapter 11 of the NAFTA permits claims only by investors of a NAFTA Party who have made or are seeking to make an investment in the territory of another NAFTA Party. As the tribunal stated in part:

> 111. Although Claimants' position is far from frivolous, the Tribunal has concluded that their interpretation of Chapter Eleven, which would require the isolation of the investor from his investment, would do more violence to the fabric of Chapter Eleven, and to the overall fabric of NAFTA, than the position espoused by Respondent. In this Tribunal's view, a careful review of the key provisions of

> Chapter Eleven in their full context, as the VCLT [Vienna Convention on the Law of Treaties] requires, demonstrates that the only investors who may avail themselves of the protections of Chapter Eleven, including its national treatment protections, are actual or prospective foreign investors in another NAFTA Party. Because Claimants concede they are only domestic investors, their claim must fail.

See Digest 2007 at 553–56 for a discussion of the U.S. Reply filed on May 7, 2007; *see also Digest 2006* at 693–701 for a discussion of the U.S. Memorial filed on December 1, 2006. The full texts of the tribunal's decision, as well as submissions and orders in the case, are available at *www.state.gov/documents/organization/99954.pdf*.

(2) Grand River Enterprises Six Nations v. United States of America

On December 22, 2008, the United States filed its counter-memorial in *Grand River Enterprises Six Nations v. United States of America*. In this case, Grand River Enterprises Six Nations, Ltd., a Canadian tobacco manufacturer that exports cigarettes to the United States, and certain members of Canadian First Nations contended that certain U.S. state laws relating to the 1998 Master Settlement Agreement ("MSA"), which settled litigation brought by U.S. states against major tobacco companies, violated Chapter 11 of the NAFTA. The claim was submitted to arbitration in 2004; *see Digest 2006* at 688–93. The laws the claimants challenged require tobacco companies that do not participate in the settlement to place funds into escrow accounts each year, in an amount calculated based on cigarettes sold in each state during the prior year. The funds are to be held as security against potential future tobacco-related lawsuits.

The original statutes contained an "allocable share release" provision that allowed tobacco manufacturers that did not participate in the MSA to receive a release of escrow deposits from states in which their cigarettes were sold. Specifically, a manufacturer could obtain a release from a state to the extent that the manufacturer's deposits in that

state exceeded what the state would have received as its share of the manufacturer's nationwide MSA settlement payments, had the manufacturer participated in the MSA. The United States argued that manufacturers like Grand River exploited the "allocable share release" provision by concentrating their sales in one or a few states and thereby obtaining large refunds of their escrow payments. Tobacco manufacturers not participating in the MSA thus were able to lower their prices, gaining an advantage over MSA participants.

Beginning in 2003 all but one of the states participating in the MSA amended their escrow statutes to close the allocable share release loophole. Under the allocable share amendments, a tobacco manufacturer that does not participate in the MSA can obtain a release of escrowed funds only to the extent that the escrow deposits it makes for cigarettes sold in a given state exceed what that manufacturer would have had to pay on its nationwide sales if it participated in the MSA.

On November 6, 2006, the claimants submitted an amended claim to a tribunal established under the UNCITRAL Arbitration Rules and administered by the International Center for the Settlement of Disputes. The claimants alleged that the allocable share amendments discriminated against them in violation of NAFTA Article 1102 (national treatment) and Article 1103 (most-favored-nation treatment). They also made numerous claims under Article 1105 (minimum standard of treatment). The claimants also asserted that the amended laws resulted in the expropriation of their investments in violation of Article 1110.

In its counter-memorial, the United States argued, as it had in the *Cattle Cases*, discussed in c.(1) *supra*, that the claimants failed to meet the fundamental jurisdictional requirements under NAFTA Article 1101(1). As the U.S. counter-memorial stated:

> Under Article 1101, Claimants Grand River, Jerry Montour, and Kenneth Hill do not qualify as "investors" because they have failed to establish that they seek to make, are making, or have made an investment in the United States,

> and the challenged escrow statutes (in both their original and amended form) do not "relate to" the remaining Claimant, Arthur Montour, Jr., whose distribution companies are not subject to escrow obligations under those measures. . . .

In reaching that conclusion, the counter-memorial analyzed the elements of Article 1101(1), which sets forth the scope of NAFTA Chapter 11:

> That Article provides, in relevant part: . . .
> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
> (a) investors of another Party;
> (b) investments of investors of another Party in the territory of the Party[.]
>
> No claim for breach of a Chapter Eleven obligation may be submitted to arbitration unless the fundamental jurisdictional prerequisites under Article 1101(1) are established. . . .
>
> Article 1101(1) imposes two separate jurisdictional requirements. *First*, NAFTA Chapter Eleven applies only to *investors* of another NAFTA Party or their *investments*. As Article 1101(1)(b) expressly states, the only "investments" covered by Chapter Eleven are those of "investors of another Party *in the territory of the Party*" that has adopted or maintained the challenged measures. The only "investors" covered by Chapter Eleven are those who are seeking to make, are making, or who have made an investment in another Party.
>
> *Second*, Article 1101(1) requires that the measures at issue in an arbitration, which have been adopted or maintained by a Party, "relate to" the investor or investment. As stated by the *Methanex* tribunal, the "relating to" language under Article 1101(1) requires a "legally significant connection" between a challenged measure and the investor or investment.
>
> The negative impact of a challenged measure on a claimant, without more, does not satisfy the "legally significant connection" standard. . . .

The U.S. counter-memorial also addressed the merits of the claim. Further excerpts from the U.S. counter-memorial follow, providing U.S. views on the protections recognized under the minimum standard of treatment as prescribed in Article 1105, and the reasons why the claimants' expropriation claim is flawed. (Footnotes and citations to other submissions are omitted.) The U.S. counter-memorial (with confidential information redacted) is available at *www.state.gov/s/l/c11935.htm*; other aspects of the U.S. submission are discussed in Chapters 4.E. and 6.E.

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3. Claimants' National Treatment and Most-Favored-Nation Claims Cannot Be Salvaged By General NAFTA Objectives Under Article 102(1)

Claimants assert that the general NAFTA objectives set out in Article 102(1) should be "seriously considered and employed in a broad and remedial fashion" when interpreting the "specific provisions" of NAFTA, including Articles 1102 and 1103. As discussed below, although the Article 102 objectives may inform the interpretation of specific NAFTA provisions, such general objectives cannot transform the nature of these obligations; nor do they impose independent obligations on the Parties to the Agreement.

The cardinal rule of treaty interpretation is set out in Article 31(1) of the Vienna Convention on the Law of Treaties: a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The relevant context includes the treaty's text, its preamble and annexes, and any related agreements or instruments. The Preamble of the NAFTA and Article 102 both shed light on the NAFTA's "object and purpose." Article 102(1), for example, lays out several objectives, "as elaborated more specifically through [the NAFTA's] principles and rules," that motivated the States Parties in negotiating the NAFTA. These objectives include "eliminat[ing] barriers to trade in, and facilitat[ing] the cross-border movement of, goods and services between the territories of the

Parties"; "promot[ing] conditions of fair competition in the free trade area"; and "increas[ing] substantially investment opportunities in the territories of the Parties." Notably, the objectives also include "preserv[ing the States Parties'] flexibility to safeguard the public welfare."

* * * *

. . . [T]he key to interpreting the provisions of the NAFTA must be the text itself, as informed by the treaty's context, object, and purpose, only to the extent those additional sources are relevant to, and consonant with, the substantive provision at issue. This approach is grounded in the well-accepted principle that general objectives can shed light on treaty provisions, but cannot impose independent obligations on treaty signatories.

Claimants cannot rely on general NAFTA objectives under Article 102 to transform the nature of national treatment and most-favored-nation obligations under Article 1102 and Article 1103. Given Claimants' failure to meet required elements under Article 1102 and Article 1103, both claims should be dismissed.

B. Claimants Fail To Establish That Their Alleged Investments Were Not Accorded The Minimum Standard of Treatment Under Article 1105

* * * *

1. A Claim Under Article 1105(1) Must Arise From The Failure To Accord The Minimum Standard Of Treatment To An Alien's Investment

Article 1105(1) requires that "[e]ach Party shall accord to *investments* of investors of another Party treatment *in accordance with international law*, including fair and equitable treatment and full protection and security." As the NAFTA Free Trade Commission ("FTC") confirmed in its 2001 interpretation, the scope of Article 1105(1) extends only to those investment protections that are recognized under customary international law:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum

standard of treatment to be afforded to *investments* of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

Under Article 1131, the FTC's interpretation "of a provision of this Agreement shall be binding on a Tribunal established under this Section." In addition, NAFTA Chapter Eleven tribunals, as well as the Supreme Court of British Columbia, have recognized the authority of the interpretation. Furthermore, "'an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.'". . .

a. The Scope of Article 1105(1) Includes Only Protections Recognized Under The Minimum Standard of Treatment

As confirmed by the FTC interpretation, Article 1105(1) protects only the property rights and interests of aliens, *i.e.*, the "investments of investors," that are recognized under the minimum standard of treatment, which "provid[es] for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property." As such, this standard establishes an absolute minimum "floor below which treatment of foreign investors must not fall."

Currently, this "floor" defines certain categories of treatment that thereby constitute the protection accorded to investments under Article 1105(1). One such category is a State's obligation to prevent a "denial of justice," which arises, for example, when its judiciary administers justice to aliens in a "notoriously unjust" or "egregious" manner "which offends a sense of judicial propriety." Another such standard is a State's responsibility to provide a

minimum level of internal security and law and order, which is found in the customary international legal obligation to accord "full protection and security" to investments of investors. The minimum standard of treatment also bars direct and indirect expropriation without prompt, adequate, and effective compensation. NAFTA Chapter Eleven, however, sets out the expropriation obligation in its own provision, Article 1110.

The NAFTA Parties agreed that the minimum standard of treatment obligation under Article 1105(1) would extend only to the "investments of investors of another Party," *i.e.*, the foreign investor's economic stake in the host State. Thus the treatment accorded to matters other than a foreign investor's investment in the host State cannot support a claim under Article 1105(1). . . .

Furthermore, because the minimum standard of treatment sets an absolute minimum "floor below which treatment of foreign investors must not fall," that floor cannot provide special treatment for particular classes of investors or investments.

* * * *

b. The Obligations Alleged By Claimants, Which They Have Not Shown To Be Included Within The Minimum Standard Of Treatment, Were In Any Case Not Violated Here

Claimants attempt to derive two broad minimum standard of treatment obligations from the international legal principle of "good faith," which they hope to insert within the minimum standard of treatment: (i) a prohibition against frustrating an investor's "basic" expectations about the regulatory environment and other specific legal obligations that were in place when the investor chose to invest and (ii) a general prohibition on discrimination against foreign investors. Claimants fail to demonstrate that such alleged obligations are part of the minimum standard of treatment. Specifically, Claimants fail to establish that their alleged obligations are supported by (i) consistent state practice; and (ii) *opinio juris*, or an understanding that such practice is required by law. Even if Claimants were able to establish such obligations, however, such obligations have not been violated in this case.

When arguing that the "principle of good faith" is part of the minimum standard of treatment, Claimants mischaracterize the

role of "good faith" under customary international law. "The principle of good faith is . . . 'one of the basic principles governing the creation and performance of legal obligations'; . . . [but] *it is not in itself a source of obligation where none would otherwise exist*." As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant "may not justifiably rely upon the principle of good faith" to support a claim. Claimants submit no evidence of State practice or *opinio juris* to contradict this well settled rule. . . .

* * * *

2. The Minimum Standard Of Treatment Does Not Obligate States To Protect An Investor's Expectations

Contrary to Claimants' assertions, States are not obligated to protect a foreign investor's expectations—legitimate or otherwise—under the minimum standard of treatment.

* * * *

As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State. . . .

* * * *

Similarly, Claimants' assertion that a foreign investor's "detrimental reliance" on the investment climate of a host State can violate the minimum standard of treatment cannot withstand scrutiny. Claimants provide no evidence of State practice establishing such an obligation. In fact, tribunals discussing state practice confirm the opposite; namely, that a State acting in its sovereign capacity does not incur liability for an investor's purported detrimental reliance on the state of the business or regulatory climate in which it invests. The *Methanex* panel, for example, rejected claimant's argument that it was entitled to the preservation of the preferences it had received for access in the MTBE market because "the very market for MTBE in the United States was the result of precisely this [the MTBE] regulatory process."

* * * *

Claimants submit no evidence of State practice establishing a legal obligation not to frustrate an investor's expectations formed at the time the investor made its investment. State practice, in fact, tends to support the opposite view. As Claimants acknowledge, under customary international law, States may regulate to achieve legitimate objectives to benefit the public welfare and will not incur liability solely because the change interferes with an investor's "expectations" about the state of the business environment. The protection of public health falls squarely within that regulatory authority under international law.

* * * *

3. There Is No Basis To Find That The United States Has Impermissibly Discriminated Against Claimants . . .

* * * *

As a legal matter, Claimants' assertion that Article 1105(1) contains an open-ended prohibition on discrimination against aliens is unsupported. Because the NAFTA Parties specifically prohibited discrimination against foreign investors and their investments in particular provisions of Chapter Eleven, and did not include an express prohibition against discrimination in Article 1105(1), that provision should not be read to include an open-ended prohibition on discrimination against foreign investments. To the extent that the customary international law minimum standard of treatment incorporated in Article 1105 prohibits discrimination, it does so in the context of other established, customary international law rules, including the prohibitions against denials of justice and unlawful expropriation, as well as the obligation of full protection and security. Furthermore, under Article 1105(1), those obligations extend only to the treatment of "investments of investors."

In addition, Claimants' assertion that the United States has violated the *minimum* standard of treatment by failing to provide them with *special* treatment, allegedly due to them because of their status as members of Canadian First Nations, fundamentally misconstrues the nature of the obligation in Article 1105. . . . NAFTA Article 1105 guarantees only a floor of treatment for "*investments*

of investors" below which the conduct of host nations must not fall. It does not provide any guarantee of treatment for *investors*—separate and apart from their investments—much less require special treatment for particular classes of investors or their investments.

* * * *

a. Customary International Law Prohibits Discrimination against Aliens Only In Specific Contexts, Not Applicable Here

The customary international law minimum standard of treatment obligation under Article 1105(1) does not include a general non-discrimination obligation that incorporates all non-discrimination principles in international law. Rather, the minimum standard of treatment obligation under Article 1105(1) extends only to the treatment of "investments of investors of another Party."

As the *Methanex* tribunal found in its examination of allegations of discriminatory measures in the context of Article 1105, "when the NAFTA Parties wished to incorporate a norm of non-discrimination, they did so" and "[w]hen the NAFTA Parties did not incorporate a non-discrimination requirement in a provision in which they might have done so, it would be wrong for a tribunal to pretend that they had." The NAFTA Parties negotiated and agreed to specific legal provisions governing when discrimination on the basis of nationality would be permitted and when it would not. Furthermore, the NAFTA Parties have clearly stated that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.". . . [T]he minimum standard of treatment addresses only certain types of discrimination against aliens.

In fact, "a degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law." For example, States routinely limit or deny aliens the right to vote and the right to work without running afoul of international law. Furthermore, customary international law upholds the right of governments to limit the property

rights of aliens within their territories. While States frequently agree to refrain from discriminating against aliens in economic matters by undertaking national treatment and most-favored-nation obligations in their international agreements, they are not required to do so by customary international law. In fact, as one scholar has explained, if the principle of nondiscrimination were reflected in customary international law, "most-favored-nation provisions in commercial and other treaties would be superfluous or, by sheer volume, merely declaratory by now," but that is decidedly not the case.

Rather than providing a general prohibition against discrimination, Article 1105(1) prohibits discrimination against the investments of aliens in particular contexts, including denial of justice, full protection and security, and expropriation claims. *First,* the minimum standard of treatment obligation requires governments to grant aliens access to their courts and judicial remedies on a non-discriminatory basis. *Second*, the minimum standard of treatment obligation requires governments to "[a]ccord to foreigners to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance the same indemnities as it accords to its own nationals in similar circumstances." *Third*, the minimum standard of treatment prohibits discrimination against aliens in the taking of property. Because Claimants have not couched their allegations of discrimination in the context of such established rules, and none of the measures they challenge can be found to discriminate against Claimants on their face, they cannot be considered under Article 1105.

* * * *

C. Claimants' Article 1110 Claim Fails Because Claimants Have Not Demonstrated That Any "Investment" Has Been Expropriated

* * * *

The defects in Claimants' expropriation claim become abundantly clear upon an examination of the factors that are analyzed to determine if a regulatory measure constitutes an expropriation in violation of international law, namely: (1) the economic effect of the challenged measure on the claimant's property; (2) the extent

to which the measure interferes with the claimant's reasonable investment-backed expectations; and (3) the character of the measure.

* * * *

1. Claimants' Alleged Business And Other Property Interests Have Not Been Expropriated Because The Impact Of The Challenged Measures Upon Them Is Insufficient To Qualify As An Expropriation

Claimants assert that their investment in the United States consists of an undocumented "integrated enterprise" (allegedly made up of NWS [Native Wholesale Supply, Grand River's U.S.-based distributor for cigarette sales on Native American reservations in the United States] and a portion of Grand River's U.S. sales operations), or the goodwill and intellectual property associated with the Seneca and Opal brands. . . . [N]either qualifies as an "investment" under NAFTA Chapter Eleven. Moreover, even if they did qualify as investments, Claimants have failed to demonstrate that the impact of the allocable share amendments was sufficient to constitute an expropriation under NAFTA Article 1110. This is because a mere negative impact on an investment's profitability as a result of regulation is insufficient to support a finding of expropriation under international law. As noted by Professor Brownlie, "State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation." Thus, "the general body of precedent usually does not treat regulatory action as amounting to expropriation." Indeed, if States were held liable for expropriation every time a regulation had an impact on an investment, governments could not afford to regulate. As one NAFTA Chapter Eleven tribunal has observed:

> [G]overnments must be free to act in the broader public interest . . . . Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.

For this reason:

> While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner.

* * * *

a. Claimants Fail To Establish A Sufficient Impact On Their Putative Integrated Business Enterprise To Prove An Expropriation

Tellingly, neither Claimants nor their expert witnesses have attempted to put a value on the so-called "integrated" business enterprise they assert constitutes their investment in the United States. . . . Claimants have thus failed to establish that the challenged measures had a sufficient economic impact on their "enterprise" to constitute an expropriation under Article 1110. In fact, the limited data Claimants did produce suggest very strongly that the challenged measures did *not* have such an impact.

* * * *

b. Claimants Fail To Establish A Sufficient Impact On Their Alleged Investment Of Intellectual Property And Goodwill To Constitute An Expropriation

As an alternative to their alleged "business venture," Claimants also define their investment as brand "goodwill" or "intellectual property." While Claimants use two separate terms to describe their putative investment, their expert reports make clear that the terms relate to the same concept: the estimated value of the profits Claimants say they can derive from their cigarette sales in the United States. . . . Claimants' effort is misplaced. It is well-established that concepts such as "goodwill," "market share," and "market access" may play some part in the *valuation* of an investment, but those concepts do not themselves constitute "investments" under NAFTA Chapter Eleven that, by themselves, are capable of being expropriated.

Even if such concepts could constitute "investments" under Chapter Eleven, however, Claimants have failed to demonstrate that the value of their brands has been sufficiently diminished in this case. *First*, the purported impact on Claimants' cigarette sales in this case has not been shown to be severe enough to meet the test for an expropriation. . . .

Second, Claimants simply have failed to present a fair market valuation of their brands, or any related "goodwill" or "intellectual property." Thus, there is no basis on which the Tribunal can conclude that an expropriation has occurred. . . .

* * * *

2. Claimants Have Failed To Establish Any Reasonable Expectation That the Favorable Regulatory Conditions They Exploited Would Continue In Perpetuity

Claimants had no reasonable expectation that the escrow statutes (and the accompanying regulatory loophole they exploited . . .) would remain unchanged. . . .

. . . Claimants have produced no evidence supporting their bare allegations of taking "state officials . . . at their word" that the escrow statutes would not be amended.

The lack of any such alleged specific commitments by the states, especially in an industry like the cigarette industry, is fatal to Claimants' Article 1110 claim. . . . Claimants are involved in one of the most highly regulated industries, and thus were well aware that "[g]overnments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue." For this reason, NAFTA tribunals have rejected expropriation claims based upon shifting regulatory conditions unless the claimant has established a "specific commitment" from the government to refrain from such regulation. As the tribunal in *Methanex* explained:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects,

> *inter ali[a]*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

That is precisely the situation here. . . .

3. The Regulatory Nature Of The Allocable Share Amendments And The Escrow Statutes They Amended Do Not Support A Finding Of Expropriation

The character of the government's action is the third factor international tribunals consider when determining whether an indirect expropriation has occurred. The character factor concerns, *inter alia*, whether the government action was akin to a physical invasion, or whether the action merely impacted property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good," for example, by regulation.

Where, as here, the action has not been in the nature of a physical invasion or taking, tribunals have looked to whether or not the action is a non-discriminatory measure of general applicability. Under international law, where the action is a nondiscriminatory regulation to promote legitimate public welfare objectives, it will not be deemed expropriatory except in rare circumstances. . . .

* * * *

2. Removal of Remaining Tariffs and Quotas Between the United States and Mexico

On January 1, 2008, the United States and Mexico removed all remaining tariffs and quotas under the NAFTA. *See* Chapter III, "Regional Negotiations and Bilateral Negotiations," of the 2008 Annual Report of the President of the United States on the Trade Agreements Program, at 129, available at *www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report*.

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement cases are available at *www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement*.

The following discussion of a selection of WTO disputes involving the United States is drawn from Chapter II, "World Trade Organization," of the 2008 Annual Report of the President of the United States on the Trade Agreements Program ("2008 Annual Report"), available at *www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report*. WTO legal texts referred to below are available at *www.wto.org/english/docs_e/legal_e/legal_e.htm*.

a. Disputes brought by the United States

(1) China–Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (WT/DS373)

In March 2008 the United States requested consultations with China concerning financial information services. A summary of the dispute and its resolution is set forth below; *see* 2008 Annual Report at 69. *See also* USTR press release, Mar. 3, 2008, available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/march*; "Questions and Answers Concerning Request for WTO Consultations with China on Financial Information Services," Mar. 3, 2008, available at *http://geneva.usmission.gov/press2008.html*.

On March 3, 2008, the United States requested WTO dispute settlement consultations with China concerning China's treatment of foreign financial information suppliers. China's regulatory regime requires foreign financial information suppliers to operate through a government-designated distributor and prohibits them

from establishing local operations to provide their services. In addition, the agency designated by China to regulate these services appears to have a conflict of interest, as it is closely connected to a commercial operator in China. This regime appears inconsistent with several WTO provisions, including Articles XVI, XVII, and XVIII of the *General Agreement on Trade in Services*, as well as specific commitments made by China in its WTO accession protocol.

The EU also requested WTO consultations with China on the same measures. The United States, the EC, and China held joint consultations on April 22–23, 2008. On June 20, 2008, Canada requested consultations with China regarding the same measures.

On December 4, 2008, the United States and China informed the DSB [Dispute Settlement Body] that they had reached an agreement with respect to this matter and provided a copy of the agreement for circulation. The agreement calls for China to take certain steps, including the revision and repeal of certain existing measures, as well as the adoption of new measures, to respond to the United States' concerns regarding the absence of an independent regulator and the imposition of unfair requirements and restrictions on U.S. financial information service suppliers operating in China. China's commitments under the agreement include the establishment, by January 31, 2009, of an independent regulator for foreign financial information service suppliers, and the implementation of new non-discriminatory and transparent regulations by June 1, 2009. The EU and Canada reached identical agreements with China with respect to their disputes on the same matter.

(2) China–Imported Auto Parts (WT/DS340)

In 2008 a panel and the WTO Appellate Body issued reports in a dispute concerning China's treatment of imported automobile parts, components, and accessories. In 2006 the United States, the European Union, and Canada had requested the WTO to establish a dispute settlement panel to consider China's measures; *see Digest 2006* at 741–42. Developments in 2008 are described below. *See* 2008 Annual Report at 67; *see also* USTR press release, available at *www.ustr.gov/*

*about-us/press-office/press-releases/archives/2008/december.**

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The panel circulated its report on July 18, 2008. The report upheld U.S. claims that China's regulations were inconsistent with China's WTO obligations. In particular, it found that China's regulations impose discriminatory internal charges and administrative procedures on imported auto parts resulting in violation of Articles III:2 and III:4 of the General Agreement on Tariffs and Trade 1994, and that certain aspects of the regulations are inconsistent with specific commitments made by China in its WTO accession agreement.

On September 15, 2008, China appealed the panel findings to the WTO Appellate Body. On December 15, 2008, the Appellate Body issued its report. The Appellate Body upheld the panel's findings with respect to Articles III:2 and III:4 of the GATT 1994, and, after upholding the panel's findings that the measures imposed internal charges and regulations, found that the specific commitment in China's WTO accession agreement regarding tariff treatment was not implicated.

b. Disputes brought against the United States

(1) Zeroing

(i) United States–Final Anti-dumping Measures on Stainless Steel from Mexico (WT/DS344)

In 2007 a panel established at Mexico's request found that the U.S. use of "model zeroing" in anti-dumping investigations breached U.S. obligations under the Agreement on

* Editor's note: In early 2009 the United States and China agreed that the reasonable period for China to comply with the Appellate Body's findings would expire on September 1, 2009.

Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") but "simple zeroing" in U.S. administrative reviews did not. "Zeroing" refers to the practice of imposing offsets for non-dumped sales comparisons in anti-dumping investigations. The panel's findings concerning administrative reviews were reversed in 2008:

> The Appellate Body issued its report on April 30, 2008. The Appellate Body reversed the panel's findings with respect to administrative reviews, finding that zeroing in administrative reviews is "as such", and "as applied" to the subject administrative reviews, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the AD [Anti-Dumping] Agreement.
>
> The DSB [WTO Dispute Settlement Body] adopted the Appellate Body report, and the panel report, as modified by the Appellate Body report, on May 20, 2008. At the DSB meeting held on June 2, 2008, the United States notified its intention to comply with its WTO obligations and indicated it would need a reasonable period of time to do so.
>
> On August 11, 2008, Mexico requested that the reasonable period of time be determined through arbitration pursuant to Article 21.3(c) of the DSU [Understanding on Rules and Procedures Governing the Settlement of Disputes]. . . . On October 31, 2008, the arbitrator issued his award, in which he decided that the reasonable period of time would be 11 months and 10 days, ending on April 30, 2009.

See 2008 Annual Report at 87–88; *see also* WTO Appellate Body report, WTO Doc. WT/DS344/AB/R.

On May 20, 2008, the United States expressed concerns about the Appellate Body's report in the dispute in a statement to the DSB. The U.S. representative summarized U.S. views as follows:

- . . . First, once again a Division [of the Appellate Body] has devised a new basis to justify findings against

zeroing in reviews—this time that the margin of dumping is exporter based and that somehow this precludes finding a margin of dumping with respect to an individual transaction. The reasoning under this approach continues to be deeply flawed and fails to comport with the actual, agreed treaty text.

- Second, the Division has significantly departed from the established understanding of the relationship between panel and Appellate Body reports and the role of the Appellate Body and that of Members. This report purports to create a new legal effect for Appellate Body reports, one that would appear to grant to the Appellate Body the very authority to issue authoritative interpretations of the covered agreements that is reserved by the WTO Agreement exclusively to Members.

Excerpts discussing the U.S. view that the WTO Appellate Body inappropriately exceeded its established role with respect to WTO panels and WTO member states follow. The full text of the U.S. statement is available at *http://geneva.usmission.gov/Press2008/May/0520DSB.html*.

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• In this dispute, the Panel correctly noted its obligations under DSU Articles 11, 3.2 and 19.1 and undertook its work in accordance with those obligations. And, in carrying out its task, this Panel—like another panel before it—carefully considered, and ultimately disagreed with, the various versions of the Appellate Body's reasoning in prior disputes involving zeroing in assessment reviews. On appeal, Mexico raised a claim under DSU Article 11.

• The first few paragraphs of the Appellate Body report's discussion of that appeal are unexceptional. The Division first recalls the task of the Panel under DSU Article 11: to assist the DSB in discharging its responsibilities, and to make an objective assessment of the matter, including the applicability of and conformity with the covered agreements. . . .

• The discussion then turns, however, in a significantly different direction—one that no longer relies on WTO Agreement text or even on prior adopted reports. The discussion begins to use terms such as "'security and predictability' in the dispute settlement system"—which is a misstatement of the text, since the DSU only speaks to the dispute settlement system providing security and predictability to the "multilateral trading system." The discussion also asserts that the Panel's "failure to follow previously adopted Appellate Body reports . . . undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements."

• The Division closes by expressing its concern about "the Panel's decision to depart from" the Appellate Body's prior rulings on these issues, stating that the Panel's approach has "serious implications for the proper functioning of the WTO dispute settlement system."

• . . . This second part of the Appellate Body's discussion misperceives the WTO Agreement and this Member-driven organization. It is WTO Members that negotiate and agree to obligations, and we do so by consensus. We have also established one and only one means for adopting binding interpretations of the obligations that we agree to: Article IX:2 of the WTO Agreement provides that the Ministerial Conference and the General Council have the exclusive authority to adopt such interpretations.

• Yet the approach in this Appellate Body report would appear to mean that Appellate Body reports should be treated as authoritative interpretations of the covered agreements—they are to be followed by panels regardless of whether a panel in a particular dispute agrees with those prior reports. . . .

* * * *

• . . . WTO Members have made it clear—in fact, the DSU says it twice—that the findings of panels and the Appellate Body cannot add to or diminish the rights and obligations in the covered agreements. . . . [T]his Appellate Body report's approach, including its references to a "coherent and predictable body of jurisprudence," would appear to transform the WTO dispute settlement system into a common law system. But that was nowhere agreed among Members.

• And what is more, this Division raised all of these systemic concerns unnecessarily . . . . The report rejected Mexico's Article 11 appeal, so all of this discussion was mere dicta by the Division.

• We do, of course, share the Appellate Body's interest in having similar cases treated similarly. We expect that all Members do likewise. We do not, however, share this report's view that this means that panels must follow Appellate Body reports in different disputes. . . . [W]e would expect any panel to take account of any other relevant adopted report, whether authored by the Appellate Body or by a different panel.

• To take account of an adopted report, of course, does not mean to follow it without hesitation. To the contrary, to take account of such a report means to examine it, to consider it, and to engage with its reasoning. . . .

• Mr. Chairman, the WTO dispute settlement system functions properly when the rules that Members established for that system are respected. One of those rules is that a panel must make an objective assessment of the matter before it . . . . [T]here is no question but that the Panel did so here.

* * * *

On the same day, the United States circulated additional written comments to WTO members, detailing its concerns about the Appellate Body's decision, as excerpted below. WTO Doc. WT/DS344/11.

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10. Four times the DSB has been presented with the question of whether margins of dumping can be calculated on a transaction-specific basis and zeroing is thus permissible in contexts such as assessment proceedings. Four times panels—that have included in their membership antidumping administrators and negotiators—have concluded that zeroing is permitted in such circumstances.*

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* Editor's note: *See, e.g.*, panel reports in *US–Zeroing (EC)* (WTO Doc. WT/DS294/R) and *US–Zeroing (Japan)* (WTO Doc. WT/DS322/R).

Four times the Appellate Body has disagreed. And each time that the Appellate Body has done so, it has presented a new rationale for its position that does not withstand close scrutiny. Thus, it is not surprising that *two* panels have taken the unprecedented step of examining, and then rejecting, the Appellate Body's reasoning.

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A. THE APPELLATE BODY'S REJECTION OF NEGOTIATING HISTORY

14. On appeal, the United States explained that, even assuming *arguendo* there was any ambiguity in the text regarding a prohibition on zeroing, an examination of the negotiating history would confirm that Members did not agree to prohibit it. In light of the absence of a textual prohibition on zeroing—neither "zeroing" nor "negative dumping margins" appears anywhere in the Anti-Dumping Agreement—one would have expected the Division to have wanted to consult the negotiating history if the Division were considering viewing the text as implicitly dealing with zeroing. Surprisingly, however, the Division's view was that recourse to the negotiating history was not "strictly necessary." Moreover, although the Division did in the end examine the US explanations of the negotiating history, the Division's conclusions regarding the negotiating history simply cannot be reconciled with that history.

1. The Tokyo Round Antidumping Code permitted zeroing

15. For example, in 1979, certain contracting parties concluded the Agreement on Implementation of Article VI of the GATT. . . . [W]e will refer to the 1979 Agreement by its colloquial name, the Tokyo Round Anti-Dumping Code ("Code"). . . . [T]he Code set out further disciplines on the imposition of antidumping measures . . . . Signatories twice brought disputes, arguing that zeroing was inconsistent with the Code. Those claims failed.

16. During the Uruguay Round, further disciplines were negotiated, resulting in yet another Agreement on Implementation of Article VI of the GATT, . . . the Anti-Dumping Agreement. While some aspects of the Code were radically altered, the provisions governing assessment proceedings—found not to have prohibited zeroing—were not. In fact, the two key provisions were identical.

17. Article 8:3 of the Tokyo Round Anti-Dumping Code provides that:

> The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2.

18. Article 9.3 of the Anti-Dumping Agreement provides that:

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

19. Yet the Division examined the negotiating history and drew the extraordinary conclusion that "we are not persuaded that the [Tokyo Round Code] provide[s] guidance as to whether simple zeroing is permissible under Article 9.3. of the *Anti-Dumping Agreement*." At least one panel had declined to find a prohibition in Article 8.3 itself. That provision is directly incorporated into the Anti-Dumping Agreement as Article 9.3. . . .

20. The Appellate Body Division's report finds that "the relevance of" the panel reports under the Code "is diminished by the fact that the" Code was separate from the GATT 1947 and has been "terminated". . . . It is completely unclear what legal significance attaches to the termination of a previous agreement that served as part of the negotiating history of the Anti-Dumping Agreement. . . . There is no requirement that negotiating history only consist of agreements or documents still in force at the time an agreement is being interpreted. And while the Code was separate from the GATT 1947, the negotiators of the Anti-Dumping Agreement relied on and drew from its provisions, so the interpretation of those provisions would be directly relevant to understanding the Anti-Dumping Agreement. The Marrakesh Agreement reflects this understanding, noting in Article XVI:1 that the "WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947." . . .

2. Article VI of the GATT did not bar zeroing

21. Japan was one of the contracting parties that challenged zeroing—unsuccessfully—under the Tokyo Round Code. While Japan challenged zeroing as being inconsistent with Article 2 of the Code, and, consequentially, with Article 8:3, Japan did *not* challenge zeroing as being inconsistent with Article VI:1. The same is true for Brazil in its dispute against the EEC involving Cotton Yarn. The latter is an adopted panel report and thus forms part of the GATT *acquis*.

22. This history confirms that the Uruguay Round negotiators operated from a premise that zeroing was *not* prohibited under Article VI of the GATT or Article 8:3 of the Tokyo Round Code. . . . In this context, there is simply no basis for the Appellate Body's conclusion that Article VI:1 of the GATT or Article 9.3 of the Anti-Dumping Agreement prohibits zeroing in assessment proceedings.

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B. THE APPELLATE BODY'S MISGUIDED EMPHASIS ON EXPORTER MARGINS OF DUMPING

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30. . . . [T]he Division's conclusion about an exporter-wide margin of dumping is at odds with Article 9.3.2. According to the Appellate Body, the *exporter's* margin of dumping, calculated on the basis of *all* of that exporter's transactions, establishes the ceiling for assessment of duties. Under Article 9.3.2, the *importer* may request a refund if that request is "duly supported by evidence . . . ." If the amount of the liability is capped by the margin of dumping, and the margin of dumping is calculated on the basis of the *exporter's* transactions, how can the *importer* duly support its request with evidence? The importer only knows what that importer's *own* transactions are. Nor does the importer necessarily have information about transactions handled by *other importers*.

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C. TRANSACTION-SPECIFIC MARGIN OF DUMPING

32. The Division then devotes all of two paragraphs to the central question of whether the margin can be at the transaction-specific level.

33. As the United States has noted before, and as four panels have found, the calculation of a transaction-specific margin of dumping for purposes of the assessment of antidumping duties is a permissible interpretation of the Anti-Dumping Agreement. That a margin of dumping may be calculated on a transaction-specific basis leads to the conclusion that authorities are not required to offset a dumping margin calculated for one transaction with a negative dumping margin calculated in a separate transaction.

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35. Put differently, a permissible interpretation of the Anti-Dumping Agreement is that a Member may calculate a margin of dumping on the basis of individual transactions, is not obligated to provide offsets for one transaction as compared to another, and thus zeroing is not prohibited in such circumstances. Under Article 17.6 of the Anti-Dumping Agreement, if an interpretation is permissible, a measure based on it must be allowed to stand.

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37. The Division states that:

> [T]he notion that a "product is introduced into the commerce of another country at less than its normal value" . . . suggests to us that the determination of dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions of the subject merchandise over the *period of investigation*.

38. There are two important aspects of this conclusion, in particular, that require comment.

(a) Lack of Textual Basis for Prohibition

39. . . . [T]he Division does not cite to any actual text that directs the calculation of a margin of dumping at a particular level (transaction-specific or multiple transactions). Instead, the Division relies on a "notion" that "suggests" a particular result. However, a "notion" that "suggests" a particular interpretation is not sufficient

to conclude that the text of a covered agreement prohibits particular action. This is especially true in the case of the Anti-Dumping Agreement, Article 17.6(ii) of which provides:

> Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

40. Moreover, a closer examination of the language upon which the Division's report relies does not support its interpretation of Article VI:1 as precluding the calculation of margins of dumping on a transaction-specific basis. Article VI:1 provides:

> a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another . . . is less than the comparable price . . . for the like product . . . .

41. The Division fails to offer a meaningful explanation as to why this sentence *precludes* the calculation of a margin of dumping on a transaction-specific basis. Indeed, the ordinary meaning of the text, read in context, does not support the conclusion that the *only* interpretation of Article VI:1 is one involving *multiple transactions*.

42. The Division's reliance on the word "product" is misplaced. "Product" in Article VI is not confined to meaning all transactions of that product. Such a reading cannot be reconciled with the use of "product" in Article II:2(b) of the GATT 1994: "Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

. . .

> (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI. . . ."

43. For a duty to be applied "on the importation of any product" it will be applied on a particular transaction. A duty is not applied only after there have been multiple transactions. Nor would the Division's reading of "product" work for the other elements of Article II:2.

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46. Taken to its logical extreme, the Division's reading of Article VI:1 suggests that there is in fact only *one* product, *one* normal value, and *one* export price, for *all* goods exported from the country in question. Article VI:1 does not even use the term "*exporter.*" There is no textual basis for the . . . conclusion that Article VI:1 "suggests . . . that the determination of dumping . . . is properly made . . . on the basis of the totality of *an exporter's* transactions . . . ."

47. Indeed, it would require that no margin could be determined until all imports had stopped. The Division appears to overlook this problem with its reference to the "totality of an exporter's transactions of the subject merchandise over the period of investigation." But that fails to address the question of the relevant time period. Nothing in the text specifies the time period as being the period of investigation, nor does the text specify the period to be used after the period of investigation. The Division was imputing into the text words that are not there.

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(b) Erroneous Reliance on Calculations in Other Proceedings

49. The Division also relied on "contextual" references. For instance, it referred to the fact that "*whether* an exporter is dumping can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in *all* of its transactions over a period of time." The Division also refers to the "purpose" of an antidumping duty, which is to "counteract the injury caused or threatened to be caused by 'dumped imports' to the domestic industry."

50. However, to the extent that these arguments are relevant at all, they pertain to antidumping *investigations*. . . .

51. Panels, and the Appellate Body itself, have repeatedly noted that different antidumping proceedings serve "different purposes". It is not clear why, even if the analysis of multiple transactions is required in an investigation, such analysis is *also* required in assessment proceedings, which serve an entirely different purpose. . . .

52. Further, in a footnote, the Division addressed a report issued in 1960 by the Group of Experts, which . . . comprised a group of antidumping experts. According to the Group of Experts, "the ideal method [for making a dumping determination] was to make a determination in respect of *each single importation of the product concerned"* . . . .

53. The Division's basis for rejecting the interpretation inherent in the Group of Experts statement was the following: the Group of Experts recognized that such a method was impracticable, . . . and perhaps most remarkably, that the WTO Agreement entered into force "long after" the Group of Experts Report. In other words, the Division considered that a report by experts far closer in time to the conclusion of the agreement at issue was "of little relevance" because it was old. This approach would appear to reverse the customary rules of interpretation of public international law.

54. The Division appears to have misunderstood the relevance of the Group of Experts' statement. That statement is relevant for purposes of understanding the permissible interpretation of Article VI.

55. The Division has failed to explain why the fact that a particular system is *administratively impracticable* leads to the conclusion that Members necessarily agreed to another system with *a completely different concept of a margin of dumping, i.e.,* one that is numerically different. Members did no such thing. Instead, they devised an *administratively practicable* system that allows them to assess a duty with the *same* margin of dumping. Thus, investigations may be conducted on the basis of multiple transactions, and so may assessment proceedings and reviews. Whether the system described by the Group of Experts is possible or not, it provides critical insight into how the concept of a margin of dumping has been viewed under the GATT 1947 and the WTO regime.

56. As required by Article 17.6 of the Agreement, the question is whether a transaction-specific margin of dumping is a *permissible*

interpretation. The Panel report . . . respected the requirements of Article 17.6.

57. Finally, the Division further bases its rejection of the concept of a transaction-specific margin of dumping on the fact that it does not believe that such a margin of dumping "can be done" for purposes of Articles 5.8, 6.10, 6.10.2, 9.4, 9.5, 11.2, and 11.3. The United States has not taken the position that a margin of dumping *must always* be calculated on a transaction-specific basis, but rather that the Agreement *allows* it to be calculated on a transaction-specific basis, and also *allows* it to be calculated on the basis of multiple transactions. . . . [T]he Division has failed to explain how the text *requires* in every instance that the calculation be made on the basis of multiple transactions, particularly in light of the negotiating history and practice under the GATT 1947, Tokyo Round Code, and the WTO.

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(ii) Other zeroing cases

A discussion of 2008 developments in two zeroing cases the European Union brought against the United States *(United States–Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (WT/DS294)* and *United States–Continued Existence and Application of Zeroing Methodology (Zeroing II) (WT/DS350))*, a third case brought by Japan *(United States–Measures Relating to Zeroing and Sunset Reviews (WT/DS322))*, and a fourth brought by Thailand *(United States–Measures Relating to Shrimp from Thailand (WT/DS343))* is available at 2008 Annual Report at 83–84, 88–89, 85–86, and 86–87, respectively.

(2) United States–Subsidies on Upland Cotton (WT/DS267)

On March 21, 2005, the DSB adopted panel and Appellate Body reports on Brazil's claims concerning alleged U.S. subsidies relating to upland cotton. On December 18, 2006, Brazil requested the DSB to establish a panel under Article 21.5 of

the DSU to hear its claims that the United States had not complied with the DSB's 2005 ruling (*see Digest 2005* at 633). On December 18, 2007, the panel issued its report, making certain findings in favor of Brazil and others in favor of the United States. The panel's findings, the Appellate Body's June 2008 report, and subsequent developments are described below; *see* 2008 Annual Report at 78–80.

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The panel found, *inter alia*, that: (1) U.S. export credit guarantees . . . issued under the modified GSM 102 program* with respect to unscheduled and certain scheduled (rice, pig and poultry meat) commodities constituted prohibited export subsidies; and (2) U.S. marketing loan and counter-cyclical payments for upland cotton were continuing to cause serious prejudice to Brazil by significantly suppressing world upland cotton prices. The panel rejected Brazil's claim that payments under the marketing loan and counter-cyclical payment programs were responsible for an increase in U.S. market share in MY [Marketing Year] 2005 and thereby caused serious prejudice to Brazil's interests. The panel also found that the United States was not required to have refused to perform on export credit guarantees that were issued prior to the deadline for the implementation of the DSB's recommendations and rulings as to such guarantees (July 1, 2005) and that were still outstanding as of that date.

The United States appealed the compliance panel's adverse findings on February 12, 2008. Brazil filed its notice of other appeal on February 25, 2008. The Appellate Body issued its report on June 2, 2008.

The Appellate Body issued its report on June 2, 2008, in which it:

- upheld the compliance panel's finding that U.S. marketing loan and counter-cyclical payments cause significant price

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* Editor's note: Information on GSM 102, the U.S. Department of Agriculture's Export Guarantee Credit Program, is available at *www.fas.usda.gov/excredits/exp-cred-guar-new.asp*.

suppression in the market for upland cotton, thereby constituting present serious prejudice to Brazil;

- while agreeing with the United States that the compliance panel erred in dismissing U.S. Government budgetary data showing that U.S. export credit guarantee programs operate at a profit, nonetheless upheld the compliance panel's ultimate finding that GSM 102 export credit guarantees with respect to unscheduled products and certain scheduled products (rice, pig meat, poultry meat) were prohibited export subsidies; and
- upheld the compliance panel's finding that Brazil's claims as to marketing loan and countercyclical payments made after September 21, 2005, and Brazil's claims as to GSM 102 guarantees for exports of pig meat and poultry meat, were within the scope of the compliance proceeding.

The DSB adopted the Appellate Body report, and the panel report, as modified by the Appellate Body report, on June 20, 2008. Brazil requested resumption of the arbitration process on August 25, 2008. . . .

* * * *

At a meeting of the DSB on June 20, 2008, the United States made a statement concerning the panel and Appellate Body reports, as excerpted below. (Citations to the DSB's reports are omitted.) The full text of the U.S. statement is available at *http://geneva.usmission.gov/Press2008/June/0620DSB.html*.

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. . . [W]e are deeply disappointed in the compliance Panel and Appellate Body reports. The United States believed it had brought the challenged payments and export credit guarantees into full compliance with the DSB's recommendations and rulings. To find otherwise, the compliance Panel and Appellate Body had to make findings on jurisdiction that re-cast or ignored those DSB recommendations and rulings and other findings that assume conclusions

and fail to demand of the complaining party that it fully establish its case. . . .

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. . . Article 21.5 establishes the scope of a compliance proceeding as a "disagreement as to the existence of or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. This provision is clear: the *DSB recommendations and rulings* shape the very scope of the compliance proceeding. The Appellate Body, however, upheld the compliance Panel's two preliminary rulings on scope by misapplying Article 21.5 and neglecting the fundamental role of the DSB's recommendations and rulings.

The first preliminary ruling on Article 21.5 involved U.S. export credit guarantees. In this proceeding, Brazil challenged U.S. export credit guarantees for pig meat and poultry meat. However, as the compliance Panel and the Appellate Body agreed, there were no DSB recommendations and rulings concerning export credit guarantees for pig meat and poultry meat, and the United States was not required to take any measure to comply with respect to those export credit guarantees. Any changes made to the GSM 102 export credit guarantee program concerning pig meat and poultry meat, then, were not taken to comply with the DSB's recommendations and rulings, and did not properly fall within the scope of the compliance proceeding.

The Appellate Body . . . makes a statement that should be of concern to Members. At paragraph 202 of its report, the Appellate Body noted that "when the measures actually 'taken' by the implementing Member are broader than the DSB's recommendations and rulings, we do not see why the scope of the DSB's recommendations and rulings should necessarily limit the scope of the 'measures taken to comply' for purposes of the Article 21.5 proceedings." It is difficult to understand how the scope of the DSB recommendations and rulings can do anything other than determine or limit the scope of the measures taken to comply. In order to be taken "to comply," there must be something to comply with. For reasons that are not clear, the Appellate Body appears to be ignoring the plain text of Article 21.5.

The United States also finds troubling the Appellate Body's dicta that the WTO dispute settlement system does not provide "incentives or disincentives for a WTO Member to take broader or narrower action as part of its implementation efforts." . . .

Where a Member goes further than necessary for compliance, for example, for administrative efficiency, good governance, or other reasons, the system should not penalize them for doing more than what was required. Otherwise, . . . the system will provide every incentive to limit any action taken only to what is strictly necessary for compliance. This result is desirable neither from the point of view of good governance nor from the point of view of the WTO.

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. . . The Appellate Body also upheld the compliance Panel's finding that the U.S. marketing loan and counter-cyclical payments made after September 21, 2005 were properly within the scope of the Article 21.5 proceeding. In so doing, both the Appellate Body and the compliance Panel failed to respect the actual recommendations and rulings of the DSB that form the basis for a compliance proceeding.

The DSB's recommendations and rulings on present serious prejudice pertained to U.S. support payments made during marketing years ("MY") 1999–2002, and not to the programs under which those payments were made. The compliance Panel confirmed that this was correct, the Appellate Body did not reverse that finding, and the DSB is adopting that finding today. Consequently, there is no question that the compliance Panel and the Appellate Body considered that payments in later years were not measures "taken to comply."

Yet the Appellate Body found that later payments were within the scope of the compliance proceeding. In so doing, the Appellate Body ignored the DSB's recommendations and rulings in this dispute by deeming MY 1999–2002 "merely the historical reference period examined by the original panel." And it considered that U.S. payments made after September 21, 2005 were also subject to the requirement of Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") to withdraw the

subsidy or remove its adverse effects, even though the DSB's recommendations and rulings did not cover payments after MY 2002, or the programs themselves. In other words, the Appellate Body inappropriately treated the original panel's finding on some measures (certain payments) as if it had been a finding on other measures (the programs or future payments allegedly mandated to be provided). . . .

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The Appellate Body worried that "the approach advocated by the United States would have serious implications for a complaining Member's ability to obtain relief against adverse effects of actionable subsidies." However, the question is not what is the Appellate Body's view of what relief is desirable, but what is the relief that was negotiated and agreed by Members in the WTO Agreements. Article 7.8 cannot be re-written to apply to additional measures just because that is what a panel or the Appellate Body believes would be a better approach. . . .

* * * *

(3) United States–Continued Suspension of Obligations in the EU–Hormones dispute (WT/DS320)

In 1999, as authorized by the DSB, the United States imposed trade sanctions on the European Union in connection with the EU ban on imports of meat from animals that had been administered certain growth hormones. The DSB had found that the EU hormones ban was inconsistent with the EU's obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"), and that the European Union did not comply with the DSB's recommendations and rulings within the required timeframe. *See II Cumulative Digest 1991–1999* at 1418–20. In 2003 the European Union amended the hormones ban. Arguing that its amendments brought it into compliance with its WTO obligations, the European Union requested consultations the following year, challenging the continuation of U.S. concessions.

As discussed below, a panel established in 2005 issued its final report on March 31, 2008, aspects of which the Appellate Body reversed on October 16, 2008, finding that U.S. duties on certain EU products did not violate U.S. obligations to the WTO. *See* 2008 Annual Report at 69–70, 87.

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The panel circulated its final report on March 31, 2008. In its report, the panel found that the United States breached Articles 23.2(a) and 23.1 of the DSU by making certain statements at the meetings of the Dispute Settlement Body and by maintaining the suspension of concessions after the EU had announced compliance. The panel also found that because the EC's revised ban of 2003 was not consistent with the SPS Agreement and had not been brought into compliance, the United States had not breached Article 22.8 of the DSU.

The EU filed its notice of appeal in this dispute on May 29, 2008. The United States filed a notice of other appeal on June 10, 2008. The Appellate Body granted the parties' request to open the hearing to the public via closed-circuit television broadcast. The oral hearing, which took place on July 28–29, 2008, was the first Appellate Body hearing ever to be open to the public.

On October 16, 2008, the Appellate Body issued its report. The Appellate Body reversed the panel's findings that the United States had breached Articles 23.2(a) and 23.1 of the DSU. The Appellate Body also reversed several of the panel's findings relating to the SPS Agreement issues concerning the EU's amended ban of 2003. The Appellate Body found that it could not conclude whether or not the EU's amended ban is WTO-consistent. The DSB adopted the Appellate Body report on November 14, 2008.

. . . [O]n December 22, 2008, the EU requested consultations with the United States and Canada pursuant to Articles 4 and 21.5 of the DSU, regarding the EU's implementation of the DSB's recommendations and rulings in the EU–Hormones dispute.

On November 14, 2008, the United States provided views on the Appellate Body's report at a meeting of the DSB. In his

statement, excerpted below, the U.S. representative praised aspects of the Appellate Body's report but expressed concern about its statements and conclusions concerning the process for resolving post-suspension disputes, the standard for experts' "independence and impartiality," and the SPS Agreement, as well as its concluding recommendations. The full text is available at *http://geneva.usmission.gov/Press2008/November/1114DSB.html*.

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- . . . [T]he United States is pleased that the Appellate Body corrected the Panel's findings on DSU Article 23. The Appellate Body's analysis of this matter is sound.
- The United States particularly welcomes the Appellate Body's finding that the United States was *not* seeking redress of a violation by continuing its suspension of concessions after the EC claimed to have come into compliance. Furthermore, we believe that—from a WTO institutional perspective—Members should take great comfort that the Appellate Body concluded that statements made by the United States and Canada at meetings of the DSB did *not* constitute "determinations" under DSU Article 23.2(a).
- We are, however, disappointed that the Appellate Body found that it was unable to complete the analysis on the consistency of the EC's revised hormones ban with the requirements of the *SPS Agreement*. The Panel and the parties invested over three years of diligent effort in examining the scientific underpinnings of the EC's revised ban, and the United States continues to believe that the Panel's conclusions were sound.
- The United States also takes this opportunity to bring to Members' attention certain aspects of the Appellate Body's report that are deeply troubling from a systemic standpoint. In its report, unfortunately, the Appellate Body undertook unnecessary analyses of provisions of the DSU and invented rules, procedures, and even obligations that are simply not present in the DSU. . . .

Process for Resolving Post-Suspension Disputes

- . . . It is widely acknowledged by Members that the DSU lacks specificity on the process by which an implementing Member subject to DSB-authorized suspension of concessions that claims it has achieved compliance may obtain relief from that suspension. Members have spent several years negotiating a process for such a situation, but have not yet achieved consensus.
- In its report, however, the Appellate Body makes a number of statements that are to be found nowhere in the DSU. For example, the Appellate Body said that Article 21.5 compliance panel proceedings are the *only* procedure to be followed for resolving post-suspension disputes—ignoring the fact that this very appeal was from a *regular* panel proceeding considering a claim under DSU Article 22.8.
- In addition, the Appellate Body said that either an original respondent or an original complainant must initiate compliance panel proceedings without delay once a claim of compliance is made, which should be of tremendous concern to any Member that might consider its resources could be limited at any point in the future.
- As a further example, the Appellate Body also said that an original responding party and an original complainant may each bring its own, separate compliance panel proceeding and the two proceedings could be harmonized and will somehow result in a review of all the issues. The Appellate Body also set forth fairly intricate rules on how the burden of proof would be allocated and shifted in such a situation.
- None of this can be found anywhere in what Members negotiated during the Uruguay Round. Nor, for that matter, has any Member proposed that approach during the negotiations over clarifying and improving the DSU.
- It is difficult to understand the Appellate Body's findings on this matter to be anything other than rule-making. That role, however, belongs to Members—not to panels or the Appellate Body.

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Standard for Experts' "Independence and Impartiality"

- . . . The United States is also concerned with the Appellate Body's approach to the selection of experts who advise dispute settlement panels. . . . [P]anels that are aware of experts' prior involvement in related matters should be able to take that into account in evaluating the weight to assign the advice provided by the experts.
- [T]he fact that a panel or the Appellate Body relies on a fact provided by one of the parties does not mean that the panel's or the Appellate Body's independence and impartiality have been compromised.
- Nor does the Appellate Body explain why a "likely" doubt as to the independence and impartiality of an *expert* meant that the independence and impartiality of *the Panel* was necessarily compromised.

Other SPS issues

- . . . With respect to the Appellate Body's findings and conclusions related to the Panel's standard of review and interpretation of the requirements of Articles 5.1 and 5.7 of the *SPS Agreement*, the United States also has some concerns that the Appellate Body's report could be misconstrued as loosening the disciplines of the *SPS Agreement* that are aimed at ensuring that SPS measures adopted by Members are scientifically justified and not disguised restrictions on trade.

"Recommendation"

- . . . Another troubling aspect of the Appellate Body report is the fact that the Appellate Body concluded its report by apparently making a recommendation that is addressed to both the United States and the EC.
- Members have authorized panels and the Appellate Body to make recommendations in only one place: Article 19.1 of the DSU. That article provides that a panel or the Appellate Body is authorized to issue a recommendation in one

circumstance: where it has concluded that a measure within the terms of reference of the proceeding is inconsistent with a covered agreement.

- In this appeal, the Appellate Body did not conclude that there was any measure that was inconsistent with a covered agreement. The Appellate Body had no authority, therefore, to make any Article 19.1 recommendation in this appeal.
- A further difficulty with reading the Appellate Body's "recommendation" as intending to have the legal status of a recommendation under Article 19.1 is that it is addressed not only to the responding party, but also to the EC, the complaining party. There is no basis in the DSU for addressing a recommendation to a complaining party.
- The use of the term "recommend" by the Appellate Body must therefore be interpreted as an ill-considered word choice, as any other reading would be contrary to the DSU. In fact, were Members to believe the Appellate Body attempted to make an Article 19.1 recommendation in this dispute, Members would have no choice but to consider that the Appellate Body ignored and acted outside its authority under the DSU.

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2. Doha Development Agenda

On March 6, 2008, U.S. Trade Representative Susan C. Schwab testified before the U.S. Senate Committee on Finance on the 2008 trade agenda. Excerpts discussing U.S. objectives for the Doha Development Agenda ("DDA" or "Doha Round"), the multilateral trade negotiations launched in Doha, Qatar, in 2001, are provided below. The full text of Ambassador Schwab's testimony is available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/march*. *See also Digest 2001* at 646–69.

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The Doha Round is the President's highest trade negotiating priority. He is committed to concluding an ambitious Doha Round this year that will increase economic growth and development, and alleviate poverty by generating new trade flows in agriculture, manufactured goods, and services.

These three areas form the market access core of the Round. Forging a strong result in each area remains the key to achieving a breakthrough that would propel the negotiations toward the finish line.

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On July 22, 2008, Ambassador Schwab held a press conference at which she outlined U.S. objectives and proposals for the Doha Round ministers' meetings in Geneva on July 19–29, 2008. The meetings were convened in an effort to resolve WTO member states' differences over agriculture and non-agriculture market access ("NAMA") modalities, the interim agreement needed to set the stage for the final stage of the Doha Round. Excerpts follow; the full text is available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/july*.

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Yesterday I made it clear that the US was committed to the Doha Round and understood the responsibility that went along with the leadership role we have and continue to play that role. Last night . . . we sent a strong signal to trading partners that we are here to get a deal done.

. . . [T]he US's current allowable agriculture domestic support is in excess of $48 billion . . . . [I]n Potsdam (last June), . . . we signaled that under the right circumstances, we could get close to $17 billion.

To move these negotiations forward this week, and in exchange for an ambitious market access outcome in agriculture and NAMA, today I will be informing my colleagues . . . that we stand ready to reduce our OTDS [Overall Trade-Distorting Support] to $15 billion. This is a major move, taken in good faith with an expectation that others will reciprocate and step forward with improved offers in market access.

These cuts will deliver effective and significant reductions in trade distorting domestic support.

They would require adjustments to our farm programs. We are prepared to make these changes, but we must also have assurances that if our programs meet these disciplines they are not subject to subsequent legal challenges that reduce them further.

We are making our offer without knowing what others will do. But for this Round to succeed as a development round, all of the main developed and developing country players will be faced with hard decisions, and all of us—developed and emerging markets—must be prepared to make tough decisions.

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On July 29, 2008, Ambassador Schwab issued a statement after the WTO ministers in Geneva failed to reach agreement on a compromise proposal, circulated by WTO Council Director-General Pascal Lamy, concerning agriculture and NAMA modalities. Ambassador Schwab's statement, excerpted below, is available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/july*.

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* * * *

There should be no question, we made important progress. . . . We gained insights into what members are prepared to offer on services . . . , greater clarity on what a modalities package might look like, and saw a constructive attitude in attempting to solve many other issues . . . .

To ensure that the advances we made this week are not lost, the United States will continue to stand by our current offers, but we maintain that they are still contingent on others coming forward with ambitious offers that will create new market access. So far, that ambition is not evident.

Regrettably, our negotiations deadlocked on the scope of a safeguard mechanism to remedy surges in imported agricultural products.

Any safeguard mechanism must distinguish between the legitimate need to address exceptional situations involving sudden and extreme import surges and a mechanism that can be abused.

In the face of a global food price crisis, we simply could not agree to a result that would raise more barriers to world food trade.

Certain members sought increased flexibilities that would have allowed them to apply tariffs that, in some cases, would exceed their current WTO bindings. This would have moved the global trading system backwards—exactly contrary to the purposes of a negotiation intended to expand trade and economic growth.

Throughout these negotiations, the United States has been strongly committed and willing to make the tough choices necessary to achieve an ambitious breakthrough. . . .

* * * *

On July 30, 2008, at the concluding meeting of the WTO Trade Negotiations Committee, Ambassador Schwab expressed disappointment at the outcome of the discussions and confirmed U.S. support for the WTO, stating in part:

> . . . [T]he United States remains fully committed to the mission of the WTO as the foundation of the rules-based multilateral trading system, and to multilateral negotiations. None of us can afford any diminution in this organization's role as the guardian of a progressively liberalizing trading system based on non-discrimination and fair play for all. It also is the centerpiece in our efforts to bring the developing countries increasingly into the global economy on terms that enable them to benefit fully from the opportunities created by international trade.

The full text of Ambassador Schwab's statement is available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/july*.

D. OTHER TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Free Trade Agreements

Texts and related materials concerning individual trade agreements are available on the website of the Office of the U.S. Trade Representative ("USTR"), at *www.ustr.gov/trade-agreements*.

a. Colombia

On April 7, 2008, President George W. Bush transmitted to Congress proposed legislation to implement the United States–Colombia Free Trade Agreement, and Secretary of State Condoleezza Rice issued a statement urging Congress to approve the agreement. Secretary Rice's statement, excerpted below, is available at *http://2001-2009.state.gov/secretary/rm/2008/04/103069.htm*. As of December 31, 2008, Congress had not approved the agreement.*

* * * *

Passage of this agreement is both a matter of national security for the United States as well as clearly in our economic interest. The agreement will promote opportunity, stability, and growth in a key partner—goals that successive U.S. administrations and Congresses, in a bipartisan manner, have long supported.

The people of Colombia have made impressive gains in building a peaceful, inclusive democracy. Thousands of guerrilla and paramilitary fighters have demobilized, the economy is growing, poverty is dropping, and respect for human rights and the rule of law has improved dramatically. Colombians want to build on these accomplishments and consolidate lasting prosperity and security. It is in our interest for them to succeed, and this agreement is the most effective tool through which we can help them do so.

The agreement will also replace Colombia's one-way access to our market with permanent, two-way free trade that benefits American businesses, workers, and farmers. When implemented, this agreement will remove barriers that now hinder the competitiveness of American agricultural and manufactured goods in Colombia, effectively creating new markets for U.S. producers and

* Editor's note: As of December 31, 2008, congressional approval of the U.S. free trade agreements with the Republic of Korea and Panama also remained pending. The United States–Peru Free Trade Agreement entered into force on February 1, 2009.

new opportunities for American workers. Last year, 40 percent of our economic growth came from exports of U.S.-produced goods. Lowering barriers to trade, as this agreement does, is a win for America.

* * * *

b. Oman

On December 29, 2008, U.S. Trade Representative Susan C. Schwab announced that the U.S.–Oman Free Trade Agreement ("FTA") would enter into force as of January 1, 2009. As Ambassador Schwab stated, "The Oman agreement builds on U.S. free trade agreements concluded with Israel, Jordan, Morocco and Bahrain, Trade and Investment Framework Agreements with 10 countries in the region, and the WTO accession[] of Saudi Arabia. . . ." USTR's press release included the following background on the FTA:

> On the first day this agreement goes into effect, 100 percent of two-way trade in consumer and industrial products will be duty free. This will expand opportunities for exports of machinery, automobiles, optic and medical instruments, electrical machinery, and agricultural products such as vegetable oils, sugars, sweeteners and beverage bases.
>
> In addition, Oman will provide substantial market access across its entire services regime, provide a secure, predictable legal framework for U.S. investors operating in Oman, provide for effective enforcement of labor and environmental laws, and enhance the protection of intellectual property.

The full text of the release is available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/december*. The FTA was signed on January 19, 2006, and U.S. implementing legislation was signed into law on September 26, 2006, Pub. L. No. 109-283, 120 Stat. 1191. *See Digest 2006* at 766.

c. The Dominican Republic–Central America–United States Free Trade

The Dominican Republic–Central America–United States Free Trade Agreement ("CAFTA–DR") entered into force for Costa Rica on January 1, 2009. *See* USTR press release, available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/december*. The CAFTA–DR entered into force between the United States and the other Central American parties (El Salvador, Honduras, Guatemala, and Nicaragua) in 2006 and between the United States and the Dominican Republic in 2007. *See Digest 2006* at 764.

2. Other Trade and Investment Instruments

Information on trade and investment instruments, including texts of agreements, is available at *www.ustr.gov/trade-agreements/trade-investment-framework-agreements*.

a. Trade and Investment Framework Agreements

(1) East African Community

On July 16, 2008, U.S. Trade Representative Susan C. Schwab and Peter Kiguta, Director-General for Customs and Trade, East African Community ("EAC"), signed a Trade and Investment Framework Agreement ("TIFA"). As Ambassador Schwab stated, "We see the TIFA as a major step toward deepening the U.S.–EAC trade and investment relationship, expanding and diversifying bilateral trade, and improving the climate for business between U.S. and East African firms." According to USTR's press release, "The U.S.–EAC TIFA will establish regular, high-level talks on the full spectrum of U.S.–EAC trade and investment topics, including the African Growth and Opportunity Act (AGOA), the World Trade Organization's Doha Round, trade facilitation issues, and trade capacity building assistance." The EAC was formed in 1999, and its members are Burundi, Kenya, Rwanda, Tanzania,

and Uganda. The full text of the press release is available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/july*.

(2) Uruguay

On October 2, 2008, Assistant U.S. Trade Representative Everett Eissenstat and Uruguayan Minister of Foreign Affairs Gonzalo Fernández signed two protocols to the U.S.–Uruguay Trade and Investment Framework Agreement ("TIFA"), covering trade facilitation and public participation in trade and the environment, respectively. The protocols are the first of their kind concluded by USTR. As a USTR press release of that date explained:

> The United States and Uruguay signed the United States–Uruguay TIFA on January 25, 2007. The TIFA established the United States–Uruguay Trade and Investment Council (TIC) and serves as a mechanism to further deepen the trade and investment dialogue. . . .
>
> The TIFA contains an annex that established a work program calling for the two governments to address such matters as liberalization of bilateral trade and investment, intellectual property rights, regulatory issues, information and communications technology and electronic commerce, trade facilitation, trade and technical capacity building, trade in services, government procurement, and cooperation on sanitary and phytosanitary measures. The annex provides for the TIC to add other matters to the work program.

The full text of the press release is available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/october*.

The protocol concerning trade facilitation seeks to expedite the movement, release, and clearance of goods and to improve cooperation among the two countries' customs and other appropriate authorities. Among other provisions, the protocol requires each party to "publish, including on the

Internet, its customs laws, regulations, and general administrative procedures" and "[t]o the extent possible" to publish for public comment "any regulations of general application concerning customs matters that it proposes to adopt." It also requires the parties to "adopt or maintain simplified customs procedures for the efficient release of goods," to seek to use information technology that expedites the release of goods, to "endeavor to adopt or maintain risk management systems for customs authorities," and to "adopt or maintain expedited customs procedures for express shipments, while maintaining appropriate customs controls." It also contains articles on cooperation, penalties, review and appeal of customs-related determinations, and advance rulings.

Among other objectives, the protocol concerning trade and the environment seeks to foster "meaningful" public participation in the development and implementation of laws and policies concerning trade and the environment and to strengthen links between the two countries' trade and environmental decision-makers, policies, and practices. For example, the protocol includes requirements to promote public awareness of and input on laws and policies relating to trade and the environment and on the implementation of the protocol. One article of the protocol requires each party to "convene and consult a new, or consult an existing, national consultative or advisory committee on trade and the environment, comprising persons of the Party with relevant experience" and to encourage those committees to exchange information and discuss matters relating to the implementation of the protocol.

b. Trade and Investment Cooperation Agreement

On April 1, 2008, USTR announced that Ambassador Schwab and Ukrainian Minister of Economy Bohdan Danylyshyn had signed a Trade and Investment Cooperation Agreement ("TICA"). As USTR noted in its press release:

> The TICA will establish a forum for discussion of bilateral trade and investment relations and will help build those

> relations. The TICA provides for the formation of a joint U.S.–Ukraine Council on Trade and Investment, which will address a wide range of trade and investment issues including market access, intellectual property, labor, and environmental issues. The Council will also help to increase commercial and investment opportunities by identifying and working to remove impediments to trade and investment flows between the United States and Ukraine. This agreement is substantially similar to the Trade and Investment Framework Agreements (TIFAs) that the United States has negotiated with a number of trading partners.

The full text of the release is available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/april*.

c. Investment and Development Cooperation Agreement

On July 16, 2008, Ambassador Schwab signed a Trade, Investment, and Development Cooperation Agreement ("TIDCA") with the Southern African Customs Union ("SACU"). As noted in a USTR fact sheet, SACU's member states—Botswana, Lesotho, Namibia, South Africa, and Swaziland—"maintain a common external tariff, share customs revenues, and coordinate policies and decision-making on a wide range of trade issues." *See www.ustr.gov/countries-regions/africa/regional-economic-communities-rec/southern-african-customs-union-sacu*. A USTR press release, excerpted below and available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/july*, described the TIDCA with SACU.

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* * * *

The TIDCA will be a formal mechanism for the United States and SACU to conclude a range of interim trade-related agreements, cooperative work and other trade-enhancing initiatives. It also will allow the United States and SACU to develop work plans on key issues such as sanitary and phytosanitary barriers, technical barriers

to trade, trade facilitation and investment promotion that should lead to increased U.S.–SACU trade and investment in the near future.

BACKGROUND:

The United States and SACU launched FTA negotiations in 2003, which were suspended in April 2006, largely due to divergent views on the scope and level of ambition for the agreement. In November 2006, the United States and SACU agreed to pursue a new type of agreement—a TIDCA—that could enhance the U.S.–SACU trade and investment relationship in the short-term and help lead the United States and SACU to a possible FTA in the longer term.

SACU is the United States' largest non-oil trading partner in Sub-Saharan Africa with bilateral trade valued at $15.8 billion in 2007. SACU is also the largest beneficiary of the AGOA, with AGOA imports valued at $2.9 billion . . . .

3. Trade Legislation and Trade Preferences

a. Andean Trade Preference Act and Andean Trade Promotion and Drug Eradication Act

(1) Extension of legislation

The Andean Trade Preference Act ("ATPA") was enacted in 1991 to combat drug production and trafficking in Bolivia, Ecuador, Colombia, and Peru. The ATPA authorized the President, upon a determination that the statutory eligibility criteria had been met, to grant trade benefits to any of those four Andean countries. The eligibility criteria included a provision concerning counternarcotics cooperation with the United States.

In 2002 the ATPA was amended by the Andean Trade Promotion and Drug Eradication Act, Title XXXI of the Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 ("ATPDEA"). Among other factors, the ATPDEA authorized the President

to designate Bolivia, Ecuador, Colombia, and Peru as ATPDEA beneficiary countries and to provide countries so designated with expanded trade benefits. The ATPDEA provided additional criteria for the President to consider in designating ATPDEA beneficiaries, including "[t]he extent to which the country has met the counternarcotics certification criteria set forth in section 490 of the Foreign Assistance Act of 1961 (22 U.S.C. 2291j) for eligibility for United States assistance." Among other provisions, § 3103 of the ATPDEA amended the ATPA to authorize the President to withdraw or suspend the designation of any country as a beneficiary country for purposes of the ATPDEA if the President determines that, as a result of changed circumstances, the country's performance is not satisfactory under the eligibility criteria set forth in the ATPA, as amended.

Excerpts discussing the ATPA, as amended (19 U.S.C. §§ 3201–3206), follow from Chapter V, "Trade Enforcement Activities," of the 2008 Annual Report of the President of the United States on the Trade Agreements Program, at 228–29. The report is available at *www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report*.

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One of the ways the United States conducts its trade relationship with the Andean countries is in the framework of the unilateral trade preferences of the Andean Trade Preference Act (ATPA), as amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA). Congress enacted the ATPA in 1991 in recognition of the fact that regional economic development is necessary in order for Bolivia, Colombia, Ecuador, and Peru to provide economic alternatives to the illegal drug trade, promote domestic development, and thereby solidify democratic institutions.

The original ATPA expired in 2001. The ATPDEA, which was signed into law on August 6, 2002 as part of the Trade Act of 2002, restored the benefits of the ATPA . . . . In addition, while the original ATPA excluded from duty-free treatment products in

several sectors including textiles, apparel, footwear, articles of leather, and tuna in airtight containers, the ATPDEA expanded the list of items eligible for duty-free treatment to include such products.

The most significant expansion of benefits in the ATPA, as amended by the ATPDEA, was in the apparel sector. Apparel assembled in the region from U.S. fabric, fabric components or components knit-to-shape in the United States may enter the United States duty-free in unlimited quantities. Apparel assembled from Andean regional fabric or components knit-to-shape in the region may enter duty-free subject to a cap. The cap was set at 2 percent of total U.S. apparel imports, increasing annually in equal increments to 5 percent.

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On February 29, 2008, the Andean Trade Preference Extension Act of 2008, Pub. L. No. 110-191, 122 Stat. 646, was signed into law, extending the preferences available under the ATPA, as amended, through December 31, 2008. On October 16, 2008, the Act to extend the Andean Trade Preference Act ("ATPA Extension Act"), Pub. L. No. 110-436, 122 Stat. 4976, was signed into law, extending the preferences again but with different timeframes and criteria for Colombia, Peru, Ecuador, and Bolivia. The legislation extends the preferences for Colombia and Peru through December 31, 2009. Ecuador will remain eligible for benefits through December 31, 2009, unless the President determines before June 30 that Ecuador does not satisfy the statutory eligibility requirements. Finally, the legislation extends preferences for Bolivia through June 30, 2009, and provides that Bolivia may be made eligible for benefits through December 31, 2009 only if the President determines before June 30, 2009 that Bolivia satisfies the eligibility requirements for ATPA and ATPDEA preferences. As discussed in a.(2) below, Bolivia's designation as an ATPA beneficiary was suspended in November 2008.

(2) Suspension of Bolivia's designation as a beneficiary country

On October 1, 2008, as required by § 3202(e)(2)(A) of the ATPA, as amended (19 U.S.C. § 3202(e)(2)(A)), USTR

published a notice of the President's intention to suspend Bolivia's designations under the ATPDEA and the ATPA. 73 Fed. Reg. 57,158 (Oct. 1, 2008). Excerpts from the Federal Register notice follow, describing the statutory background for the President's intended action. Chapter 3.B.2.a.(2) discusses Bolivia's designation as a country that has "failed demonstrably" to adhere to its counternarcotics obligations.

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The ATPA (19 U.S.C. 3201 *et seq.*), as renewed and amended by the ATPDEA (Pub. L. 107-210), the Andean Trade Preferences Extension Act (Pub. L. 109-432), and the Andean Trade Preferences Extension Act (Pub. L. 110-191) provides trade benefits for countries that have been designated by the President as beneficiary countries. The ATPDEA expanded the tariff benefits available to beneficiary countries of ATPA to certain articles, including certain textile and apparel products. Bolivia is currently a beneficiary country for purposes of the ATPA and ATPDEA. The President may withdraw or suspend the designation of a country as a beneficiary country or withdraw, suspend, or limit the application of duty-free treatment to any eligible article if the President determines that as a result of changed circumstances, the country is not satisfying the statutory eligibility criteria. At least 30 days before taking one of the aforementioned actions, the President must publish a notice in the *Federal Register* of the action the President proposes to take; during this 30-day period, the USTR is required to accept public comments and hold a public hearing on the proposed action.

1. Eligibility Criteria

As noted above, Bolivia currently receives preferential tariff treatment under ATPA and ATPDEA. Pursuant to 19 U.S.C. 3202(d), in deciding whether to designate any country as a beneficiary country under ATPA, the President is required to take into account inter alia:

(11) whether such country has met the narcotics cooperation certification criteria set forth in section 481(h)(2)(A) of the Foreign Assistance Act of 1961 for eligibility for United States assistance.

In addition, among the criteria set forth in 19 U.S.C. 3203(b)(6)(B) that the President is required to take into account in deciding whether to designate a country as eligible for the expanded benefits under ATPDEA is:

(v) The extent to which the country has met the counternarcotics certification criteria set forth in section 490 of the Foreign Assistance Act of 1961 (22 U.S.C. 2291j) for eligibility for United States assistance.

On September 15, 2008, pursuant to section 706(2)(A) of the Foreign Relations Authorization Act, the President designated Bolivia as a country that has failed demonstrably during the previous 12 months to adhere to its obligations under international counternarcotics agreements and to take the measures set forth in section 489(a)(1) of the Foreign Assistance Act of 1961.

* * * *

On November 25, 2008, President Bush issued Proclamation 8323, which among other things suspended Bolivia's designation as a beneficiary country for the purposes of the ATPA and the ATPDEA, effective December 15, 2008, based on the determinations that "Bolivia no longer satisfies the eligibility criterion in section 203(d)(11) of the ATPA, as amended" and that "Bolivia is no longer performing satisfactorily under the eligibility criterion in section 204(b)(6)(B)(v) of the ATPA, as amended." 73 Fed. Reg. 72,675 (Nov. 28, 2008).

b. Generalized System of Preferences

The ATPA Extension Act, Pub. L. No. 110-436, 122 Stat. 4976 (*see* 3.a(1) *supra*), extends the U.S. Generalized System of Preferences ("GSP") program for the eleventh time through December 31, 2009. The GSP was authorized initially under the Trade Act of 1974, 19 U.S.C. §§ 2461–2467; it provides preferential duty-free treatment for nearly 5,000 products from 131 developing countries and territories that have been designated as beneficiaries.

c. Preferential treatment for certain apparel articles

The ATPA Extension Act (*see* 3.a.(1) *supra*) amended Title IV of the Dominican Republic–Central America–United States Free Trade Agreement Implementation Act by adding a section that provides for preferential tariff treatment of certain apparel articles (pants, skirts, and the like, made of cotton other than denim) that are assembled wholly in an eligible CAFTA–DR country and imported directly from an eligible CAFTA–DR country, if such articles are accompanied by an earned import allowance certificate issued under a program established by the Secretary of Commerce. The legislation establishes a pilot program that will apply only to the Dominican Republic. On November 26, 2008, President Bush issued a proclamation that, among other things, made the determination and certification required to bring that new program into effect. 73 Fed. Reg. 72,675 (Nov. 26, 2008).

d. Haitian Hemispheric Opportunity through Partnership Encouragement Act

On June 18, 2008, the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2008 ("HOPE II Act") took effect as part 1 of subtitle D of title XV of Public Law 110-246, 122 Stat. 1651, 2289. The HOPE II Act expands trade benefits for Haiti, including duty-free access for certain Haitian knit and woven apparel that enter the United States from Haiti or the Dominican Republic. By Proclamation 8296 of September 30, 2008, President Bush fulfilled the requirements for extending the new preferences to Haiti. 73 Fed. Reg. 57,475 (Oct. 3, 2008).

4. Arbitration Arising from the Softwood Lumber Agreement

As noted in B.1.a. *supra,* on September 12, 2006, the United States and Canada concluded the Softwood Lumber Agreement ("SLA"), which was intended to settle issues

concerning trade between the two countries in softwood lumber that had given rise to arbitration under the North American Free Trade Agreement. *See Digest 2006* at 762–63 for an overview of the SLA, which entered into force on October 12, 2006. The text of the SLA is available at *www.state.gov/documents/organization/107266.pdf*. Amendments to Articles II–IV and X, as well as associated annexes, are available at *www.state.gov/documents/organization/107267.pdf*.

a. Arbitration on export measures requested in 2007: Case No. 7981

(1) Award on liability

On August 13, 2007, the United States filed a Request for Arbitration with the London Court of International Arbitration ("LCIA"), challenging Canada's failure to apply to provinces with high lumber exports the correct formula for calculating export charges and volume limits under the SLA. *United States of America v. Canada*, LCIA, Case No. 7941. The United States also contested Canada's failure to apply that calculation to all lumber exporting provinces in a timely manner. On October 15, 2007, the tribunal bifurcated the proceedings into a liability phase and a remedies phase. *See 2007 Digest* at 593–97.

On March 3, 2008, the LCIA issued its decisions concerning liability:

1. The Softwood Lumber Agreement 2006 (SLA) does not obligate Canada to calculate expected United States consumption for purposes of determining trigger volumes of softwood lumber imports from Canada for Option A provinces pursuant to paragraph 14 of Annex 7D of the Softwood Lumber Agreement. Therefore, Canada has not breached paragraph 14 of Annex 7D of the Softwood Lumber Agreement and the USA's case to the contrary is dismissed.
2. The Softwood Lumber Agreement 2006 (SLA) obligates Canada to make this calculation for all export measures for softwood lumber as of January 1, 2007.

Therefore Canada's case to the contrary as to interpretation is dismissed.

3. Insofar as, according to section 2 above, Canada breached the SLA by failing to make such calculation as of January 1, 2007, Canada is liable for the consequences of that breach.

The LCIA did not make a decision concerning the consequences of Canada's breach but invited the parties to submit, within one month, "comments or (if possible) an agreement on how to proceed." It also ordered the parties to bear their respective costs.

Gretchen Hamel, USTR spokeswoman, issued a statement on March 4, 2008, stating:

> The tribunal agreed with the United States that Canada violated the SLA by failing to properly adjust the quota volumes of the Eastern Canadian provinces in the first six months of 2007 to account for rapidly changing market conditions. However, the tribunal disagreed with the United States in finding that the same adjustment is not required for the Western provinces.
>
> . . . [W]e respectfully disagree with the key result. The SLA brought about an end to more than twenty years of litigation, and it was crafted as a balanced set of rights and obligations for both the United States and Canada. The viability of the SLA is dependent on maintaining that balance. The tribunal's decision regarding the calculation of the trigger volumes for the Western Canadian provinces is not consistent with the balance we negotiated under the SLA. . . .

The full text of Ms. Hamel's statement is available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/march*; the tribunal's award is available at *www.ustr.gov/sites/default/files/award_on_export_measures.pdf*.

(2) Remedies phase

On May 29, 2008, the United States filed its Statement of the Case on Remedy. The United States asserted that paragraph 22 of Article XIV of the SLA requires the tribunal to make two simultaneous determinations: (1) identify a reasonable period of time not longer than 30 days for Canada to cure its breach; and (2) determine appropriate adjustments to the export measures to compensate for the breach if Canada failed to cure the breach within that time period. After noting that 30 days would be a reasonable time for Canada to cure its breach, the U.S. statement focused on the compensatory measures the tribunal should order Canada to take. The United States proposed that the tribunal assess additional export charges upon breaching regions in the amount those regions would have paid absent the breach. Alternatively, the United States offered one other price-based remedy and two volume-based remedies. As the United States argued in part:

> 13. Canada's breach, which resulted in the overshipment of over 180 million board feet of softwood lumber into the United States, has disrupted the system of export measures to which the parties agreed—a system that limits the volume of exports either through explicit volume restrictions or through export charges that encourage producers to restrict exports (or both). If the system is disrupted, the premise upon which the United States agreed to forego remedies under domestic law is undermined. That is, absent the SLA's volume restrictions (and export charges), the United States would have had no meaningful reason to enter into the Agreement. Canada should be held accountable for the consequences of this disruption.

The full text of the Statement of Interest is available at *www.ustr.gov/sites/default/files/us_statement_case_on_remedy.pdf*.

On September 22–23, 2008, the tribunal held a hearing on the issue of remedies, and the United States submitted its post-hearing brief on October 31, 2008. In its brief, the United States asserted that the SLA requires retroactive compensation for all breaches and that each of the four remedies the United States had proposed was appropriate. Excerpts from the U.S. brief follow, discussing the basis for the U.S. view that the SLA requires the tribunal to determine an appropriate award that provides retroactive compensation for all breaches of the SLA.* Citations to other submissions are omitted. The full text of the U.S. brief is available at *www.ustr.gov/sites/default/files/us_post_hearing_brief_remedy.pdf*.

* * * *

2. At the hearing on remedy, held from September 22 to September 23, 2008, the United States offered the Tribunal the only reasonable interpretation of the 2006 Softwood Lumber Agreement ("SLA" or "Agreement"). It offered the only interpretation that gives meaning to the entire dispute resolution provision contained in Article XIV and demonstrated that the SLA provides for retrospective remedies and requires those remedies to be in the form of compensatory adjustments to the export measures. To aid the Tribunal in its task, the United States provided four proposals for appropriate compensatory adjustments to the export measures. Canada put forward no alternate remedies . . . . To the limited extent that Canada substantively criticized three of our four proposed remedies, Canada's criticisms fail to undermine the appropriateness

* Editor's note: The tribunal issued its decision on remedies on February 23, 2009, "identif[ying] 30 days from the date of this Award as a reasonable period of time for Respondent to cure the breach" and ordering that, "as an appropriate adjustment to compensate for the breach found above, Canada shall be required to collect an additional 10 percent ad valorem export charge upon softwood lumber shipments from Option B regions until an entire remedy amount of CDN $ 63.9 million, plus CDN $ 4.36 million in interest (a total of CDN $ 68.26 million) has been collected." *See www.ustr.gov/sites/default/files/award_on_remedy.pdf*.

of the proposed remedies. In any event, none of this allows Canada to escape the mandatory provisions of Article XIV, which include determination of an appropriate remedy.

* * * *

I. The SLA Requires Retroactive Compensation For All Breaches

4. . . . Article XIV provides a comprehensive dispute resolution mechanism in which the Tribunal determines a reasonable period of time for the breaching party to cure its breach *and* determines compensatory export measures in an amount that remedies the breach, in case the breaching party fails to cure the breach within the reasonable period of time. The Tribunal performs both these tasks simultaneously so that the breaching party (in this case Canada) is aware both of the time it has to cure the breach and the consequence of its failure to timely cure.

5. If a dispute arises as to whether the breach has been cured or remedied, Article XIV provides additional mechanisms to resolve any such dispute. The absence of any compensatory export measures would undermine those additional mechanisms and prevent the parties from exercising their rights and implementing the terms to which they agreed.

* * * *

8. . . . Article XIV directs the Tribunal to determine a cure period of no more than 30 days *and* to determine appropriate compensatory measures to compensate for the breach. Without this mandatory, two-step process, the remainder of Article XIV, and in particular paragraphs 27 and 29, cannot function.

9. Canada avoids the text of the SLA, and largely ignores the SLA's context. Instead, Canada suggests that the SLA's provision for a "reasonable period of time" for Canada to cure the breach is similar to language used in other "trade agreements." First, . . . the SLA is not a multilateral trade agreement like the North American Free Trade Agreement ("NAFTA") or the World Trade Organization ("WTO") agreement. Indeed, the SLA does not govern all trade *between* the United States and Canada. It does not control United States exports of softwood lumber to Canada. Rather, it regulates Canadian exports of softwood lumber *to* the

United States by a system of Canadian-imposed export measures. SLA, art. VII. . . .

10. Second, even assuming that these multilateral trade agreements *were* appropriate substantive comparisons, Canada still failed to demonstrate any similarities indicating that their prospective-only dispute resolution systems should govern the enforcement of the SLA. Canada relies primarily upon the WTO Dispute Settlement Understanding's ("DSU's") use of the term "reasonable period of time" to conclude that the SLA, which also uses that phrase, prohibits retrospective remedies. Of course, Canada fails to acknowledge that the "reasonable period of time" to comply with WTO recommendations *should not exceed 15 months*. As the United States explained during the hearing, the purpose of this extended and flexible time frame is to permit sovereign nations to come into "compliance" with the recommendation of a WTO ruling.

11. In contrast, the SLA does not contemplate that the Tribunal make "recommendations" to the breaching party, nor does it provide breaching parties time to come into "compliance" with those recommendations. The Tribunal's decisions under the SLA are "final and binding," not recommendations. SLA, art. XIV, ¶ 20. Further, the SLA contemplates that "breaches" be "cured." These terms are not used in the WTO DSU. Canada pessimistically insists that the 30-day cure period cannot be used to negotiate or agree upon a cure because the SLA does not contain such an explicit suggestion. Canada's reading of the SLA is contrary to the general preference for amicable resolution of state-to-state disputes.

II. Each Of The Remedies Proposed Is Appropriate

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13. The SLA not only authorizes, but mandates, the determination of "appropriate" compensatory adjustments to the export measures "in an amount that remedies the breach." SLA, art. XIV, ¶¶ 22–24. The SLA does not instruct the Tribunal *how* to go about making this determination, except to provide that the compensatory measures be appropriate adjustments to the quotas and/or to the export charges. As such, the United States offered the Tribunal

four appropriate yet distinct proposals—each of which would remedy the breach. Our proposals are suggestions for appropriate compensatory measures. The SLA provides for a determination of appropriate compensatory measures, regardless of whether those proposals are made by a party.

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47. The SLA states that the Tribunal shall "determine *appropriate* adjustments to the Export Measures to compensate for the breach" should Canada fail to cure its breach within a reasonable period of time that the Tribunal determines. SLA, art. XIV, ¶¶ 22(b) (emphasis added). The SLA does not define "appropriate" but leaves the determination to the discretion of the Tribunal. Indeed, numerous approaches may be appropriate, as long as they consist of compensatory adjustments to export measures. As such, the Tribunal may determine it is appropriate to implement any one of, or any combination of, the four proposed remedies.

* * * *

b. New U.S. request for arbitration on provincial subsidies: Case No. 81010

On January 18, 2008, the United States filed a Request for Arbitration with the LCIA, asserting that six Canadian provincial subsidy programs violated the SLA. *United States of America v. Canada*, LCIA, Case No. 81010. The United States challenged six programs put into place by Quebec and Ontario that provided grants, tax credits, and other financial incentives to Canadian softwood lumber producers. The United States argued that the assistance programs circumvented the SLA by reducing or offsetting the export measures the SLA requires Canada to impose when exports of Canadian softwood lumber exceed a certain share of the U.S. market and U.S. prices for softwood lumber drop below a certain level.

In its second corrected Statement of the Case, submitted on December 23, 2008, the United States analyzed the six

programs and explained why they constitute violations of the SLA. Excerpts follow from the Statement of the Case, discussing the SLA's anti-circumvention provision and its exceptions and analyzing one of the six subsidy programs. (Footnotes and references to other submissions in the case are omitted.) The texts of the U.S. submissions in the case are available at *www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/2006-softwood-lumber-agreement.*

* * * *

II. Relevant Provisions of the SLA

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A. The Anti-circumvention Provision

16. In exchange for both the return of US$5 billion and the retroactive revocation of antidumping and countervailing duty orders, Canada agreed to settle all of its multi-forum legal proceedings and impose export measures on lumber exports to the United States from all of Canada's major exporting regions. These export measures are the central mechanism of the Agreement, requiring Canadian producers to pay export charges or to follow quota restrictions on exports, or both, whenever the prevailing price of lumber is US$355 or less per thousand board feet ("MBF"). SLA, art. VII. This system of export measures replaced the United States' imposition of trade remedies and encourages (and in some cases, compels), the Canadian lumber industry to limit exports to the United States when the price of lumber falls below a particular price.

17. To maintain the integrity of the Agreement, both parties agreed not to take "any action to circumvent or offset the commitments under the SLA, including any action having the effect of reducing or offsetting the Export Measures or undermining the commitments set forth in Article V." SLA, art. XVII, ¶ 1.

18. Any "[g]rants or other benefits" that Canadian federal, provincial, or local governments provide on a *de jure* or *de facto* basis to its softwood lumber producers or exporters "shall be considered to reduce or offset the Export Measures," and thereby

circumvent the commitments Canada made under the SLA. SLA, art. XVII, ¶ 2. In other words, the parties agreed that any grant or other benefit made to Canadian softwood lumber producers or exporters *per se* offsets the export measures and circumvents the agreement.

B. Exceptions

19. There are five enumerated exceptions to the *per se* rule articulated in Article XVII, ¶ 1: (1) provincial timber pricing or forest management systems as they existed on July 1, 2006; (2) other governmental programs that provide benefits on a non-discretionary basis in the form and the total aggregate amount in which they existed and were administered on July 1, 2006; (3) actions or programs for the purpose of forest or environmental management, protection, or conservation subject to certain exceptions; (4) payments or other compensation to First Nations to address or settle claims; and, (5) measures that are not specific to the forest products industry. SLA, art. XVII, ¶ 2(a)–(e).

20. First, "provincial timber pricing or forest management systems as they existed on July 1, 2006," shall not be considered to reduce or offset the export measures. SLA, art. XVII, ¶ 2(a).

21. Second, "other governmental programs that provide benefits on a non-discretionary basis in the form and the total aggregate amount in which they existed and were administered on July 1, 2006," are not considered to reduce or offset the export measures. SLA, art. XVII, ¶ 2(b). To meet this exception, the program must be, first, *non-discretionary*. A non-discretionary act is one that an authority has a duty to take. In contrast, "the concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision maker is given a choice of options . . . ."

22. The non-discretionary program must also be in the form and the total aggregate amount in which it *existed* and was *administered* on July 1, 2006. SLA, art. XVII, ¶ 2(b). This means that the form of the program, must not have changed since July 1, 2006.

23. Third, "actions or programs . . . for the purposes of forest or environmental management, protection, or conservation . . . or to facilitate public access to and use of non-member resources,

provided that such actions or programs do not involve grants or other benefits that have the effect of undermining or counteracting movement toward the market pricing of timber," shall not be considered to reduce or offset the export measures. SLA, art. XVII, ¶ 2(c).

24. Fourth, "payments or other compensation to First Nations to address or settle claims," shall not be considered to reduce or offset the export measures. SLA, art. XVII, ¶ 2(d)

25. Fifth, "measures that are not specific to the forest products industry" shall not be considered to reduce or offset the export measures. SLA, art. XVII, ¶ 2(e).

* * * *

30. The Foreign Sector Prosperity Fund ("FSPF") provides millions of Canadian dollars in targeted grants to Ontario's lumber producers in direct contravention of the anti-circumvention provisions of the SLA. The Ontario Ministry of Natural Resources ("Ontario MNR" or "Ministry") has explicitly acknowledged that the FSPF is a grant program. Because the program provides grants to Ontario softwood lumber producers and because it does not fall within any of the exceptions listed in Article XVII, the program falls within the anti-circumvention provision and constitutes a *per se* breach of the SLA. . . .

* * * *

36. The Ontario FSPF provides numerous benefits directly to producers of Canadian "softwood lumber products." SLA Annex 1A, ¶ 1. Accordingly, there can be no dispute that the grants distributed through the FSPF constitute "[g]rants or other benefits that a Party, including any public authority of a Party, . . . provide[s] on a *de jure* or *de facto* basis to producers or exporters of Canadian Softwood Lumber Products." SLA art. XVII, ¶ 2. Because the FSPF does not fall within any of the SLA's enumerated exceptions, it constitutes "action" that reduces or offsets the Export Measures (*id*. ¶1), thereby circumventing the SLA.

37. Specifically, the Ontario FSPF, which provides grants to lumber companies for capital improvements is not a "provincial timber pricing or forest management system[]," that could qualify for the exception in paragraph 2(a). SLA art. XVII, ¶2(a).

38. Nor is the Ontario FSPF an "action[] or program[] undertaken by a Party, including any public authority of a Party, for the purpose of forest or environmental management, protection, or conservation," which could qualify it for the exception in paragraph 2(c). SLA art. XVII, ¶2(c). To the contrary, Ontario itself concedes that the program was limited to projects related to energy conservation and generation, improvements in the efficiency of forest products production, value-added manufacturing, and worker training.

39. The Ontario FSPF is not a "payment or other compensation to First Nations to address or settle claims," that falls under the exception in paragraph 2(d). SLA, art. XVII, ¶2(d). And, because the Ontario FSPF is specifically targeted to the forest industry, it cannot qualify for the exception in paragraph 2(e) for "measures that are not specific to the forest products industry." SLA art. XVII, ¶2(e).

40. Finally, . . . the Ontario FSPF does not provide benefits on a non-discretionary basis and, therefore, is not exempt under paragraph 2(b). Government discretion is exercised at nearly every stage of the FSPF application process.

* * * *

E. COMMUNICATIONS

In September 2008 the Senate provided advice and consent to five treaties concluded under the auspices of the International Telecommunication Union ("ITU"). The two treaties concerning the ITU's Radio Regulations are discussed in Chapter 4.B. The three treaties amending the ITU's Convention and Constitution are discussed in Chapter 7.B.1.d.

F. INVESTMENT AND OTHER ISSUES

1. Committee on Foreign Investment in the United States

The Foreign Investment and National Security Act of 2007 ("FINSA"), Pub. L. No. 110-49, 121 Stat. 246, amended § 721

of the Defense Production Act of 1950 ("DPA"), 50 U.S.C. App. 2170, under which the President and the Committee on Foreign Investment in the United States ("CFIUS") review foreign acquisitions of U.S. businesses for national security risks. Among other things, FINSA codifies CFIUS, which was established by Executive Order 11858 on May 7, 1975. *See Digest 2007* at 601–02. On January 23, 2008, President Bush issued Executive Order 13456, which further amended Executive Order 11858 to change aspects of CFIUS. As President Bush stated in issuing the new order:

> The Executive Order furthers the goals of the new law by ensuring that the Committee on Foreign Investment in the United States will review carefully the national security concerns, if any, raised by certain foreign investments into the United States. The Executive Order reaffirms our commitment to open economies and our policy of welcoming foreign investment and the important economic benefits that such investment brings. At the same time, the Executive Order sets forth procedures for protecting our national security, recognizing that our openness is vital to our prosperity and security.

Among other things, Executive Order 13456 adds new executive branch members to CFIUS, specifies procedures for ensuring the efficiency and thoroughness of CFIUS's reviews, and establishes limitations on efforts by CFIUS and its members to mitigate national security risks posed by transactions. *See* Department of the Treasury fact sheet, available at *www.treas.gov/offices/international-affairs/cfius/docs/Summary-EO11858-Amend.pdf*.

On November 21, 2008, the Department of the Treasury issued a final rule, effective December 22, 2008, amending the Department's regulations in order to implement FINSA. 73 Fed. Reg. 70,702 (Nov. 21, 2008). The Department had published a notice of inquiry on October 11, 2007, and a notice of proposed rulemaking on April 23, 2008, seeking public comments on the draft regulations. *See Digest 2007* at

602–05. Excerpts from the Federal Register publication follow, describing aspects of FINSA and the new rule.

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I. Background

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FINSA . . . formalizes the process by which CFIUS conducts national security reviews of any transaction that could result in foreign control of a person engaged in interstate commerce in the United States, which FINSA refers to as a "covered transaction." Specifically, FINSA provides for CFIUS review of covered transactions, which must be completed within 30 days, to determine the effect of the transaction on national security and to address any national security concerns. Subject to certain exceptions . . . , FINSA requires an additional investigation, which must be completed within 45 days, in the following types of cases: (1) Where the transaction threatens to impair U.S. national security and that threat has not been mitigated prior to or during the 30-day review; (2) where the transaction is a foreign government-controlled transaction; (3) where the transaction results in foreign control over critical infrastructure that, in the determination of CFIUS, could impair national security, if that impairment has not been mitigated; or (4) where the lead agency recommends, and CFIUS concurs, that an investigation be undertaken. Executive Order 11858 also provides that CFIUS shall undertake an investigation if a member of CFIUS advises the chairperson that it believes that the transaction threatens to impair the national security and that the threat has not been mitigated.

To ensure accountability for CFIUS decisions, FINSA requires that a senior-level official of the Department of the Treasury and of the lead agency certify to Congress, for any covered transaction on which CFIUS has concluded action under section 721, that CFIUS has determined that there are no unresolved national security concerns. . . . If the President makes a decision on a transaction under section 721, then he must announce his decision publicly within 15 days of the completion of the investigation.

In addition, in order for CFIUS to conclude action under section 721 for a foreign government-controlled transaction without proceeding beyond a review to an investigation, the Department of the Treasury and the lead agency must determine, at the Deputy Secretary level or above, that the transaction "will not impair the national security." Similarly, in cases where the transaction would result in foreign control over critical infrastructure, the transaction could impair national security, but such impairment has been mitigated during the review period, CFIUS may conclude action under section 721 without proceeding beyond a review if the Department of the Treasury and the lead agency determine, at the Deputy Secretary level or above, that the transaction will not impair national security.

Where a covered transaction presents national security risks, FINSA provides statutory authority for CFIUS, or a lead agency acting on behalf of CFIUS, to enter into mitigation agreements with parties to the transaction or to impose conditions on the transaction to address such risks. This authority enables CFIUS to mitigate any national security risk posed by a transaction rather than recommending to the President that the transaction be prohibited because it could impair U.S. national security. FINSA also provides CFIUS with authority to impose civil penalties for violations of section 721, including violations of any mitigation agreement.

* * * *

III. Discussion of Final Rule

Overview of Significant Issues

The Final Rule retains many of the basic features of the existing regulations, which were adopted in 1991 after the 1988 enactment of section 721 of the DPA. The system continues to be based on voluntary notices to CFIUS by parties to transactions, although FINSA provides CFIUS with the authority to review a transaction that has not been voluntarily notified. The principal new development with regard to the procedures for filing notices with CFIUS is that the Final Rule makes explicit CFIUS's current practice of encouraging parties to contact and engage with CFIUS before making a formal filing. . . .

* * * *

Covered Transaction

FINSA introduced the term "covered transaction" to identify the types of transactions that are subject to review and investigation by CFIUS. The statutory definition of covered transaction maintains the scope of section 721 as pertaining to any merger, acquisition, or takeover by or with a foreign person that is proposed or pending after August 23, 1988, which could result in foreign control of any person engaged in interstate commerce in the United States (the latter type of person is defined in these regulations as a "U.S. business"). The Final Rule further clarifies the meaning of the term "covered transaction," *see* § 800.207, by specifying the scope of important elements of the term, including "transaction," "control," "U.S. business," and "foreign person." . . .

* * * *

Control

FINSA does not define "control," but rather requires that CFIUS prescribe a definition by regulation. *See* FINSA, Public Law 110-49, section 2, adding section 721(a)(2). . . . The Final Rule maintains the longstanding approach of defining "control" in functional terms as the ability to exercise certain powers over important matters affecting an entity. Specifically, "control" is defined as the "power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the [matters listed in § 800.204(a)], or any other similarly important matters affecting an entity." *See* § 800.204(a). Two points should be emphasized concerning this definition. First, it eschews bright lines. . . . Second, . . . the focus of the statute and therefore of these regulations is *control*. Even acknowledging the considerable flexibility necessarily inherent in a national security regulation, the statutory standard is not satisfied by anything less than control.

* * * *

Foreign Person

The term "foreign person" is defined in § 800.216. The Final Rule introduces the new concept of a "foreign entity," . . . and specifies that an entity that falls within the definition of a "foreign entity" will be deemed a foreign person.

. . . Section 800.302(b) provides a very limited qualification to the application of the general control principle. Pursuant to § 800.302(b), a foreign person does not control an entity if it satisfies a two-pronged test: (1) It holds ten percent or less of the voting interest in the entity; and (2) its interest is held solely for the purpose of passive investment. Section 800.223 lays out the test for whether an interest is held solely for the purpose of passive investment. Under that test, an interest would be held solely for the purpose of passive investment if the foreign person has no plan or intent to control the entity, neither possesses nor develops any purpose other than passive investment, nor takes any action that is inconsistent with an intent to hold the interest solely for the purpose of passive investment. This special rule applies to all types of investors equally, rather than assuming that certain types of institutions are passive investors.

* * * *

Section-by-Section Analysis

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Section 800.204(c)—Minority Shareholder Protections

The Proposed Rule identified several minority shareholder protections at what is now § 800.204(c) and provided that the Committee will not deem those negative rights (*i.e.*, rights to prevent certain events from occurring) to confer control in themselves. Many commenters suggested negative rights that they believe should be added to the list of minority shareholder protections.

This Final Rule expands the list of minority shareholder protections, now at § 800.204(c), to include two additional negative rights: The power to prevent an entity from voluntarily filing for bankruptcy or liquidation, and the power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors as provided in the relevant corporate documents governing such shares.

The list in § 800.204(c), however, expressly is not intended to be exhaustive of the rights that shall not in themselves be deemed to confer control over an entity. Section 800.204(c) includes a list of negative rights that the Committee recognizes as minority shareholder protections because they protect the investment-backed expectations of minority shareholders and do not affect strategic decisions on business policy or day-to-day management of an entity or other important matters affecting an entity.

The Committee recognizes, however, that other negative rights proposed by commenters for inclusion in § 800.204(c) are often provided to minority shareholders. Section 800.204(d) explicitly provides that the Committee will consider, on a case-by-case basis, whether minority shareholder protections other than those listed in § 800.204(c) do not confer control over an entity. Non-inclusion in § 800.204(c) of any particular right does not mean that the Committee has determined that such a right necessarily results in control and does not prejudge whether the Committee would determine under § 800.204(d) that such a right does not confer control in a particular transaction.

The Committee will consider favorably in the context of specific transactions notified to the Committee the parties' opinion that the following minority shareholder protections do not in themselves confer control: The power to prevent changes in the capital structure of the entity, including through mergers, consolidations, or reorganizations, that would dilute or otherwise impair existing shareholder rights; the power to prevent the acquisition or disposition of assets material to the business outside the ordinary course of business; the power to prevent fundamental changes in the business or operational strategy of the entity; the power to prevent incursion of substantial indebtedness outside the ordinary course of business; the power to prevent fundamental changes to the entity's regulatory, tax, or liability status; and the power to prevent any amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity. The Committee's favorable consideration of these rights does not preclude it from finding that the existence of one or a combination of these rights confers control under the facts and circumstances of a particular transaction.

* * * *

Section 800.302(b)—Solely for the Purpose of Passive Investment

The Proposed Rule provided in § 800.302(c) that a transaction that results in a foreign person holding ten percent or less of the outstanding voting interests in a U.S. business is not a covered transaction if the transaction is "solely for the purpose of investment." . . . Some commenters suggested that the term "solely for the purpose of investment" was too vague and created additional uncertainty for portfolio investors. A commenter also suggested clarifying that investors holding less than ten percent of the interests of a business can wield significant influence.

The Final Rule addresses these comments by clarifying that the rule for holdings of ten percent or less of the outstanding voting interests in a U.S. business—which is now at § 800.302(b) of the Final Rule—applies only to interests that are held or acquired "solely for the purpose of passive investment." The addition of the word "passive" emphasizes that this rule does not pertain to a transaction if the foreign person plans or intends to gain control over the U.S. business. The example in § 800.223 of the Final Rule also makes clear that the Committee will consider whether the foreign person's negotiation of rights constitutes evidence that the foreign person possesses a purpose other than passive investment. Under the Final Rule, a transaction would not be a "covered transaction" if the foreign person holds ten percent or less of the voting shares in a U.S. business and the investment is passive such as where, for example, the foreign investor has no affirmative rights other than the ability to vote its shares *pro rata* and no negative rights other than any minority shareholder protection listed in § 800.204(c) or as considered by the Committee on a case-by-case basis under § 800.204(d).

* * * *

2. U.S.–Rwanda Bilateral Investment Treaty

On November 20, 2008, President Bush transmitted to the Senate for advice and consent to ratification the Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the

Encouragement and Reciprocal Protection of Investment, signed at Kigali on February 19, 2008. S. Treaty Doc. No. 110-23 (2008). The treaty was the second one concluded on the basis of the 2004 U.S. model bilateral investment treaty and was the first one since 1998 with a sub-Saharan African country. The United States is a party to 40 bilateral investment treaties, five of which are with countries in sub-Saharan Africa. President Bush's transmittal letter is excerpted below. *See also* White House, "Fact Sheet: United States–Rwanda Bilateral Investment Treaty," Feb. 19, 2008, available at *http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080219-8.html*.

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The Treaty is fully consistent with U.S. policy to secure protections for U.S. investment abroad and to welcome foreign investment in the United States. Under this Treaty, the Parties agree to accord national treatment and most-favored-nation treatment to investments. They also agree to customary international law standards for expropriation and for the minimum standard of treatment. The Treaty includes detailed provisions regarding the payment of prompt, adequate, and effective compensation in the event of expropriation; free transfer of funds related to investment; freedom of investment from specified performance requirements; prohibitions on nationality based restrictions for the hiring of senior managers; and the opportunity for investors to resolve disputes with a host government through international arbitration. The Treaty also includes extensive transparency obligations with respect to national laws and regulations and commitments to transparency in dispute settlement. The Parties also recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental and labor laws.

* * * *

Excerpts discussing the treaty's provisions concerning minimum standard of treatment and expropriation follow from the report of the Department of State, submitted to the

President by Secretary of State Rice on October 26, 2007, and included in S. Treaty Doc. No. 110-23.

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* * * *

Minimum Standard of Treatment (Article 5, Annex A)

Article 5 of the Treaty establishes a minimum standard of treatment that each Party owes to covered investments. The minimum standard of treatment is defined as "treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." "Fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. The obligation to provide "full protection and security" requires a host country to provide the level of police protection required under customary international law. Article 5 also states that a determination that there has been a breach of another provision of the Treaty or of a separate international agreement does not establish that there has been a breach of the Treaty's minimum standard of treatment obligation.

Annex A sets forth the shared understanding of the Parties regarding the meaning of "customary international law" in Article 5 (and in Annex B on Expropriation) and clarifies that the customary international law minimum standard of treatment of aliens owed under Article 5 refers to all customary international law principles that protect the economic rights and interests of aliens.

Expropriation and Compensation (Article 6, Annexes A and B)

Article 6 incorporates into the Treaty the customary international law standard for lawful expropriation, providing that neither Party may expropriate property unless it does so for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and accompanied by prompt, adequate, and effective compensation. Article 6 addresses both direct expropriation, when a government actually transfers title or seizes an investment, and indirect expropriation, when a governmental action or series of actions has an effect equivalent to direct expropriation. . . .

Annex B clarifies the shared understanding of the Parties with respect to Article 6 as to how to determine whether an expropriation has occurred. The Annex states that a Party's actions can only be considered an expropriation if they interfere with a tangible or intangible property interest or right in an investment. With respect to indirect expropriation, the Annex endorses a case-by-case, fact-based approach, and lists three factors, among others, that tribunals must consider in determining whether an indirect expropriation has occurred: (1) the adverse economic impact of the government action, (2) the extent of government interference with reasonable investment-backed expectations, and (3) the character of the government action. The analytical approach adopted in Annex B is adapted from the seminal U.S. Supreme Court case relating to regulatory taking, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and is consistent with customary international law.

* * * *

3. SEC Mutual Recognition Arrangement with Australian Securities and Investments Commission

On August 25, 2008, the U.S. Securities and Exchange Commission ("SEC") and the Australian Securities and Investments Commission ("ASIC") entered into a mutual recognition arrangement. The SEC's press release of that date stated:

> The mutual recognition arrangement provides a framework for the SEC, the Australian government, and ASIC to consider regulatory exemptions that would permit U.S. and eligible Australian stock exchanges and broker-dealers to operate in both jurisdictions, without the need for these entities (in certain aspects) to be separately regulated in both countries.
>
> * * * *
>
> Through this mutual recognition arrangement, the SEC and the Australian authorities agree to consider

providing exemptions to exchanges and securities brokers in one another's countries. Once implemented, these exemptions could permit U.S. stock exchanges and broker-dealers regulated by the SEC, subject to conditions imposed by the Australian authorities, to offer their services to Australian wholesale investors and financial firms without being subject to most ASIC regulation. Likewise, eligible Australian stock exchanges and broker-dealers regulated by ASIC, subject to conditions imposed by the SEC, could offer their services to certain types of U.S. investors and firms without being subject to most SEC regulation.

* * * *

An integral component of the mutual recognition arrangement is an Enhanced Enforcement Memorandum of Understanding (MOU) and a new Supervisory MOU that will allow for considerably greater regulatory and enforcement cooperation and coordination between the SEC and ASIC. These MOUs will apply broadly to all U.S. and Australian market activity and not just those related to the mutual recognition arrangement.

Under the arrangement, both the SEC and ASIC will retain jurisdiction to pursue violations of their respective anti-fraud laws and regulations.

The full text of the press release and the two MOUs are available at *www.sec.gov/news/press/2008/2008-182.htm*.

4. Intellectual Property

a. Special 301 Report

On April 25, 2008, the Office of the U.S. Trade Representative ("USTR") announced the issuance of the 2008 Special 301 Report to identify those foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons that rely

upon intellectual property protection, and those foreign countries determined to be priority foreign countries. USTR submits the report annually pursuant to § 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994). The 2008 report included countries on the Priority Watch List and the Watch List and countries under § 306 monitoring; placement of a trading partner in one of these categories indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons relying on intellectual property protection. *See Digest 2007* at 605–07 for additional background.

The 2008 report summarized particular concerns about China and the Russian Federation, added Pakistan to the Priority Watch List,* identified countries whose performance had improved in 2008, and added four new countries to the Watch List, as excerpted below. The full text of the report is available at *www.ustr.gov/about-us/press-office/reports-and-publications/archives*; for a summary of countries identified in the 2008 report, *see* USTR press release of April 25, 2008, available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/april*.

* * * *

. . . The 2008 Special 301 review process examined IPR protection and enforcement in 78 countries. Following extensive research and analysis, USTR designates 46 countries in this year's Special 301 Report in the categories of Priority Watch List, Watch List, and/or Section 306 Monitoring status. This report reflects the Administration's resolve to encourage and maintain effective IPR protection and enforcement worldwide.

* Editor's note: China, Russia, Argentina, Chile, India, Israel, Thailand, and Venezuela were the report's other Priority Watch List countries. *See* Special 301 Report at 19–37; *see also* USTR press release, "USTR Issues 2008 Special 301 Report," Apr. 25, 2008, available at *www.ustr.gov/about-us/press-office/press-releases/archives/2008/april*.

Several countries made significant positive progress on IPR protection and enforcement in 2007. For example, Russia has increased penalties for copyright crimes and stepped up action against unlicensed optical disc plants. China has made progress on implementation of measures to reduce end-user software piracy and agreed to strengthen enforcement against company name misuse. In Taiwan, prosecutions for business software piracy have increased, and Taiwan passed legislation making illegal and subjecting to civil and criminal liability services that intentionally facilitate peer-to peer file sharing. Seizures of counterfeit pharmaceuticals have increased in Indonesia and Nigeria. India has approved initiating action for accession to the Madrid Protocol.

China and Australia joined the two key World Intellectual Property Organization (WIPO) treaties for copyright protection. Malaysia launched a new intellectual property (IP) Court, consisting of 15 sessions courts and 6 high courts. Vietnam has taken actions to address the problem of signal piracy. . . .

In 2007, the United States worked to strengthen IPR laws and enforcement around the globe. The three pending free trade agreements (FTAs) all contain world-class IPR provisions, and FTA partner countries such as the Dominican Republic and Oman overhauled their IPR laws as part of the FTA implementation process.

* * * *

Positive Developments

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. . . USTR is pleased to announce that the following countries are having their status improved in the Special 301 Report or are being removed entirely because of progress on IPR issues this past year:

- Belize is being removed from the Watch List due to improvements in IPR enforcement efforts following heightened engagement with the United States.
- Egypt is being moved from the Priority Watch List to the Watch List due to improvements in pharmaceutical IPR protection. The United States urges Egypt to make further improvements, however, in its IPR enforcement efforts and to further clarify its practices with respect to data protection.

- Lebanon is being moved from the Priority Watch List to the Watch List due to improvements in IPR enforcement efforts. Despite this progress, the United States urges Lebanon to pass long-awaited IPR amendments.
- Lithuania is being removed from the Watch List due to improvements in IPR enforcement and passage of IPR legislation following heightened engagement with the United States.
- Turkey is being moved from the Priority Watch List to the Watch List due to improvements in IPR protection. The United States encourages Turkey to make further improvements to its IPR protection and enforcement regimes.
- Ukraine is being moved from the Priority Watch List to the Watch List due to improvements in IPR protection following close engagement with the United States during WTO accession negotiations. The United States urges Ukraine to continue, however, to make improvements in IPR enforcement and to effectively implement its recently passed IPR laws.

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[Watch List] Algeria will be added . . . . The United States is concerned about the lack of protection in Algeria against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products, as well as insufficient coordination between Algeria's health and patent authorities to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products. . . . The United States also has concerns about weak enforcement against piracy and counterfeiting in Algeria. The United States will work together with Algeria to address these IPR concerns, including through Algeria's bid for accession to the WTO and the bilateral Trade and Investment Framework Agreement.

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Greece will be added . . . . IPR enforcement in Greece is weak and uneven, and efforts to improve enforcement generally lack effective coordination. The U.S. copyright industries estimate that

Greece has one of the highest levels of piracy in the European Union. The United States recognizes that in 2007, Greece increased cooperation with industry, executed an extensive education and outreach plan, provided IPR training to police and customs officers, and conducted a Christmas season raid/seizure campaign, and recently established a formal interagency coordinating IPR committee. However, the United States urges improvements in IPR enforcement, including sustained implementation of enforcement measures against street vendors, more effective raids and seizures, increased prosecutions, encouragement of judges to impose deterrent-level penalties, strengthened border enforcement, and establishment of a national action plan to combat IPR infringement. The United States will continue to work with Greece, with the goal of improving IPR protection and enforcement.

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Norway will be added . . . . The United States is concerned about the lack of product patent protection for certain pharmaceutical products. The regulatory framework in Norway regarding process patents filed prior to 1992 denies adequate protection to nearly 75 percent of the pharmaceutical products currently on the Norwegian market, according to U.S. industry reports. The United States will continue to encourage Norway to resolve this issue.

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Spain will be added . . . . The United States is concerned by the Spanish government's inadequate efforts to address the growing problem of Internet piracy, described by U.S. copyright industries as one of the worst in Europe. There is also a widespread misperception in Spain that peer-to-peer file sharing is legal. While Spanish law enforcement authorities have taken some positive measures against pirate Internet websites, prosecutors have failed to pursue IPR cases, judges have failed to impose deterrent-level sentences against IPR infringers, and right holders do not have access to important legal tools needed to bring meaningful civil infringement suits. The United States will continue to work closely with Spain to address these IPR enforcement issues during the next year.

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b. Singapore Treaty on the Law of Trademarks

On December 7, 2007, the Senate provided its advice and consent to ratification of the Singapore Treaty on the Law of Trademarks, done at Singapore on March 27, 2006 (S. Treaty Doc. No. 110-2).* The resolution of advice and consent to the multilateral treaty contained a condition requiring the Secretary of State to transmit to the Senate Foreign Relations and Judiciary committees any amendments to the treaty's regulations within 60 days after the Assembly of the Parties has agreed to such amendments. 153 Cong. Rec. S15,037 (2007). The report on the treaty by the Senate Committee on Foreign Relations, S. Rep. No. 110-8, at 5 (2007), noted that "[a]n amendment to the Regulations . . . should not, in the normal course, require advice and consent." Nevertheless, the Committee expressed its expectation that "[i]f there is any question . . . as to whether an amendment to the Regulations goes beyond the implementation of specific provisions in the Singapore Treaty, the executive branch [will] consult with the committee in a timely manner in order to determine whether Senate advice and consent is necessary."

On October 1, 2008, the United States deposited its instrument of ratification for the treaty. As noted in an October 1 press release issued by the U.S. Mission to the United Nations in Geneva:

> The Singapore Treaty updates and improves the WIPO Trademark Law Treaty of 1994 (TLT) that harmonizes formalities and simplifies procedures for registering and renewing trademarks.
>
> Specifically, the Treaty allows national trademark offices to move to an entirely electronic system for trademark application and processing, which is an efficient

* Editor's note: The treaty entered into force internationally and for the United States on March 16, 2009. *See www.wipo.int/pressroom/en/articles/2008/article_0068.html*.

and cost saving alternative to paper communications. The Singapore Treaty also addresses burdensome recording requirements in some countries that make it difficult for trademark licensors and licensees to enforce trademark rights against third parties. In addition, it expands the original TLT to apply to trademarks consisting of non-visible signs, in line with Free Trade Agreements entered into by the United States.

See www.us-mission.ch/Press2008/October/1001SingaporeTreaty.html for the full text of the release.

5. Tax Treaties with Mandatory Arbitration Provisions

The United States enters into bilateral income tax treaties to eliminate double taxation and prevent tax evasion. According to the Internal Revenue Service, under these treaties, the United States taxes at a reduced rate or exempts from U.S. taxes certain income that residents of foreign countries receive from U.S. sources. In turn, the treaty partners of the United States tax at a reduced rate, or provide tax exemptions on certain items of income that U.S. citizens or residents receive from sources in those foreign countries. Most income tax treaties contain language to prevent U.S. citizens or residents from using them to avoid paying U.S. taxes on income from a U.S. source. *See www.irs.gov/businesses/international/article/0,id=96739,00.html*. A new feature of three recent tax treaties or protocols is the availability of mandatory arbitration for certain disputes arising under them.

On December 28, 2007, a protocol amending the U.S. tax treaty with Germany and a new bilateral tax treaty with Belgium, both containing the new mandatory arbitration provisions, entered into force. The United States signed the Protocol Amending the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes ("2006 German Protocol") on

June 1, 2006. The United States signed the Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and accompanying Protocol ("Belgium Convention") on November 27, 2006. S. Treaty Doc. No. 110-3. The Senate provided its advice and consent to both instruments on December 14, 2007. 153 Cong. Rec. S15,706 (2007). According to a press release issued by the Department of the Treasury on January 2, 2008, the instruments "generally apply to tax years beginning on or after January 1, 2008. Certain provisions of the protocol[] with . . . Germany . . . are effective, however, on or after January 1, 2007." The full text of the release is available at *www.treas.gov/press/releases/hp753.htm*.

The Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, concluded on September 26, 1980, as amended ("Canada Protocol"), which President Bush transmitted to the Senate on March 13, 2008, also contains a mandatory arbitration provision. S. Treaty Doc. No. 110-15 (2008). On July 10, 2008, Michael F. Mundaca, Deputy Assistant Secretary for International Tax Affairs, U.S. Department of the Treasury, testified before the Senate Committee on Foreign Relations on the Canada Protocol as well as other pending income tax treaties. Excerpts from Mr. Mundaca's testimony discussing the new mandatory arbitration provisions in the Canada Protocol, the Belgium Convention, and the 2006 German Protocol follow. The full text of Mr. Mundaca's testimony is available at *http://foreign.senate.gov/testimony/2008/MundacaTestimony080710p.pdf*.

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As a complement to these substantive rules regarding allocation of taxing rights, tax treaties provide a mechanism for dealing with

disputes between the countries regarding the treaties, including questions regarding the proper application of the treaties that arise after the treaty enters into force. To resolve disputes, designated tax authorities of the two governments—known as the "competent authorities" in tax treaty parlance—are to consult and to endeavor to reach agreement. . . . The U.S. competent authority under our tax treaties is the Secretary of the Treasury. That function has been delegated to the Deputy Commissioner (International) of the Large and Mid-Size Business Division of the Internal Revenue Service.

* * * *

Consideration of Arbitration

Tax treaties cannot facilitate cross-border investment and provide a more stable investment environment unless the treaty is effectively implemented by the tax administrations of the two countries. Under our tax treaties, when a U.S. taxpayer becomes concerned about implementation of the treaty, the taxpayer can bring the matter to the U.S. competent authority who will seek to resolve the matter with the competent authority of the treaty partner. The competent authorities will work cooperatively to resolve genuine disputes as to the appropriate application of the treaty.

The U.S. competent authority has a good track record in resolving disputes. Even in the most cooperative bilateral relationships, however, there will be instances in which the competent authorities will not be able to reach a timely and satisfactory resolution. Moreover, as the number and complexity of cross-border transactions increases, so does the number and complexity of cross-border tax disputes. Accordingly, we have considered ways to equip the U.S. competent authority with additional tools to resolve disputes promptly, including the possible use of arbitration in the competent authority mutual agreement process.

The first U.S. tax agreement that contemplated arbitration was the U.S.–Germany income tax treaty signed in 1989. Tax treaties with several other countries, including Canada, Mexico, and the Netherlands, incorporate authority for establishing voluntary binding arbitration procedures based on the provision in the prior U.S.–Germany treaty. Although we believe that the presence of

these voluntary arbitration provisions may have provided some limited assistance in reaching mutual agreements, it has become clear that the ability to enter into voluntary arbitration does not provide sufficient incentive to resolve problem cases in a timely fashion.

Over the past few years, we have carefully considered and studied various types of mandatory arbitration procedures that could be used as part of the competent authority mutual agreement process. In particular, we examined the experience of countries that adopted mandatory binding arbitration provisions with respect to tax matters. Many of them report that the prospect of impending mandatory arbitration creates a significant incentive to compromise before commencement of the process. Based on our review of the U.S. experience with arbitration in other areas of the law, the success of other countries with arbitration in the tax area, and the overwhelming support of the business community, we concluded that mandatory binding arbitration as the final step in the competent authority process can be an effective and appropriate tool to facilitate mutual agreement under U.S. tax treaties.

One of the treaties before the Committee, the Protocol with Canada, includes a type of mandatory arbitration provision negotiated contemporaneously with, and very similar to, a provision in our current, recently ratified treaties with Germany and Belgium, which this Committee and the Senate considered last year.

In the typical competent authority mutual agreement process, a U.S. taxpayer presents its problem to the U.S. competent authority and participates in formulating the position the U.S. competent authority will take in discussions with the treaty partner. Under the arbitration provision proposed in the Canadian protocol, as in the similar provisions that are now part of our treaties with Germany and Belgium, if the competent authorities cannot resolve the issue within two years, the competent authorities must present the issue to an arbitration board for resolution, unless both competent authorities agree that the case is not suitable for arbitration. The arbitration board must resolve the issue by choosing the position of one of the competent authorities. That position is adopted as the agreement of the competent authorities and is treated like any other mutual agreement (*i.e.*, one that has been negotiated by the competent authorities) under the treaty.

Because the arbitration board can only choose between the positions of each competent authority, the expectation is that the differences between the positions of the competent authorities will tend to narrow as the case moves closer to arbitration. In fact, if the arbitration provision is successful, difficult issues will be resolved without resort to arbitration. Thus, it is our expectation that these arbitration provisions will be rarely utilized, but that their presence will encourage the competent authorities to take approaches to their negotiations that result in mutually agreed conclusions in the first instance.

The arbitration process proposed in the agreement with Canada, consistent with the German and Belgian provisions, is mandatory and binding with respect to the competent authorities. However, consistent with the negotiation process under the mutual agreement procedure, the taxpayer can terminate the arbitration at any time by withdrawing its request for competent authority assistance. Moreover, the taxpayer retains the right to litigate the matter (in the United States or the treaty partner) in lieu of accepting the result of the arbitration, just as it would be entitled to litigate in lieu of accepting the result of a negotiation under the mutual agreement procedure.

Arbitration is a growing and developing field, and there are many forms of arbitration from which to choose. We intend to continue to study other arbitration provisions and to monitor the performance of the provisions in the agreements with Belgium and Germany, as well as the performance of the provision in the agreement with Canada, if ratified. We look forward to continuing to work with the Committee to make arbitration an effective tool in promoting the fair and expeditious resolution of treaty disputes. The Committee's comments made with respect to the German and Belgian arbitration provisions have been very helpful and will inform future negotiations of arbitration provisions.

* * * *

As previously noted, the proposed Protocol [with Canada] provides for mandatory arbitration of certain cases that have not been resolved by the competent authority within a specified period, generally two years from the commencement of the case. Under the

proposed Protocol, the arbitration process may be used to reach an agreement with respect to certain issues relating to residence, permanent establishment, business profits, related persons, and royalties. The arbitration board must deliver a determination within six months of the appointment of the chair of the arbitration board, and the determination must either be the proposed resolution submitted by the United States or the proposed resolution submitted by Canada. The board's determination has no precedential value and the board shall not provide a rationale for its determination.

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On September 23, 2008, the Senate provided its advice and consent to ratification of the Canada Protocol. 154 Cong. Rec. S9332 (2008). The resolution of advice and consent contained one declaration stating that the treaty "is self-executing." It also contained one condition, excerpted below, requiring the Secretary of the Treasury to submit information to Congress concerning the implementation of the new mandatory arbitration mechanisms in the Canada Protocol, the 2006 German Protocol, and the Belgium Convention.

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1. Not later than two years from the date on which this Protocol enters into force and prior to the first arbitration conducted pursuant to the binding arbitration mechanism provided for in this Protocol, the Secretary of Treasury shall transmit the text of the rules of procedure applicable to arbitration boards, including conflict of interest rules to be applied to members of the arbitration board, to the committees on Finance and Foreign Relations of the Senate and the Joint Committee on Taxation. The Secretary of Treasury shall also, prior to the first arbitration conducted pursuant to the binding arbitration mechanism provided for in the 2006 Protocol Amending the Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes (the "2006 German Protocol") (Treaty Doc. 109-20) and

the Convention between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and accompanying protocol (the "Belgium Convention") (Treaty Doc. 110-3), transmit the text of the rules of procedure applicable to the first arbitration board agreed to under each treaty to the committees on Finance and Foreign Relations of the Senate and the Joint Committee on Taxation.

2. 60 days after a determination has been reached by an arbitration board in the tenth arbitration proceeding conducted pursuant to either this Protocol, the 2006 German Protocol, or the Belgium Convention, the Secretary of Treasury shall prepare and submit a detailed report to the Joint Committee on Taxation and the Committee on Finance of the Senate, subject to law relating to taxpayer confidentiality, regarding the operation and application of the arbitration mechanism contained in the aforementioned treaties. The report shall include the [specified] information . . . .

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3. The Secretary of Treasury shall, in addition, prepare and submit the detailed report described in paragraph (2) on March 1 of the year following the year in which the first report is submitted to the Joint Committee on Taxation and the Committee on Finance of the Senate, and on an annual basis thereafter for a period of five years. In each such report, disputes that were resolved, either by a mutual agreement between the relevant competent authorities or by a determination of an arbitration board, and noted as such in prior reports may be omitted.

The Canada Protocol entered into force on December 15, 2008, with effect from January 1, 2009. In late 2008 the United States and Germany concluded a Memorandum of Understanding pursuant to the 2006 German Protocol, concerning the application of the treaty's mandatory arbitration provisions. The MOU provides guidance on the operation of the new U.S.–German tax treaty arbitration procedure. The text of the MOU is available at *www.irs.gov/businesses/corporations/article/0,id=201207,00.html*.

Cross References

Counternarcotics certification process, **Chapter 3.B.2.a.**
Tacit amendment procedures in multilateral treaties, **Chapters 4.B., 13.A.2.b., 13.A.2.e., and 14.D.**
Commercial private international law, **Chapter 15.A.**
International civil litigation in U.S. courts, **Chapter 15.C.**
Economic sanctions, including JADE Act sanctions, **Chapter 16.A.**

Chapter 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. UN Convention on the Law of the Sea

On November 3, 2008, Department of State Legal Adviser John B. Bellinger, III, addressed the Law of the Sea Institute in Berkeley, California, on the United States and the Law of the Sea Convention. In his speech, as excerpted below, Mr. Bellinger discussed the reasons for the executive branch's support for U.S. accession to the 1982 United Nations Convention on the Law of the Sea ("LOS Convention" or "Convention") and ratification of the 1994 Agreement relating to the Implementation of Part XI of the LOS Convention ("1994 Agreement"), responded to arguments against U.S. accession, and described how the State Department's Office of the Legal Adviser confronts law of the sea issues on a daily basis. Mr. Bellinger's comments on legal issues relating to the Arctic are excerpted in A.2. below. The full text of the speech is available at *www.state.gov/s/l/c8183.htm*. Detailed discussion of the executive branch's views on why the United States should become a party to the LOS Convention and the 1994 Agreement is available in *Digest 2007* at 613–30.

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. . . In the fall of 2003, after a careful review process involving a wide range of agencies, the Administration decided to strongly support U.S. accession.

We concluded that there were several important benefits to joining the Convention:

First, the Convention strongly advances U.S. national security interests because it guarantees our military and commercial vessels—both ships and aircraft—navigational rights and freedoms throughout the world's oceans, including the right of innocent passage through and over foreign territorial seas and international straits. . . .

Second, the Convention advances U.S. economic interests. It would codify U.S. sovereign rights over all the resources in the ocean, and on and under the ocean floor, in a 200-nautical mile Exclusive Economic Zone off our coastline. The United States has one of the longest coastlines and the largest Exclusive Economic Zone of all the countries in the world and stands to gain greatly from these provisions. The Convention also codifies sovereign rights over resources on and under the ocean floor beyond 200 nautical miles, if the area meets certain geological criteria set out in the Convention. The Convention establishes an institution—the Commission on the Limits of the Continental Shelf—that offers a coastal State the opportunity to maximize international recognition and legal certainty with respect to the continental shelf beyond 200 nautical miles offshore. This is an especially valuable feature of the Convention right now, as it would maximize legal certainty regarding U.S. rights to energy resources in vast offshore areas, including in areas that are likely to extend at least 600 miles north of Alaska.

The third principal benefit of the Convention is that it sets forth a comprehensive legal framework and establishes basic obligations for protecting the marine environment from all sources of pollution. This framework allocates regulatory and enforcement authority so as to balance a coastal State's interests in protecting the marine environment and its natural resources with the rights and freedoms of navigation of all States.

Apart from the benefits of these substantive provisions, joining the Convention would give the United States a "seat at the table"

in the interpretation and development of the law of the sea. As a leading maritime power and a country with one of the longest coastlines in the world, the United States has an enormous stake in that project, and we need to ensure a level of influence commensurate with our interests. Although the Convention's first several years were fairly quiet on this score, its provisions are now being actively applied and developed. The Continental Shelf Commission and the International Seabed Authority, for example, are up and running, and we—the country with perhaps the most to gain, and lose, on law of the sea issues—should not be sitting on the sidelines. Our status as a non-Party puts us in a far weaker position to advance U.S. interests.

In addition to the benefits of joining, the main stumbling block to accession has been removed. President Reagan had refused to sign the Convention because of concerns regarding its deep seabed mining chapter, including provisions mandating technology transfer and insufficient U.S. influence in decision-making. . . . The Implementing Agreement concluded in 1994 contains legally binding changes to the Convention's deep seabed mining chapter. . . . [T]he 1994 Agreement overcomes each one of the U.S. objections to the Convention and meets President Reagan's goal of guaranteed access by U.S. industry to deep seabed minerals on the basis of reasonable terms and conditions.

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. . . [T]he United States will continue to abide by the Convention and work within its framework. Even as we remain outside the Convention, the Legal Adviser's Office confronts law of the sea issues on a daily basis. For example, we work at the International Maritime Organization and in regional fora to protect the marine environment by elaborating rules for reducing vessel source pollution, ocean dumping, and other sources of marine pollution. We recently achieved U.S. ratification of a treaty—"MARPOL Annex VI"—aimed at limiting air pollution from ships and a protocol limiting land-based sources of marine pollution in the Caribbean Region. A global treaty on ocean dumping—the "London Protocol"—awaits action by the full Senate. At home, we coordinate with the Department of Justice to ensure that prosecutions

involving foreign flag vessels are consistent with the marine pollution chapter of the Convention, and we scrutinize legislative proposals from both the Executive Branch and the Congress to ensure that U.S. marine pollution jurisdiction is applied and enforced in accordance with law of the sea rules.

We also negotiate maritime boundary treaties with our neighbors in line with the provisions of the Convention. . . . [B]y virtue of our island possessions, we . . . have over thirty instances in which U.S. maritime claims overlap with those of another country. Less than half of them have been resolved. Some involve disagreements about how much effect to give to islands in determining a maritime boundary. In the case of the Beaufort Sea, Canada argues that the existing treaty establishing the land boundary between Alaska and Canada also determines the maritime boundary. Our office is also assisting a State Department-led Task Force to determine the outer limits of the U.S. continental shelf beyond 200 nautical miles. The U.S. Coast Guard icebreaker Healy has recently conducted several cruises in the Arctic Ocean, including one that mapped areas of the Chukchi Borderland where the U.S. shelf may extend more than 600 miles from shore.*

U.S. and international efforts to combat terrorism and proliferation have also generated law-of-the-sea-related issues. Consistent with the Convention, we fashion shipboarding agreements to promote the maritime interdiction aspects of the Proliferation Security Initiative. And we bring law of the sea equities into the elaboration of treaties on suppression of criminal acts at sea. In fact, the U.S. Senate has just given its advice and consent to ratification of two protocols that supplement the convention that addresses suppression of unlawful acts at sea—the 2005 so-called "SUA Protocol" and the 2005 "Fixed Platforms" Protocol.

Law of the sea issues have also featured prominently in UN Security Council discussions and resolutions regarding piracy off the coast of Somalia. For example, a key element of UNSCR 1816

* Editor's note: The Department of State Office of the Spokesman issued a media note on August 11, 2008, providing additional details on the cruises carried out by the U.S. Coast Guard cutter *Healy* in the Arctic. *See http://2001-2009.state.gov/r/pa/prs/ps/2008/aug/108119.htm*.

is to treat Somali territorial waters as the high seas for interdiction purposes.

Fisheries issues also absorb our legal attention, as depleted stocks have become a major economic and environmental issue. Countries are seeking to create regional fisheries management organizations in more and more areas of the world and are looking to strengthen the means for cracking down on illegal, unregulated, and unreported fishing.

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2. Arctic

a. Overview

In his November 2008 remarks in Berkeley, California (*see* A.1. *supra*), Mr. Bellinger addressed legal issues relating to the Arctic, as excerpted below.

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Over the past year or so, some of the most interesting law of the sea issues for us have come from the Arctic, where climate change is creating the prospect for increased shipping, oil and gas activity, tourism, and fishing. As a result, the law of the sea has become more relevant than ever. . . .

My first observation is that while some have expressed concern that the Arctic is a "lawless" region, this could not be further from the truth. For one, the law of the sea, as reflected in the Convention, provides an extensive legal framework for a host of issues relevant to the Arctic. It sets forth navigational rights and freedoms for commercial and military vessels and aircraft in various maritime areas. It addresses the sovereignty of the five Arctic coastal States—the U.S., Russia, Canada, Denmark, and Norway—by setting forth the limits of the territorial sea and the applicable rules. It addresses sovereign resource rights by setting forth the limits of the exclusive economic zone and the continental shelf and rules governing those

areas. It provides the geological criteria relevant to establishing the outer limits of the continental shelf beyond 200 nautical miles—a topic of great interest these days as the Arctic coastal States seek to extend their respective shelves to the limits permissible under international law. For Parties to the Convention—that is, the four *other* coastal States—it sets forth a procedure for securing international recognition of those outer limits. International law also sets forth rules for resolving cases where the maritime claims of coastal nations overlap. And finally, the law of the sea provides rules regarding marine scientific research in the Arctic and sets out the respective rights and responsibilities among coastal States, flag States, and port States regarding protection of the marine environment.

But the law of the sea is not the only law governing the Arctic. Various air-related agreements indirectly protect the Arctic, such as the Montreal Protocol on the Ozone Layer and the Framework Convention on Climate Change. There is also so-called "soft law" applicable to the Arctic—for example, non-binding rules such as the International Maritime Organization's 2002 guidelines for ships operating in ice-covered waters. Further, there is an intergovernmental forum—the Arctic Council—which comprises the eight countries with land territory above the Arctic Circle. The Council, which puts great weight on environmental issues, has issued Guidelines on Arctic offshore oil/gas activities.

My second observation is that we should not be taken in by hyperbole in the press about a "race" to the Arctic. Yes, there are efforts to secure legal certainty in places where previously such certainty was not especially important. But this is not the Wild West. Last May, officials from Canada, Denmark, Norway, Russia, and the United States gathered in Greenland to put to rest the concern that there is a rush to stake out and exploit Arctic natural resources. In the so-called "Ilulissat Declaration," these countries made clear that there are already robust international legal rules applicable to the Arctic, and that they are committed to observing these rules. [*See* A.2.b. below.]

A third observation is that, while there is likely to be a need to expand international cooperation in the Arctic in certain areas, there is no need for a comprehensive Arctic treaty. . . . Calls for a

new Arctic treaty along the lines of the Antarctic Treaty are particularly misguided, as the legal, geographic, and other aspects of these two regions are vastly different. Among other things, unlike Antarctica, where most of the world does not recognize the sovereignty claimed by seven countries and a treaty served to suspend the claims issue so as to permit scientific research, the land territory in the Arctic is almost entirely undisputed. Also unlike Antarctica, most of the Arctic is ocean and widely recognized as subject to the law of the sea.

My final observation relates again to the Ilulissat Declaration. Some have wondered, with concern, whether the Declaration is intended to reflect the emergence of a new grouping of the five countries bordering the Arctic Ocean. Not at all. These countries are simply geographically located in positions where they have particular rights and obligations under the law of the sea that are relevant to the Arctic Ocean; they have an obvious interest in maintaining a dialogue with one another on these issues. Moreover, we do not view the Ilulissat Declaration or the Greenland Ministerial as excluding the legitimate interests of the other members of the Arctic Council—Finland, Iceland, and Sweden—or other States with an interest in Arctic matters.

Now . . . I would like to discuss where there may be room for improvement. *First*, as maritime traffic and tourism in the Arctic increases, there will likely be a need for strengthened cooperation in search and rescue. . . . Under the Convention, each coastal State is required to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose." The U.S. Coast Guard is working to enhance its own search and rescue capabilities in the Arctic, and we are considering ways to enhance cooperative arrangements with our Arctic neighbors to ensure, among other things, rational allocation of resources and avoidance of gaps in coverage.

Second, as the five Ministers noted in the Ilulissat Declaration, there are opportunities for greater scientific cooperation on Arctic issues, both among the Arctic coastal states and with other interested

countries. U.S. and Canadian scientists worked together this past summer to gather seismic and bathymetric data related to establishment of the outer limits of the continental shelf in the Arctic—notwithstanding the unresolved maritime boundary with Canada in the Beaufort Sea.

A *third* area is cooperation on the environment. The Ministers in Ilulissat noted the "stewardship role" their nations have in protecting the Arctic Ocean's unique ecosystem. In the Arctic Council, these and other countries are assessing the state of biological diversity, addressing the regional impacts of non-carbon dioxide climate forcing agents, and enhancing the existing "Arctic Off-Shore Oil and Gas Guidelines" for adoption by Arctic ministers in April 2009. . . . Another environment-related issue that should involve the broader international community, through the International Maritime Organization, is to update the IMO's Guidelines for Ships Operating in Ice-Covered Waters, also known as the "Polar Code." . . .

Finally, I view it as a very positive development that, both domestically and internationally, experts are considering the legal issues associated with the warming of the Arctic. To the extent enhancements are needed in one or more areas regarding the safety, security, or environmental protection of the Arctic Ocean, these can be agreed upon and put in place before they become necessary.

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On March 7, 2008, J. Ashley Roach, Captain, JAGC, U.S. Navy (ret'd), Office of the Legal Adviser, spoke at the University of California at Berkeley on the legal issues posed by the melting of the ice in the Arctic. Mr. Roach focused his comments, excerpted below, on the issues concerning sovereignty, territoriality, and maritime passage in the Arctic Ocean. The full text of Mr. Roach's comments is available at *www.state.gov/s/l/c8183.htm*.

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My first point is that consideration of these issues is timely now *before* large-scale navigation becomes feasible. It will take considerable time to identify and agree on the steps that will be needed to ensure the safety, security and environmental protection of the Arctic Ocean, and even more time to put them in place.

And we need to be aware that these issues are not just of concern to Canada and the United States. These issues are of concern to all five states bordering on the Arctic, the other states in the high north, and flag states whose shipping might wish to ply these waters *when* they become suitable for large-scale navigation.

1. Terminology

As a preliminary matter, it is important to be aware of the differences in "Arctic" terminology and definitions.

- Geographically, definitions of the Arctic vary:
  - Some consider the Arctic to consist of all land, submerged lands, and water north of the Arctic Circle (66° 33' 39" North of the Equator).
  - The US Arctic Research statute includes a broader area, including the Bering Sea and a portion of the land area of Alaska below the Arctic Circle.
  - The Canadian Arctic Waters Pollution Prevention Act defines the Arctic as all Canadian land and waters north of 60° N (i.e., the Northwest Territories).
  - Other definitions include where permafrost begins.
- Land territory north of the Arctic Circle includes northern Alaska, northern mainland Canada abutting the Bering Sea (the Northwest Territories), the Canadian Arctic islands (which Canada calls the Canadian "arctic archipelago"), Greenland (Denmark), Svalbard/Spitzbergen (Norway), northern Norway, northern Sweden, northern Finland, and the Russian territory of Franz Josef Land, Novaya Zemlya, North Land, Anjou Islands, Wrangel Island and northern Siberia.
- Arctic submerged lands consist of the "continental shelf" and the "deep seabed."

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- Defining the Arctic Ocean is much like defining the Arctic; neither has a definitive and obvious extent. As with the Arctic, the United States has an interest in not subscribing to one particular definition of the Arctic Ocean for all purposes. Rather each definition serves its own purpose.
  - There is a definition adopted by the International Hydrographic Organization (IHO) in 1953; it defines the Arctic Ocean by a series of segments that includes all the waters, whether or not frozen, seaward of the northern limits of the U.S., Canada, Denmark (Greenland), Norway, and Russia. This definition includes several "seas," such as the Beaufort, Chukchi, Norwegian, Barents, Laptev, and Greenland Seas, as well as Baffin Bay.
  - As a member of the IHO, the U.S. agrees with this definition in the context of providing uniformity to mariners for navigational purposes (the primary purpose of this organization).

I make this point in part to recall that the entrance to the Arctic Ocean from the Pacific Ocean is through the Bering Strait. I suggest that consideration of issues concerning shipping in the Arctic Ocean need to begin to focus on that chokepoint rather than further north.

2. Maritime Zones

. . . [T]he different maritime zones in the Arctic Ocean . . . are territorial seas, exclusive economic zones (EEZ), continental shelves, the deep seabed beyond the limits of national jurisdiction (i.e., the Area) and high seas. . . .

- Each of the five States bordering the Arctic Ocean has claimed an EEZ in the waters beyond and adjacent to its territorial sea, in which it enjoys sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil,

and in the same area, jurisdiction with regard to protection and preservation of the marine environment.

- The maximum breadth of the EEZ is 200 nm measured from baselines determined in accordance with the LOS Convention.
- Each of these five States has a continental shelf over which it has exclusive sovereign rights for the purpose of exploring it and exploiting its natural resources.
- The continental shelf may extend more than 200 nm from properly established baselines if the geologic criteria set out in article 76 are met.
- For Parties to the LOS Convention (which includes the other four countries), the Convention sets forth a procedure for establishment of the outer limits of the shelf beyond 200 nm. If the coastal State establishes its outer limits on the basis of recommendations of the Convention's Commission on the Limits of the Continental Shelf (Commission [or CLCS]), the limits are considered "final and binding."
- Russia and Norway have made submissions to the Commission but it has not yet made its recommendations on the outer limit of their extended shelves. . . . Russia is collecting additional data to substantiate its submission.
- Denmark, Canada, and the U.S. are in the process of collecting the necessary scientific data to support their submissions/establishment. (The U.S. may not make a submission unless it is a party to the LOS Convention.)

* * * *

- The "Area" consists of the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (i.e., beyond the outer limits of the continental shelf). Under the LOS Convention, deep seabed mining in the Area is administered by the International Seabed Authority.
- The water column more than 200 nm from land in the Arctic Ocean, whether or not frozen, is "high seas" where:
  - high seas freedoms apply, and

- no State may validly purport to subject any part of the high seas to its sovereignty.

3. Maritime boundaries

In this area, not all the maritime boundaries have been agreed.

* * * *

- The U.S.-Russia maritime boundary—running from the Bering Sea north to the Arctic—has been negotiated. The 1990 U.S.-USSR (now Russia) treaty is being applied provisionally pending ratification by the Russian Duma. The Senate gave its advice and consent in 1992. The treaty provides that the maritime boundary extends north along the 168° 58' 37" meridian through the Bering Strait and Chukchi Sea into the Arctic Ocean "as far as is permitted under international law."
  - The Russian submission to the CLCS respects this boundary. . . .
- The U.S. and Canada disagree on the location of the maritime boundary in the Beaufort Sea and northward. Canada considers that the maritime boundary follows the 141st meridian, which forms the land boundary between Alaska and the Northwest Territories. The United States rejects that the 1825 Anglo-Russian and 1867 Russo-American treaty establishing the land boundary also established the maritime boundary and considers that the boundary should be based on the "equidistance" methodology.
- Nevertheless, as described above Canadian and U.S. scientists will be cooperating this summer in gathering seismic and bathymetric data related to establishment of the outer limits of their continental shelves in the Arctic.
- . . . [A] month ago the U.S. Minerals Management Service held a very successful lease sale of off-shore blocks for oil and gas exploration in the Chukchi Sea. These blocks were well off shore some 60-200 miles, thereby avoiding issues with protected species near-shore.

4. Northwest Passage

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- The Northwest Passage connects Baffin Bay/Davis Strait in the Atlantic with the Beaufort Sea in the Arctic Ocean, through the waters of Canadian Arctic archipelago.
- The commercial potential of the passage lies in the reduction, both in distance and time, of the transit between Asia and Europe or the eastern Atlantic.
- The United States recognizes Canadian sovereignty over its Arctic islands.
- The U.S.—and many other countries—consider the Northwest Passage is a "strait used for international navigation," in which vessels and aircraft are entitled under the law of the sea to the non-suspendable right of transit passage, in the normal mode, without the permission of, or prior notice to, the State bordering the strait. Canada's right to enforce environmental requirements on transiting vessels in the strait is circumscribed by article 233 of the LOS Convention.
- Canada claims the waters are internal and that, therefore, Canadian consent is necessary for passage. Canada also asserts the right to impose on transiting vessels environmental regulations of its choosing.

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- The U.S. rejects the Canadian claim—it does not meet the criteria for historic title, and article 35(a) [of the LOS Convention], which prevents drawing of straight baselines from altering the previous navigational rights, applies to the Canadian Arctic.
- In January 1988, Canada and the United States reached a pragmatic agreement applicable to a limited class of U.S. vessels, i.e., icebreakers (all of which belong to the U.S. Coast Guard).
- The Agreement, which was expressly without prejudice to either country's position on the status of the Northwest Passage, provides for U.S. icebreakers to conduct marine

scientific research during the transit and, as such, for the U.S. to seek Canada's consent prior to such passage.

- Subsequent transits by U.S. Coast Guard icebreakers of the Northwest Passage have all taken place in accordance with this Agreement.

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- The U.S. Navy conducts submerged transits throughout the Northwest Passage and the Arctic region. The Arctic is a particularly advantageous pathway for shifting submarines between the Atlantic and Pacific fleets. . . .
  - In addition to these transits, U.S. naval forces conduct transits, training and operations in the Arctic region. . . .

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- . . . [R]ather than debating legal differences, we think it is much more useful to focus on the extensive, long-term common interests in security, environmental protection and safety of navigation shared between the U.S. and Canada in the Arctic.

5. Sources of law

- In our view, there are many sources of international law that are applicable to the Arctic Ocean, and, more importantly, available to enhance the security, environmental protection and safety of navigation of the Arctic Ocean. As a result, we do not believe it is necessary to develop a new regime of laws for the Arctic, as some have suggested.
- The sources include, e.g.:
  - the law of the sea, as reflected in the Law of the Sea Convention . . . ;
  - various IMO agreements on safety of navigation and prevention of marine pollution, which clearly apply to the Arctic Ocean . . . (e.g., SOLAS, MARPOL and its annexes on vessel source pollution, the London Convention/Protocol on ocean dumping); and
  - various air-related agreements that indirectly protect the Arctic, such as the Montreal Protocol on the ozone layer,

the Framework Convention on Climate Change, the POPs Convention (to which the U.S. is not yet a party).

- There is also so-called "soft law" applicable to the Arctic Ocean, including the IMO guidelines and the Arctic Council guidelines.
- IMO Guidelines for Ships Operating in Arctic Ice-Covered Waters (2002), IMO's Enhanced Contingency Planning Guidance for Passenger Ships Operating in Areas Remote from SAR Facilities (2006), the IMO's Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas (2007) and the Arctic Council Guidelines on Arctic offshore oil/gas activities (1997/2002).
- The U.S. participated actively in the development of, and supports, the IMO Guidelines:

* * * *

- The U.S. also supports the Arctic Council Guidelines on offshore oil/gas activities.
  - They recommend voluntary standards, technical and environmental best practices, and regulatory controls for Arctic offshore oil and gas operators.
  - The Guidelines were designed to be consistent with U.S. offshore regulations . . . .

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- Various institutions address the Arctic Ocean as well, whether as part of a global approach or specifically:
  - The Arctic Council is the only diplomatic forum focused on the Arctic. It is an intergovernmental forum of the eight countries with land territory about the Arctic Circle—Canada, Denmark (Greenland, Faroe Islands), Finland, Iceland, Norway, Russian, Sweden, and the U.S. Six indigenous organizations serve as "permanent participants" in the Council and participate along side the governments in the operation of the Council.

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- The Council's focus is environmental protection and sustainable development. With U.S. support, the Council's working groups have taken on increased responsibilities for studies and projects in recent years.

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- The U.S. experience with the Council has been positive overall, although we continue to resist calls to make it more like an international organization.
- The United States believes that the Council should remain a high-level forum devoted to issues within its current mandate. . . .

6. Tools

Then, what specific tools are available to enhance the security, environmental protection and safety of navigation in the Arctic Ocean and its approaches? There are a number of international instruments available to do so. They relate to search and rescue, routeing and reporting measures, vessel traffic services, ship identification, ISPS Code and MARPOL special areas.

Search and Rescue

- The Arctic nations are all party to the IMO's International Convention on Maritime Search and Rescue (1979). The SOLAS Convention requires each party to provide search and rescue services for the rescue of persons in distress at sea around its coasts.
- The Arctic nations are also party to the Convention on International Civil Aviation (ICAO), Annex 12 to which addresses SAR.
- Both SAR Conventions require parties to establish SAR Regions (SRRs) and call on parties to cooperate in the establishment and provision of SAR services.
- The United States has a number of bilateral SAR agreements and MOUs with other countries.
  - A maritime SAR agreement with Russia (1988)
  - An aeronautical and maritime SAR agreement with Canada and the UK (1999)

  - Is developing a multilateral SAR MOU for the North Atlantic SAR region.
- In the Alaska region, the U.S. Coast Guard has recently announced plans to operate SAR aircraft from forward operating bases in Nome and Barrow starting this summer.

Routeing and Reporting Measures, Vessel Traffic Services

- The U.S., Canada and Russia are party to the IMO's International Convention for the Safety of Life at Sea (1974, as amended).
- Chapter V of the annexed regulations provides for the establishment of ships' routeing measures and ship reporting systems, which can be made mandatory if the IMO approves them (Regulations V/10 and 11).
- SOLAS regulation V/12 provides for the establishment by parties of vessel traffic services where the volume of traffic or the degree of risk justified such services.

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AIS and LRIT

- SOLAS already requires all ships over 500 gross tons on international voyages to be equipped with automatic identification systems (AIS).
- Later this year, the IMO's system for long range identification and tracking (LRIT) of ships should become operational.
- These systems, along with others in development, will enable coastal States to identify and track commercial ships heading for and in the Arctic Ocean.

ISPS Code

- Following 9-11, the IMO adopted special measures to enhance maritime security, as amendments to SOLAS (chapter XI-2) and the International Ship and Port Facility Security (ISPS) Code.
- These are applicable to commercial ships that could be expected to traverse the Arctic Ocean, and will be applicable to ports on the rim.

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MARPOL Special Areas

- Annex I to MARPOL 73/78 contains regulations for the prevention of pollution by oil.
  - The Annex provides for the establishment of special sea areas where for recognized technical reasons in relation[] to its oceanographic and ecological condition and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution by oil is required. (regulation I/1.11)
- In respect of the Antarctic area, any discharge into the sea of oil or oily mixtures from any ship is prohibited (regulation I/15.4)
  - A similar prohibition might be found to be appropriate for the Arctic Ocean as well.

* * * *

b. Ilulissat Declaration

On May 28, 2008, the United States participated in a meeting in Ilulissat, Greenland, with representatives of the four other coastal states bordering on the Arctic Ocean: Canada, Denmark, Norway, and the Russian Federation. The Danish Minister for Foreign Affairs and the Premier of Greenland hosted the meeting. The five countries adopted a declaration, referred to as the Ilulissat Declaration, stating that the extensive international legal framework applicable to the Arctic Ocean does not need to be expanded through a new comprehensive international legal regime. The declaration, referenced by Mr. Bellinger in A.2. *supra*, is set forth below.

The Arctic Ocean stands at the threshold of significant changes. Climate change and the melting of ice have a potential impact on vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities, and the potential exploitation of natural resources.

By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges. In this regard, we recall that an extensive international legal framework applies to the Arctic Ocean as discussed between our representatives at the meeting in Oslo on 15 and 16 October 2007 at the level of senior officials. Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.

This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean. We will keep abreast of the developments in the Arctic Ocean and continue to implement appropriate measures.

The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting. Experience has shown how shipping disasters and subsequent pollution of the marine environment may cause irreversible disturbance of the ecological balance and major harm to the livelihoods of local inhabitants and indigenous communities. We will take steps in accordance with international law both nationally and in cooperation among the five states and other interested parties to ensure the protection and preservation of the fragile marine environment of the Arctic Ocean. In this regard we intend to work together including through the International Maritime Organization to strengthen existing measures and develop new measures to improve the safety of maritime navigation and prevent or reduce the risk of ship-based pollution in the Arctic Ocean.

The increased use of Arctic waters for tourism, shipping, research and resource development also increases the risk of accidents and therefore the need to further strengthen search and

rescue capabilities and capacity around the Arctic Ocean to ensure an appropriate response from states to any accident. Cooperation, including on the sharing of information, is a prerequisite for addressing these challenges. We will work to promote safety of life at sea in the Arctic Ocean, including through bilateral and multilateral arrangements between or among relevant states.

The five coastal states currently cooperate closely in the Arctic Ocean with each other and with other interested parties. This cooperation includes the collection of scientific data concerning the continental shelf, the protection of the marine environment and other scientific research. We will work to strengthen this cooperation, which is based on mutual trust and transparency, inter alia, through timely exchange of data and analyses.

The Arctic Council and other international fora, including the Barents Euro-Arctic Council, have already taken important steps on specific issues, for example with regard to safety of navigation, search and rescue, environmental monitoring and disaster response and scientific cooperation, which are relevant also to the Arctic Ocean. The five coastal states of the Arctic Ocean will continue to contribute actively to the work of the Arctic Council and other relevant international fora.

c. Russian border demarcation efforts

On September 18, 2008, the Department of State Office of the Spokesman responded to a question taken at the daily press briefing, asking for the U.S. "reaction to the Russian government's attempts to mark the northern Russian border to claim its share of the Arctic territory." Excerpts from the statement follow; the full text is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/sept/109928.htm*. Discussion of U.S. comments on the Russian Federation's 2001 submission to the Commission on the Limits of the Continental Shelf concerning the proposed outer limits of its continental shelf is available in *Digest 2002* at 732–37.

* * * *

We have no information about proposed Russian domestic legislation concerning the Arctic. Our understanding from Russian President Medvedev's public remarks is that he called for a law delineating the definition of Russia's southern Arctic boundary, i.e. its boundary within the Russian land mass. This would be a purely internal matter. There is no universal definition of what constitutes the Arctic. Arctic nations use different criteria for defining the portions of their territory considered to be part of their Arctic regions. These definitions are generally for the purpose of internal administration and have no standing in international law.

According to President Medvedev's remarks, after Russia has defined its southern Arctic boundary, it would then seek to define its continental shelf beyond 200 nm from its coastline. The Russians have been gathering scientific evidence in support of their submission under the Law of the Sea Convention asserting that their continental shelf extends to the North Pole. . . . Based on information available to us at this point in time, we have no reason to believe the Russians are proposing a different course of action.

The Russian Federation is within its rights to delineate an extended continental shelf, so long as the outer limits are consistent with international law, as supported by sound scientific data. . . .

3. Outer Limits of the Continental Shelf

On November 12, 2008, Japan made a submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the LOS Convention. On December 22, 2008, the U.S. Mission to the United Nations delivered a note verbale to the UN Secretariat concerning Japan's submission. The substantive paragraphs of the note verbale are set forth below, and the full text is available at *www.un.org/Depts/los/clcs_new/submissions_files/jpn08/usa_22dec08.pdf*.

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The United States has taken note of the potential overlap between two areas of the continental shelf with respect to which information is being submitted by Japan (one extending beyond 200 nautical miles) (nm) from Haha Shima and from Minami-Tori Shima and the other extending beyond 300 nm from Minami-Io To), and areas of continental shelf beyond 200 nm extending from Farollon de Pajaros in the Commonwealth of the Northern Mariana Islands.

The United Nations Convention on the Law of the Sea, including its Annex II, and the Rules of Procedure of the Commission, in particular Annex 1 thereto, provide that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.

With reference to the Executive Summary of Japan's submission, the Government of the United States confirms that it does not object to Japan's request that the Commission consider the documentation in its submission relating to the aforementioned areas and make its recommendation on the basis of this documentation, to the extent that such recommendations are without prejudice to the establishment of the outer limits of its continental shelf by the United States, or to any final delimitation of the continental shelf concluded subsequently in these areas between Japan and the United States.

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4. Other Boundary or Territorial Issues

a. United States–Canada Beaufort Sea dispute

On August 23, 2007, the U.S. Department of the Interior's Minerals Management Service published a Call for Information and Nominations concerning two proposed oil and gas lease sales in the Beaufort Sea and two in the Chukchi Sea, scheduled tentatively for 2009 through 2012. 72 Fed. Reg. 48,295 (Aug. 23, 2007). On July 25, 2008, the state of Alaska's Department of Natural Resources announced the "Beaufort Sea Areawide 2008 Competitive Oil and Gas Lease Sales,"

scheduled for October 22, 2008. Under U.S. law, Alaska has jurisdiction over the seabed and subsoil out to three nautical miles of the baseline from which the territorial sea is measured. On August 1, 2008, the U.S. Department of the Interior's Minerals Management Service issued a notice in the Federal Register soliciting public comments on whether to begin a new five-year Outer Continental Shelf Oil and Gas Leasing Program for mid-2010 to mid-2015 to succeed the current program. 73 Fed. Reg. 45,065 (Aug. 1, 2008). By diplomatic note of August 11, 2008, Canada expressed its concern that the areas covered by the proposed lease sales or leasing program fall within Canadian waters. In response, the United States expressed the view that the areas fall within U.S. sovereignty. The U.S. diplomatic note, dated August 19, 2008, is set forth below. Additional background on the dispute over the Canadian maritime boundary is available in *Digest 2005* at 705–07 and *Digest 2004* at 734–35.

The Department of State acknowledges receipt of diplomatic note No. UNGR-0156, dated August 11, 2008, from the Canadian Embassy regarding the Beaufort Sea Oil and Gas Lease Sales 209 and 217, the Beaufort Sea Areawide 2008 Lease Sale, and the new 5-year OCS Leasing Program.

The United States Government does not accept that any parts of the Beaufort Sea Oil and Gas Lease Sale 209 or 217, the Beaufort Sea Areawide 2008 Lease Sale, or the new 5-year OCS Leasing Program referred to in the diplomatic note encroach on Canada's sovereign rights under international law. The United States does not share the Canadian view that the location of the maritime boundary in this area follows the 141st meridian of longitude. The United States on many occasions has informed Canada of the proper location of the maritime boundary in this area, which has been followed in the case of the lease sale noted above. The United States rejects any purported exercise of jurisdiction or sovereignty by the Government of Canada, or any of its provinces or territories, in the United States part of the Beaufort Sea east of the 141st meridian.

The Government of the United States notes that it will use special procedures with respect to the portion of Lease Sale 209 and 217 that are subject to an overlapping claim by the Government of Canada, as has been done for previous sales in this area. These procedures are without prejudice to U.S. interests or the future settlement of the boundary. The Government of the United States notes that there were no bids submitted in the last sale held in this area, Sale 202, held in April, 2007, which also included that portion of the Beaufort Sea subject to an overlapping claim by the Government of Canada.

b. U.S. exclusive economic zone generated by Howland and Baker Islands

On May 8, 2008, the U.S. District Court for the Territory of Guam rejected a motion to dismiss U.S. charges that a Taiwan-owned Marshall Islands fishing vessel had fished illegally in the U.S. exclusive economic zone ("EEZ") around Baker and Howland Islands, approximately 1,600 miles southwest of Hawaii. *United States v. Marshalls 201*, 2008 U.S. Dist. LEXIS 38627 (D. Guam 2008). The court held that the United States had properly established an EEZ off of Howland and Baker Islands. It accepted the U.S. argument, made in its Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter and In Rem Jurisdiction, filed on December 28, 2007, that Congress explicitly recognized the EEZ in enacting the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), Pub. L. No. 94-265, 18 U.S.C. § 1857(2). The court also rejected the defendant's assertion that the United States was not entitled to claim an EEZ off of Baker and Howlands Islands because they were "rocks" under Article 121(3) of the LOS Convention. Under Article 121(3), "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." In a separate decision issued on May 8, 2008, the court denied the defendant's

motion for summary judgment. 2008 U.S. Dist. LEXIS 38628 (D. Guam 2008).

Excerpts from the court's order denying the motion to dismiss are set out below. For additional background *see Digest 2007* at 643–46. The U.S. opposition brief and an accompanying declaration are available as documents 54.a. and b., respectively, for *Digest 2007* at *www.state.gov/s/l/c8183.htm*. As of the end of 2008, trial on the merits was pending.*

* * * *

. . . [T]he Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act") (*See* 16 U.S.C. § 1857) . . . specifically and explicitly recognizes the EEZs off of Baker and Howland Islands. Section 1824(e)(8) of Title 16 (*as amended*) states that "[i]n the case of violations by foreign vessels occurring within the exclusive economic zones off . . . Howland, Baker, and Wake Islands, amounts received by the Secretary attributable to fines and penalties imposed under this Act, shall be deposited into" an account named for the action.

Additionally, the Magnuson Act specifically recognizes jurisdiction for enforcement of the EEZs. It states that "in the case of Guam or any possession of the United States in the Pacific Ocean, the appropriate court is the United States District Court for the District of Guam . . ." 16 U.S.C. § 1861(d).

* * * *

. . . The United States . . . suggests that even if Congress had not expressly declared EEZs around Baker and Howland Islands, these Islands do not fit the Convention definition of "rocks."

* Editor's note: On June 8, 2009, the court issued an order dismissing the case with prejudice after the parties entered into a consent decree resolving all issues in the case. *United States v. Marshalls 201*, Case No. CV 06-00030 (D. Guam).

In order to find that Baker and Howland Islands are "rocks" one must first determine that they "cannot sustain human habitation." The United States introduced evidence that both Islands can sustain human habitation and "have had periods of habitation in the relatively recent past and . . . have played a role in various economic ventures."

The Defendant argues that the principal determinant is whether a particular island or "islet" can sustain human habitation or economic life of its own. . . . Because Baker and Howland Islands "have no economic life of their own," they should be considered "rocks" under the Convention.

The court finds that the Defendant's argument misconstrues Article 121. The specific language of the statute reads that "rocks which *cannot* sustain human habitation *or* economic life on their own shall have no exclusive economic zone or continental shelf." (*See* United Nations Law of the Sea Convention, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *emphasis added*). In the present case, the United S[t]ates has provided sufficient evidence in its pleadings to give the impression that Baker and Howland Islands are in fact islands as defined under the Convention.

Notwithstanding the arguments over the definition of an island under the Convention, Federal law makes clear that the United States may declare EEZs around its territories. As noted above, Baker and Howland Islands have been designated as two such territories. Jurisdiction regarding actions taking place in these EEZs is clearly set out in the Magnuson Act. . . .

* * * *

c. Role of U.S. Board on Geographic Names

The U.S. Board on Geographical Names ("BGN") is responsible for maintaining the uniform use of geographic names throughout the U.S. government and has databases of domestic names, foreign names, and Antarctic names. In July 2008 BGN's database of foreign names changed the designation of several islands claimed by more than one country.

This led to international questions as to whether this change in designation reflected a change in U.S. policy with regard to those islands, which it did not. As a result of this incident, BGN's database of foreign names was amended during the summer of 2008 to add the following disclaimer:

> The geographic names in this database are provided for the guidance of and use by the Federal Government and for the information of the general public. *The names, variants and associated data may not reflect the views of the United States Government on the sovereignty over geographic features.*

See http://geonames.usgs.gov.

5. Piracy

a. U.S. statement to International Maritime Organization

During the International Maritime Organization Council's 101st session, held November 10–14, 2008, the United States delivered a statement expressing deep concern about incidents of piracy and armed robbery off of Somalia and their impact on commercial shipping, the safety of seafarers, and the delivery of humanitarian assistance to Somalia, as excerpted below. The full text of the statement is available at *www.state.gov/s/l/c8183.htm*. The Security Council's reauthorization of the African Union peacekeeping operation in Somalia and its consideration of other options, including a UN peacekeeping force, are discussed in Chapter 17.B.6. Security Council decisions on authorization of use of force to counter the pirates off the Somali coast and to maintain and strengthen the arms embargo on Somalia are discussed in Chapter 18.A.5. and B.10.b., respectively.

We remain deeply concerned about incidents of piracy and armed robbery at sea off of Somalia and their impact on commercial

shipping, the safety of seafarers, and the delivery of critical humanitarian assistance to Somalia.

We recognize that the situation in Somalia is complex and naval forces alone cannot prevent or solve the problem of piracy and armed robbery at sea. A comprehensive solution that relies on participation from private industry, from international organizations such as the IMO, and from governments has the best chance of being effective and sustainable.

The United States has been working with other countries and stakeholders to effectively implement United Nations Security Council Resolutions 1816 and 1838. We are once against sponsoring, along with our partners, a resolution to be adopted later this month to renew the authorities provided in Resolution 1816.

We are also coordinating with industry and Member States on ways to refine the Maritime Safety Committee (MSC) Circulars to better effect the prevention and suppression of piracy and armed robbery against ships. We welcome the participation of the maritime industry in fully integrating operational recommendations to minimize the vulnerability to acts of piracy, and further the integration of appropriate passive and active shipboard measures to prevent pirates from boarding vessels. Working together and in balance, we can significantly enhance security.

We will continue to support the IMO's work to conclude a sub-regional Memorandum of Understanding on piracy and armed robbery at sea and to promote greater cooperation in the prevention, interdiction, prosecution and punishment of those responsible for these heinous acts.

We welcome recent developments within the North Atlantic Treaty organization and the European Union to deploy resources to the Horn of Africa that are intended to escort World Food Program charter vessels and protect merchant shipping. We look forward to supporting an expanded role of the African Union in the fight against piracy.

We note with concern the recent decision of a cruise ship company to sail with a full complement of crew and passengers into the Gulf of Aden from the Red Sea with the expectation that naval forces would be available to provide continuous escort for this slow-moving sailing yacht's cruise to Oman. Sufficient naval forces

are . . . not available to provide such escort on a routine basis. The company intends to make a similar cruise in the spring of next year. Such decisions put the safety of innocent passengers and crew at substantial risk and deserve an appropriately serious response by this organization.

We note that any solution to the problem of piracy and armed robbery at sea must include a commitment by the international community to take custody of and effectively prosecute pirates and armed robbers. . . .

The United States is committed to working internationally, including with like-minded member states of the IMO and through the appropriate structures at the IMO, to find those solutions. The United States is committed to working internationally with all stakeholders in the fight against piracy off of Somalia. Unfortunately, we cannot agree at this time with a proposal for a UN naval force. We would note that while a military component is one element to combat piracy off the coast of Somalia, the shipping industry can do more to protect itself against actions of piracy and armed robbery at sea while they transit the Gulf of Aden and coast of Somalia. Finally, a key element vital to the success of any military effort is laying the groundwork for effective disposition of captured suspects. If there is no effective mechanism for the delivery of consequences, additional military elements may only serve to exacerbate the problem. There is an immediate need to support the military component already present by working with member states to develop the ability to prosecute and detain piracy suspect[s]. . . .

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b. Naval action not constituting piracy

On December 3, 2008, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, addressed a Security Council meeting concerning the Israeli Navy's action to deny entry of a Libyan vessel seeking to carry humanitarian assistance to the port of Gaza on December 1, 2008. Excerpts from Ambassador Wolff's statement, stating that Israel's actions did not constitute piracy under the UN

Convention on the Law of the Sea, follow. The full text of the statement is available at *www.archive.usun.state.gov/press_releases/20081203_354.html.*

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. . . We are confronted today by a most unusual situation. The Council has been asked to meet by a Council member to react to a situation of its own making. Libya, a country that does not have relations with Israel, which can't even acknowledge its existence in the letter it sent to the Council that brought the issue under consideration to our attention, and which has an openly hostile attitude toward Israel took the remarkable step of attempting to send one of its vessels through waters patrolled by Israel off Gaza in an attempt to land at a port which is not open to international maritime trade.

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Our understanding from media accounts emerging from Tripoli is that after Israeli vessels turned the Libyan vessel back on Monday, the Libyan vessel tried once again to enter the port on Tuesday without Israel's consent. Under these circumstances, Israel was justified in escorting the vessel beyond the territorial sea and into international waters. It cannot be said that Israel's actions constituted piracy under the Law of the Sea Convention. Piracy has a very specific meaning under international law, including that the act be[] by a private ship for private ends. . . .

Indeed, the Israeli navy simply approached the vessel, flagged by a hostile state, and instructed it to turn around and not continue in Gazan waters. It then ensured that it did not return to its original course. The Israeli navy fired no shots and did not insist on boarding the Libyan vessel.

Mechanisms are clearly in place—as I have mentioned—for the transfer of humanitarian assistance to Gaza by member states that truly want to do so. These non-provocative and non-confrontational mechanisms should be the ones used. Direct delivery by sea is neither appropriate nor responsible under the circumstances.

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6. Maritime Security and Law Enforcement

a. Maritime interdiction agreements with five Pacific Island states

In 2008 the United States concluded bilateral maritime law enforcement agreements with Palau, the Federated States of Micronesia, the Cook Islands, the Republic of the Marshall Islands, and the Republic of Kiribati. The agreements all contain "shiprider" provisions, permitting authorized law enforcement officials from the five states to ride aboard U.S. Coast Guard vessels and aircraft to conduct joint operations to help detect illicit activity at sea. Subject to certain limitations, the agreements permit Coast Guard vessels and aircraft, with the states' law enforcement officials on board, to assist in fisheries surveillance and law enforcement activities in the five states' exclusive economic zones. Four of the agreements authorize Coast Guard vessels, with the states' law enforcement officials on board, to enter into the states' territorial seas to assist the states' authorities in stopping, boarding, and searching vessels suspected of violating the relevant countries' laws and assist in arresting suspects and seizing contraband and vessels. Four of the agreements permit the Coast Guard, with the states' law enforcement officials on board, to stop, board, and search vessels claiming those states' nationality in international waters. Except for the agreement with the Cook Islands, the agreements also authorize officers from these states to assist Coast Guard personnel in boarding ships pursuant to U.S. authority.

The agreement with the Marshall Islands is also a shipboarding agreement. It authorizes the Coast Guard, under certain circumstances, to board and search ships used for commercial or private purposes in international waters that claim registry or nationality in the Marshall Islands without the presence of officials from the Marshall Islands. The agreement also authorizes the Coast Guard to detain the suspect vessels and persons on board pending instructions from the Government of the Republic of the Marshall Islands.

The five agreements are as follows:

1. Cooperative Shiprider Agreement between the Government of the United States of America and the Government of the Republic of Palau to support ongoing regional maritime security efforts, effected by an exchange of notes on March 5 and 20, 2008; entered into force March 20, 2008;
2. Cooperative Shiprider Agreement between the Government of the United States of America and the Government of the Federated States of Micronesia to support ongoing regional maritime security efforts, effected by an exchange of notes on April 30 and May 14, 2008; entered into force May 14, 2008;
3. Agreement between the Government of the United States of America and the Government of the Cook Islands concerning cooperation in joint maritime surveillance operations [shiprider], signed at Apia July 25, 2008; entered into force July 25, 2008;
4. Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation in maritime surveillance and interdiction activities [shiprider and shipboarding], signed at Majuro, August 5, 2008; entered into force August 5, 2008; and
5. Agreement between the Government of the United States of America and the Government of the Republic of Kiribati concerning cooperation in joint maritime surveillance operations [shiprider], signed at Tarawa November 24, 2008; entered into force November 24, 2008.

The texts of the agreements are available at *www.state.gov/s/l/c8183.htm*.

b. Amendments to Memorandum of Understanding concerning suppression of illicit maritime traffic

On May 9, 2008, the United States and the United Kingdom of Great Britain and Northern Ireland agreed to modify the

Memorandum of Understanding between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Deployment of United States Coast Guard Law Enforcement Detachments on Royal Navy and Royal Fleet Auxiliary Ships and Aircraft to Suppress Illicit Traffic in the Waters of the Caribbean and Bermuda, signed on July 29, 2005. Under the amendments, a U.S. Coast Guard law enforcement detachment may operate from Royal Navy and Royal Fleet auxiliary ships and aircraft throughout the Joint Operating Area of the U.S. Defense Department's Joint Interagency Task Force ("JIATF") South, rather than operating only in the waters of the Caribbean and Bermuda. JIATF South is responsible for the detection and monitoring of suspect air and maritime drug activity in the Caribbean Sea, western Atlantic, Gulf of Mexico, and the eastern Pacific. The United Kingdom is one of three countries that provide ships, aircraft, and liaison officers to JIATF South.

c. Letter of intent concerning maritime safety and security

On April 15, May 12, and May 16, 2008, the U.S. Coast Guard Commandant, the Commander of the U.S. Department of Defense's Northern Command, and the Secretary of the Navy of the United Mexican States signed a letter of intent to strengthen their organizations' exchange of information and cooperation in matters of safety and maritime security. The document expressed the signatories' intent to establish and share standard operating procedures for the prevention of and response to incidents or illicit acts that could threaten the maritime security of Mexico and the United States. Among other things, it also expressed the signatories' intention to establish a standing bi-national working group on maritime security and safety. The letter of intent is not intended to create binding obligations under national or international law. The full text is available at *www.state.gov/s/l/c8183.htm*.

7. Marine Scientific Research

a. Department of State guidance

On September 3, 2008, the U.S. Department of State provided guidance to all U.S. embassies and consular posts concerning procedures for obtaining foreign ministries' authorization for marine scientific research applications, consistent with Part XIII of the LOS Convention. Excerpts from the cable follow, explaining the procedures and the legal framework. Additional background on U.S. policy concerning marine scientific research is available in *Digest 1989–90* at 477–80.

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. . . In addition to well-established concepts such as freedom of navigation and maritime boundaries, the Law of the Sea Convention provides coastal State jurisdiction over the conduct of marine science research within . . . the Exclusive Economic Zone (EEZ). Within its EEZ, a coastal State has sovereign rights to explore and exploit, conserve and manage the natural resources of the waters, seabed and subsoil. The coastal State also has certain controls over marine scientific research within its EEZ.

The Law of the Sea Convention further provides that "appropriate official channels" be used to obtain access to an EEZ for marine scientific research. This requirement ensures that 1) the researching State provides adequate and timely disclosure of the proposed research to the coastal State, 2) the coastal State provides adequate consideration and timely response for the proposed research, and 3) the resulting data is delivered to the coastal State in a timely fashion.

OA [Department of State Bureau of Oceans, Environment and Scientific Affairs, Office of Oceans Affairs] serves as the conduit for U.S. public- or privately-funded researchers seeking access to foreign EEZs as well as for foreign researchers seeking access to the U.S. EEZ. On an annual basis, OA manages approximately

400 applications to foreign EEZs, 70 applications to the U.S. EEZ, and 500 post-cruise data transfers. . . .

Initial responsibility for seeking authorization . . . falls on the shoulders of either the chief scientist or his/her sponsoring organization. U.S. applicants are encouraged to develop their research plans in consultation with scientists from the coastal State and to include letters of endorsement from coastal State partners with their application. According to the Law of the Sea Convention, applications must be received by the coastal State no later than six months prior to the expected starting date of the marine scientific research. Due to the complex logistics of marine scientific research, the information submitted in the original application can change one or more times during the course of the application review process. It is the responsibility of the chief scientists and platform operator to report these changes to OA as soon as possible.

* * * *

Although marine scientific research is traditionally conducted aboard ships (research vessels or ships of opportunity), there is a growing trend for marine scientific data collection from other platforms, such as aircraft, moored or fixed structures, autonomous vehicles, and unmanned vehicles. The flag of the platform does not alter the responsibility of the chief scientist to seek research authorization from the coastal State through OA or to provide the opportunity for the coastal State to participate or be represented in the research project. Applicants are encouraged, if practicable, to make available one berth per coastal State and to cover the costs of the observer's transport to and from the research platform.

* * * *

b. Activities not constituting marine scientific research

The International Oceanographic Commission ("IOC")/UN Educational, Scientific and Cultural Organization ("UNESCO") Advisory Body of Experts on the Law of the Sea ("ABE-LOS VIII") held its eighth meeting in Paris, France, April 21–25, 2008. ABE-LOS VIII was convened to respond to a tasking

from the IOC Assembly and Executive Council to develop a legal framework for the collection of oceanographic data by specific means, particularly profiling floats, drifting buoys, and XBTs* that are deployed in the high seas and may drift into the EEZs of IOC member states. The fundamental legal question the tasking posed was whether the collection of this oceanographic data—temperature, pressure, and salinity at depth—in an EEZ is marine scientific research ("MSR") governed by the provisions of Part XIII of the LOS Convention, requiring the consent of the coastal State, or whether it is a high seas freedom not subject to coastal state control.

In 1982 the Third UN Conference on the Law of the Sea, which adopted the LOS Convention, decided that the collection from the EEZ of data used for marine meteorological forecasting was not governed by Part XIII of the LOS Convention. Because the data collected by profiling floats is used for marine metereological (weather) forecasting, ocean state estimation, and the study of climate change, the United States has long held the view that the collection in the EEZ of this data by profiling floats is not MSR governed by Part XIII of the LOS Convention.

During the ABE-LOS VIII meeting the experts decided to forward to the IOC Executive Council draft guidelines for the deployment by an IOC member state, or by an institution that has the nationality of an IOC member state, of Argo profiling floats into the high seas that may drift into the EEZs of other IOC member states.** On April 25, 2008, J. Ashley Roach, Captain, JAGC, U.S. Navy (ret'd), Office of the Legal Adviser,

* Editor's note: According to the National Oceanic and Atmospheric Administration, the Expendable Bathythermograph (XBT) is a probe oceanographers use "to obtain information on the temperature structure of the ocean to depths of up to 1500 meters. [It] is dropped from a ship and measures the temperature as it falls through the water." *See www.aoml.noaa.gov/goos/uot/xbt-what-is.php*.

** Editor's note: According to the Argo project's website:

> Argo is an international project to collect information on the temperature and salinity of the upper part of the world's oceans. Argo uses robotic floats that spend most of their life drifting below the

and head of the U.S. delegation, made a statement for the record at the close of the meeting. The U.S. statement, excerpted below, expressed concerns about the utility of the draft guidelines, reiterated the U.S. position that operational oceanography is not MSR governed by Part XIII of the LOS Convention, and questioned the need for similar guidelines for drifting buoys and XBTs that may drift into EEZs. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*.

At its forty-first session, the IOC Executive Council finalized and adopted the guidelines as an annex to Resolution EC-XL1.4 on the "Guidelines for the implementation of Resolution XX-6 of the IOC Assembly regarding the deployment of profiling floats in the High Seas within the framework of the Argo Programme." The resolution and guidelines are available at *http://ioc-unesco.org/index.php?option=com_oe&task=viewDocumentRecord&docID=3085*.

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. . . [T]he data collected by Argo profiling floats is essential for, and is used for, short term weather forecasting, for ocean state forecasting, and for understanding climate change.

Consequently, the gathering of these data is exactly the sort of activity which . . . the Third UN Conference on the Law of the Sea in 1982 [decided] was *not* marine scientific research governed by Part XIII of the Convention. This is more fully spelled out in the

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ocean surface. They make temperature and salinity measurements when they come up to the surface and after transmitting their data to satellites, they return to depth to drift for 10 days. Currently, there are roughly 3000 floats producing 100,000 temperature/salinity profiles per year. The floats go as deep as 2000m.

See www.argo.ucsd.edu/FrFAQ.html.

10 January 2007 comments of the United States contained in document ABE-LOS VII/8, pages 17–31.

* * * *

Because we understand that Argentina does not accept this, the United States, as an exception and without prejudice to its position, has, as a matter of courtesy and cooperation, provided notification to Argentina of its Argo floats that may drift into Argentina's EEZ.

* * * *

The Guidelines we have been working on all these years are supposed to be practical. They are not legally binding, of course.

To give the notifications contemplated by paragraphs 1, 3 and 4 of the draft Guidelines to other coastal States is simply not practicable. No implementer such as the United States is staffed to make such notifications to other coastal States.

To the extent that making such notifications becomes expected, I regret to say that the United States will have to consider the situation.

* * * *

The information gathered by drifting buoys and XBTs is also used for weather forecasting and ocean state estimation. The use of those instruments is, also, not marine scientific research governed by Part XIII of the Convention.

Further, there is at present no information center, comparable to the Argo Information Center, for drifting buoys.

As XBTs obtain data only one-time, I see no need for any Guidelines for their deployment or control over their data.

The deployment of Argo profiling floats, drifting buoys and XBTs are traditional exercises of the high seas freedom of navigation. They are not subject to coastal state control.

* * * *

8. Maritime Search and Rescue: U.S.–Costa Rica Agreement

On July 3, 2008, the U.S. Coast Guard and the Ministry of Public Security of Costa Rica signed the Memorandum of

Understanding for Cooperation between the Ministry of Public Security of Costa Rica and the United States Coast Guard Concerning Aeronautical and Maritime Search and Rescue ("MOU"). The MOU, which does not create binding obligations under international law, sets forth the participants' responsibilities for search and rescue ("SAR"); delimits SAR regions; recognizes a direct operational relationship among the participants' internationally recognized Rescue Coordination Centers, located for the United States in Alameda, California, and for Costa Rica in San Jose, Costa Rica, to expedite and enhance coordination; confirms the customary international law right of assistance entry; and describes a wide variety of coordination activities that the participants may undertake. The Coast Guard has concluded 12 other maritime SAR agreements or arrangements with its counterparts in other countries. The full text of the MOU is available at *www.state.gov/s/l/c8183.htm*.

9. Salvage at Sea

On November 30, 2007, R.M.S. Titanic, Inc. ("RMST") filed a Motion for a Salvage Award in the U.S. District Court for the Eastern District of Virginia. *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel . . . believed to be the RMS Titanic*, Civil Action No. 2:93cv902. On October 15, 2007, the district court had issued a memorandum opinion and order directing RMST to file a motion for a salvage order within 60 days, including its salvage costs through December 31, 2006. As the opinion noted, the court had designated RMST as the salvor-in-possession of the sunken wreck of the *Titanic* in 1994, and the U.S. Court of Appeals for the Fourth Circuit had affirmed that designation repeatedly. *R.M.S. Titanic, Inc.*, 531 F. Supp. 2d 691 (E.D. Va. 2007). *See Digest 2006* at 828–46 for additional background.

On March 17, 2008, the United States filed an *amicus* response in the district court, providing views on RMST's motion for an interim *in specie* salvage award. Excerpts follow

from the U.S. response, explaining the U.S. interest in the case and the U.S. reasons for supporting an interim *in specie* award with conditions and limitations to ensure that the artifacts from the *Titanic* are conserved and curated together in an intact collection. (Most footnotes and internal cross references are omitted.) The full text of the U.S. response is available at *www.state.gov/s/l/c8183.htm*.

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. . . [T]he United States has taken a number of major steps to protect the *R.M.S. Titanic*, its wreck site, and its artifacts. This interest was formally recognized by the United States Congress when, in 1986, it passed the R.M.S. Titanic Maritime Memorial Act, which noted that the *R.M.S. Titanic* "is of major national[,] international[,] cultural[,] and historical significance, and merits appropriate international protection." 16 U.S.C. § 450 rr. The Act further served to encourage the United States, the United Kingdom, France, Canada, and other interested nations to "designate the *R.M.S. Titanic* as an international maritime memorial to those who lost their lives aboard her in 1912." *Id*. In keeping with the United States' interests in this vessel, the Act directed NOAA [the U.S. National Oceanic and Atmospheric Administration] to "develop international guidelines for research on, exploration of, and if appropriate, salvage of the *R.M.S. Titanic*." 16 U.S.C. § 450 rr-3. The guidelines, which NOAA developed in consultation with the United Kingdom, France, and Canada, became effective on April 12, 2001. 66 Fed. Reg. 18905, 18912 (2001). In addition, the Act called for the United States Department of State to negotiate and enter into an International Agreement with other interested nations to preserve the historic nature of the shipwreck. This has been accomplished and the legislation, "To amend the R.M.S. Titanic Maritime Memorial Act of 1986 to implement the International Agreement Concerning the Shipwrecked Vessel RMS Titanic," was re-transmitted for introduction and referral to the appropriate congressional committees in 2007.

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I. Evaluation of the Proposed Award

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As specified in NOAA's Guidelines for Research, Exploration and Salvage of *R.M.S. Titanic*, "[b]asic professional archaeological standards dictate that artifacts recovered or salvaged from a wreck site should be kept intact as a collection. Such collections should not be dispersed through the sale of individual artifacts to private collectors such as through auction house sales." *Id.* at 18906. Accordingly, consistency with NOAA's Guidelines requires that "individual artifacts would not be sold." *Id.* at 18906. On the other hand, "this would not necessarily preclude the sale, transfer or trade of an entire collection to a museum or other qualified institution, provided that this commercial transaction does not result in the dispersal of artifacts." *Id.* at 18906–07. Such principles are also reflected in the International Agreement regarding the *R.M.S. Titanic*. Article 3, ("Each party shall take all reasonable measures to ensure that all artifacts recovered from RMS Titanic after entry into force of this Agreement, that are under its jurisdiction, are conserved and curated consistent with the relevant Rules and are kept together and intact as project collections"); *see also* Annex, XII (Curation of Project Collection).[5] In addition, the proposed legislation to implement the International Agreement expressly prohibits the sale of artifacts not constituting a "collection." Administration's Proposed Titanic Implementing Legislation § 6(d); *id.* at § 3(c) (definition of "collection").

* * * *

II. Limitations That Should Be Included in an Interim *In Specie* Salvage Award

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[5] The United States notes that the International Agreement will not become effective for the United States until its implementing legislation is signed into law and the United States has deposited its instrument of acceptance.

A. Integrity of the Collection

First, an essential component of an interim *in specie* salvage award should be a covenant that is designed to maintain the integrity of the collection of *R.M.S. Titanic* artifacts. Thus, the Court should require that the collection be maintained in an intact collection that joins the artifacts awarded to RMST by the French maritime tribunal ("French artifacts").* A covenant of this nature would recognize the fundamental principle woven throughout the R.M.S. Titanic Maritime Memorial Act of 1986, NOAA's Guidelines for Research, Exploration and Salvage of *R.M.S. Titanic*, the International Agreement Concerning the Shipwrecked Vessel *R.M.S. Titanic*, and the proposed legislation to implement the Agreement. Namely, that "artifacts recovered or salvaged from a wreck site should be kept intact as a collection." 66 Fed. Reg. at 18906 . . . .

B. Management of the Collection

Secondly, the Court should include a covenant in the award that would govern the management of the collection. As noted in the R.M.S. Titanic Maritime Memorial Act of 1986, "[i]t is the sense of Congress that research and limited exploration activities concerning the RMS Titanic should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance." 16 U.S.C. § 450 rr-5; *see also* 66 Fed. Reg. at 18912. In keeping with Congress' goal of enhancing public knowledge regarding the *R.M.S. Titanic* artifacts, the collection should be managed using the professional standards recognized in NOAA's Guidelines, the International Agreement Concerning the Shipwrecked Vessel *R.M.S. Titanic* including the Annexed Rules, and the numerous orders made by the Court and the Fourth Circuit. For example, "the guidelines are based on . . . widely

* Editor's note: In 1993 a French administrator awarded Titanic Ventures Limited Partnerships ("Titanic Ventures"), RMST's predecessor, title to 1,800 *Titanic* artifacts. Titanic Ventures institute retrieved the artifacts from the shipwreck in 1987 and took them to France. *R.M.S. Titanic, Inc.*, 435 F.3d 521, 527–28 (4th Cir. 2006).

accepted international and domestic professional archaeological standards, including the International Council on Monuments and Sites (ICOMOS) International Charter on the Protection and Management of Underwater Cultural Heritage, and the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation." 66 Fed. Reg. at 18905; *see also id.* at 18913 (discussing documentation, artifact conservation, and curation of project collection); International Agreement regarding the *R.M.S. Titanic*, Art. IX, 24; Art. XII, 28–30. These standards are also recognized by the regulations governing the curation of federally-owned and administered archeological collections set forth at 36 C.F.R. Part §§ 79.1–79.11 and related appendices. Accordingly, a covenant of this nature would make clear that the *R.M.S. Titanic* artifacts must be managed in a manner that "ensure[s] proper recording and dissemination to the public of historical, cultural and archaeological information." 66 Fed. Reg. at 18912. Moreover, "[a]dherence to proper scientific methodology and approach is in the interest of the public because it preserves the integrity of the site, the artifacts recovered and the story contained at the wreck-site." *Id.* at 18911; *see also* International Agreement regarding the *R.M.S. Titanic*, Preamble (stating that the parties "seek[] to ensure the protection of *RMS Titanic* and its artifacts for the benefit of present and future generations"). . . .

C. Oversight of the Collection

In addition, the Court should include in an interim *in specie* award a requirement that would permit the reasonable oversight of the collection [by NOAA] to ensure adherence to the covenants.

* * * *

D. Protection of the Collection in the Event of Sale

In the future, RMST or other entities may contemplate selling the *R.M.S. Titanic* artifacts. The United States has also acknowledged that "as long as the collection is kept together and maintained for research, education, viewing and other use of public interest, there should not be restrictions on commercial transactions which are intended to further these public purposes." 66 Fed. Reg. at 18907. Accordingly, an interim *in specie* salvage award

should provide protection for the *R.M.S. Titanic* artifacts in the event of their sale. . . .

Thus, the United States suggests that the Court include a covenant in the award that specifies that the collection cannot be sold to or possessed by any successor entity unless the new entity can demonstrate that it is fully capable of carrying out the requirements set forth in the covenants. The United States further contends that the covenant should make any sale or transfer of possession of the artifacts contingent upon approval of the Court. . . .

E. Protection of Collection in the Event of Bankruptcy

Finally, the Court should include in an interim *in specie* salvage award a covenant designed to protect the *R.M.S. Titanic* artifacts in the event of bankruptcy.

. . . [T]he Court should consider imposing a requirement that, in the event of insolvency, RMST, or a Court-approved assignee, would be prohibited from selling the collection in a piecemeal fashion. In addition, the Court should require RMST or any Court-approved assignee to secure a bond sufficient to insure the faithful performance of covenants in the event of insolvency or bankruptcy.

* * * *

On April 15, 2008, the court ordered RMST to submit "proposed covenants specifying conditions or limitations to be included in an in specie award, should the court determine that one is appropriate . . . ." The court stated:

> At [a] minimum, these proposed covenants must ensure that the artifacts are conserved and curated in an intact collection that is available to the public and accessible for historical review, educational purposes, and scientific research in perpetuity. The proposed covenants shall incorporate safeguards to ensure that they will remain effective in perpetuity, notwithstanding any future changes in circumstances. Furthermore, the proposed covenants shall guard against contingencies that might impair their future effectiveness.

Among other things the court also ordered RMST to consult with the United States, resolve any concerns raised by the United States, revise the proposed covenants accordingly, and submit them to the court. The court also ordered the United States to submit its views on the revised proposed covenants and provide any additional covenants or revisions it deems necessary. On September 12, 2008, RMST filed its proposed revised covenants and conditions and an accompanying memorandum. On October 14, 2008, the United States submitted its *amicus* response, stating that RMST's proposed covenants and conditions, while making "great strides" in meeting the objectives of the court's April 2008 order, should be modified. Excerpts from the U.S. response below set forth U.S. views concerning the *Titanic* artifacts now located in France, as well as RMST's proposal concerning rival collections. (Most footnotes and citations to other submissions in the case are omitted.) The full text of the U.S. response is available at *www.state.gov/s/l/c8183.htm*. The court's decision was pending at the end of 2008.

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1. Extending All Of The Trustee's Obligations to The TITANIC Collections Would Be Optimal

In its Memorandum, RMST explains at length why the obligations set forth in regard to deaccessioning of artifacts, subsequent sale, or in the event of bankruptcy should extend only to the STAC [Subject TITANIC Artifact Collection] and not the French TITANIC Artifact Collection. The United States agrees that RMST "would still be obliged under the terms of the October 20, 1993 Proces-Verbal of the French Maritime Tribunal, which provided that RMST would '. . . not carry out any commercial transactions concerning such objects nor any sale of any one of them nor any transaction entailing their dispersion, if not for the purposes of an exhibition.'" The United States, however, does not agree that, if RMST promises to extend all of its obligations set forth in the C&Cs [Covenants and Conditions] to the TITANIC Collections,

it would necessarily raise[] jurisdictional conflicts with the French Government. The French Government participated in negotiating the International Agreement Concerning the Shipwrecked Vessel *R.M.S. Titanic* and formulating the international guidelines that became the NOAA's Guidelines for Research, Exploration and Salvage *of R.M.S. Titanic*. The United States is unable to identify a conflict between the professional archaeological standards and requirements in these documents and the 1993 Proces-Verbal of the French Maritime Tribunal.

Regardless, the United States is sensitive to RMST's concerns that it is required to answer to two separate sources of authority in relation to the same artifacts. Accordingly, while the United States believes it would be optimal to extend all of the Trustee's obligations to the TITANIC Collections, the United States will continue to cooperate with the French Government with a view toward assisting respective authorities address issues consistent with the negotiated agreements as a matter of practice and policy, if not international law.

* * * *

F. Section VI.G Regarding Rival Collections Should Not Be Included In The C&Cs.

. . . This provision permits "an incumbent Trustee . . . to propose a sale, transfer, assignment, or other transaction involving something less than the entirety of the Subject Titanic Artifact Collection ("STAC")." Section VI.G . . . is contrary to the public interest. Accordingly, it should be deleted in its entirety.

Section VI.G is problematic for multiple reasons. For example, RMST has repeatedly promised this Court and the French Government that it will keep the artifacts intact and together in perpetuity. Section VI.G is simply inconsistent with RMST's earlier commitments, as well as the orders of this Court and the French Tribunal. . . .

Likewise, this provision is inconsistent with the International Agreement Concerning the Shipwrecked Vessel *R.M.S. Titanic* and NOAA's Guidelines for Research, Exploration and Salvage *of R.M.S. Titanic*. *See*, *e.g.*, 66 Fed. Reg. 18905, 18906 (2001) ("Basic professional archaeological standards dictate that artifacts recovered or

salvaged from a wreck site should be kept intact as a collection. Such collections should not be dispersed through the sale of individual artifacts . . . .").

* * * *

Furthermore, RMST has not offered compelling reasons for departing from its earlier commitments regarding maintaining the integrity of the TITANIC Collections. Instead, RMST relies on private economic concerns and speculation regarding potential rival collections. While it may be possible that another entity will seek to salve artifacts from the R.M.S. Titanic wreck site, there has been little or no interest in competing salvage claims for a number of years. Contrary to RMST's suggestion, the final publication of NOAA's Guidelines for Research, Exploration and Salvage of *R.M.S. Titanic* does not appear to have acted as a catalyst for subsequent salvage or recovery to support its theory that entry of the International Agreement Concerning the Shipwrecked Vessel *R.M.S. Titanic* would encourage additional dive expeditions to the wreck site and the establishment of new collections of artifacts.

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B. OUTER SPACE

1. Destruction of Decaying U.S. Satellite

On February 20, 2008, the United States successfully launched a specially modified missile to engage an inoperable U.S. National Reconnaissance Office ("NRO") satellite that was in a decaying orbit. The previous week, the United States provided a notification to the Secretary General of the United Nations, the Scientific and Technical Subcommittee ("STSC") of the Committee on the Peaceful Uses of Outer Space, other UN bodies, and governments throughout the world that the United States would attempt to engage the satellite. The February 15 statement to the STSC of James Higgins, U.S. Representative to the subcommittee, is excerpted below. The full text of his remarks is available at

www.state.gov/s/l/c8183.htm. See also statement by Ambassador Christina Rocca, Permanent Representative of the United States of America to the Conference on Disarmament, to that body on February 15, available at *http://geneva.usmission.gov/Press2008/February/0221Satellite.html.*

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. . . I believe the Subcommittee is aware from previous press reports that there is a U.S. Government satellite that is expected to reenter the Earth's atmosphere in the next couple of weeks. Yesterday afternoon in Washington, the U.S. announced plans for specific actions regarding that satellite. In the interests of transparency, consistent with the provisions of the 1967 Outer Space Treaty, and in the spirit of international cooperation, the United States would like to inform the Subcommittee on this matter.

The President of the United States has authorized the U.S. Department of Defense to attempt the engagement of an inoperable National Reconnaissance Office (NRO) satellite, which is currently in a decaying orbit. The President determined that protecting against the possible risk to human life was paramount. The highly-toxic nature of the satellite's fully fueled hydrazine tank, which would likely survive in a natural re-entry, was the key factor influencing this decision.

* * * *

We have recently modified three SM-3 missiles and three U.S. Navy ships to perform this mission. If this engagement is successful, we anticipate rupturing the fuel tank, causing the hydrazine to dissipate, so that it will no longer pose a danger to human life.

We will choose the time, location, and geometry of the engagement to maximize the chance of hitting the fuel tank and to ensure that the resulting debris will re-enter quickly and thus not pose a danger to satellites and peaceful space operations. Additionally, the engagement point will be carefully chosen to minimize the chance that any initial debris re-entering after the engagement will impact a populated area.

This engagement will not create significant long-lived orbital debris or additional hazards from re-entering debris. We estimate that 99 per cent of the debris resulting from the engagement will reenter the Earth's atmosphere within two weeks.

The U.S. continues to have the world's strongest domestic regulations for space debris mitigation. The U.S. also continues to support the debris mitigation guidelines developed by the Inter-Agency Space Debris Coordination Committee (IADC) and the United Nations Committee on the Peaceful Uses of Outer Space. This engagement attempt falls well within these sets of international guidelines, since orbital debris from this engagement will be extremely short-lived.

As a sign of our transparency, the United States is prepared to brief the Subcommittee on our efforts to minimize debris as a result of this engagement attempt. We can do this during our scheduled technical presentation on the space debris environment next week.

. . . If the engagement fails, we are examining options for consequence management to mitigat[e] the hazards that could be created if a fully fueled hydrazine tank were to land in an inhabited area.

Whether the engagement succeeds or fails, the U.S. is prepared to offer assistance to governments to mitigate the consequences of any satellite debris impacts on their territory. The U.S. does not require assistance from other governments for tracking or for re-entry prediction.

The 1972 Convention on International Liability for Damage Caused by Space Objects provides that a party will be "absolutely liable" for damages "caused by its space object on the surface of the Earth or to aircraft in flight." The U.S. is a party to that convention, so any liability to other treaty parties would be determined in accordance with its terms.

Should there be recoverable debris or component parts that land on the territory of a foreign government, the U.S. may wish to recover them in accordance with Article 5 of the 1968 Agreement on the Rescue of Astronauts and the Return of Objects Launched into Outer Space.

All actions regarding this matter will be consistent with the provisions of the 1967 Outer Space Treaty.

On April 1, 2008, Mark A. Simonoff, U.S. Representative to the Forty-seventh Session of the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space, made a statement in the general exchange of views. Mr. Simonoff's statement included a summary of the results of the U.S. actions in engaging the NRO satellite, as excerpted below. The full text of Mr. Simonoff's remarks is available at *www.state.gov/s/l/c8183.htm*.

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On February 20 of this year, a specially modified tactical missile fired from a United States naval vessel engaged a non-functioning National Reconnaissance Office satellite. This satellite, which had been registered with the UN Secretary General with the international designator of USA-193, was in its final orbits before making what would have been an uncontrolled re-entry into the Earth's atmosphere. The objective of the operation—which was successful—was to rupture the fuel tank to dissipate the approximately 453 kilograms of the highly toxic propellant fuel, hydrazine.

Due to the satellite's failure shortly after launch, U.S. experts had determined that the toxic propellant had frozen, would probably survive re-entry, and could have posed a unique hazard to people on Earth. After assessing these estimates, the President of the United States made the decision to engage the satellite. . . .

At the conclusion of this operation, the United States Navy removed the special modifications that were made to the two remaining tactical missiles and three naval vessels. The U.S. has no plans to adapt any technology from this extraordinary effort for use on any current or planned weapon system.

Almost all of the resulting debris from the engagement has fallen to Earth, but to our knowledge no debris has survived the reentry.

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The United States also issued a notification to the Secretary General, the STSC, other UN bodies, and Governments throughout the world the day after the successful engagement.*

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2. Outer Space Arms Control Treaty: Questions of Verification

On March 4, 2008, Paula DeSutter, Assistant Secretary of State for Verification, Compliance, and Implementation, addressed the George C. Marshall Institute Roundtable at the National Press Club on the topic "Is An Outer Space Arms Control Treaty Verifiable?" The full text of the speech, excerpted below, is available at *http://2001-2009.state.gov/t/vci/rls/rm/101754.htm*.

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. . . [A]s the international community continues to debate the merits of pursuing outer space arms control agreements, governments must address two fundamental questions: First, are the restraints contemplated in such agreements verifiable? Second, if not, would such agreements nonetheless enhance the security of the parties to such agreements, or actually harm their security?

In trying to reach an overall verification judgment regarding any proposed bilateral or international agreement, the United States seeks to answer two questions:

- First, we seek to determine if the proposed agreement is technically verifiable. To do so, we weigh the proposed limitations, the clarity of the language by which the limitations are expressed, and our ability to detect noncompliance in a timely

* Editor's note: *See, e.g.,* statement by Ambassador Christina Rocca to the Conference on Disarmament on February 21, 2008, available at *http://geneva.usmission.gov/Press2008/February/0221Satellite.html*.

fashion, using both our own national means and methods of verification and possible treaty-mandated or agreed-upon cooperative measures. The result of this process is a judgment as to the "degree of verifiability" of the agreement.

- Second, we address the issue of whether the proposed agreement is effectively verifiable. This second, broader assessment aims to establish whether the "degree of verifiability" is sufficient to enable the United States to detect significant noncompliance, or a pattern of noncompliance, early enough to counter the threat presented by a violation and deny a violator the benefits of its wrongdoing. We must also evaluate the risk of undetected cheating prior to a "break out" from a regime. Such "effectiveness" judgments are informed not only by the factors considered in reaching judgments regarding the degree of verifiability, but also by the broader context, including the compliance history of the parties to the potential agreement, the risks associated with noncompliance, and the difficulty of responding to deny violators the potential benefits of their violations.

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With regard to objectives and constraints, efforts to pursue space arms control agreements have a long, but undistinguished, history. Most space arms control proposals have sought to accomplish one or more of four objectives: (1) prevent an arms race in outer space; (2) prevent the placement of weapons in outer space; (3) prevent the threat or use of force against objects in outer space; and/or (4) prevent the development, testing, deployment, and/or use of terrestrial-based anti-satellite weapons (ASATs). . . .

To achieve one or more of the four objectives most often posited for space arms control, the vast majority of proposed constraints have sought to ban the deployment, use and, even the threat of use, of certain capabilities, while permitting other activities explicitly, such as research, development, testing, production, and storage.

There are many scope problems with such proposals, including the fact that there is no—I repeat, no—on-going arms race in space. . . .

* * * *

Conclusions

After considerable review, my government has concluded that it does not support additional arms control restrictions on our space activities. Only part of the reason we have come to this conclusion has to do with the foregoing verification issues. Put broadly, we have reached this conclusion for two reasons: First the types of restrictions that have been suggested by some states and some non-governmental groups are not verifiable. Second, even if they could be made verifiable, which we believe they could not, they would unduly constrain legitimate self-defense, commercial and other activities.

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. . . In our view, the Outer Space Treaty is sufficient to meet today's and tomorrow's needs. It establishes guiding principles for space operations by all nations: that space shall be free for all to explore and use; that space activities shall be carried out in accordance with international law, including the Charter of the United Nations, which guarantees the right of self-defense; that weapons of mass destruction shall not be put into orbit; that States Party shall not interfere with the assets of other states; and that States Party shall bear responsibility for the activities carried on by governmental and non-governmental entities in territories and locations under their jurisdiction and control. These are the principles according to which space faring nations have and should continue to conduct themselves.

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3. Transparency and Confidence-building Measures

In remarks to the UN General Assembly's First Committee on October 8, 2008, Ambassador Christina Rocca, Permanent Representative of the United States of America to the Conference on Disarmament, indicated U.S. openness to initiatives based on voluntary transparency and confidence-building measures on space issues, stating:

> . . . [T]he United States has consistently opposed space arms control proposals as the existing outer space regime

> is sufficient to guarantee all nations unfettered access to, and operations in, space. The United States is, however, willing to consider initiatives based on voluntary transparency and confidence-building measures ["TCBMs"] to solve concrete problems related to the use of space. In this spirit, we have begun a trans-Atlantic dialogue with the European Union on measures that focus on a pragmatic and incremental approach to space safety.
>
> It is therefore with regret, Mr. Chairman, that I must note our disappointment that we were unable to reach agreement this year with Russia and China on a draft General Assembly resolution to examine the feasibility of new voluntary TCBMs. Unfortunately, we could not reach agreement on a resolution that removes what the United States believes is a false and unacceptable linkage between expert assessments of pragmatic TCBMs and efforts to begin pointless negotiations on unverifiable space arms control agreements.

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

Cross References

SUA protocols, **Chapters 3.B.1.e., 18.A.3.b., and 18.B.1.b.**
Protocol to the Convention on the International Hydrographic Organization, **Chapter 7.C.**
MARPOL Annex VI (Regulations for the Prevention of Air Pollution from Ships), **Chapter 13.B.2.a.**
MARPOL Annex I (Regulations for the Prevention of Pollution by Oil from Ships), **Chapter 13.B.2.b.(2)**
Fisheries issues, **Chapter 13.B.2.d.**
Space assets protocol to Cape Town Convention, **Chapter 15.A.3.**
Transit through strait in international waters, **Chapter 18.A.1.c.(2)**
Proliferation Security Initiative shipboarding agreement with the Bahamas, **Chapter 18.B.3.**

Chapter 13

Environment and Other Transnational Scientific Issues

A. ENVIRONMENT AND CONSERVATION

1. Land and Air Pollution and Related Issues

a. Climate change

(1) Overview

During 2008 the United States participated in climate change negotiations conducted pursuant to the Bali Action Plan adopted at the Thirteenth Session of the Conference of State Parties in December 2007. The Bali Action Plan launched a "comprehensive process to enable the full, effective, and sustained implementation of the [UN Framework Convention on Climate Change] Convention," and provided the foundation for subsequent UNFCCC negotiations intended to lead to an "agreed outcome" on climate change in December 2009. The Bali Action Plan provided that the negotiating process would address, among other things, a "shared vision for long-term cooperative action" on climate change and enhanced action to mitigate and adapt to climate change, develop and transfer technology, and provide financial resources and investment. *See* U.N. Doc. FCCC/CP/2007/6/Add.1.

On June 17, 2008, Paula J. Dobriansky, Under Secretary of State for Democracy and Global Affairs, laid out U.S. views on the conditions necessary to achieve a lasting international

agreement on global climate change in a speech at Chatham House in London. Ms. Dobriansky's remarks, excerpted below, are available in full at *http://2001-2009.state.gov/g/rls/rm/106106.htm*.

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First, the United States wants a successful and comprehensive arrangement on climate change for the post-2012 period. We want a deal by December 2009. We are actively engaged in the U.N. Framework Convention on Climate Change, we support the Bali Roadmap, and we want a new approach to address the key elements of the Bali Roadmap: mitigation, financing, adaptation, and technology. We also support action aimed at addressing deforestation and land misuse.

Second, developed countries alone cannot solve climate change. If our efforts are to be environmentally effective and sustainable, all major economies must commit to action that will cut global emissions.

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Climate change, as President Bush has said, is one of the great challenges of our time. The United States is prepared to enter into binding international commitments to reduce greenhouse gas emissions—as part of a global agreement in which all major economies undertake binding international commitments—recognizing that these commitments would be differentiated according to national characteristics.

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The plan we developed at the UN climate conference in Bali focusing on mitigation, adaptation, financing and technology, is a big step forward. We remain flexible and optimistic.

The Major Economies Meetings on Energy Security and Climate Change seek to identify common ground in support of the discussions under the UNFCCC. This process offers an opportunity to build the kind of consensus among the biggest economies that we will need to achieve an effective global agreement.

Significantly, the 17 economies participating in the Major Economies Meetings comprise over 80% of the world's greenhouse gas emissions, over 80% of the world's consumption of energy, and over 80% of the world's economy.

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The world in 2008 is a different place than it was in 1990, just before negotiations began for the UNFCCC. Thus, if we are to stabilize atmospheric concentrations of greenhouse gases, commitments from all major economies are necessary. . . .

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We know that among the major economies and among all countries, there are different national circumstances. So while the character of the commitment may be common, the content of those commitments will vary from country to country. . . . We fully recognize and support the important principle of common but differentiated responsibilities and respective capabilities that was reiterated in the Bali Action Plan.

What's essential is that each country contributes to a common long-term greenhouse gas reduction goal in a way that meets its needs for economic growth and sustainable development.

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. . . A post-2012 arrangement on climate change must also recognize the critical role of technology. The United States is joining partners around the world in accelerating support for renewable sources of energy, advanced nuclear technologies, and emerging coal-fired power plant technologies so that we can capture and store carbon.

Last September, President Bush called for the creation of a new international fund to make clean energy technologies more widely available in the developing world. The President has requested authorization from Congress for a U.S. contribution of $2 billion over the next three years to the Clean Technology Fund, and the United Kingdom and Japan have also pledged substantial support. Late last month, we had a successful meeting in Germany which included developed and developing countries and resulted in strong agreement on the parameters of how the Fund will work, how it

will be governed, and how it will bring benefits to emerging economies.

We are also working to place new emphasis on public transit and vehicle efficiency standards, including in developing countries where transportation demand is rising rapidly. And advanced biofuels, which use non-food feedstocks, will reduce concerns about competition between food and fuel. Compared with gasoline, these advanced biofuels may cut carbon emissions by up to 86%.

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The United States and the EU have joined in proposing a World Trade Organization (WTO) Doha agreement to eliminate tariff and non-tariff barriers for climate friendly goods and services. . . .

Our post-2012 arrangement should recognize that the actions countries take at the national level are critical—particularly, in creating good investment climates and ensuring good governance so that private investment can flow.

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To have an effective framework, it is imperative that all major economies contribute to a global goal of deep greenhouse gas emissions cuts, and at the same time respect the principle of common but differentiated responsibilities. Our new arrangement must also ensure that we are facilitating, not restricting, economic growth and investment in clean technologies and supporting new, innovative financing strategies.

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(2) Meetings of major economies

The 17 states participating in the Major Economies Process on Energy Security and Climate Change—a U.S. initiative intended to develop a new framework on climate change—met four times in 2008. The meetings culminated in a joint statement, issued on July 9, 2008, which is excerpted below. The full text of the statement is available at *http://georgewbush-whitehouse.archives.gov/news/releases/2008/*

07/20080709-5.html; *see Digest 2007* at 673–78 for additional background.

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1. Climate change is one of the great global challenges of our time. Conscious of our leadership role in meeting such challenges, we, the leaders of the world's major economies, both developed and developing, commit to combat climate change in accordance with our common but differentiated responsibilities and respective capabilities and confront the interlinked challenges of sustainable development . . . . We have come together to contribute to efforts under the U.N. Framework Convention on Climate Change, the global forum for climate negotiations. Our contribution and cooperation are rooted in the objective, provisions, and principles of the Convention.

2. We welcome decisions taken by the international community in Bali, including to launch a comprehensive process to enable the full, effective, and sustained implementation of the Convention through long-term cooperative action, now, up to, and beyond 2012, in order to reach an agreed outcome in December 2009. Recognizing the scale and urgency of the challenge, we will continue working together to strengthen implementation of the Convention and to ensure that the agreed outcome maximizes the efforts of all nations and contributes to achieving the ultimate objective in Article 2 of the Convention . . . .

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4. . . . We believe that it would be desirable for the Parties to adopt in the negotiations under the Convention a long-term global goal for reducing global emissions, taking into account the principle of equity. . . . Significant progress toward a long-term global goal will be made by increasing financing of the broad deployment of existing technologies and best practices that reduce greenhouse gas emissions and build climate resilience. However, our ability ultimately to achieve a long-term global goal will also depend on affordable, new, more advanced, and innovative technologies, infrastructure, and practices . . . .

5. Taking into account assessments of science, technology, and economics, we recognize the essential importance of enhanced greenhouse gas mitigation that is ambitious, realistic, and achievable. We will do more . . . in keeping with the principle of common but differentiated responsibilities and respective capabilities. Achieving our long-term global goal requires respective mid-term goals, commitments and actions, to be reflected in the agreed outcome of the Bali Action Plan . . . .

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7. We recognize that adaptation is vital to addressing the effects of inevitable climate change and that the adverse impacts of climate change are likely to affect developing countries disproportionately. We will work together in accordance with our Convention commitments to strengthen the ability of developing countries, particularly the most vulnerable ones, to adapt to climate change. . . .

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(3) UN Framework Convention on Climate Change: Conference of the Parties

The United States participated in the Fourteenth Session of the Conference of the Parties to the UN Framework Convention on Climate Change in Poznan, Poland, December 1–12, 2008. In a December 1 press briefing, Ambassador Harlan L. Watson, alternate head of the U.S. delegation, and Daniel A. Reifsnyder, Deputy Assistant Secretary of State for Environment and Sustainable Development, addressed the U.S. position at the outset of the conference as excerpted below. The full text of the briefing is available at *http://2001-2009.state.gov/g/oes/rls/rm/112594.htm*.

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Question: I assume one of the goals in Poznan . . . is long-term shared global vision, which might involve a number attached to

2050 . . . . Do you think that we can agree to a number here in Poznan on 2020? . . .

Ambassador Watson: No . . . . We have been on record within the context of the G8 on the 50 by 50 number—the emissions reduction of 50%, with no base year attached. That was what was agreed to in the G8 Leaders Statement. We also had an intensive discussion of this within the Major Economies Process, but we could not get consensus on that. There are various ranges that have been considered with regard to the near term—so-called 2020 range. I do not think many Parties are willing to sign on to any range at this time. . . .

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Question: Dr. Watson, do you believe that the deadline for international negotiations is going to be met by COP-15?

Ambassador Watson: That's what we have agreed to. It won't be easy, but we've been committed to that, we agreed to it in Bali. . . . [O]ur President has reaffirmed that within the G8, within the Major Economies Process, and we intend on doing that.

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On December 8, 2008, Harlan Watson and Daniel Reifsnyder held a press briefing to discuss the progress of the negotiations. The full text of the briefing is available at *http://2001-2009.state.gov/g/oes/rls/rm/113005.htm.*

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DAS Reifsnyder: . . . [T]he Adaptation Fund was created under the Kyoto Protocol, with a share of the proceeds to come from [Clean Development Mechanism] CDM projects. Because the United States is not a Party to the Kyoto Protocol we've not engaged in the discussions of the Adaptation Fund. We follow them because they're of interest to us, but we've not taken positions with regard to the Adaptation Fund directly. Our concern has been to ensure that the Global Environment Facility (GEF), which manages the Adaptation Fund, strictly segregates funds in the GEF Trust Fund

from those in the Adaptation Fund. I think that has been done—so we've been satisfied . . . .

Question: What is the U.S. position on including India and China in cutting carbon emissions?

Ambassador Watson: Well, building upon the conversations ongoing within the G-8—and particularly in the Major Economies Process, in which China and India and other major emerging economies were participating—the agreement that came out of there is that all countries need to contribute and that's certainly a position that we believe in. You just cannot get to the heart of the issue by having developed countries alone reducing their emissions. In fact, even if the developed countries reduced their emissions by a 100 percent, you're still going to have huge growth. . . .

Question: You are thinking about the need not to foreclose options too soon . . . . Do you think that leaving all options open will give anybody enough time to create an agreement in Copenhagen . . . ?

Ambassador Watson: . . . [W]e fully expect that we'll be looking at a negotiating text in June.

. . . [W]e still have not really focused in the discussions on the so-called paragraphs 1(b)(i) and 1(b)(ii)—the sub-paragraphs of the Bali Action Plan that refer to mitigation by developed countries and developing countries. There needs to be a deeper understanding on those sub-paras. . . . Whether or not it can be possible to get agreement by the time of Copenhagen remains to be seen. . . . [I]t will not be easy. But I think there's a broad commitment, certainly on the part of this administration, and I think of many other Parties, to come out of Copenhagen with an agreed outcome. It may not be the final, final. But it's something that we really believe will move the ball forward.

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The Conference of the Parties to the UNFCCC concluded on December 13, 2008, with agreement on a work program for 2009 that would launch intensive negotiations in June 2009. The Parties also endorsed a new program under the Global Environment Facility to promote dissemination of clean technology. On December 11, 2008, Paula Dobriansky,

Under Secretary of State for Democracy and Global Affairs and head of the U.S. delegation; James Connaughton, Chairman of the White House Council on Environmental Quality; Harlan Watson; and Daniel Reifsnyder briefed the press. The full text of the briefing is available at *http://2001-2009.state.gov/g/rls/rm/113171.htm*.

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Question: . . . America stayed out of the Kyoto Protocol. What did America gain from that? . . .

Under Secretary Dobriansky: . . . [W]e've always remained committed to the UN Framework Convention on Climate Change and the principles of the Convention. And I think that we have also worked very collegially, broadly, and aggressively with those who did support the Kyoto Protocol or have supported the Kyoto Protocol, and also with those that didn't earlier on. . . . [W]hen I look at the evolution of where we were a number of years ago and where we are now, I think quite significantly there is a very strong convergence and desire to have an environmentally effective and economically sound international agreement—one of which the United States is part, one of which developed countries are part, and we undertake our responsibilities, but one in which, also, major emerging economies as well undertake actions that will contribute to the overall goal of reducing greenhouse gas emissions. All must contribute.

So, in this context, we have always said that we believe it's important to have the character of our agreement be common and the content differentiated. . . .

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Question: . . . [I]f you look back over the course of the last few years, is there anything that you would have done differently . . . ?

Chairman Connaughton: I wish, first, that Russia had made its mind up sooner, as to whether it was going to join Kyoto or not. . . . As soon as it was decided that Kyoto was going to go forward, then countries began to face up to the reality of what they needed to do at the national level to work toward meeting those

commitments. And it was at that point that the floodgates opened on technology cooperation, on public-private partnerships, and it was that foundation actually that gave rise to the Asia-Pacific Partnership and then the Major Economies Process. . . .

The other thing that would have been useful was to have gotten going on the cooperative actions several years earlier, because there's still, most of the countries of the world—with the exception of the EU, Canada, Japan, the U.S., maybe a couple of others—most of the countries of the world are still designing strategies for what they might do on greenhouse gases in the midterm. Until they have that national dialogue, do the economics, and perform the technology assessments, it will be very difficult to get internationally binding commitments because this time around, countries won't commit first and then figure out how to do it later. I think we've all recognized we need to pursue the approach like the one we did in the Montreal Protocol, where we actually did the homework first, and then designed the intentional regime around it. And I think that's clearly where the conversation is today.

. . . We all have commitments, including the U.S., under the Framework Convention. We have not fulfilled it to the level that we could, you know, those commitments.

And there's a lot of room to take action without even waiting for a broad, complete, comprehensive new set of agreements. There are things we can do immediately that the Major Economies leaders identified for us. And let me say three right out of the box. The world today could eliminate the tariffs on the technologies that reduce greenhouse gases. And there's absolutely no reason why we still carry tariffs on goods and services that are going to cut air pollution and greenhouse gases. There's no reason, if you believe climate change and human health are important public priorities, which I do.

A second one: we do not have an agreed measurement system that has the integrity to support our understanding of the effectiveness of different climate policies. And so whether you're doing taxes or incentives, whether you're doing market-based mandates or technology mandates, whether you're doing international trading or funding clean technology projects internationally, we need a system where one ton of emissions reduced is measured the same

way in one country as it is in another, so we can understand which approaches work best. . . .

The third piece is the sectoral approach that you all keep hearing about. There's plenty of work to be done with sectors working together on benchmarking, sharing best practices, and actually finding opportunities for joint investment—plenty of work to be done, including with developing countries that are small and the big emerging countries. . . . I think it's a small investment by most countries, but the yields are proving to be enormous. So that's an area we don't have to wait on. We can take action, fully consistent with our current treaty obligations, and actions that, under any scenario, would be fully supportive of any agreed outcome in this international process.

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Question: . . . There's been a lot of back and forth at the conference . . . about whether we need to see action domestically on legislation in the U.S. before we can move forward on an agreement in Copenhagen. . . . [H]ow you see that? . . .

Chairman Connaughton: First, I think your question actually applies broadly to all countries. In fact, there are very few countries today that have in law a climate mitigation[] strategy for the midterm. Most of them are working through their 2012 commitments. . . . So, we're all in the same boat on this, not just the U.S.

I think one key distinguishing feature is the one I described in my opening remarks. Unlike most other countries, America now has mandates supported by substantial incentives, so it's not just a mandate, but actually high confidence that there's financing available for it in eight of the most significant sectors that contribute to greenhouse gases. The one I left off that doesn't have a mandate are our farmers. And we've got a big chunk of fifty billion dollars going to our farmers to do sequestration on their less productive lands, so—it's harder to regulate farmers, as we all know—so we just decided to incentivize . . . them.

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President Bush thought it was very important that we come forward aggressively and get it done, so that the world had a clear

signal of what our political bodies thought would be reasonably achievable. . . . I think it's very important this time around that we go after the extremely good, and there's a lot of talk of the perfect still, but if we can get the extremely good in all the major economies, with real national programs, that have a level of accountability that we can actually bank on, that's a very powerful place upon which to draw a new international agreement.

If, however, we're in a situation where our friends in Europe are trying to dictate the environmental outcome for Mexico, or the U.S. is attempting to define what's reasonably achievable in South Africa, that's not a very constructive place to be. I think what we need to do is help each country build out its portfolio of strategies consistent with its own capabilities, which is also part of our treaty obligation, and then find the ways to reinforce those outcomes. . . . It's only when we fall back, and we have to spend enormous amounts of time on the five to ten percent that's riddled with conflict, where we end up delaying years and years and years.

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b. Aviation emissions controls

(1) UK proposed per-plane duty

In January 2008 the UK Treasury announced a proposal to replace the UK's existing Air Passenger Duty with a per-plane duty for flights taking off from UK airports. The United Kingdom proposed basing the new duty on an aircraft's maximum take off weight, plus distance traveled. The United Kingdom characterized its proposed duty as an environmental duty that would "ensure the industry makes a greater contribution toward its environmental costs . . . more in line with the environmental impacts of flights" and "provide incentives for the more efficient use of planes by taxing similarly sized aircraft the same, no matter how full the plane." On April 15, 2008, the U.S. Embassy in London submitted a diplomatic note to the UK Foreign and Commonwealth Office, expressing serious policy and legal concerns about the proposal and requesting that the U.S. diplomatic note be

included in the public record and considered in the UK consultation process. The United States also placed the issue on the agenda for the meeting on April 15–16, 2008, of the Joint Committee created by the U.S.–EU Air Transport Agreement (*see* Chapter 11.A.1.a.), and shared a copy of the note with the European Commission and Member State representatives who attended that meeting.

Excerpts from the diplomatic note below set out U.S. legal concerns; the full text of the note is available at *www.state.gov/s/l/c8183.htm*.

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In addition to policy objections, the proposed duty raises serious legal concerns, including inconsistency with the United Kingdom's obligations as a party to the Convention on International Civil Aviation (Chicago, 1944) and the Air Transport Agreement signed on April 25 and 30, 2007, by the United States and the European Community and its Member States ("the U.S.–EU Agreement"), which has been provisionally applied since March 30, 2008. For example, the preferential treatment accorded flights with destinations in the European Economic Area and short-haul flights generally raises issues of discrimination under both agreements. In addition, Article 15 of that Convention stipulates that "*[n]o fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.*" It would be hard . . . to justify the proposed duty as anything other than a fee, duty or charge imposed on aircraft solely by reason of their exiting from the United Kingdom. Moreover, if this were an actual environmental measure, the proposed duty would be inconsistent with International Civil Aviation Organization (ICAO) policy on environmental charges and taxes. In its Resolution of 9 December 1996 (149th Session), the ICAO Council:

> *[s]trongly recommends that any environmental levies on air transport which States may introduce should be in the*

> *form of charges rather than taxes and that the funds collected should be applied in the first instance to mitigating the environmental impact of aircraft engine emissions, for example to:*
>
> > *a) address[] the specific damage caused by these emissions, if that can be identified;*
> >
> > *b) fund[] scientific research into their environmental impact; or*
> >
> > *c) fund[] research aimed at reducing their environmental impact, through developments in technology and new approaches to aircraft operations.*

The Council further urged States to be guided by the principles in what is now titled "ICAO's Policies on Charges for Airports and Air Navigation Services" (Doc 9082/7, Seventh Edition–2004), underscoring that "*there should be no fiscal aims behind the charges*" and that "*the charges should be related to costs*." Those policies have been further endorsed in subsequent ICAO Assembly Resolutions, including at the most recent Assembly, which took place in September 2007.

Nor can these deficiencies be cured by relabeling the per-plane duty as a user charge since it would not constitute a permissible user charge for purposes of Article 12 of the U.S.–EU Agreement.

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The United Kingdom subsequently decided against imposing the proposed per-plane duty. Instead, it planned to increase the passenger tax.

(2) EU emissions trading proposal

On October 30, 2008, Kristen Silverberg, Ambassador to the European Union, provided comments to the Acting Director General of the European Union's Environment Directorate General, concerning the EU's proposal to include international civil aviation in the European Union Emissions Trading

Scheme ("ETS"). Ambassador Silverberg requested that the letter be included in the public record of the EU's consultations on its proposal. Her letter also enclosed a copy of a joint letter the United States, Australia, Canada, China, Japan, and South Korea transmitted to the European Union on April 6, 2007, urging EU member states and EU representatives to reconsider the proposal; *see Digest 2007* at 692–94. Ambassador Silverberg's comments were consistent with ICAO Assembly Resolution A36-22, urging Parties to "refrain from unilateral implementation of greenhouse gas emissions charges." *See* ICAO Assembly Resolutions in Force (as of September 28, 2007), ICAO Doc. 9902, p. I-72–73. Excerpts follow from Ambassador Silverberg's letter; the text of the letter and its enclosure are available at *www.state.gov/s/l/c8183.htm*.

* * * *

The United States reiterates its concerns with the inclusion of international civil aviation in the European Union Emissions Trading Scheme (ETS). The United States maintains that such unilateral, compulsory application to foreign carriers operating to and from European Union airports, without the consent of their governments is inconsistent with the Convention on International Civil Aviation (the Chicago Convention) and the U.S.–EU Air Transport Agreement.

The United States agrees on the need to address aviation's contribution to climate change and is doing so in a comprehensive approach. The U.S. aviation industry has already achieved significant results in shrinking its carbon footprint while simultaneously growing. Since 2000, U.S. commercial aviation has reduced its carbon emissions by over 70 million tons while flying 20% more passenger miles and 30% more cargo miles. Looking forward, the combination of operational improvements, new technologies, and sustainable alternative fuels, matched with the particular circumstances of the U.S. aviation industry, promises to sustain and even exceed those results.

European Union measures taken without the consent of its international partners threatens global cooperation on climate change in the aviation sector. The United States urges the European Union to engage constructively with its partners to find real solutions, as suggested in the April 2007 letter to the German Presidency, attached hereto. While the conclusions of the October 2008 Transport Council were a positive step, they cannot be construed as sufficient response to our concerns. If the European Union insists on moving forward unilaterally, the United States reserves its right to take appropriate measures in response under international law.

c. Ozone depletion

On November 19, 2008, Daniel A. Reifsnyder, Deputy Assistant Secretary of State for Environment and Sustainable Development, made a statement at the high-level segment of the 20th Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer ("Montreal Protocol"), held November 16–20, 2008, in Doha, Qatar. Excerpts below set forth U.S. views on the parties' 2007 agreement to reduce hydrochlorofluorocarbons ("HCFCs") (*see Digest 2007* at 697–99) and the U.S. proposal that the parties should agree to consider how to destroy certain ozone-depleting substances and find ways to promote the transition from HCFCs to substances with little or no impact on global warming. The full text of Mr. Reifsnyder's remarks is available at *http://2001-2009.state.gov/g/oes/rls/rm/112052.htm*.

* * * *

When nations of the world negotiated the Vienna Convention for the Protection of the Ozone Layer in 1985—and even when they negotiated the Montreal Protocol on Substances that Deplete the Ozone Layer in 1987—nearly everyone thought that these agreements were about preserving the stratospheric ozone layer that protects the Earth from the harmful effects of ultraviolet radiation . . . .

And they are. . . .

* * * *

But we have recently come to appreciate that these agreements—the Vienna Convention and the Montreal Protocol—are about far more than protecting the Earth's stratospheric ozone layer. They are also, perhaps even equally, about protecting the Earth's climate system. A study published in the *Proceedings of the National Academy of Sciences* in March 2007 reported that in 2010, the Montreal Protocol will have reduced net [global warming potential] GWP-weighted emissions from [ozone depleting substances] ODS by 5 times the reduction target of the first commitment period of the Kyoto Protocol. In simple terms, the Vienna Convention and the Montreal Protocol have already bought us considerable time in our continuing efforts to address the environmental risks of climate change.

Last year, Parties to the Montreal Protocol took yet another major step along this path when they agreed to accelerate the developed and developing country phase-outs of hydrofluorochlorocarbons (HCFCs). It is unfortunate that this agreement has been so little heralded in the press and so little appreciated by the public at large, because it represents, in the words of Achim Steiner, Executive Director of the UN Environment Programme, ". . . perhaps the most important breakthrough in an international environmental negotiation process for at least five or six years." As a result of this agreement, we will avoid putting nearly 524,000 [ozone depletion potential] ODP tons into the atmosphere—but we will also avoid putting 9.4 gigatons of carbon dioxide equivalent emissions into the atmosphere—an amount comparable, depending on the choice of substitutes, to the climate benefit of the first commitment period under the Kyoto Protocol. In other words, our agreement was good for the ozone layer and simultaneously good for the climate system.

But enthusiasm for the Montreal Protocol should not stop here—for what lies before us are at least two new vistas for action that may produce significant new environmental benefits. By this, I mean the opportunity presented by destroying ozone-depleting substances in banks that will otherwise leak into the atmosphere,

most of them by 2015, and the opportunity to find ways of promoting the transition from HCFCs to substances that have low to no global warming potential.

I am encouraged that Parties see these potentials and may yet adopt decisions . . . that may go some distance toward beginning to realize them.

* * * *

On December 1, 2008, Daniel Reifsnyder addressed the press on the first day of the Fourteenth Session of the Conference of the Parties to the UNFCCC in Poznan, Poland. In his remarks, Mr. Reifsnyder commented on the need to ensure that the parties to the UNFCCC work together with the parties to the Montreal Protocol. Excerpts from Mr. Reifsnyder's comments follow; the full text of his remarks is available at *http://2001-2009.state.gov/g/oes/rls/rm/112594.htm*. *See also* 1.a.(3) *supra*.

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This year, under the Montreal Protocol, we were looking at two other aspects that also have a bearing on these talks. One is on the destruction of CFCs and other substances that are currently included in banks—such as refrigerators, air conditioners and foams. Most of these banks will leak into the atmosphere by about 2015 if they are not recovered and destroyed. So, Parties to the Montreal Protocol are now exploring ways of recovering and destroying these substances. And we took an important decision in this regard in Doha.

The Montreal Protocol Parties also decided to look into the issue of hydrofluorocarbons (HFCs). HFCs are substances that people may move to as they transition out of the HCFCs. . . . HFCs have no ozone-depleting potential, so they don't create a problem for the stratospheric ozone layer, but some of them have very high global warming potentials (GWPs), so they could create a problem for the climate system. This is an issue that has been recognized now under the Montreal Protocol—and we think it should also be taken up here under the U.N. Framework Convention

on Climate Change. It is something that the two conventions are trying increasingly to work together to address—because we don't want to solve one environmental problem—depletion of the stratospheric ozone layer—but create another problem for the climate system. So, it is very important that the two conventions begin to work together on this. We had a good decision in Doha that seeks to begin a dialogue between the two conventions, and we hope to hear more about that here this week. . . .

* * * *

2. Protection of Marine Environment and Marine Conservation

a. Air pollution from ships

On July 21, 2008, President George W. Bush signed into law the Marine Pollution Prevention Act, Pub. L. No. 110-280, 122 Stat. 2611, which implements Annex VI (Regulations for the Prevention of Air Pollution from Ships) to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 thereto ("MARPOL Convention"). The United States signed the Protocol of 1997 that added Annex VI to the MARPOL Convention on December 22, 1998, and the President transmitted it to the Senate for advice and consent on May 15, 2003; *see Digest 2003* at 783–88. As noted in the Secretary of State's letter submitting the Protocol of 1997 to the President for transmittal to the Senate (S. Treaty Doc. No. 108-7):

> Annex VI seeks to reduce air pollution from ships at sea and in port. It does so by limiting the emission of nitrogen oxides (NOx) from marine diesel engines above 130 kW (175 hp); governing the sulfur content of marine diesel fuel; prohibiting the deliberate emission of ozone-depleting substances; regulating the emission of volatile organic compounds during transfer of cargoes between tankers and terminals; and setting international standards for shipboard incinerators and fuel oil quality.

> Annex VI also establishes similar requirements for platforms and drilling rigs at sea, with some exceptions. . . .

The Senate provided its advice and consent to ratification of the protocol on April 7, 2006. 152 Cong. Rec. S3400 (2006). The resolution of advice and consent contained two understandings and one declaration, all of which were to be included in the instrument of ratification. The understandings provided:

> (1) The United States of America understands that the Protocol of 1997 does not, as a matter of international law, prohibit Parties from imposing, as a condition of entry into their ports or internal waters, more stringent emission standards or fuel oil requirements than those identified in the Protocol.
>
> (2) The United States of America understands that Regulation 15 applies only to safety aspects associated with the operation of vapor emission control systems that may be applied during cargo transfer operations between a tanker and port-side facilities and to the requirements specified in Regulation 15 for notification to the International Maritime Organization of port State regulation of such systems.

The declaration, which the executive branch specifically requested, provided:

> The United States of America notes that at the time of adoption of the Protocol of 1997, the NOx emission control limits contained in Regulation 13 were those agreed as being achievable by January 1, 2000, on new marine diesel engines, and further notes that Regulation 13(3)(b) contemplated that new technology would become available to reduce on-board NOx emissions below those limits. As such improved technology is now available, the United States expresses its support for an amendment to Annex VI, that would, on an urgent basis, revise the agreed NOx emission control limits contained in

> Regulation 13 in keeping with new technological developments.

Enactment of the Marine Pollution Prevention Act was the last major step the United States needed to complete before submitting its instrument of ratification to become party to Annex VI. The new law amended the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901–1915, which implements U.S. obligations under MARPOL Annexes I, II, and V, and also applies generally to "a ship of United States registry or nationality, or one operated under the authority of the United States, wherever located" and "with respect to regulations prescribed under section 1905 . . . , any port or terminal in the United States." As amended, the act also incorporates the requirements of Annex VI. For example, new 33 U.S.C. § 1902(5) covers, with respect to Annex VI:

> (A) . . . a ship that is in a port, shipyard, offshore terminal, or the internal waters of the United States;
>
> (B) . . . a ship that is bound for, or departing from, a port, shipyard, offshore terminal, or the internal waters of the United States, and is in—
>
> > (i) the navigable waters or the exclusive economic zone of the United States;
> >
> > (ii) an emission control area designated . . . [by regulations with respect to a U.S. port or terminal promulgated pursuant to § 1905*]; or
> >
> > (iii) any other area that the [Environmental Protection Agency] Administrator, in consultation with the

* Editor's note: Among other things, § 1905 as amended requires persons in charge of ports and terminals to provide adequate "reception facilities for receiving ozone depleting substances, equipment containing such substances, and exhaust gas cleaning residues," in accordance with regulations that the Marine Pollution Prevention Act requires the Secretary of Homeland Security and the Administrator of the Environmental Protection Agency to prescribe jointly.

> Secretary [of Homeland Security] and each State in which any part of the area is located, has designated by order as being an area from which emissions from ships are of concern with respect to protection of public health, welfare, or the environment;
>
> (C) . . . a ship that is entitled to fly the flag of, or operating under the authority of, a party to Annex VI, and is in—
>
> (i) the navigable waters or the exclusive economic zone of the United States;
>
> (ii) an emission control area designated . . . [by regulations pursuant to § 1905];
>
> (iii) any other area that the Administrator, in consultation with the Secretary and each State in which any part of the area is located, has designated by order as being an area from which emissions from ships are of concern with respect to protection of public health, welfare, or the environment; and
>
> (D) . . . any other ship, to the extent that, and in the same manner as, such ship may be boarded by the Secretary to implement or enforce any other law of the United States or Annex I, II, or V of the Convention, and is in—
>
> (i) the exclusive economic zone of the United States;
>
> (ii) the navigable waters of the United States;
>
> (iii) an emission control area designated under section 4; or
>
> (iv) any other area that the Administrator, in consultation with the Secretary and each State in which any part of the area is located, has designated by order as being an area from which emissions from ships are of concern with respect to protection of public health, welfare, or the environment.

Under § 1902(2) "a warship, naval auxiliary, or other ship owned or operated by the United States when engaged in

noncommercial service; or . . . any other ship specifically excluded by the MARPOL Protocol or the Antarctic Protocol" is exempt from MARPOL Annex VI, but § 1902(3) authorizes the EPA Administrator or the Secretary to "determine that some or all of the requirements . . . shall apply to one or more classes of public vessels, except that such a determination . . . shall have no effect unless the head of the Department or agency under which the vessels operate concurs . . . ." Paragraph (3) is inapplicable "during time of war or during a declared national emergency."

On October 8, 2008, the United States deposited its instrument of ratification of Annex VI to the MARPOL Convention, which then entered into force for the United States on January 8, 2009.

b. Marine pollution from ships

(1) International Convention on the Control of Harmful Anti-Fouling Systems on Ships

On January 28, 2008, President Bush transmitted the International Convention on the Control of Harmful Anti-Fouling Systems on Ships ("Convention") to the Senate for its advice and consent to ratification. S. Treaty Doc. No. 110-13 (2008). The Convention was adopted at a diplomatic conference of the International Maritime Organization on October 5, 2001, and the United States signed it on December 12, 2002. There are four Annexes to the Convention, though Annex 1 is arguably the most important because it identifies the anti-fouling systems that are controlled by the Convention. The Convention entered into force on September 17, 2008. President Bush's transmittal letter is excerpted below.

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* * * *

The Convention aims to control the harmful effects of anti-fouling systems, which are used on the hulls of ships to prevent the growth

of marine organisms. These systems are necessary to increase fuel efficiency and minimize the transport of hull-borne species; however, anti-fouling systems can also have negative effects on the marine environment, including when a vessel remains in place for a period of time (such as in port). To mitigate these effects, the Convention prohibits Parties from using organotin-based anti-fouling systems on their ships, and it prohibits ships that use such systems from entering Parties' ports, shipyards, or offshore terminals. The Convention authorizes controls on use of other anti-fouling systems that could be added in the future, after a comprehensive review process.

. . . The United States played a leadership role in the negotiation and development of the Convention . . . .

Organotin-based anti-fouling systems are specifically regulated through the Organotin Anti-Fouling Paint Control Act of 1988 (OAPCA), 33 U.S.C. 2401–2410. New legislation is required to fully implement the Convention and will take the form of a complete revision and replacement of OAPCA. All interested executive branch agencies support ratification. I recommend that the Senate give early and favorable consideration to the Convention and give its advice and consent to its ratification, with the declaration set out in the analysis of Article 16 in the attached article-by-article analysis.

* * * *

Excerpts follow from the report of the Department of State, submitted to the President by Secretary of State Condoleezza Rice on October 26, 2007, and included in S. Treaty Doc. No. 110-13. They discuss the proposed declaration mentioned in the President's transmittal letter concerning the entry into force for the United States of amendments to Annex 1 of the Convention.

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* * * *

Article 16—Amendments . . . lays out the procedures for amending the Convention and its Annexes. All amendments are adopted by a two-thirds majority of the Parties present and voting.

Amendments to the body of the Convention must be individually ratified or acceded to by each Party. The Executive Branch would submit to the Senate for advice and consent any amendments to the body of the Convention.

For amendments to an Annex other than Annex 1, Parties have a twelve-month period (unless the Marine Environment Protection Committee decides on a different time period) after it is adopted in which to object to the amendment, in which case the amendment will not bind the objecting Party. This procedure was modeled after one found in the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL).

Amendments to Annex 1 are handled in the same manner as amendments to other Annexes, except that, in addition to having twelve months to object, Parties are given the further options of either: (1) notifying the Secretary-General, prior to entry into force of a particular amendment, that such amendment shall enter into force for it only after a subsequent notification of its acceptance; or (2) making a declaration at the time it deposits its instrument of ratification or accession to the Convention that any amendment to Annex I shall enter into force for it only after the notification to the Secretary-General of its acceptance of such amendment. It is recommended that the United States exercise the second option and include the following declaration in its instrument of ratification:

> The Government of the United States of America declares that, pursuant to Article 16(2)(f)(ii)(3) of the Convention, amendments to Annex 1 of the Convention shall enter into force for the United States of America only after notification to the Secretary-General of its acceptance with respect to such amendments.

In the event that an annex amendment was adopted that was of such a nature that it needed to be sent to the Senate for advice and consent in order for the United States constitutionally to be bound by it, the Executive Branch would take the necessary steps

to ensure that the amendment did not enter into force for the United States absent such advice and consent.

* * * *

On September 26, 2008, the Senate provided its advice and consent to ratification. 154 Cong. Rec. S9850 (2008). The resolution of advice and consent contained two declarations. The first, to be included in the instrument of ratification, was the declaration specifically requested by the executive branch:

> The United States of America declares that, pursuant to Article 16(2)(f)(ii)(3) of the Convention, amendments to Annex 1 of the Convention shall enter into force for the United States of America only after notification to the Secretary-General of its acceptance with respect to such amendments.

The second, which was not to be included in the instrument of ratification, stated that the Convention "is not self-executing."

The report on the Convention by the Senate Committee on Foreign Relations, S. Rep. No. 110-19, at 8–9 (2008), noted that in the Committee's view "any amendment to Annex 1 would require the advice and consent of the Senate," but "[a]mendments to Annexes 2, 3, and 4 should not, in the normal course, rise to the level of those that require the advice and consent of the Senate." Nevertheless, the Committee noted that if there were any question as to whether an amendment to Annexes 2, 3, or 4 went beyond the current mandate of the Annex being amended as described in the Convention, the Committee expected the executive branch to consult "in a timely manner in order to determine whether advice and consent is necessary."

(2) Prevention of pollution during transfer of oil cargo between oil tankers at sea

On August 15, 2008, the United States, Liberia, the Marshall Islands, and Singapore, as well as the International Association

of Independent Tanker Owners, the International Chamber of Shipping, and the Oil Companies International Marine Forum, submitted written comments to the International Maritime Organization's Marine Environment Protection Committee ("MEPC") on the proposed amendments to Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1973 relating thereto ("MARPOL"). IMO Doc. MEPC/58/10/7, available at *www.state.gov/s/l/c8183.htm*. The amendments to Annex I (Regulations for the Prevention of Pollution by Oil) would regulate the transfer of oil cargo between oil tankers at sea ("STS transfers") and require advance notification for such transfers. The comments, excerpted below, expressed concern that the notification requirement would infringe unjustifiably upon high seas freedoms of navigation.

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4. [D]uring the drafting process, it became apparent that the regulation would in effect impose a mandatory waiting period of 48 hours for STS transfers. This mandatory waiting period may have very substantial and detrimental economic and operational consequences.

* * * *

5. . . . [T]he . . . proposed amendments vary substantially from the original submission . . . that led to creation of the new work programme item upon which these amendments are based.

6. [T]he original submission was founded largely upon concerns related to fuel transfer outside of harbour waters and FPSO/FSU [floating production, storage, and offloading/floating storage and offloading systems] operations. Those operations are now excluded from the proposed amendments. Further, although we can agree that there is environmental benefit from the proposed amendments, we cannot agree that there is a compelling need regarding STS transfers beyond the territorial seas to justify waiving important historical rights of high seas freedom of navigation. . . .

Geographic scope of the proposed regulations

7. The most complex of elements within this issue can easily be resolved by creating regulations of general applicability. This is similar to how the rest of MARPOL Annex I is constructed. . . .

8. Advance notification in the Exclusive Economic Zone (EEZ) is not at all similar to the existing MARPOL Annex I requirements, in that there has never been an advance reporting requirement and Annex I has never previously given the EEZ any special status in its regulations. Rather, similar matters have been left to the contracting Governments to interpret and apply, consistent with customary international law.

9. Thus, drafting regulation 42, if it is to require advance notification in the EEZ, is not agreeable to the co-sponsors because of its negative impact on freedoms of navigation, historically enjoyed by both commercial and non-commercial ships.

Freedom of navigation principles

10. The historical principles of high seas freedom of navigation are founded in the customary international law and memorialized in Articles 58 and 87 of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).

11. Regulation of ship-to-ship (STS) transfers in the territorial sea through advance notification does not raise legal or policy concerns. Those principles that apply in the territorial sea are found in Article 21 of the UNCLOS.

12. High seas freedom of navigation is a right within the EEZ and is critically important to the free flow of commerce and to strategic security interests. Advance notification of intentions to engage in a high seas freedom of navigation is incompatible with the rights enjoyed by all ships to operate beyond the territorial sea. The co-sponsors do not support waiving these important rights via the proposed Chapter 8, in the case where neither of the vessels involved in the STS transfer intends to enter a port or place within the coastal state.

* * * *

Mechanisms addressing environmental concerns

16. With regard to environmental protection, there are currently existing mechanisms which could enable Member States to

effectively monitor, regulate, or prevent incidents related to STS transfers occurring in their EEZ that do no require any changes to existing MARPOL Annex I regulations. These include:

1. OPRC (response arrangements);
2. LRIT (passive vessel location reporting via flag States, when it becomes operational);
3. AIS (passive vessel location data);
4. Conditions of port entry related to the STS transfer;
5. Regulation of STS providers that operate from the coastal State;
6. Voluntary measures; and
7. Bilateral agreements between coastal and flag States

17. These existing mechanisms provide a comprehensive range of tools for a State to safely regulate and monitor STS transfers occurring beyond the territorial sea, without compromising historical principles of freedom of navigation. The co-sponsors therefore do not consider that there is a compelling need for advance notification of these STS transfers, where neither vessel intends to enter a port of a coastal State.

Conclusion

18. The co-sponsors do not support advance notification of STS transfers beyond the territorial sea, where neither of the involved vessels is entering a port of the coastal State or flies the flag of the coastal State. Regulation 42 should be modified or deleted . . . .

* * * *

At its 58th session in London, October 6–10, 2008, the MEPC debated the U.S. and others' comments concerning the proposed amendments to MARPOL Annex I. Paragraphs 10.10 and 10.11 of the report on the MEPC's meeting stated:

> In document MEPC 58/10/7, it was proposed by the co-sponsors that draft regulation 42 ("advance notification") of MARPOL Annex I should either be deleted from the present amendments or modified such that notification

of STS transfers are only required for operations within territorial seas or internal waters.

After extensive debate on this issue reflecting on the impact of a notification period both in terms of commercial considerations and rights under UNCLOS, it was agreed that draft regulation 42 should be retained but that the reference to the exclusive economic zone in paragraph 1 should be placed in square brackets, with a decision on this point to be taken at MEPC 59.

The draft amendments would add to MARPOL Annex I a new Chapter 8, Prevention of Pollution During Transfer of Oil Cargo Between Oil Tankers at Sea, and were approved for adoption at MEPC 59 (July 2009) (MEPC 58/23, Annex 24; MEPC 59/5 Annex).

c. Specially protected areas

On April 3, 2008, the International Maritime Organization ("IMO") designated the waters of the Papahānaumokuākea Marine National Monument, a 1,200-mile area that includes the Northwestern Hawaiian Islands, as a "Particularly Sensitive Sea Area." The IMO's action responded to a U.S. proposal submitted in 2007; *see Digest 2007* at 705–06. A press release issued by the National Oceanic and Atmospheric Administration, excerpted below, discusses the IMO's action. The full text of the release is available at *www.noaanews.noaa.gov/stories2008/20080404_papahana.html.*

* * * *

The designation . . . declares the waters of the monument a "Particularly Sensitive Sea Area" (PSSA). The designation puts into effect internationally recognized measures designed to protect marine resources of ecological or cultural significance from damage by ships while helping keep mariners safe.

On May 1, special zones known as "Areas to be Avoided" (ATBAs) will appear on international nautical charts to direct ships away from coral reefs, shipwrecks and other ecologically or culturally sensitive areas in the monument PSSA that may also pose a navigation hazard. These zones, which were recently adopted by the IMO, will expand upon the ATBAs previously established in the area.

An IMO-adopted ship reporting system will also go into effect on May 1. Vessels planning to pass through the monument PSSA on their way to or from a U.S. port or place will be required to notify monument managers by reporting into the system. For other vessels transiting the area, reporting will be voluntary but recommended. The reporting system will provide critical alerts and other information to assist mariners in navigating safely through the area.

* * * *

The monument is the second marine protected area in the United States to receive PSSA designation, the first being Florida Keys National Marine Sanctuary in 2002. It joins 10 other PSSAs worldwide, including the Great Barrier Reef and the Galapagos Archipelago.

The PSSA covers all waters of the monument, which includes a 1,200-mile stretch of coral islands, seamounts, banks and shoals. Established in June 2006 by President Bush, the monument is home to more than 7,000 marine species and contains 4,500 square miles of pristine coral reefs.

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d. Fish and marine mammals

(1) Illegal, unregulated, and unreported fishing

On April 16, 2008, in testimony before the House of Representatives Committee on Natural Resources, Subcommittee on Fisheries Conservation, Wildlife and Oceans,

David A. Balton, Deputy Assistant Secretary of State for Oceans and Fisheries, discussed challenges and opportunities in combating illegal, unreported, and unregulated fishing ("IUU") and improving shark conservation and management. Excerpts are set forth below; the full text of Ambassador Balton's testimony is available at *http://2001-2009.state.gov/g/oes/rls/rm/103741.htm*.

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. . . The international community has forged a robust international law framework at both the global and regional levels and has developed a broad range of new tools for managing shared fisheries. The entirety of this framework rests on the 1982 Convention on the Law of the Sea, which established the overall structure for international fisheries management.

Building on the Law of the Sea framework, we have a series of other treaties for the management of international fisheries to which the United States is party, including the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement. The United States is also a key member of more than 10 [Regional Fisheries Management Organizations] RFMOs and is leading international efforts to strengthen these organizations and to create new ones. Complementing these binding mechanisms are a number of voluntary instruments, including . . . the FAO Code of Conduct for Responsible Fisheries, international plans of action that address bycatch of sharks and seabirds, capacity management, and IUU fishing, and a number of other technical guidelines and model instruments to guide further cooperation, including one for improved data collection and sharing.

The creation and adoption of this international law framework is an important achievement. But its implementation at a regional and national level remains imperfect. There remains a genuine need for stronger action by Nations and RFMOs—including better cooperation on monitoring and enforcement—to ensure sustainable fisheries and end IUU fishing.

IUU Fishing

* * * *

. . . RFMOs have also adopted measures to address IUU fishing, including requirements to improve monitoring, control and surveillance (MCS) of vessels, restrictions on transshipment of fish at sea, catch and trade documentation schemes, lists of both authorized vessels and vessels identified as having engaged in IUU fishing, market-related measures and port State controls, to name some. We have also seen increasing cooperation between and among RFMOs, particularly those in adjacent areas (such as the Northwest Atlantic Fisheries Organization and the Northeast Atlantic Fisheries Commission) and those that deal with fisheries for similar species (such as the five RFMOs that manage tuna fisheries around the world).

. . . [T]he United States has also supported efforts among RFMOs to work towards a global IUU vessel list by contributing to a process that provides for inclusion of vessels identified by one RFMO on the lists of others, while taking into account any due process concerns that may arise.

We are also pursuing stronger port controls. Because fish must be landed before they can get to the market, controlling the landing point often presents the best and most effective chance to combat IUU fishing. Stronger agreed standards for port States to regulate the landing and transshipment of fish in port can complement the market-related measures already in place through several RFMOs. The United States strongly supported the development through the FAO of a voluntary model scheme to facilitate coordination and cooperation among port States to address IUU fishing. Last year, the FAO Committee on Fisheries agreed to create a new, binding agreement based on the Model Scheme. . . . Our goal is to complete the negotiations in time for the next meeting of the Committee on Fisheries to adopt an agreement in March 2009.

The United States continues to advocate for other measures to combat IUU fishing. Through FAO, we are pressing for the development of a global record of fishing vessels—including transport and support vessels—that would include unique vessel identifiers

and comprehensive ownership information. At the RFMO level, we are seeking stronger MCS measures, including broader access to data from vessel monitoring systems, increased vessel observer programs, stronger documentation schemes, etc.

Cooperative mechanisms such as the International MCS Network,* which facilitates cooperation and information-sharing between monitoring, control, and surveillance officials in different countries, are increasingly important. Recognizing the connections among vessels involved in or supporting IUU fishing, we have also strongly supported the FAO and the International Maritime Organization's joint working group on IUU fishing, and in particular efforts to create a global record of all fishing vessels.

The Administration understands very well that Congress shares our desire to crack down on IUU fishing. The 2006 Magnuson-Stevens Reauthorization Act has provided new tools in this regard. . . .

I note that the U.S. IUU National Plan of Action contained a number of recommendations for stronger statutory and regulatory tools to combat IUU fishing. While the provisions of the 2006 Magnuson-Stevens Reauthorization Act took up some of these recommendations, we support efforts to address others that would strengthen our ability to enforce both domestic rules and international conservation and management measures.

Sharks

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The Shark Finning Prohibition Act of 2000 banned finning in all U.S. federal waters, and directed [that] fisheries for sharks are subject to strict domestic management measures. The United States believes that banning finning is an important step that countries can take in pursuing sustainable conservation and management of sharks.

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* Editor's note: For details on the International Network for the Cooperation and Coordination of Fisheries-Related Monitoring Control and Surveillance Network ("MCS Network"), *see www.publicaffairs.noaa.gov/worldsummit/mcsdocument.html*.

To this end, the United States spearheaded a series of successful shark resolutions in RFMOs, beginning with the 2004 resolution in the International Commission for the Conservation of Atlantic Tunas that constituted the first international ban on shark finning. Similar measures are now in place in most RFMOs, including the Western and Central Pacific Fisheries Commission, the Inter-American Tropical Tuna Commission, and the Northwest Atlantic Fisheries Organization.

. . . [In] part the basis for the United States Government to lead international fora to take actions to prohibit shark finning was the provisions of the Shark Finning Prohibition Act and the Magnuson Act, including the 5% fin-to-carcass weight ratio. We look forward to working with the Congress, NOAA and other agencies to ensure that changes to U.S. law or regulations allow the United States to maintain the strong standards we've helped set for the international community and the global shark conservation agenda we've helped establish.

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The United States also promotes shark conservation and management in other international organizations such as the Convention on International Trade in Endangered Species (CITES). With U.S. support, whale sharks, great white sharks and basking sharks have been have been listed in Appendix II of CITES as species that may become threatened with extinction unless trade is regulated. Last year, we successfully proposed several species of critically endangered sawfish for listing on Appendix I of CITES, which effectively bans all trade in sawfish parts and fins. We also supported proposals by Germany to list spiny dogfish and porbeagle shark. At U.S. urging, CITES is currently working to identify key shark species threatened by international trade and consider possibilities for additional listings, to examine the linkages between trade in shark meat and fins, and to make recommendations to improve shark conservation and the management of international trade in shark species.

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The United States attended the first international meeting to identify and elaborate an option for international cooperation on

migratory sharks convened by the Secretariat of the Convention on the Conservation of Migratory Species (CMS) in December 2007. Although no concrete decisions were reached . . . , momentum seemed to favor a global instrument that would address a broad suite of issues relating to shark conservation and management . . . , and would provide for cooperation and immediate engagement with the FAO, RFMOs, and the fishing industry.

Most of the major RFMOs have now adopted measures banning finning, promoting the collection of catch/effort/discard/trade data and sharks-related research, and encouraging the live release of sharks caught as bycatch. While adoption of these measures is a significant step forward, we remain concerned that the measures have not been fully implemented or effectively enforced . . . , and the measures do not go far enough to provide real conservation benefits for vulnerable shark species. More importantly, only one RFMO—the Northwest Atlantic Fisheries Organization—has adopted explicit fishery management measures for a shark-like species, and only one RFMO—the Commission for the Conservation of Antarctic Marine Living Resources—has banned directed shark fishing due to the insufficiency of scientific information.

We will work to ensure that RFMOs effectively implement and enforce the shark conservation measures they have already adopted, including finning bans. . . . [W]e will continue to defend against efforts by other Nations to weaken the rules in current finning bans and will promote the interpretation of those rules that yields the best conservation benefit. . . .

Strengthening RFMOs

Though RFMOs are imperfect, they are currently the most practical way to manage shared international fisheries. As active participants in many RFMOs, we are committed to multilateral efforts to strengthen fisheries governance in order to ensure the sustainability of target stocks while also conserving associated and dependent species and the habitats on which they depend.

In many ways, we are at a crossroads. Many national and multilateral fora responsible for fishery management are under heavy criticism for failing to take decisions that the science tells us is necessary to ensure sustainability of fishery resources, or to take steps (many of which are widely acknowledged to be effective)

to mitigate the impacts of fishing activities on non-target species and habitats. If RFMOs fail to fulfill their obligations, we can expect calls to continue for other organizations to step in and fill that void.

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In this regard, I should mention that the Inter-American Tropical Tuna Commission adopted a new treaty, known as the Antigua Convention, to provide it with a comprehensive mandate that incorporates modern standards for international fisheries management. In 2005, the Senate provided its advice and consent to U.S. ratification of the Antigua Convention. However, because Congress has yet to pass legislation to implement the Convention, we have not deposited our instrument of ratification. We therefore urge Congress, and this Subcommittee in particular, to take up this legislation at the earliest opportunity.

Capacity building

While the United States has been a leader in managing its own fisheries and in pressing for stronger international fisheries governance, success depends upon our building strong international partnerships. Effective international governance can only work if all parties have the will and the capacity to implement agreed rules. In some parts of the world, the problems facing fisheries—especially IUU fishing—are inextricably linked to other concerns such as transboundary crime, smuggling, human trafficking, human rights, and environmental degradation. Developing countries need help to build their capacities to effectively address these myriad and interlinked issues. The United States has strongly supported mechanisms like the UN Fish Stocks Agreement Part VII Fund, which provides assistance to developing Nations for implementing the Agreement, and other similar funds within RFMOs.

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(2) U.S.–Canada salmon treaty amendments

Through diplomatic notes exchanged on December 23, 2008, the United States and Canada agreed to bring a set of salmon conservation fishing regimes and research programs

into effect from January 1, 2009 to December 31, 2018 ("Agreement"). The Agreement revised five chapters of Annex IV of the 1985 Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon ("1985 Treaty"), which were due to expire at the end of 2008. The Agreement, which covers major Pacific salmon fisheries along the coasts of Oregon, Washington, British Columbia, and southeast Alaska, was negotiated under the auspices of the Pacific Salmon Commission, which the United States and Canada established to implement the 1985 Treaty. In particular, the Agreement will help protect Chinook salmon stocks listed as threatened under the U.S. Endangered Species Act, 16 U.S.C. §§ 1531–1544.

Notably, the obligations set out in the Agreement relating to the management of Chinook salmon are subject to a funding contingency. The Agreement calls upon the United States to contribute $37.5 million from funds that the executive branch will have to request from Congress to (1) support transition in Canadian fisheries affected by the conservation measures ($30 million over two years beginning in FY 2010); and (2) improve the coast-wide coded wire tagging ("CWT") program operated by domestic management agencies ($7.5 million over five years beginning in 2010). Similarly, the Agreement calls upon Canada to contribute $7.5 million (Canadian) for the CWT on the same schedule as the United States. If the funds are not appropriated, the obligations under the Chinook salmon chapter of the Agreement will be suspended.

Consistent with past practice, the United States concluded the Agreement as an executive agreement and did not submit it to the Senate for its advice and consent. As explained in the letter from the Secretary of State transmitting the 1985 Treaty to the President on February 4, 1985:

> Article XIII provides for the amendment of annexes through exchange of diplomatic notes. Since Annex IV contains fishery regimes that will be revised routinely and

frequently, changes to these regimes will not be submitted to the Senate for advice and consent to ratification.

The texts of the notes comprising the Agreement are available at *www.state.gov/s/l/c8183.htm*.

(3) Pacific Hake/Whiting Agreement

On November 17, 2005, the Senate gave advice and consent to ratification of the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting. 151 Cong. Rec. S13,282 (2005). Implementing legislation, "The Pacific Whiting Act," was included as Title VI, §§ 601–611, of the Magnuson-Stevens Fishery Management and Conservation Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575, which was signed into law on January 12, 2007. The agreement entered into force on June 25, 2008. For background, *see Digest 2005* at 734; *Digest 2004* at 753–55.

(4) Extension of 1988 U.S.–Russia agreement on mutual fisheries relations

By an exchange of notes on March 28, 2008, and September 19, 2008, the United States and the Russian Federation concluded an agreement extending the 1988 Agreement between the Government of the United States and the Government of the Russian Federation on Mutual Fisheries Relations, with annexes and agreed minutes, as amended and extended ("Mutual Fisheries Agreement"). The agreement extends the Mutual Fisheries Agreement until December 31, 2013. The President transmitted the agreement to the President of the Senate and the Speaker of the House of Representatives on January 15, 2009, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, as amended (16 U.S.C. §§ 1801–1884). The Mutual Fisheries Agreement and the exchange of diplomatic notes are available at *www.state.gov/s/l/c8183.htm*.

(5) Protection of vulnerable marine ecosystems: Bottom fishing

The United States participated in the twenty-seventh meeting of the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR"), October 27–November 7, 2008. CCAMLR adopted a U.S. proposal to amend Conservation Measure 22-06 (first adopted in 2007), which affords protection to vulnerable marine ecosystems ("VMEs") from the destructive impacts of any type of bottom fishing gear in high seas areas within the scope of the Convention. The amendment offers clarification about the geographic extent of this Conservation Measure, significantly expanding protection to VMEs such as seamounts, hydrothermal vents, cold-water corals, and sponge fields. The Conservation Measure responds to the 2006 UN General Assembly Resolution on Sustainable Fisheries, which called upon states and regional fisheries management organizations ("RFMOs") to take immediate action to ensure that fish stocks are managed sustainably and to protect VMEs from destructive fishing practices. U.N. Doc. A/RES/61/105.

The U.S. delegation also sponsored and achieved adoption of substantive amendments to CCAMLR's Scheme of International Scientific Observation ("SISO") to clarify and strengthen the roles and standards associated with international scientific observers and the vessels on which they serve. The amendments introduce conduct, reporting, and data confidentiality standards to affirm the professional standing of scientific observers and to safeguard the quality of data and integrity of the program. The changes also include standards for observer safety, bilateral arrangements, and cooperation with the observers while on board. The revisions to the SISO are consistent with principles and guidelines adopted by several RFMOs and other domestic observer programs in the United States. The SISO was first drafted in 1992 to provide practical at-sea procedures and a standardized approach to reporting biological data and monitoring

fishing operations. Scientific observers provide a significant proportion of the data used by CCAMLR scientists in assessing fish stock status and establishing catch limits.

(6) South Pacific Regional Fisheries Management Organization treaty negotiations

On March 10–14 and October 6–10, 2008, the United States participated in the fourth and fifth international negotiating sessions to establish a regional fisheries management organization ("RFMO") in the South Pacific Ocean to manage non-highly migratory species and address fisheries impacts on vulnerable marine ecosystems. *See Digest 2007* at 713–14. At both sessions, participants discussed the draft text, which draws heavily on recently completed agreements that established RFMOs in the Pacific, Indian, and Atlantic oceans (e.g., the Western and Central Pacific Fisheries Convention ("WCPFC"), the Southern Indian Ocean Fisheries Agreement ("SIOFA"), and the South East Atlantic Fisheries Organization ("SEAFO")). In general, the United States is seeking an agreement that is progressive, builds on best RFMO practice, and is consistent with the principles of international law, as outlined in the UN Convention on the Law of the Sea and the UN Fish Stocks Agreement, as well as related instruments, but is also flexible enough to address changing circumstances.

During the fifth session, the United States stressed the importance of consistency with the UN Fish Stocks Agreement and provided specific proposals related to conservation and management principles in order to increase the focus of the agreement on protecting habitats from the adverse impacts of fishing activities and to reflect concepts from the FAO International Guidelines on the Management of Deep Sea Fisheries on the High Seas. *See www.southpacificrfmo.org* for the FAO guidelines, which were adopted on August 29, 2008.

(7) Whales

The International Whaling Commission ("IWC") held its 60th annual meeting in Santiago, Chile, June 23–27, 2008. *See www.iwcoffice.org/meetings/meeting2008.htm*. At the meeting, one commissioner and several nongovernmental organizations (acting as observers) raised concerns over a September 8, 2007, incident in which several members of the Makah tribe in Washington State illegally shot and killed a gray whale. *See Digest 2007* at 722–24. The IWC recognizes the Makah tribe as an aboriginal whaling community, and the United States and the Russian Federation share an approved catch limit for gray whales for their respective aboriginal communities.

The U.S. delegation explained that in 2007, members of the Makah tribe in Washington State had killed a gray whale in violation of U.S. law. Although the IWC had established a catch limit for 2007, and the whale take did not exceed that catch limit, the tribe had not been granted a permit under U.S. law to take any whales because of continuing review for compliance with the Endangered Species Act, 16 U.S.C. §§ 1531–1544.

The U.S. delegation also stated that the United States reported the incident to the IWC as a violation of domestic law, but did not report it as an infraction or violation of the International Convention for the Regulation of Whaling ("ICRW"), as several nongovernmental organizations had encouraged the United States to do. The United States took the position that the incident did not represent an infraction or violation of the ICRW because paragraph 13(a)(5) of the Schedule to the ICRW requires that "[a]ll aboriginal whaling shall be conducted under national legislation that accords with this paragraph." By its terms, the Schedule does not make domestic legislation part of the ICRW treaty regime. Thus, the United States stated that a violation of domestic law was not a violation of the treaty, and compliance with domestic law was not subject to review by the IWC. The U.S. delegation noted that the U.S. interpretation

was supported by general international law principles recognizing the separate nature of legal regimes in the international and domestic planes.

e. Land-based sources and activities, Wider Caribbean Region

On September 25, 2008, the Senate gave its advice and consent to ratification of the Protocol Concerning Pollution from Land-Based Sources and Activities ("Protocol") to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, with Annexes, done at Oranjestad, Aruba, on October 6, 1999 ("Convention") (S. Treaty Doc. No. 110-1). 154 Cong. Rec. S9555 (2008).* The resolution of advice and consent contained two declarations. The first, to be included in the instrument of ratification, was the declaration specifically requested by the executive branch:

> In accordance with Article XVIII, the United States of America declares that, with respect to the United States of America, any new annexes to the Protocol shall enter into force only upon the deposit of its instrument of ratification, acceptance, approval or accession with respect thereto.

The second, which was not to be included in the instrument of ratification, stated that the Convention "is not self-executing."

The report on the Convention by the Senate Committee on Foreign Relations, S. Rep. No. 110-21, at 7–8 (2008), noted that in the Committee's view, the first two annexes to the Convention "are largely technical and procedural in nature. Nevertheless, the committee expects the executive branch to consult with the committee in a timely manner regarding proposed amendments to either Annex 1 or 2 in order to

* Editor's note: The United States deposited its instrument of ratification on February 12, 2009.

determine whether the advice and consent of the Senate is necessary." The Committee also noted its belief that any amendment to Annex 3, or proposals to add an additional annex to the Protocol, would likely require the advice and consent of the Senate.

3. Other Conservation Issues

a. Transboundary aquifers

On May 7, 2008, the United States submitted comments to the UN Secretary-General concerning the International Law Commission's ("ILC" or "Commission") draft articles on the law of transboundary aquifers. The United States provided its views in response to a request from the Secretary-General, dated November 26, 2006. The U.S. comments expressed a strong preference for "context-specific, regional and local arrangements as the best way to address pressures on transboundary groundwaters, rather than a global framework treaty" and recommended that the draft articles be recast as non-binding principles. The full text of the U.S. submission is set forth below and is available at *www.state.gov/s/l/c8183.htm*. The ILC's draft articles are available at *http://untreaty.un.org/ilc/reports/2008/2008report.htm*.

The United States believes that the Commission's work on transboundary aquifers constitutes an important advance in providing guidance for the reasonable use and protection of underground aquifers, which are playing an increasingly important role as water sources for human populations. The current absence of guidance to states struggling to cope with pressures on transboundary aquifers should be addressed and the Commission's efforts to develop a set of flexible tools for using and protecting these aquifers can be a very useful contribution for such states. In its work to date, the Commission has struck a reasonable balance between the scope of coverage and extent of proposed obligations. Namely, the draft encompasses a wide scope—addressing activities, wherever located,

that "have or are likely to have an impact" on transboundary aquifers—in order to protect aquifer systems, but is careful not to overstate the proposed obligations of Parties to protect aquifers to the detriment of other important activities. In short, the Commission has made very good progress on a complex and important matter.

The United States continues to strongly prefer context-specific, regional and local arrangements as the best way to address pressures on transboundary groundwaters, rather than a global framework treaty. Although the draft articles may have been drafted with a framework convention in mind, the United States supports recasting such articles as recommendatory, non-binding principles—as was done in the case of liability for transboundary harm. There still is much to learn about transboundary aquifers in general, and specific aquifer conditions and state practice vary widely. Numerous factors might appropriately be taken into account in any specific negotiation, such as hydrological characteristics of the aquifer at issue; present uses and expectations regarding future uses; climate conditions and expectations; and economic, social and cultural considerations. Thus, groundwater arrangements are best handled by regional or local action taking into account the political, social, economic and other factors affecting each unique situation. In addition, the current draft articles go beyond current law and practice. They contain a set of obligations—including procedures for data exchange, monitoring, resource management and technical cooperation—that clearly go well beyond the obligations of states, and so would not be suitable as a declaration of what customary law is or even a reasonable progressive development of that law and should be changed. Recasting such articles as recommendatory, non-binding principles, therefore, would be consistent with the general character of much of the substance of the text, but would require that the language be revised to remove mandatory language and statements of obligation.

While the United States is not convinced that a global treaty is necessary, we recognize that many states have expressed an interest in such a convention. If the Commission continues in this direction, despite our reservations, there are a number of important

issues that we believe would need to be addressed. Such issues include: (1) the relationship between a framework convention and other bilateral or regional arrangements, and (2) the role of non-aquifer states-party.

The first set of issues deals with the relationship between a convention and other agreements that affect management and protection of transboundary aquifers. A number of other agreements already have been concluded, such as the agreements between the United States and its neighbors for the management of their boundary waters. As the Commission considers these articles further, it should ensure that parties to a framework convention have the option to conclude agreements with other aquifer states that may diverge in substance from a framework convention. Aquifer states are in the best position to judge their local situation, to weigh competing considerations and needs with respect to particular aquifers, and to manage their common aquifers as they deem best, and they should not be inhibited from doing so. Thus, the Commission should be careful not to adopt provisions that would appear to supersede existing bilateral or regional arrangements or to limit the flexibility of states in entering into such arrangements.

In addition, although Article 19 encourages aquifer states to enter bilateral and regional agreements and arrangements to manage common aquifers, it also prohibits aquifer states from entering into an agreement or arrangement regarding a particular aquifer or aquifer system that would adversely affect, to a significant extent, the utilization, by one or more aquifer states, of the water in that aquifer or aquifer system without their express consent. While the commentary states that this prohibition is not meant to give such other aquifer states a veto over contracting states, the effect of its plain language arguably empowers a non-participating aquifer state to thwart the conclusion of an agreement or exact unreasonable concessions from negotiating states by withholding its express consent.

The United States recognizes the importance of involving all relevant aquifer states in any agreement affecting a transboundary aquifer. Nevertheless, the obligation to seek the express consent of the aquifer states that would be significantly adversely affected, but that are not participating in the negotiation of that agreement,

may impose unnecessary and unreasonable constraints on negotiating aquifer states. States-Party, whether acting alone or in concert, still would be bound to utilize the relevant transboundary aquifer in an equitable and reasonable manner (Article 4), and avoid causing significant harm to other aquifer states (Article 6), among other obligations. Making the conclusion of such an agreement also dependent upon the express consent of other aquifer states, therefore, seems unnecessary, as any effort to conclude an agreement would be circumscribed by the above-mentioned provisions, and may be unreasonable to the extent that it gives such other states undue influence over the separate negotiations. Rather, we recommend that states be required to consult other interested aquifer states and invite such states, where appropriate, to participate in the agreement or arrangement. Such an obligation ensures that all aquifer states are made aware of the agreement and have a reasonable opportunity to participate in its development, without placing unduly burdensome restrictions on a subset of aquifer states interested in concluding a particular agreement or arrangement.

A second set of issues concerns states-party that do not share transboundary aquifers. The current draft articles contemplate that non-aquifer states will become party and will have obligations with respect to activities that might affect aquifer states. Certain articles impose obligations on non-aquifer states-party, including: Article 10 concerning states in which recharge or discharge zones are located; Article 14 concerning activities of states that may affect transboundary aquifers; Article 15 concerning technical cooperation with developing states; and Article 16 concerning emergency situations that might affect a transboundary aquifer. These articles recognize that aquifers are vulnerable to pollution and other damage from sources outside the immediate circle of aquifer states. However, the articles on cooperation, information exchange, protection of ecosystems, pollution control and management do not apply to non-aquifer states. The U.S. recommends further consideration as to whether non-aquifer states-party should be integrated in some way in these latter provisions. For instance, Article 11 requires aquifer states-party, where appropriate, to prevent, reduce and control pollution of their transboundary aquifer

system that may cause significant harm to aquifer states-party. However, it may be worth considering whether this obligation should be expanded to require protection against pollution that may cause significant harm to non-aquifer states-party as well, given that non-aquifer states-party already would be obligated pursuant to Article 10 to cooperate with aquifer states-party to protect the aquifer or aquifer system.

Finally, if the Commission were to develop a framework convention, it would be necessary to add final clauses as well as ensure appropriate terminology throughout the text. In particular, the current draft articles only use the terms "aquifer state" or "state" throughout the text. However, a convention should use terms such as "aquifer Party" or "state-Party" instead to avoid any confusion as to the breadth of the obligations in the convention.

On October 29, 2008, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixtieth session. Excerpts below provide U.S. views on the ILC's recommendation that the General Assembly: (1) take note of the draft articles on the law of transboundary acquifers; (2) recommend that states make appropriate bilateral or regional arrangements for managing their transboundary aquifers, based on the ILC's draft articles; and (3) consider, at a later stage, elaborating a convention based on the draft articles. The full text of Mr. Simonoff's statement is available at *www.state.gov/s/l/c8183.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2008/2008report.htm*.

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We believe the Commission's recommendation to the General Assembly is a prudent compromise for future action. We continue to think context-specific arrangements are the best way to address

pressures on transboundary groundwaters, as there is still much to learn about transboundary aquifers in general, and specific aquifer conditions and State practice *vary widely*. The draft articles also clearly go beyond current law and State practice. For those reasons, the United States had supported recasting such articles as recommendatory, non-binding principles—as was done in the case of liability for transboundary harm—for use in such specific contexts.

Nevertheless, we think that the Commission's first recommendation—to urge states to use the draft articles in context-specific bilateral and regional arrangements—is a helpful alternative approach. While the draft articles go beyond current law and State practice and, therefore, do not reflect customary international law, we believe that they still can provide helpful guidance to states seeking to effectively manage their transboundary aquifers. As a result, the United States echoes the call for concerned states to look to the draft articles for such guidance.

Regarding the later elaboration of a convention, we continue to believe that another global treaty like the 1997 Convention seems unlikely to garner much support or to make much difference in State practice. We therefore have reservations about the value of further discussing the possibility of a treaty within the Commission or the General Assembly.

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b. Forest conservation

On October 20, 2008, the United States and Peru entered into an agreement to protect Peru's tropical forests, financed by relief from debt owed to the United States. A media note issued by the Department of the State is excerpted below and available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/111051.htm*.

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This agreement with Peru was made possible by the Tropical Forest Conservation Act (TFCA) of 1998. It will complement an existing TFCA debt-for-nature program in Peru dating from 2002, a 1997 debt swap under the Enterprise for the Americas Initiative, and the United States–Peru Trade Promotion Agreement, which includes a number of forest protection provisions. With this agreement, Peru will be the largest beneficiary under the Tropical Forest Conservation Act, with more than $35 million generated for conservation.

. . . Funds generated by the debt-for-nature program will help Peru protect tropical rainforests of the southwestern Amazon Basin and dry forests of the central Andes. These areas are home to dense concentrations of endemic birds such as the Andean Condor and Andean Parakeet; primates including the Peruvian Yellow-tailed Woolly Monkey and Howler Monkey; other mammals such as the Jaguar, Amazonian Manatee, Giant Otter, Spectacled Bear and Amazon River Dolphin; as well as many unique plants. Rivers supplying water to downstream settlements originate in many of these forests, and people living in and around the forests depend on them for their livelihood and survival.

The new Peru agreement marks the 14th Tropical Forest Conservation Act pact, following agreements with Bangladesh, Belize, Botswana, Colombia, Costa Rica, El Salvador, Guatemala, Jamaica, Panama (two agreements), Paraguay and the Philippines, as well as an earlier agreement with Peru. These debt-for-nature programs will together generate more than $188 million to protect tropical forests.

c. Agreement on the Conservation of Albatrosses and Petrels, with Annexes

On September 26, 2008, President Bush transmitted to the Senate for its advice and consent to ratification the Agreement on the Conservation of Albatrosses and Petrels, with Annexes ("Agreement"). The Agreement, which was done at Canberra on June 19, 2001, entered into force on February 1, 2004. As the Department of State report, submitted to the President

by Secretary of State Condoleezza Rice on August 22, 2008, and included in S. Treaty Doc. No. 110-22, stated:

> The parties to the Agreement commit to take conservation measures to achieve the primary objective of the Agreement, which is to achieve and maintain a favorable conservation status for albatrosses and petrels. The Agreement also facilitates research, information exchange, technology transfer, and capacity building among the Parties and through regional fisheries management organizations.

Excerpts follow from the Department of State report, discussing (1) an understanding concerning the applicability of the Agreement to sovereign immune vessels and aircraft that the executive branch proposed for inclusion in the U.S. instrument of ratification, and (2) the executive branch's interpretation of a requirement for parties to the Agreement to prohibit the use of, and trade in, albatrosses and petrels or their eggs. *See* Chapter 4.A.2. for discussion of the executive branch's assertion that the Agreement is non-self-executing and Chapter 4.C.3. for discussion of the declaration proposed by the executive branch to clarify the status of the United States with respect to the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, June 23, 1979.

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Article III sets forth a series of actions that the Parties, individually and together, are to take in furtherance of the obligation to take measures to achieve and maintain a favorable conservation status for albatross and petrels.

Article III also requires a Party to prohibit the deliberate taking of, or deliberate harmful interference with, albatrosses and petrels, their eggs, or their breeding sites.

Article III permits a Party to grant an exemption to these prohibitions, but only if there is no other satisfactory course of

action and the exemption is made for one of four enumerated purposes. A Party granting such an exemption is to submit full details of the exemption to the Secretariat as soon as possible.

The Agreement does not apply to sovereign immune vessels and aircraft, consistent with customary international law. Because the Agreement does not reflect this exclusion, it is recommended that the United States include the following understanding in its instrument of ratification:

> It is the understanding of the United States of America that the Agreement does not apply to vessels and aircraft that are entitled to sovereign immunity under international law, in particular to any warship, naval auxiliary, and other vessels or aircraft owned or operated by a State and used, for the time being, only on government, noncommercial service. However, it is also the understanding of the United States of America that each Party 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 Agreement.

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Annex 2 contains the Action Plan. The Action Plan includes detailed provisions on species conservation, habitat conservation and restoration, management of human activities, research and monitoring, collation of information by the Advisory Committee, education and public awareness, and implementation.

SECTION 1

Section 1 of the Action Plan contains provisions on species conservation.

Section 1 provides that, in addition to actions specified in Article III and without prejudice to any obligations they may have under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Parties are to prohibit the use of, and trade in, albatrosses and petrels or their eggs, or any readily recognizable parts or derivatives thereof. The

Administration understands this provision to apply both to international use and trade as well as to use and trade within the United States and its territories. Section 1 also provides that Parties may grant exemptions to this prohibition according to the exemption provisions set forth in Article III(3) of the Agreement.

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B. OTHER TRANSNATIONAL SCIENTIFIC ISSUES

Plant Genetic Resources

On July 7, 2008, President Bush transmitted the Treaty on Plant Genetic Resources for Food and Agriculture, adopted by the Food and Agriculture Organization on November 3, 2001, to the Senate for advice and consent to ratification. S. Treaty Doc. No. 110-19 (2008). The United States signed the treaty on November 1, 2002. *See also Digest 2002* at 810–11. The treaty entered into force internationally on June 2004. In his letter transmitting the treaty to the Senate, President Bush described its significance as excerpted below.

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The centerpiece of the Treaty is the establishment of a multilateral system under which a party provides access to other parties, upon request, to listed plant genetic resources held in national genebanks. These resources are to be used solely for purposes of research, breeding, and training in agriculture. A recipient of such a resource must then share the benefits from its use, e.g., a recipient who commercializes a product containing an accessed plant genetic resource must generally pay a percentage of any gross sales into a trust account.

Transfers under the multilateral system are to be accompanied by a standard material transfer agreement, the current version of which was concluded in June 2006.

Provision of plant genetic resources from U.S. genebanks is fully consistent with the Department of Agriculture's long-standing

general practice of providing access to such plant genetic resources upon request. Ratification of the Treaty will provide U.S. agricultural interests with similar access to other parties' genebanks, thus helping U.S. farmers and researchers sustain and improve their crops and promote food security.

The Treaty may be implemented under existing U.S. authorities.

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Excerpts follow from the State Department report, which was transmitted in S. Treaty Doc. No. 110-19.

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The Treaty establishes a system of access to plant genetic resources held in a Party's national gene banks with concomitant sharing of benefits by the recipient . . . . It also commits Parties to promote the conservation and sustainable use of plant genetic resources integral to global food security. Throughout the complex negotiations, the United States was firmly committed to creating a system that promotes U.S. and global food security and protects U.S. access to genetic resources held outside of our borders.

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Article-by-Article analysis

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Article 10 recognizes the sovereign rights of States over their PGRFA [plant genetic resources for food and agriculture], including the right to determine access. In exercising such rights, the Parties have elected to create a Multilateral System of access and benefit-sharing, the centerpiece of the Treaty, with the twin purposes of facilitating access to PGRFA and sharing, in a fair and equitable way, the benefits arising from use of PGRFA.

* * * *

Under [Article 11], Parties agree to take appropriate measures to encourage natural and legal persons within their jurisdiction who hold listed PGRFA to include it in the Multilateral System. . . .

The United States currently encourages private entities to deposit germplasm in the National Plant Germplasm System pursuant to authority derived from 7 U.S.C. § 5841.

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Article 12 . . . creates the core obligation of the Treaty: the obligation to provide to other Parties facilitated access to covered PGRFA (*i.e.*, on the Annex I list and under a Party's management and control). Such access is also to be provided to legal and natural persons within a Party's jurisdiction, subject to a decision by the Governing Body providing otherwise as referenced in Article 11. The Multilateral System does not cover transfers of domestic PGRFA to domestic entities (*e.g.*, from USDA to a legal or natural person under the jurisdiction of the United States), unless the PGRFA was obtained from the Multilateral System.

Article 12 describes the conditions under which a Party takes on an obligation to provide access. Significantly, Parties are only obliged to provide access to PGRFA under the Multilateral System when the PGRFA will be used solely for the purpose of research, breeding, and training for food and agriculture (not chemical, pharmaceutical, or other non-food/feed industrial uses). . . .

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The obligations in Article 12 regarding provision of access would be implemented under existing authorities. . . . Should a situation arise where U.S. provision of PGRFA to certain Parties/persons would require a license under U.S. law (which is unlikely in light of, *inter alia*, the Treaty's requirements, the nature and scope of the PGRFA list and applicable Security Council resolutions), it would be addressed on a case-by-case basis.

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Cross References

Tacit amendment procedures in multilateral treaties, **Chapters 4.B., 11.F.4.b., and 14.D.**
U.S.–EU Air Transport Agreement, **Chapter 11.A.1.a.**
World Trade Organization, **Chapter 11.C.**

Chapter 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

1. Cambodia

In 2008 the United States took steps to continue the protection of the cultural heritage of Cambodia by extending import restrictions on Cambodian archaeological material for an additional five years. This action was based on determinations by the Department of State's Bureau of Educational and Cultural Affairs, finding that the cultural heritage of Cambodia "continue[d] to be in jeopardy from pillage of archaeological materials." The United States acted pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("Convention"), which the United States ratified in 1983 and implements through the Convention on Cultural Property Implementation Act. *See* Pub. L. No. 97-446, 96 Stat. 2329, 19 U.S.C. §§ 2601–2613. If the requirements of 19 U.S.C. § 2602 are satisfied, the President has the authority to enter into agreements to apply import restrictions for up to five years on archaeological or ethnological material of a nation which has requested such protections and which has ratified, accepted, or acceded to the Convention. The President may also impose import restrictions on cultural property in an emergency situation pursuant to 19 U.S.C. §§ 2603 and 2604.

Effective September 19, 2008, the United States and Cambodia extended and amended their existing Memorandum of Understanding ("MOU") concerning the imposition of import restrictions on certain archaeological objects from Cambodia. 73 Fed. Reg. 54,309 (Sept. 19, 2008); *see also http://2001-2009.state.gov/r/pa/prs/ps/2008/sept/109987.htm*.

The original MOU, entered into in 2003, concerned the imposition of U.S. import restrictions on certain stone, metal, and ceramic archaeological materials. It also extended and expanded on emergency protections on stone sculpture and architectural elements from Cambodia that the United States had imposed in 1999. *See* 68 Fed. Reg. 55,000 (Sept. 22, 2003); 64 Fed. Reg. 67,479 (Dec. 2, 1999); *see also Digest 2003* at 821, 823–25. Under the amended MOU, the United States will continue the existing import restrictions and provide additional import protections to certain Cambodian objects from the Bronze and Iron Ages, as well as to certain glass and bone artifacts, through September 19, 2013.

To reflect the expansion of coverage in 2008, the MOU was renamed the "Memorandum of Understanding between the Government of the United States of America and the Government of the Kingdom of Cambodia Concerning the Imposition of Import Restrictions on Archaeological Material from Cambodia from the Bronze Age through the Khmer Era." The text of the amended MOU and related documents are available at *http://culturalheritage.state.gov/cbfact.html*.

2. Iraq

In 2008 the United States also acted to protect Iraq's cultural heritage. Effective April 30, 2008, the Department of Homeland Security, U.S. Customs and Border Protection ("CBP"), and the Department of the Treasury issued a final rule amending CBP regulations to reflect the imposition of import restrictions on archaeological and ethnological material of Iraq. 73 Fed. Reg. 23,334 (Apr. 30, 2008); *see also*

http://2001-2009.state.gov/r/pa/prs/ps/2008/apr/104224.htm. The "Designated List of Archeological and Ethnological Material," contained in the Federal Register publication, described the types of articles covered by the import restrictions (ceramic; stone; metal; glass; ivory, bone, and shell; stucco; painting; textiles; paper, parchment, and leather; and wood from the Neolithic through the Abbasid eras). Excerpts below from the Federal Register publication explain the action and the applicable legal framework.

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U.N. Security Council Resolution 1483

U.N. Security Council Resolution 1483, adopted on May 23, 2003, obligates all member nations, regardless of whether they are parties to the 1970 UNESCO Convention, to assist in the protection of Iraq's cultural heritage.

Paragraph 7 of the Resolution states that "all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph;".

Emergency Protection for Iraqi Cultural Antiquities Act of 2004

The Emergency Protection for Iraqi Cultural Antiquities Act of 2004 (title III of Pub. L. 108-429) ("the Act") authorizes the President to exercise the authority of the President under section 304 of the Convention on Cultural Property Implementation Act

(19 U.S.C. 2603) with respect to any archaeological or ethnological material of Iraq without regard to whether Iraq is a State Party under the Convention on Cultural Property Implementation Act, and without the need for a formal request from the government of Iraq.

Under 19 U.S.C. 2603, if the President determines that an emergency condition applies with respect to any archaeological or ethnological material of any State Party, the President may apply the import restrictions set forth in 19 U.S.C. 2606 with respect to such material.

* * * *

Pursuant to section 304 of the Convention on Cultural Property Implementation Act (19 U.S.C. 2603) and section 3002 of the Act, the Acting Assistant Secretary of State for Educational and Cultural Affairs, United States Department of State, concluding that an emergency condition applies with respect to archaeological and ethnological materials of Iraq, made the necessary determination on July 2, 2007, to impose import restrictions on such materials of Iraq. Accordingly, CBP is amending 19 CFR part 12 to reflect the imposition of the import restrictions. . . .

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B. IMMUNITY OF ART AND OTHER CULTURAL OBJECTS

In January 2008 the United States filed an *amicus curiae* brief in the U.S. Court of Appeals for the District of Columbia Circuit, in support of the City of Amsterdam's appeal of a district court decision in a case concerning immunity of certain artwork in the United States under the Department of State's Mutual Educational and Cultural Exchange Program. The district court held in 2007 that artworks the City of Amsterdam loaned temporarily to U.S. museums under immunity protection provided pursuant to 22 U.S.C. § 2459 could serve as the basis for jurisdiction under the expropriation exception to the Foreign Sovereign Immunities Act, 28

U.S.C. § 1605(a)(3). *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007); *see Digest 2007* at 742–44. In 2004 and 2005 the United States filed a Statement of Interest and Supplemental Statement of Interest in support of the City of Amsterdam's immunity; *see Digest 2004* at 792–96 and *Digest 2005* at 776–77.

In its 2008 *amicus curiae* brief, the United States stated:

> . . . [T]he district court's ruling misconstrues the scope and language of the "takings" exception in a manner that substantially undermines the purposes of 22 U.S.C. § 2459. . . . [T]his ruling, if affirmed, will discourage foreign states and other lenders from providing their artwork for temporary exhibit in the United States, and will significantly impair the ability of the United States to facilitate cultural exchanges as instruments of foreign policy.

Further excerpts summarizing the U.S. argument are set forth below. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. The D.C. Circuit did not issue an opinion on the matter in 2008 because the parties agreed to settle their dispute out of court.

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* * * *

Congress enacted 22 U.S.C. § 2459 to encourage temporary loans by foreign lenders of objects of "cultural significance" when exhibiting them in the United States is determined by the Executive Branch to be "in the national interest." The statute sought to ensure that exhibits provided immunity protection by the State Department would not form the basis of suit, and the statute has achieved that goal since its enactment in 1965.

When Congress enacted § 2459, attachment of property was generally required to effect process on foreign states, and the district court recognized that, under § 2459, immunized artwork could not be the basis for *in rem* or *quasi in rem* jurisdiction to adjudicate an ownership dispute. . . . When Congress enacted the FSIA in 1976, it created a statutory procedure for making service

on and obtaining *in personam* jurisdiction over foreign states. Those FSIA provisions did not nullify the assurances to foreign lenders that Congress had deemed necessary in enacting § 2459 by making those lenders' artwork the basis for jurisdiction regardless of State Department § 2459 determinations. The district court erred in interpreting the later enactment to vitiate the earlier grant of immunity.

It is particularly anomalous to infer such a result from the FSIA's exception for property "present in the United States in connection with a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(3). Section 2459 instructs the courts to treat certified exhibits as if they are not present in the United States for jurisdictional purposes, and there is no reason to treat them differently for purposes of 28 U.S.C. § 1605(a)(3) when doing so would frustrate the operation of the earlier statute. Moreover, under the FSIA, it is necessary to conclude not only that property is "present" in the United States in connection with a commercial activity, but that the commercial activity has "substantial contact" with the United States. 28 U.S.C. § 1603(e). When artwork has been immunized—placed out of bounds for jurisdictional purposes—under § 2459, a court should not conclude that the requirements of the FSIA have been met.

* * * *

C. PRESERVATION OF AMERICA'S HERITAGE ABROAD

The Commission for the Preservation of America's Heritage Abroad is an independent agency of the U.S. government established in 1985 by § 1303 of Pub. L. No. 99-83, 99 Stat. 190, 16 U.S.C. § 469j. Among other things, the Commission negotiates bilateral agreements with foreign governments to protect and preserve cultural heritage. In 2008 the Commission, together with the Department of State, concluded three such agreements with Montenegro, Georgia, and Italy.

1. Montenegro

On October 16, 2008, the United States and Montenegro signed the Agreement between the Government of the United States of America and the Government of Montenegro on the Protection and Preservation of Certain Cultural Property. The full text of the agreement, excerpted below, and accompanying documents are available at *www.heritageabroad.gov/montenegro.html*.

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* * * *

Article 1

Each Party will take appropriate steps to protect and preserve the cultural heritage of all national, religious, or ethnic groups . . . that resided in its territory, including victims of genocide during the Second World War.

* * * *

Article 2

The Parties shall cooperate in identifying a list of appropriate items, which fall within the scope of Article 1, particularly those which are in danger of deterioration or destruction.

Article 3

Each Party will ensure that there is no discrimination, in form or in fact, against the cultural heritage of any group referred to in Article 1 or against the nationals of the other Party in the scope and application of its laws and regulations concerning:

(a) the protection and preservation of their cultural heritage;
(b) the right to contribute to the protection and preservation of their cultural heritage; and
(c) public access thereto.

Article 4

In cases where a group concerned, referred to in Article 1, is unable, on its own, to ensure adequate protection and preservation

of its cultural heritage, each Party shall take special steps to ensure such protection and preservation of cultural heritage within its territory and shall invite the cooperation of the other Party and its nationals where assistance is required for this purpose.

Article 5

Properties of cultural heritage, referred to in Article 4, that are of special significance shall be designated in a list of items of cultural heritage. . . .

All properties of cultural heritage so designated shall be protected, preserved, and marked in the manner stipulated by valid legal internal regulations of either Party. Public access thereto shall be ensured.

* * * *

Article 7

Nothing in this Agreement shall be construed to relieve either Party of its obligations under the 1972 Convention for the Protection of the World Cultural and Natural Heritage or any other agreement for the protection of cultural heritage.

* * * *

2. Georgia

On July 28, 2008, the United States and Georgia signed the Agreement between the Government of the United States of America and the Government of Georgia on the Protection and Preservation of Certain Cultural Properties. The full text of the agreement, which is substantially similar to the October 2008 agreement with Montenegro described in C.1. *supra*, is available at *www.heritageabroad.gov/agreements/doc/georgia.pdf*.

3. Italy

On December 18, 2008, the United States and Italy signed the Agreement between the Government of the United States

of America and the Government of the Italian Republic Concerning the Protection and Preservation of Places of Commemoration. The full text of the agreement is available at *www.heritageabroad.gov/agreements/doc/italy.pdf*.

D. UNESCO

Anti-Doping Convention

On February 6, 2008, President George W. Bush transmitted to the Senate for advice and consent to ratification the International Convention against Doping in Sport ("Anti-Doping Convention"). S. Treaty Doc. No. 110-14 (2008). The United Nations Educational, Scientific, and Cultural Organization ("UNESCO") adopted the Anti-Doping Convention on October 19, 2005, and the treaty entered into force on February 1, 2007. UNESCO subsequently revised Annex I to the Anti-Doping Convention, listing prohibited substances, and the revisions entered into force on January 1, 2008. Executive Communication 6772, available at S. Rep. No. 110-11, at 25–64 (2008), transmitted the amended version of Annex I to the Senate to consider.

Excerpts follow from the Department of State's report, which was included in the President's transmission; *see Digest 2005* at 781–84 for additional background.

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* * * *

Overview

The Convention builds on longstanding efforts of the international community, supported by the United States, to develop a common approach and standards for equitable anti-doping control and enforcement for international competition. These efforts led to the creation and adoption by the World Anti-Doping Agency ("WADA") of the [World Anti-Doping] Code in 2003. The Convention was developed to build on these efforts and support them by providing a common instrument that countries could join

to demonstrate their commitment to the Code as the basis for national anti-doping control and policy. . . .

The terms of the Convention recognize that, notwithstanding the need to provide a common framework for anti-doping controls, regulation of sport is a matter of national law and policy. The Convention is not structured to secure changes to national law or regulation, but rather to secure commitments by parties to promote international collaboration, research, education, and their own national efforts and awareness of anti-doping control efforts and of the Code. The Convention was developed for application to competitions regulated by national and international anti-doping organizations pursuant to the World Anti-Doping Code. The convention does not apply to professional sports organizations or other competitions outside the jurisdiction of the World Anti-Doping Code. There are no obligations in the Convention that require any changes to existing United States law or policy and nothing in the Convention which, upon ratification, would require implementing legislation for the United States to meet its obligations.

The Convention consists of its main text, two annexes (The Prohibited List International Standard and Standards for Granting Therapeutic Use Exemptions), and three appendices (the World Anti-Doping Code, International Standards for Laboratories, and International Standards for Testing). . . .

Article-by-Article Analysis

* * * *

Article 3—Means to achieve the purpose of the Convention . . . . Under Subsection (a), the Parties undertake to adopt "appropriate" measures at the national and international levels that are consistent with the principles of the Code. This provision does not create any obligation on Parties to take any actions beyond those set out elsewhere in the Convention, but it notes that actions taken by Parties to advance the purposes of the Convention should be consistent with the principles of the Code. Article 4(2) of the Convention, however, notes that the Code itself does not create

any binding obligations. The United States supports the principles of the Code.

* * * *

Article 4—Relationship of the Convention to the Code . . . confirms that the Code and the other appendices to the Convention are included for information purposes and do not create any binding obligations under the Convention. Notwithstanding this status, under this article Parties commit to the principles of the Code as the basis for measures under Article 5 of the Convention. United States anti-doping policy is consistent with the principles of the Code. This provision also makes it clear that nothing in the Convention restricts a Party from adopting additional measures that are complementary to the Code. This provision also states that, unlike the appendices, the two annexes to the Convention . . . are integral parts of the Convention.

* * * *

Article 8—Restricting the availability and use in sport of prohibited substances and methods . . . imposes general obligations that the United States can implement with no changes in law or policy. Paragraph 1 requires each Party to adopt measures where appropriate to restrict the availability of prohibited substances and methods in order to restrict their use in sport by athletes, unless their use is based on a therapeutic use exemption. Many substances on WADA's Prohibited List are controlled substances whose production, movement, importation, distribution, and sale are controlled by the Federal Controlled Substances Act. . . .

* * * *

Article 16—International cooperation in doping control . . . .

Paragraphs (a), (d), (e), (f), and (g) obligate Parties to facilitate, subject to relevant host countries' regulations, the work of the WADA and anti-doping organizations . . . in a manner consistent with the Code . . . . The United States currently facilitates such activities through its support of the activities of the USADA [U.S. Anti-Doping Agency]. . . .

* * * *

On May 22, 2008, Department of State Principal Deputy Legal Adviser Joan Donoghue testified in support of the treaty. Ms. Donoghue's written statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

This Convention builds on the longstanding efforts of the international community to jointly develop an equitable approach to anti-doping control and enforcement measures in international competition. These efforts resulted in the creation of the World Anti-Doping Agency ("WADA") in 1999, and, with the strong support of the United States, WADA's development of the World Anti-Doping Code in 2003.

* * * *

. . . The final text of this Convention accomplishes every negotiating goal that the United States hoped to achieve, and it avoids the possible pitfalls that the U.S. negotiators had identified. Additionally, by embodying US undertakings in an advice and consent treaty, ratification of this Convention will demonstrate broad based support by both the legislative and executive branches of the federal government for the national and international application of the principles of the World Anti-Doping Code.

* * * *

The Convention also maintains the present structure and administration of WADA. There was some concern at the negotiations that the Convention would enable UNESCO or other outside influences to have a role in WADA's funding and decision-making processes. However, the final text ensures that WADA maintains its present ability to equitably address and oversee international anti-doping issues. UNESCO will have no role or oversight capacity in WADA's structure or functions. The Convention also does not change the relationship between WADA and individual national anti-doping agencies.

Finally, the Convention places no additional funding requirements on the United States. . . .

* * * *

The Senate provided its advice and consent to ratification of the Anti-Doping Convention on July 21, 2008. 154 Cong. Rec. S6980 (2008). The resolution of advice and consent contained one understanding, one declaration, and one condition. The understanding and declaration, which were included in the U.S. instrument of ratification, stated:

> It is the understanding of the United States of America that nothing in this Convention obligates the United States to provide funding to the World Anti-Doping Agency. . . .
>
> Pursuant to Article 2(4), which defines "Athlete" for purposes of doping control as "any person who participates in sport at the international or national level as defined by each national anti-doping organization and accepted by States Parties and any additional person who participates in a sport or event at a lower level accepted by States Parties", the United States of America declares that "Athlete" for purposes of doping control means any athlete determined by the U.S. Anti-Doping Agency to be subject to or to have accepted the World Anti-Doping Code.

The condition required the Secretary of State, "[n]ot later than 60 days after an amendment to either of the Annexes that was concluded in accordance with the specific amendment procedure in Article 34 enters into force for the United States," to submit the amended Annex to the Senate Foreign Relations and Judiciary committees. The report on the Anti-Doping Convention by the Senate Committee on Foreign Relations, S. Rep. No. 110-11, at 12 (2008), explained that the Committee had recommended that condition but considered that "an amendment to the Annexes done in accordance with Article 34 does not require the advice and consent of the Senate. . . ." As the report noted:

> . . . Article 34 of the Convention provides a fast-track procedure by which the Annexes to the Convention can be amended and, unless two-thirds of the States Parties to the Convention express their objection to a particular

amendment proposed pursuant to this procedure, that amendment will enter into force for a State Party even absent its explicit consent if that State Party has not notified the Director-General that it does not accept the amendment at issue.

The United States deposited its instrument of ratification on August 25, 2008, and the Anti-Doping Convention entered into force for the United States on October 1, 2008.

Cross References

Tacit amendment procedures in multilateral treaties, **Chapters 4.B., 11.F.4.b., 13.A.2.b., and 13.A.2.e.**

Exceptions to foreign sovereign immunity under the Foreign Sovereign Immunities Act, **Chapter 10.A.1.a.**

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, **Chapter 18.A.3.a.**

Chapter 15

Private International Law

A. COMMERCIAL LAW

1. Carriage of Goods by Sea Convention

On July 3, 2008, the UN Commission on International Trade Law ("UNCITRAL") approved the draft United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which will modernize and harmonize international law concerning the carriage of goods by sea. The United States, with broad input and participation from all sectors of U.S. industry, participated actively in negotiating the draft convention, which achieved key U.S. objectives.

On October 20, 2008, the U.S. representative expressed U.S. support for the draft convention during the UN General Assembly Sixth (Legal) Committee's debate on the work of UNCITRAL, as excerpted below. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*.

The General Assembly adopted the convention without a vote on December 22, 2008. U.N. Doc. A/RES/63/122. The convention is available at *www.uncitral.org/uncitral/en/uncitral_texts/transport_goods.html*.

* * * *

The United States strongly supports this draft Convention. It will bring about a much-needed modernization and harmonization of the law in this field. In the United States, the governing legal regime is the 1936 Carriage of Goods by Sea Act (COGSA), which is (for the most part) simply the domestic enactment of the 1924 Hague Rules. Updating and modernizing are particularly necessary when a law drafted over 80 years ago still regulates an industry that has changed remarkably in the meantime. For example, the draftsmen of the early 1920s could not anticipate the container revolution or electronic commerce.

Prior to the commencement of this negotiation six years ago, U.S. shipper and carrier interests were prepared to join together to seek new U.S. legislation to replace the 1936 COGSA. They realized, however, that a new global regime would be preferable to domestic U.S. legislation. They therefore agreed to defer seeking new U.S. legislation and to support U.S. government participation in the UNCITRAL negotiation of a new carriage of goods convention, so long as that process was successfully concluded within a reasonable period of time. They announced that they would support a new international regime so long as it was consistent with their key objectives. Those objectives included:

1. replacement of the current "port-to-port" scope of application with a modified "door-to-door" scope, so that the same legal regime will govern the entire contractual period of carriage, which in a multimodal shipment will often include inland transportation as well as a sea voyage;
2. inclusion of a two-part rule on jurisdiction and forum selection clauses;
3. inclusion of a provision that allows the parties to certain types of contracts of carriage containing various safeguards to derogate from the terms of the Convention.

The text approved by UNCITRAL achieves all of these objectives. That is not to say that the United States supports each and every one of the Convention's provisions. But we understand that, just as there were certain issues that were key to U.S. support of

the Convention, there were likewise other issues that were key to other countries. We can accept the parts of the Convention that we do not like as part of an overall compromise because we strongly believe that any detriments of the Convention are more than offset by the benefits of greater predictability and uniformity.

We believe that the draft Convention is a major improvement over the current situation, and we hope that it will achieve widespread support. This is a unique opportunity to unify and update maritime law and practice.

United States industry has indicated it supports the Convention. With industry support, we look forward to the signing ceremony in Rotterdam next year, and we will take the necessary steps to begin the ratification process.

2. UNIDROIT Model Law on Leasing

In November 2008 the Joint Session of the International Institute for the Unification of Private Law ("UNIDROIT") General Assembly and the UNIDROIT Committee of Governmental Experts adopted a model law on leasing. The text of the model law is available at *www.unidroit.org/english/documents/2008/study59a/s-59a-17-e.pdf*. The model law builds on the UNIDROIT Convention on International Financial Leasing (Ottawa, May 28, 1988) ("Ottawa Convention"). Nonetheless, the model law differs from the Ottawa Convention in certain important respects.

Under the Ottawa Convention the definition of a financial lease covers loan-like transactions in which the lessor recovers the full cost of the leased item, which are more commonly used by European businesses than others. The model law focuses primarily on leasing in which the payments made under the lease take into account or do not take into account the amortization of the lessor's investment in the leased item. The change in focus brings the model law into conformity with both U.S. law (*i.e.*, Article 2A of the Uniform Commercial Code) and U.S. practice concerning financial leases.

By limiting the liability of the financial lessor for actions taken in the course of performing its duties as lessor and as owner, the model law also provides a different rule than the one contained in the Ottawa Convention. Article 8(1) of the Ottawa Convention precludes liability of the lessor in its capacity as lessor but is silent as to liability based on the lessor's capacity as owner. The rule in the model law recognizes that while the lessor in a financial lease is an owner of the asset, the lessor is essentially a conduit between the supplier and the lessee and is protected from liability because its role is limited to financing the leasing transaction.

The application of the model law is subject to certain limitations. The law provides that large aircraft equipment of the type covered by the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, adopted in Cape Town in 2001 ("Cape Town Convention"), i.e., airframes, aircraft engines, and helicopters of a certain size, is excluded from the sphere of application of the law, unless the lessor, the lessee, and the supplier otherwise agree in writing. This exclusion removes a potential source of conflict between the model law and the Cape Town Convention.

On November 13, 2008, Michael Dennis, Attorney-Adviser, Department of State Office of the Legal Adviser, and head of the U.S. delegation, made a statement to the Joint Session of the UNIDROIT General Assembly and the UNIDROIT Committee of Governmental Experts on the adoption of the model law. Mr. Dennis's statement is excerpted below.

The United States welcomes the adoption of the Model Law. It is an outstanding product . . . that . . . will bring significant benefits to developing countries and countries in transition.

In many emerging economies, the legal infrastructure for leasing is insufficient, and as a result modern forms of leasing finance are virtually unavailable or available only at high cost. This of course sharply limits its use.

The model law can bring about its benefits by incorporating contemporary leasing law into domestic law. This, in turn, will

substantially boost the ability of end users to have available much needed equipment and other goods at a reasonable cost.

We are very pleased that a number of states have already adopted the *elements* of the earlier draft model law in their national legislation and that many other states are considering doing so. We welcome this important result.

3. UNIDROIT Mobile Equipment Convention: Draft Protocol on Space Assets

On November 15, 2008, Harold S. Burman, Attorney-Adviser, Department of State Office of the Legal Adviser, submitted a memorandum to Martin Stanford, Deputy Secretary-General of UNIDROIT, providing U.S. views to the UNIDROIT Governing Council on the draft protocol to the 2001 Cape Town Convention on space assets financing and whether negotiations concerning the draft protocol should resume. Mr. Burman's memorandum, excerpted below, offered U.S. reflections following UNIDROIT's meetings in Berlin in May and October 2008 to discuss the draft protocol. The full text of the memorandum is available at *www.state.gov/s/l/c8183.htm*. For previous U.S. views on the draft protocol, *see Digest 2006* at 931–34 and other annual Digests beginning in 2001.

* * * *

After reviewing the results of the two Berlin meetings, United States views in general remain essentially the same as our previous statements on this protocol. We support conclusion of the Protocol, which may be achievable during 2010, but would support the Protocol itself only if agreement can be reached on provisions that can achieve actual economic and credit enhancement for this field of commerce. The benefits of such a Protocol would be greatest for manufacturers of space equipment and those who acquire space-based services, . . . as well as medium and smaller size space sector commercial operators, which would expand and deepen the long-term growth of that sector. In the space sector established larger operators may have less immediate need of secured finance,

although that need may be different for non-telecommunications uses such as remote sensing and other uses. We consider expansion of the number of space-based commercial sector participant companies to be a policy objective this Protocol can achieve.

The U.S. at the 2008 April meeting of the Legal Subcommittee of the UN Commission on the Peaceful Uses of Outer Space (UNCOPUOS) stated its continued support for concluding this Protocol. Along with a number of states at COPUOS, we have concluded that there are no apparent conflicts between the UN outer space treaty system and the draft UNIDROIT Protocol, and we support retention of a provision that nothing in the Protocol would alter the international obligations of a state party to the UN outer space treaties.

To place our views in context, this would be the third Protocol to the Cape Town Convention of 2004 on international rights in mobile equipment. The first Protocol to the Convention, which the United States has ratified, on rights in aircraft, aircraft engines and helicopters[,] has we believe been an important international success in promoting modern law on secured finance as applied to transnational commerce. . . . A second Protocol was concluded in 2007 on railroad equipment which is expected to come on line by 2010.

The goal for negotiating a third Protocol on space asset financing, primarily at this stage satellites and satellite-based commerce and services, would be to bring to that area of activity the economic benefits of secured financing. This effort entails challenges somewhat greater than encountered for aircraft. The aircraft finance Protocol was able to build upon an already functioning treaty-based area of commerce, i.e. the regulation of commercial air transportation services under the Chicago Convention of 1944 and its progeny, as well the structure provided by the ICAO [International Civil Aviation Organization] as a specialized agency of the United Nations. In addition, there were over forty years of experience in aircraft financing so that the effects of a treaty incorporating market-tested concepts from the Uniform Commercial Code were well understood.

None of these factors apply to the current effort to construct a Protocol on financing space assets. Space-based commercial activities are minimally addressed in the 1967 UN Outer Space Treaty and its related four additional treaties. Some aspects of

telecommunications and satellite commerce are regulated in part by the International Telecommunications Union,* but the ITU treaty-based structure and system for allocation of orbital rights do not pertain directly to and cannot resolve, and therefore cannot enhance, secured financing rights. Furthermore, there is limited experience with secured financing of assets in non-territorial outer space that are for a number of purposes outside of national jurisdiction and for which traditional secured rights may not be effective. Finally, there appear to be policy concerns about the reach of private party financing rights in outer space that have made consensus difficult to reach, in comparison to the agreements reached on commercial airspace.

We have stated previously that for the draft Protocol to be effective, it must enhance the economic advantages of secured finance interests in outer space assets, so that the economic benefits outweigh the higher risk of investing in satellite-based commerce in comparison to commercial air space. Unlike the Aircraft Protocol, there is general agreement amongst space-faring states that transfer of interests in commercial satellites, whether or not to a foreign creditor or operator must remain subject to national licensing, export, and other regulatory regimes including in our case operations and export controls for national security purposes. This necessarily creates greater uncertainty as to the likelihood of realizing enforcement rights in the event of default, so that the need for balancing economic incentives is also greater.

To meet that need the draft Protocol contains provisions on creditor's remedies, including some specific to space assets such as options for placing in escrow command and control data so that an enforcing creditor can, subject to regulatory approvals, assume control. Additional economic enhancements are illustrated by U.S. proposals for protection of income streams from satellite operations pending licensing and export approvals. In addition, the U.S. and others have supported expanding the reach of the Protocol to cover associated rights more commonly covered by international

* Editor's note: Chapter 7.B.1.d. discusses amendments to the Constitution and Convention of the ITU.

project finance so as to make the Protocol more effective economically. A possible disconnect from this objective however may arise from current proposals to impose broad obligations on enforcing creditors to maintain undefined "public services", which may create a[] large enough but unpredictable economic risk so as to fail to achieve the presumed goal of the Protocol, i.e. to realize sufficient predictable benefits from secured rights so as to attract that type of finance for outer space in the first place. The U.S. and like-minded states have emphasized that governments that choose to place public services on commercial satellites, rather than on satellites that they own or control, undertake the risk of nonperformance, and that the Protocol should not be the vehicle to deal with that risk (outside of life-saving and comparable circumstances) if it also seeks to create a climate in which private sector secured finance becomes more available to boost outer space commercial activities.

Enforcement of rights as to aircraft under the aircraft finance Protocol can be taken upon landing of an aircraft and the attendant reach of national law. Enforcement of rights in an operational satellite however usually depend on access to and ability to use ground-station based command and control data (TTC) and in some cases specific facilities, which may raise jurisdictional and other issues that the Protocol will need to address. There remain other issues that have no direct parallel in aircraft finance, among them the issue of whether separate secured interests can be recognized for large-scale "components" such as operating systems within a satellite, and how conflicts between holders of such interests and that of the satellite itself or interests held in other components will be dealt with. New issues have arisen about the enforcement of rights as to one satellite of a satellite group or constellation, and whether space asset salvage and recovery rights should be given any priority for satellite insurers.

Finally, for the Protocol to be able to be implemented, questions must be resolved as to a new space asset finance registry, what types of assets would be covered and how they would be identified with sufficient certainty so as to allow computer-based searches for prior secured interests. To the extent that certainty of location of a satellite is necessary for purposes of enforcement of

secured rights, the registry maintained by the UN Office of Outer Space Affairs (OOSA) would be insufficient, and political consensus is lacking as to authorizing such activity by the UN Secretariat in any event. Some space-faring states have available adequate tracking facilities but use of those for this purpose has not been considered at this stage in the context of these negotiations.

* * * *

B. FAMILY LAW

1. Convention on International Recovery of Child Support and Other Forms of Family Maintenance

On September 8, 2008, President George W. Bush transmitted the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, adopted at The Hague on November 23, 2007, and signed by the United States on that same date, to the Senate for its advice and consent to ratification. S. Treaty Doc. No. 110-21; *see also Digest 2007* at 769–70 and other annual volumes beginning in 2002. Excerpts follow from President Bush's transmittal letter.

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The United States supported the development of the Convention as a means of promoting the establishment and enforcement of child support obligations in cases where the custodial parent and child are in one country and the non-custodial parent is in another. The Convention provides for a comprehensive system of cooperation between the child support authorities of contracting states, establishes procedures for the recognition and enforcement of foreign child support decisions, and requires effective measures for the enforcement of maintenance decisions. It is estimated that there are over 15 million child support cases in the United States and that an increasing number of these cases will involve parties who live in different nations. United States courts already enforce

foreign child support orders, while many countries do not do so in the absence of a treaty obligation. Ratification of the Convention will thus mean that more U.S. children will receive the financial support they need from both their parents.

The Department of State and the Department of Health and Human Services, which leads the Federal child support program, support the early ratification of this Convention. The American Bar Association and the National Child Support Enforcement Association have also expressed support for the Convention. . . .

The Convention requires only two contracting states for entry into force. No state has yet ratified the Convention. Early U.S. ratification would therefore likely hasten the Convention's entry into force. This would be in the interests of U.S. families, as it would enable them to receive child support owed by debtors abroad more quickly and reliably. I therefore recommend that the Senate give prompt and favorable consideration to the Convention and give its advice and consent to ratification, subject to the reservations and declaration described in the accompanying report of the Secretary of State, at the earliest possible date.

Excerpts follow from the report of the U.S. Department of State, submitted to the President by Secretary of State Condoleezza Rice on June 27, 2008, and included in S. Treaty Doc. No. 110-21 (some footnotes omitted). They include discussion of the proposed reservations and declaration mentioned in the President's transmittal letter.

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* * * *

Overview of the Hague Convention on the International Recovery of Child Support and Family Maintenance

This Convention contains numerous groundbreaking provisions that will, for the first time on a worldwide scale, establish uniform, simple, fast, and inexpensive procedures for the processing of international child support cases. While similar procedures already are the norm in the United States, establishing them as the internationally agreed global standard represents a considerable advance on prior child support conventions, which leave many of these

procedures to be regulated largely by each country's national law. The United States is not a party to any of these prior conventions.

A major benefit of ratification for the United States will be reciprocity . . . .

The Convention will not affect intrastate or interstate child support cases in the United States. It will only apply to cases where the custodial parent and child live in one country and the non-custodial parent in another. International child support cases within the scope of the Convention are already processed under existing federal and state law and practice. The Convention will be implemented through a combination of existing law and practice and certain necessary conforming amendments to federal legislation and relevant uniform state law (the Uniform Interstate Family Support Act (UIFSA)). It is expected that the United States would not deposit its instrument of ratification until such changes to federal law have been enacted and the UIFSA amendments have been adopted by all states. The Convention is considered to be non-self-executing. It will not impose additional financial or administrative burdens.

* * * *

Article-by-Article Analysis[1]

Article 2 defines the scope of the Convention. The Convention applies to maintenance obligations arising from a parent-child relationship towards a child under the age of 21. This does not mean that a Contracting State must change its internal law if the duration of support under that law is below age 21; nor does it require a State to establish a support obligation for a child who is under 21 years of age. Article 2(1) merely requires a State to recognize and enforce a foreign child support decision in favor of a child under the age of 21. . . . The Convention also applies to the recognition and enforcement of spousal support when the application is made in conjunction with a claim for child support. This is

[1] A Protocol on the Law Applicable to Maintenance Obligations was adopted at The Hague on November 23, 2007, the same day as the Convention. There is no support within the United States for the Protocol and there is thus no plan for the United States to become a party to the Protocol.

consistent with the scope of the U.S. Title IV–D program,[3] which requires state child support agencies (which will perform most of the Central Authority responsibilities in cases under the Convention, and which are often referred to as the "IV–D agencies") also to provide services to applicants seeking spousal support if there is also a request for child support from the same applicant involving the same debtor. In addition, with the exceptions of Chapters II and III (which require certain services by Central Authorities), the Convention applies to the establishment and modification of spousal support even in cases where there is not a related request for child support. This is also consistent with Title IV–D, as the Title IV–D agencies are not required to provide services for applicants requesting spousal support in cases where there is not also a request for child support by the same applicant against the same debtor. Thus, a foreign applicant seeking establishment or modification of spousal support (with no related request for child support) in the United States will need to do so through a direct request to the competent authority, rather than by an application to the IV–D agency.

* * * *

Under Article 20(2), a State may make a reservation with respect to three of the bases of jurisdiction set forth under Article 20(1): creditor-based jurisdiction, jurisdiction based on a written agreement, or jurisdiction based on a matter of personal status or parental responsibility. If a State makes such a reservation, it must nevertheless, pursuant to Article 20(3), recognize and enforce a decision if its law would, in similar factual circumstances, confer jurisdiction on its authorities to make a decision in that case. If a Contracting State cannot recognize a decision because of a

[3] The existing federal child support program, included in Title IV–D of the Social Security Act (42 U.S.C. § 651 *et seq.*), establishes a comprehensive set of requirements with which states must comply as a condition for receiving federal funds for a state's child support program. This program is administered by the Office of Child Support Enforcement in the Department of Health and Human Services (HHS/OCSE). All 50 states, plus the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam, participate in the Title IV–D program and comply with its requirements.

reservation, and the debtor is habitually resident in that State, Article 20(4) provides that the State must, with rare exceptions, take all appropriate measures to establish a new decision in favor of the creditor.

If a maintenance decision for a child under the age of 18 cannot be recognized solely because of a reservation under this Article, Article 20(5) provides that the decision must be accepted as establishing the eligibility of that child for maintenance in the requested State. The term "eligibility" does not refer to the amount of maintenance, which will be determined pursuant to the law of the requested State. In this context, the United States interprets "eligibility" to refer to the child's entitlement to initiate a maintenance proceeding in the requested State.

It is recommended that the United States make a reservation in respect of Article 20(1)(c), (e), and (f) because those provisions are not consistent with U.S. law on the minimum contacts required for jurisdiction in order to satisfy constitutional due process requirements.

The 20(1)(c) basis for jurisdiction—the fact that the creditor resides in the forum State—is a common one in nearly all countries, but not the United States. In the United States, under current Supreme Court jurisprudence, the mere fact that the creditor resides in the forum does not give the forum jurisdiction over the debtor in a child support case. In order to satisfy our due process standards, there must be a nexus between the debtor and the forum in order to give the forum jurisdiction over the debtor. In other words, it is the respondent's (debtor's) contacts with the forum, not the petitioner's (creditor's), that are determinative. *Kulko v. Superior Court*, 436 U.S. 84 (1978).

Article 20(1)(e) requires a competent authority to recognize and enforce a support decision, other than one for child support, if the parties have agreed in writing to the issuing State's jurisdiction. In the United States, the general state-law rule is that forum selection clauses in divorce, spousal support and child support cases are unenforceable if the chosen forum has no nexus with either party.

Finally, Article 20(f) requires a competent authority to recognize and enforce a support decision where the issuing authority exercised jurisdiction on a matter of personal status or parental

responsibility. In the United States, a competent authority must have personal jurisdiction over the parties. The fact that a court has *in rem* jurisdiction over a marriage, for example, does not mean that the court has personal jurisdiction over the parties. Without the requisite minimum contacts for personal jurisdiction, a U.S. court cannot issue a valid order.

* * * *

Article 25 seeks to simplify the process for an application for recognition and enforcement by addressing the number and type of documents needed. Currently, this is left to national law, and practices vary widely. In some States, the document requirements are quite onerous and costly. Article 25(1) lists the only documents that are required to accompany an application for recognition and enforcement. One such document applies only with respect to decisions of administrative tribunals. Article 25(1)(b) provides that in the case of such a decision, the application must include a document stating that the requirements of Article 19(3) (the administrative decision is subject to judicial review and has the same force and effect as a judicial decision) are met, unless the requesting State has specified in accordance with Article 57 that its administrative decisions always meet these requirements. It is recommended that the United States make this specification in accordance with Article 57(1)(e), as all child support decisions in the United States made by administrative tribunals are subject to judicial review and have the same force and effect as a court decision.

Article 25(3) provides several additional, optional mechanisms for simplifying the documentation process. Because even States that accept uncertified copies of other documents may require a certified copy of the decision, Article 25(3)(a) provides that a Contracting State may specify that it always requires a certified copy of the decision.

As child support decisions are often only a few paragraphs of a lengthy divorce decision, Article 25(3)(b) provides that a State may specify the circumstances in which it will accept, in lieu of a complete text of the decision, an abstract or extract of the decision.

As many States are very comfortable with treating administrative decisions the same as judicial decisions, Article 25(3)(c) provides that a State may specify that it does not require a document in each case stating that the requirements of Article 19(3) concerning administrative decisions are met. As UIFSA, which all U.S. states have adopted as a condition for continued receipt of federal funding, treats administrative child support decisions the same as judicial orders, it is recommended that the United States make the Article 25(3)(c) specification, in accordance with Article 57(1)(e).

It is not recommended that the United States make the other specification, as practices regarding the need for a certified copy of a decision may vary from state to state.

* * * *

Articles 44 and 45 address language requirements and translation costs. Pursuant to Article 44, the general rule is that all documentation must be in the original language, accompanied by a translation into the official language of the requested State or into another language that it has declared is acceptable, unless the competent authority in the requested State dispenses with translation. Unless otherwise agreed by the Central Authorities, any other communications (*e.g.,* e-mails) between Central Authorities must be in an official language of the requested State or in either English or French. (These are the two official languages of the Hague Conference.) However, a Contracting State may, by making a reservation, object to the use of either French or English. It is recommended that the United States make a reservation objecting to the use of French. Under Article 45, the general rule is that the cost of translation is borne by the requesting State. . . .

* * * *

Article 61 establishes that if a State has two or more territorial units in which different systems of law are applicable in relation to maintenance matters under the Convention, it may declare that the Convention will extend to all of its territorial units, or only to one or more of those units. The declaration may be modified at any time. . . . It is recommended that the United States declare that the Convention will extend to the jurisdictions participating in

Title IV–D of the Social Security Act (*i.e.*, all 50 states, the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands). The Convention would therefore not extend to American Samoa, the Northern Marianas or any other U.S. territory that does not participate in Title IV–D.

* * * *

On July 16, 2008, the Department of Heath and Human Services transmitted draft implementing legislation to Congress. As the transmittal letter explained:

> The bill amends Title IV-D of the Social Security Act to make changes necessary to ensure that the United States will be able to comply fully with the requirements of any multilateral child support convention to which the United States is a party, including the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. . . .
>
> The amendments made by the bill . . . will ensure that child support services available in domestic cases to residents of the United States will be extended to those cases received from Contracting States [to the Convention]. Along with other related amendments, the bill authorizes the appropriate authorities in Contracting States to receive information from the Federal Parent Locator Service about the State of residence of an individual sought for support enforcement purposes, and makes amendments to ensure that the Federal tax refund offset process will be available to a State collecting past-due support under a State or Tribal order pursuant to a request from a Contracting State. In addition, the bill updates a provision of current law that requires States to enact the 1996 version of the Uniform Interstate Family Support Act (UIFSA). The National Conference of Commissioners on Uniform State Laws (NCCUSL) is drafting the amendments to UIFSA required to implement the Convention . . . , and the bill requires States to enact the new version of UIFSA.

On July 25, 2008, the Uniform Law Commission approved amendments to the UIFSA, which serves as the mechanism for interstate enforcement of family support, to implement the provisions of the Convention concerning international recovery of child support. The Departments of State and Health and Human Services worked closely with the Uniform Law Commission in preparing the UIFSA amendments.

2. Bilateral Arrangements for Enforcement of Family Support Obligations

On November 28, the Department of State issued a notice amending and supplementing a 2007 notice providing a list of reciprocating countries for the enforcement of family support obligations. 73 Fed. Reg. 72,555 (Nov. 28, 2008). As the notice explained in part:

> Section 459A of the Social Security Act (42 U.S.C. 659A) authorizes the Secretary of State with the concurrence of the Secretary of Health and Human Services to declare foreign countries or their political subdivisions to be reciprocating countries for the purpose of the enforcement of family support obligations if the country has established or has undertaken to establish procedures for the establishment and enforcement of duties of support for residents of the United States.

The declaration authorized by the statute may be made "in the form of an international agreement, in connection with an international agreement or corresponding foreign declaration, or on a unilateral basis."

The notice listed the following designated foreign reciprocating countries: Australia; the Czech Republic; El Salvador; Finland; Hungary; Ireland; the Netherlands; Norway; Poland; Portugal; the Slovak Republic; Switzerland; Canadian Provinces or Territories: Alberta, British Columbia, Manitoba, New Brunswick, Northwest Territories, Nunavut, Newfoundland/Labrador, Nova Scotia, Ontario, Saskatchewan, and Yukon;

and the United Kingdom of Great Britain and Northern Ireland. As of the date of the notice, a reciprocity agreement had been signed, but was not yet in effect, with Costa Rica. *See Digest 2007* at 770–72 for additional background on the reciprocating-country status.

C. INTERNATIONAL CIVIL LITIGATION

1. Concurrent and Related Proceedings in Foreign Courts: Anti-suit Injunctions

a. Pertamina v. Karaha Bodas

On June 23, 2008, the U.S. Supreme Court denied a writ of certiorari to the U.S. Court of Appeals for the Second Circuit in a case arising from the effort of an Indonesian oil and gas company to use foreign litigation to overturn U.S. courts' enforcement of an arbitral award issued in Switzerland. *Pertamina v. Karaha Bodas*, 128 S. Ct. 2958 (2008). Previously in the case, the Second Circuit upheld an anti-suit injunction issued by a district court that enjoined Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") from pursuing a Cayman Islands lawsuit seeking restitution of funds that Karaha Bodas Company, L.L.C. ("Karaha") had received under a 2000 Swiss arbitral award. Pertamina brought its suit in the Cayman Islands after U.S. federal courts enforced the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention"), which the United States implements through 9 U.S.C. §§ 201–208, and funds were transferred to Karaha. *See Digest 2007* at 780–88.

In May 2008 the United States filed an *amicus curiae* brief in the case at the invitation of the Court. The brief summarized the U.S. argument as follows:

> The court of appeals' decision is correct and does not warrant further review. The transfer of funds to respondent pursuant to an order of the district court did not

> divest the court of subject matter jurisdiction to ensure that that very transfer would not subsequently be undone. In addition, it was appropriate for the district court to enjoin petitioner from pursuing litigation that was by its terms designed to undo the results of final federal judgments.
>
> Although the Second Circuit's jurisdictional holding may conflict with the Eighth Circuit's decision in *Goss* [*Int'l Corp. v. Tokyo Kikai Seisakusho*], the scope of any conflict is narrow and uncertain, and involves an issue that does not appear to arise frequently. The only proffered ground for review of the second question presented is a purported conflict between decisions issued in this litigation, but the court below plausibly distinguished the Fifth Circuit's earlier decision. Finally, although the courts of appeals have employed different formulations regarding the standards for issuing foreign antisuit injunctions, it is not clear that those differences in language have actually translated into different results, and an injunction would be warranted here even under the strictest formulation.

Further excerpts below set forth U.S. views in greater detail. The full text of the U.S. brief is available at *www.usdoj.gov/osg/briefs/2007/2pet/6invit/2007-0619.pet.ami.inv.pdf*.

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* * * *

A. The Decision Below Is Correct

1. The transfer of funds sufficient to satisfy the district court's judgment did not divest that court of subject matter jurisdiction to maintain an antisuit injunction. Rather, this Court's decisions make clear that the district court possessed authority to restrain petitioner from prosecuting another action that sought to nullify or evade its previous judgment.

In *Dietzsch v. Huidekoper*, 103 U.S. 494 (1880), a replevin action originally filed in state court was properly removed to federal

court after the plaintiffs had obtained possession of the property by posting a replevin bond. *Id.* at 496 . . . . Despite the valid removal, both courts proceeded to adjudicate the action, with the state court entering judgment for the defendant and the federal court entering judgment for the plaintiffs. . . . The defendant then brought a further action in state court to collect the replevin bond . . . . This Court held that the federal court had authority to enjoin the defendant from prosecuting the second state court suit. The Court described the request for the injunction as "ancillary" and "auxiliary to" the earlier federal action, and stated that a federal court "has the right to enforce [its] judgment against the party defendant and those whom he represents, no matter how or when they attempt to evade it or escape its effect." *Id.* at 497–498.

Dietzsch is controlling here. The purpose of the district court's injunction was "to enforce its own judgment by preventing the defeated party from wresting" away from respondent "the substantial fruits of a judgment rendered in [its] favor." *Dietzsch*, 103 U.S. at 497–498. To conclude that the district court lacked jurisdiction to maintain an injunction following transfer of the funds would mean that the final judgment "settle[d] nothing" and leave respondent "under the necessity of engaging in a new conflict elsewhere." *Id.* at 498. . . .

Petitioner seeks to distinguish *Dietzsch* on the ground that the earlier federal judgment in that case was an "ongoing order[] in need of continued protection." But the order was "ongoing" only in the sense that it awarded property to one party at the expense of another, which is equally true here.

Nor have later decisions undermined *Dietzsch*'s holding. In 1934, the Court described it as "well settled" that "a federal court of equity has jurisdiction of a bill ancillary to an original case * * * to secure *or preserve* the fruits and advantages of a judgment or decree rendered therein," regardless of whether the original judgment was "at law or in equity" and "irrespective of whether the court would have jurisdiction if the proceeding were an original one." *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) (emphasis added) . . . . More recently, the Court has stated that a court's power to "vindicate its authority" and "effectuate its decrees" extends to restricting actions that "flout[] or imperil[]"

the court's judgment, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 380 (1994), and that the doctrine of ancillary jurisdiction preserves "a federal court's inherent power to enforce its judgments." *Peacock v. Thomas*, 516 U.S. 349, 356 (1996).

. . . The Court has never held . . . that formal execution extinguishes a district court's authority to take *any* further steps to protect the efficacy of its judgments. To the contrary, the Court has reaffirmed that a court's ancillary jurisdiction may extend past satisfaction of a money judgment in certain circumstances. See, *e.g.*, *United States v. Beggerly*, 524 U.S. 38, 45–47 (1998) (acknowledging ancillary jurisdiction to set aside judgment procured by fraud) . . . . Although in the normal course satisfaction of the judgment will extinguish the material threats to the judgment, nothing in this Court's cases suggests a lack of authority to protect a judgment from extraordinary challenges of the type attempted here. . . .

2. The court of appeals correctly held that the district court did not abuse its discretion in granting an antisuit injunction. Comity considerations should play a substantial role when a federal court is asked to enjoin a party from engaging in litigation in a foreign forum, and such injunctions should "'be "used sparingly" and granted only with care and great restraint.'" In the unusual circumstances of this case, however, a foreign antisuit injunction was appropriate.

Reduced to their essence, the federal judgments that the antisuit injunction seeks to protect establish that: (a) the 2000 arbitration award will be enforced in the United States; and (b) as a result, respondent has a superior claim on certain funds that were formerly held in New York bank accounts. In the Cayman Islands action, petitioner sought a determination that the award upon which the United States judgments were based was "vitiat[ed]" by fraud, and a return of "all sums received by [respondent] pursuant to the Arbitral Award (and its enforcement)." Because "[a]lmost the entire judgment debt (99 7/10%) was paid from funds restrained in the federal court in New York, in proceedings based on the judgment of the federal court in Texas," it is clear that "the entire point" of the Cayman Islands action is to overturn the results of the United States proceedings. "[C]onsiderations of comity

have diminished force" in those circumstances, *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004), and a United States court typically has a significant interest in vindicating its own final judgments against collateral attacks designed to nullify or effectively reverse them.

The antisuit injunction here is also supported by the strong public policies favoring the orderly processing of litigation and the finality of judgments. Petitioner had the opportunity to present any substantive defenses to the Swiss arbitration panel. Petitioner presented a fraud defense, but it was rejected by the arbitrators. Petitioner also had the opportunity to seek further review within the Swiss system, but failed to comply with the filing-fee requirement. And despite acknowledging that it had possession of the documents on which the Cayman Islands action was based no later than November 2002, petitioner did not seek to raise its current allegations in either the Fifth Circuit confirmation litigation, which ended in 2004, or the Second Circuit enforcement litigation, which ended in 2006.

The policies underlying the New York Convention likewise support an antisuit injunction in this case, and further diminish the weight of the comity concerns cited by petitioner. The Convention strongly favors the use of arbitration as a means to settle disputes efficiently and quickly. The Supreme Court of Indonesia—the only other possible "primary" jurisdiction with respect to the 2000 arbitration award—concluded that only the Swiss courts would have authority to set aside or annul that award. Accordingly, permitting petitioner to pursue the Cayman Islands action "would tend to undermine the regime established by the Convention for recognition and enforcement of arbitral awards."

* * * *

b. Goss Int'l Corp. v. Tokyo Kikai Seisakusho

On June 23, 2008, the Supreme Court denied a writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit in a case involving a U.S. corporation's request for an anti-suit injunction. *Goss Int'l Corp. v. Tokyo Kikai Seisakusho*, 128 S. Ct.

2957 (2008). This case arose from a judgment that Goss International Corp. ("Goss") obtained against Japanese defendant Tokyo Kikai Seisakusho ("TKS") under the Antidumping Act of 1916 ("1916 Act"), 15 U.S.C. § 72. After the World Trade Organization ("WTO") found that the 1916 Act violated WTO rules, Congress repealed it prospectively. Japan then enacted the Special Measures Law, a "clawback statute" permitting Japanese corporations and Japanese nationals to sue in Japanese courts to recover any judgment awarded under the 1916 Act. The Eighth Circuit vacated a preliminary anti-suit injunction that a district court issued to prevent TKS from suing Goss in Japan under the Special Measures Law and remanded for dismissal of Goss's request for a permanent injunction. *See Digest 2007* at 776–80.

In May 2008 the United States filed an *amicus curiae* brief in the case at the invitation of the Court. The U.S. brief argued that the Court should deny the petition for a writ of certiorari despite the U.S. view that the Eighth Circuit's analysis was flawed. The United States summarized its views as follows:

> The court of appeals' analysis was flawed in several respects. Most fundamentally, the court erred in concluding that an action under the Special Measures Law would not involve the same issues that were previously resolved in the now-final federal court litigation. And if the court of appeals' decision is properly interpreted as holding that the satisfaction of a money judgment divests a district court of subject matter jurisdiction to maintain an antisuit injunction *regardless* of whether the second suit would involve the same issues as the first one, it erred in that respect as well. Finally, the court of appeals erred in its comity analysis. It erroneously assessed the significance of Congress's decision to repeal the 1916 Act—and to do so in a prospective-only manner—for purposes of determining whether an action under the Special Measures Law would be inconsistent with United States public policy.
>
> On balance, however, further review is not warranted. This case involves an unusual set of circumstances that

> are unlikely ever to recur, and the central errors in the court of appeals analysis involve threshold issues that are, at present, unique to this particular case. As a result, this case presents a less-than-ideal vehicle for any broad consideration of the standards that federal courts should use in determining whether to enjoin a party from pursuing litigation in a foreign tribunal. Finally, although the Eighth Circuit's jurisdictional holding may conflict with the Second Circuit's analysis in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* . . . (*Pertamina*), the scope of any conflict is narrow and uncertain and involves an issue that does not appear to arise frequently.

Further excerpts from the U.S. *amicus curiae* brief follow, setting forth the U.S. arguments in greater detail. (Citations to other submissions in the case and internal cross-references are omitted.) The full text of the U.S. brief is available at *www.usdoj.gov/osg/briefs/2007/2pet/6invit/2007-0618.pet.ami.inv.pdf*.

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A. The Court Of Appeals' Analysis Was Erroneous In Several Respects

1. As the district court explained, even courts of appeals that disagree about the role and significance of international comity in determining whether a foreign antisuit injunction should be issued generally agree that a "threshold question" is whether "the foreign litigation involves the same issues and parties as the federal action." . . . In reversing the district court's grant of preliminary injunctive relief, the court of appeals appears to have relied heavily on its conclusion that "[t]he issues previously decided below in the district court are different from the issues sought to be litigated in the foreign jurisdiction." That case-specific conclusion is erroneous.

The court of appeals correctly observed that the "cause of action" that respondents wish to litigate, as well as the "remedy"

they seek, are available only in Japan. It does not necessarily follow, however, that the two cases do not involve the same "issues" in the relevant sense. The fundamental issues resolved in the completed United States proceedings were (1) whether petitioner was entitled to be compensated for respondents' conduct in allegedly "dumping" printing-press equipment in the United States, and (2) if so, the amount of such compensation. The final judgment in that litigation conclusively resolved those issues in favor of petitioner. The litigation commenced by respondents in Japan under the Special Measures Law effectively seeks to relitigate those issues, albeit under Japanese law rather than United States law, in order to achieve a different (and directly contrary) result.

It is true that an action under the Special Measures Law would not permit respondents to relitigate the underlying factual questions, or whether governing United States law imposed liability under such circumstances. But that is because the Special Measures Law makes the very existence of a final satisfied judgment under the 1916 Act the *basis* for imposing liability in the amount of the United States judgment. Accordingly, the Special Measures Law represents an even more direct attack on a final federal judgment than would a mere attempt to relitigate the underlying factual matters. The district court was therefore correct in concluding as a threshold matter that an antisuit injunction was a potentially available remedy. . . .

2. The scope of the court of appeals' holding regarding a federal court's power to maintain an antisuit injunction following satisfaction of an underlying judgment is unclear. There is language in the court's opinion that could be viewed as limiting its holding to situations in which the issues to be litigated, or the remedies that would be sought, in the second proceeding are different from those in the earlier proceeding. Thus, the court of appeals noted that "United States courts are being asked to prevent [respondents] from seeking a remedy available solely in Japan," and quoted this Court's statement that it has "cautioned against the exercise of jurisdiction over proceedings that are 'entirely new and original,' or where 'the relief [sought is] of a different kind or on a different principle' than that of the prior decree." [*Peacock v. Thomas*, 516 U.S. 349, 358 (1996) (brackets in original; citations

omitted).] As discussed, the court then concluded (albeit erroneously) that the issues decided in the original federal action "are different from the issues sought to be litigated in the foreign jurisdiction." And the court emphasized that its jurisdictional holding applied under "these circumstances" and "the facts of this case."

On the other hand, the court of appeals' decision can also plausibly be read as stating that a federal court lacks jurisdiction to maintain an antisuit injunction if its judgment awarded only monetary relief and the judgment has been fully satisfied. The court began the relevant discussion by stating that "the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment," and emphasized that "the judgment now is rendered, paid, and satisfied," and that "[n]o pending litigation, other than this appeal, remains in the United States courts[.]" The court of appeals determined that it "need not decide whether the district court abused its discretion in issuing the preliminary antisuit injunction," but the only "changed" circumstance it referenced was its view that "there is no longer an outstanding judgment to protect." Finally, although the court of appeals "reach[ed] no categorical conclusion regarding the propriety of the issuance of an antisuit injunction in all cases involving the preservation of a judgment," the reason it gave for not doing so was because "there are cases where the satisfaction of judgment is not * * * solely the payment of a money judgment."

To the extent that the court of appeals' jurisdictional holding is dependent upon the court's conclusion that the issues to be litigated in the Japanese proceeding are not the same as those that were previously litigated in the United States, that holding is flawed for the reasons already explained. And if the court of appeals held that a federal court lacks jurisdiction to maintain an antisuit injunction in *any* situation once a purely money judgment has been fully satisfied, that holding would be erroneous for the reasons explained in the government's brief in *Pertamina*. . . . [*See* C.1.a.(1) *supra*.] Moreover, this case would be an apt illustration for why such a categorical approach would be incorrect. In this case satisfaction of the judgment in the United States court was a condition precedent for the Japanese cause of action designed to countermand the effect of the United States proceeding. In these

circumstances, treating satisfaction of the judgment as precluding an antisuit injunction ignores reality.

3. The court of appeals also erred in declining to give any weight in its public-policy analysis to "Congress's decision to repeal the 1916 Act prospectively, rather than retroactively." To be sure, Congress' decision to repeal the 1916 Act was "clearly [a] response to the WTO proceedings." But neither that fact, nor the fact that the authors of the House Report were aware of the "blocking" regulation that had already been issued by the EU, nor the fact that petitioner received the only judgment ever granted under the 1916 Act, nor the existence of potential diplomatic avenues for reacting to the Special Measures Law, is dispositive of the comity question here.

Subject to the constraints imposed by the Constitution, the public laws enacted by Congress embody, by definition, the public policy of the United States. The 1916 Act was a validly enacted federal law. And when Congress repealed that law in 2004, it made an express determination that the repeal would not apply to cases, including this one, that had been filed before the repeal. It is the position of the United States that the prospective repeal of the 1916 Act brought the United States into conformity with the DSB's [Dispute Settlement Body of the World Trade Organization] recommendations and rulings in the disputes with Japan and the EC over the 1916 Act. The court of appeals therefore erred in failing to recognize that Congress's decision to repeal the 1916 Act in a manner that preserved the judgment in this case is itself "United States policy" entitled to "play a role in the decision to grant a foreign antisuit injunction." Moreover, once Congress's express intent to give the repeal only prospective effect is recognized, the fact that this was the only pending case of which Congress was aware strengthens, rather than undermines, the case for an injunction.

Relatedly, the court of appeals also erred in giving seemingly dispositive weight to its view that "international comity must allow the Japanese courts, in the first instance, to determine the enforceability of the Special Measures Law." As a law specifically designed to overturn a final judgment entered by a court that clearly possessed jurisdiction and was implementing the law of its

nation with respect to conduct and harm occurring within the territorial jurisdiction of that nation, the Special Measures Law is itself in considerable tension with general notions of international comity, and thus should not have received full weight in the comity analysis. See *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 931, 937 (D.C. Cir. 1984).

* * * *

b. Petitioner suggests that further review is necessary because of the existence of other clawback statutes and the prospect that foreign governments could enact others. The United Kingdom has a clawback statute that provides recovery for the noncompensatory portion of any antitrust award, Protection of Trading Interests Act, 1980, c. 11, § 6.2 (1980), and other nations have enacted clawback legislation with respect to certain judgments obtained under United States antitrust laws as well. See Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, §§ 8–9 (Can. 1985); Foreign Proceedings (Excess of Jurisdiction) Act, 1984, No. 3, § 10 (Austl.). Foreign governments have also enacted clawback statutes aimed at laws such as the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (22 U.S.C. 6021 *et seq.*), and the Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541. See, *e.g.*, Council Regulation 2271/96, art. 6, 1996 O.J. (L 309) 39 (EU).

Notwithstanding the existence of those statutes, the United States is unaware of any other application of a foreign clawback statute against the United States in recent years, and it is not clear to what extent such cases will arise in the future. Moreover, clawback statutes pose sensitive diplomatic, as well as legal, questions. See United States Embassy, London, England, Diplomatic Note No. 56, 21 I.L.M. 840, 843 (Nov. 9, 1979) (stating that the then-proposed Protection of Trading Interests Act "raises serious questions under the very principles of international law and comity to which Her Majesty's Government is committed"). In addition, the fact that the Special Measures Law is a response to a United States law that has been repealed, and that the WTO found to be inconsistent with the WTO Agreement, may diminish the extent to

which further review here would likely provide a useful precedent for future disputes. . . .

c. Software AG, Inc. v. Consist Software Solutions, Inc.

On February 21, 2008, the U.S. District Court for the Southern District of New York issued a preliminary anti-suit injunction in a contract and trademark dispute. *Software AG, Inc. v. Consist Software Solutions, Inc.*, 2008 U.S. Dist. LEXIS 19347 (S.D.N.Y. 2008). In its findings of facts, the court explained that in 2006, Software AG, Inc. and its parent company, Software AG (collectively "Software AG"), notified Consist Software, Inc. ("Consist") of their intention to terminate their exclusive distributorship agreement with Consist. Under that agreement, Consist distributed Software AG's products in Brazil and six other South American countries, and Software AG provided Consist with software upgrades or other modifications, as well as certain maintenance support.

Consist challenged in U.S. court the validity of Software AG's termination notice, and in December 2007 the district court determined that the agreement would terminate on January 1, 2008. Consist's Brazilian affiliates ("Consist-Brazil"), acting as Consist's agent, then entered into agreements with customers in Brazil and the other South American countries to provide maintenance services for Software AG products (including new versions of Software AG programs) after the expiration of the distributorship agreement. Consist-Brazil also posted notices on its Brazilian website asserting that it would continue to provide technical updates and support services for Software AG.

Software AG brought a separate action in the Southern District of New York seeking a declaratory judgment, injunctive relief, and compensatory damages. Software AG challenged Consist's efforts to continue to provide maintenance services for Software AG products and to use certain trademarks for Software AG's products in the seven South American countries. While that action was pending,

Consist-Brazil filed two lawsuits in Brazil, obtaining *ex parte* orders enjoining Software AG from using certain trademarks in distributing and maintaining its products in Brazil and ordering Software AG to provide Consist-Brazil with maintenance services and products so Consist-Brazil could meet its obligations to its South American customers.

In its preliminary anti-foreign-suit injunction, the district court ordered Consist to ensure that the Brazilian court orders were vacated and to withdraw the actions Consist-Brazil had brought against Software AG in Brazil. The order included a provision requiring Consist to prevent Consist-Brazil or Consist's other subsidiaries or affiliates in the seven South American countries from filing any new actions relating to the dispute in those countries. The order also compelled Consist to prevent Consist-Brazil and its other subsidiaries or affiliates from trying to register or use any Software AG trademarks in the seven South American countries.

Excerpts follow from the court's opinion determining that a foreign anti-suit injunction was appropriate. (Citations to other submissions in the case are omitted.) Consist's appeal to the U.S. Court of Appeals for the Second Circuit was pending at the end of 2008.*

* * * *

59. The power of federal courts to enjoin foreign suits by persons subject to their jurisdiction is well established. *China Trade and Development Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987) (citing *U.S. v. Davis*, 767 F.2d 1025, 1038 (2d Cir. 1985), and *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984)). Although an injunction operates only against the parties, and not directly against the foreign court, the need for due regard of international comity principles

* Editor's note: The U.S. Court of Appeals for the Second Circuit affirmed the district court's decision on March 27, 2009. 2009 U.S. App. LEXIS 6538 (2d Cir. 2009).

still exists because such an order effectively restricts the jurisdiction of the foreign court. *See id.* at 35–36 (citing *Davis*, 767 F.2d at 1038).

* * * *

61. To determine whether to enjoin the litigation [in *China Trade*], Judge Motley employed a test that had been used by some judges in the Southern District, and which is now known as the *China Trade* test. First, two threshold requirements for an anti-foreign-suit injunction must be met: (1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined. If these two threshold requirements are met, five further factors should be considered: (1) frustration of a policy in the enjoining forum; (2) vexatiousness of the foreign action; (3) whether there is a threat to the issuing courts' *in rem* or *quasi in rem* jurisdiction; (4) whether the proceedings in the other forum prejudice other equitable considerations; and (5) whether adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment. *See China Trade*, 837 F.2d at 35. . . .

* * * *

63. The Second Circuit recently clarified the *China Trade* test in affirming the district court's issuance of an anti-foreign-suit injunction in *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007). . . . The Second Circuit explained that although *China Trade* instructed that two of the five factors should be accorded greater significance *all* of the additional factors should be considered when determining whether an anti-suit injunction is warranted. *Karaha*, 500 F.3d at 119.

* * * *

67. In this case, the two threshold *China Trade* factors are satisfied, and the remaining factors counsel strongly in favor of an anti-suit injunction addressed both to the existing lawsuits in Brazil and any pending administrative proceedings, as well as an injunction against the commencement of any further suits or proceedings

in the Territory until such time as the contractual dispute between Software AG and Consist/Consist-Brazil is resolved.

68. The parties to all pending proceedings are the same. In order to obtain an anti-foreign-suit injunction, the moving party must show that "parties to both suits are substantially the same." *Paramedics Electromedicina Comercial Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 2003 WL 23641529, at *11 (S.D.N.Y. June 4, 2003). . . . Other courts have endorsed similar reasoning. *See, e.g.*, *Motorola Credit Corp. v. Uzan*, 2003 WL 56998 (S.D.N.Y. Jan. 7, 2003) (finding sufficient similarity between parties, even though the parties to the two actions were not identical, because "the real parties in interest are the same in both matters"), *cited in Paramedics*, 369 F.3d at 652; *SG Avipro Finance Ltd. v. Cameroon Airlines*, 2005 WL 1353955, at *2 (S.D.N.Y. June 8, 2005) (same).

69. Consist has long insisted that Consist-Brazil is a separate entity, not before this Court; and that Consist-Brazil is, as far as this Court is aware, the party plaintiff in the lawsuit or lawsuits in Brazil that resulted in the issuance of the *ex parte* orders. However, . . . there is no difference between Consist and Consist-Brazil. Consist—the party to the distribution agreements—has carried out its contractual obligations through the medium of its wholly controlled affiliate or subsidiary, Consist-Brazil. . . . Consist-Brazil has at all times acted as the agent of Consist in the territory. Moreover, Consist-NY (through Fridman) controls and binds Consist-Brazil. Therefore, even though Consist-Brazil (as opposed to Consist NY) was the named plaintiff in the two lawsuits in Brazil, under the reasoning of *Paramedics*, the actions in Brazil and in this Court are "sufficiently similar in terms of parties" to satisfy the first threshold factor of *China Trade*.

70. Resolution of this case will be dispositive of the action to be enjoined. This Court has already decided that the 1998 Agreement was successfully terminated by Software AG and has now decided, preliminarily, that certain consequences flow from that fact. In particular, this Court has preliminarily determined that contracts entered into by Consist (through the medium of its agent, Consist-Brazil) and third parties are unauthorized beyond the date the distribution agreement was terminated, as is

Consist-Brazil's claim to the Software AG trademarks in Brazil. Any preliminary or final injunction relating to these matters will be compromised by contrary orders from a foreign court—especially orders obtained *ex parte*, and without any assurance that our esteemed colleagues in Brazil have been fully advised of what is really going on here. This Court has been informed that the proceedings in Brazil pertain to precisely the same issues that are at the heart of the action here, namely, whether the trademarks in Brazil belong to Software AG and whether Consist can continue to provide maintenance for Software AG products. The injunctions that Consist-Brazil has obtained *ex parte* interfere with this Court's ability to issue valid and binding orders directed to the same subject matter, and they expose Software AG to severe penalties and sanctions. . . . [T]he second threshold factor of *China Trade* is satisfied.

71. Once past these two threshold requirements, courts are directed to consider additional, discretionary factors, including, *inter alia*, whether the foreign action threatens the enjoining court's jurisdiction and whether the foreign action would frustrate important policies of the enjoining forum. *See, e.g.*, *Paramedics*, 369 F.3d at 652; *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, 2006 WL 10886, at *2 (S.D.N.Y. Jan. 3, 2006). "[W]hen the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an [anti-suit] injunction . . . ." *Paramedics*, 2003 WL 23641529, at *14 (quotations and citation omitted). Consist should not be able to seek legal recourse from the Brazilian courts in a transparent attempt to deprive this Court of jurisdiction. . . . Defendants' "petition to the Brazilian courts was less of a 'parallel proceeding' entitled to comity and more of an attempt to defeat this Court's plain jurisdiction over their conduct." *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 441 F. Supp. 2d 552, 562 (S.D.N.Y. 2006). . . .

72. Important policies of this forum are threatened by Consist's attempts to seek relief in Brazil. For example, Plaintiffs' claims implicate a federal statute, the Lanham Act, which embodies important public policies of the United States regarding trademarks and false advertising. *Cf. Laker Airways Ltd.*, 731 F.2d at

931 n.73 ("An impermissible evasion is much more likely to be found when the party attempts to elude compliance with a statute of specific applicability upon which the party seeking an injunction may have relied . . . ."), *cited in Paramedics*, 2003 WL 23641529, at *15. There also exists a general policy interest in having the laws of the New York—which the parties agreed would govern the 1998 Agreement—interpreted by a U.S. court, rather than a foreign court.

73. . . . The parallel proceedings have already prejudiced equitable considerations. Not only do the orders issued by the courts in Brazil undermine this Court's jurisdiction but . . . Consist did not initiate proceedings in Brazil until after this Court held a full hearing on Software AG's motion of injunctive relief, and the matter was taken under advisement. . . . Moreover, requiring the re-litigation in Brazil of the same issues that are currently before this Court will surely result in inconvenience and unnecessary expense. Consist has already embarked on a race to judgment in the courts of Brazil, and the orders it obtained from those courts demonstrate that the risk of inconsistent rulings is real. Indeed this Court's rulings, issued after a full hearing, are inconsistent with the Brazilian court's orders which [were] issued *ex parte* and without a full hearing.

74. Having found that the two threshold requirements are satisfied, and having considered the additional discretionary factors under *China Trade* and its progeny, this Court finds that an anti-foreign-suit injunction is appropriate.

75. This Court has the authority to order Consist-Brazil to withdraw the pending proceedings in Brazil. *See, e.g.*, *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, 2006 U.S. Dist. LEXIS 83169, at *11 (S.D.N.Y. Nov. 16, 2006).

76. To the extent Consist and Fridman are enjoined to keep their "100% controlled" affiliates from filing additional actions in South American courts, the anti-suit injunction doctrine of *China Trade* is not even implicated, because additional actions are not parallel proceedings. Nor is *China Trade* relevant to this Court's order requiring Consist to advise the Brazilian courts of the matters before this Court.

* * * *

2. Enforceability of Arbitration Clauses: *Safety Nat'l Casualty Corp. v. Certain Underwriters at Lloyd's London*

On September 29, 2008, the U.S. Court of Appeals for the Fifth Circuit reversed on interlocutory appeal a lower court's denial of a motion to compel arbitration in a contractual dispute among three insurers. *Safety Nat'l Casualty Corp. v. Certain Underwriters at Lloyd's London*, 543 F.3d 744 (5th Cir. 2008). The lower court found that, under the McCarran–Ferguson Act, 15 U.S.C. §§ 1011–1015, a Louisiana statute regulating insurance preempted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and federal legislation implementing the New York Convention, 9 U.S.C. §§ 201–208. The court referred to preemption by Louisiana state law as "reverse preemption." Under the McCarran–Ferguson Act, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ." 15 U.S.C. § 1012(b). For additional discussion of the McCarran–Ferguson Act, *see Digest 2003* at 462–67, *Digest 2000* at 468–70, and *II Cumulative Digest 1991–1999* at 1530–33.

In this case, Louisiana Safety Association of Timbermen-Self Insurers Fund ("LSAT") entered into reinsurance agreements with Certain Underwriters at Lloyd's London ("Underwriters"), each of which included an arbitration provision. Safety National Casualty Corporation ("Safety National"), to which LSAT allegedly assigned its rights under the reinsurance agreement, sued the Underwriters in federal district court. The Underwriters filed a motion to compel arbitration and stay the proceedings, which the district court granted. After the parties could not agree on the number of arbitrators, the Underwriters attempted to have the district court lift the stay and compel arbitration. The district court held that the Louisiana state law regulating insurance precluded enforcement of the arbitration provisions.

Excerpts follow from the Fifth Circuit's opinion, finding that the New York Convention, even though it is implemented

> by a federal statute, is not an "Act of Congress" under the McCarran–Ferguson Act and that, as a result, the McCarran–Ferguson Act did not provide a basis for the Louisiana statute to reverse preempt the New York Convention. Therefore, the court concluded the arbitration provisions in the reinsurance agreements should be enforced. Footnotes and case citations are omitted.*

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* * * *

[III] . . . [T]he Convention on the Recognition and Enforcement of Foreign Arbitral Awards expressly states that courts "shall" compel arbitration when requested by a party to an international arbitration agreement:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The Convention additionally sets forth at least some procedures to be followed in obtaining enforcement of an arbitration award. . . .

But even if the Convention required legislation to implement it in United States courts, that does not mean that Congress intended an "Act of Congress," as that phrase is used in the McCarran–Ferguson Act, to include a treaty. Implementing legislation does not replace or displace a treaty. A treaty remains something more than an act of Congress. It is an international agreement

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* Editor's note: On February 11, 2009, the Fifth Circuit granted rehearing *en banc*, vacating the panel's 2008 decision. 558 F.3d 599 (5th Cir. 2009). On November 9, 2009, as this volume was going to press, the Fifth Circuit, sitting *en banc*, issued a decision concluding that the McCarran–Ferguson Act does not "authorize[] state law to reverse-preempt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) or its implementing legislation." [footnote omitted] 2009 U.S. App. LEXIS 24585 (5th Cir. 2009). *Digest 2009* will discuss relevant aspects of the *en banc* decision.

or contract negotiated by the Executive Branch and ratified by the Senate,** not Congress. The fact that a treaty stands on equal footing with legislation when implemented by Congress does not mean that it ceases to be a treaty and becomes an "Act of Congress."

The Supreme Court has indicated that the preemptive reach of the McCarran–Ferguson Act was not intended to extend to the conduct of foreign affairs. The Supreme Court considered in *American Insurance Ass'n v. Garamendi* whether a state law, aimed at aiding Holocaust victims by requiring insurers to disclose information about insurance policies sold in Europe before and during World War II, interfered with the Federal Government's conduct of foreign relations. . . . The Court ultimately concluded that the state law conflicted with Presidential foreign policy as expressed in executive agreements with foreign nations and was preempted. In addressing California's argument that in the McCarran–Ferguson Act "Congress authorized state laws of [the] sort [California had enacted]," the Court said,

> As the text itself makes clear, the point of McCarran–Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised . . . . [A] federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.***

We think it unlikely that when Congress crafted the McCarran–Ferguson Act, it intended any future treaty implemented by an act of Congress to be abrogated to the extent that treaty conflicted

** Editor's note: Pursuant to Article II, § 2 of the U.S. Constitution, the New York Convention was ratified by the President with the advice and consent of the Senate, not by the Senate. Article II § 2 provides: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."

*** Editor's note: For additional discussion of this case, *see Digest 2003* at 462–67.

in some way with a state law regulating the business of insurance if Congress's implementing legislation did not expressly save the treaty from reverse preemption by state law. . . . There is no indication in the McCarran–Ferguson Act that Congress intended, through the preemption provision and the use of the term "Act of Congress," to restrict the United States' ability to negotiate and implement a treaty that might affect some aspect of international insurance agreements in the same way that other international agreements would be affected by the terms of the treaty. . . .

Most importantly, there is no apparent reason why Congress would have chosen to distinguish in the McCarran–Ferguson Act between treaties that are self-executing and those that are not. It is undisputed that if the provisions in the Convention directing courts to enforce international arbitration agreements were self-executing, then the McCarran–Ferguson Act would have no preemptive effect because self-executing treaties are not an "Act of Congress." . . .

* * * *

. . . The text of the McCarran–Ferguson Act does not support the inclusion by implication of "a treaty implemented by an Act of Congress." Because we give the phrases "Act of Congress" and "such Act" their usual, commonly understood meaning, we conclude that treaties, self-executing or not, are not reverse preempted by the McCarran–Ferguson Act.

The Supreme Court's decision in *Missouri v. Holland* reflects that a treaty followed by implementing legislation, may accomplish more than either treaty or an Act of Congress, standing alone. . . .

The Supreme Court recognized a difference between acts of Congress and "a treaty followed by such an act." . . . The Court said, ". . . Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." The Court continued, "[w]e do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . . ."

In the present case, as in *Holland*, the treaty followed by the implementing legislation, must be considered as the sum of its parts, not piecemeal, in determining what Congress meant when it used the words "Act of Congress" and "such Act" in the McCarran–Ferguson Act.

Our focus on congressional intent and the conclusion that referral to arbitration is required in this case is reinforced by the Supreme Court's analysis in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, although the McCarran–Ferguson Act was not implicated in that case. The question was the "arbitrability, pursuant to the Federal Arbitration Act and the [Convention], of claims arising under the Sherman Act and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction." The Court held such claims were arbitrable. . . .

. . . [T]he Supreme Court observed that "[t]he Convention reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to the public policy of that country.'" The Court also noted that "Art. II(1) of the Convention, which requires the recognition of agreements to arbitrate that involve 'subject matter capable of settlement by arbitration,' contemplates exceptions to arbitrability grounded in domestic law." "Yet in implementing the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope." "Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention." But the Court "decline[d] to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions *where Congress has not expressly directed the courts to do so*."

The question, then, is whether the use of "no Act of Congress" and "such Act" in the McCarran–Ferguson Act is an express direction by Congress that a treaty such as the Convention is preempted to the extent it "invalidate[s], impair[s], or supersede[s]" a state law that renders arbitration clauses unenforceable. For the reasons considered above, the text and context of the

McCarran–Ferguson Act compel us to conclude that it contains no such express congressional direction.

* * * *

3. Judicial Abstention in a Case Brought Under the Hague Abduction Convention: *Barzilay v. Barzilay*

On August 4, 2008, the U.S. Court of Appeals for the Eighth Circuit reversed a district court's decision to abstain from a case brought by a parent under the Hague Abduction Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670 ("Hague Abduction Convention"). *Barzilay v. Barzilay*, 536 F.3d 844 (8th Cir. 2008). The Eighth Circuit remanded the case to the district court to determine the merits of the plaintiff's Hague Convention claim.

As the Eighth Circuit explained, this case arose after a couple, both Israeli citizens, divorced in Missouri. Under their divorce decree, the parents had joint custody and agreed that if one of them repatriated to Israel, the other would go there to live with their children. The father then returned to Israel but the mother did not.

When the mother later brought the children to Israel for a visit, the father went to court in Israel. The court issued a consent decree, under which the mother agreed to an interim international parenting agreement and to repatriate to Israel by a specific date. Both parents agreed that the Israeli court had sole authority over the children's custody, and the mother agreed that failure to return the children to Israel by the agreed date "'is regarded as kidnapping' in violation of the Hague Convention." The mother then failed to return to Israel, and the father successfully sued her in Israeli court for violating the consent decree.

The mother petitioned a Missouri court to modify the initial custody agreement and issue a temporary restraining order to prevent enforcement of the Israeli judgment. The state court denied the father's motion to dismiss the case or

decline jurisdiction and stated that "'[t]he mere presence of the minor children on vacation in Israel is insufficient to establish a 'habitual presence' . . ." under the U.S. implementing legislation for the Hague Convention, the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601–11611.

The father then sued in the U.S. District Court for the Eastern District of Missouri under ICARA, seeking the children's return to Israel and "immediate access" to them. The district court abstained because it concluded that the Missouri court had addressed the merits of a Hague Convention claim. The father appealed.

Because it found that "neither parent filed a Hague petition in state court" the Eighth Circuit concluded "that the Hague Convention issues were not properly or fully raised in that proceeding" and thus the district court had abused its discretion in abstaining. Excerpts follow from the Eighth Circuit's analysis in reaching that conclusion (footnotes omitted). For discussion of other issues concerning the Hague Convention, *see* Chapter 2.B.2.*

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. . . [T]he Hague Convention . . . was adopted in 1980 to address the problem of intercountry child abduction under international law. . . . The Convention is not directed at kidnappings by strangers, but rather at the "unilateral removal or retention of children by parents, guardians or close family members." Beaumont & McEleavy, The Hague Convention on International Child Abduction 1 (1999), *cited in Mozes* [*v. Mozes*], 239 F.3d [1067,] 1070 [(9th Cir. 2001)]. The principal objectives of the Convention are "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State

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* Editor's note: The U.S. District Court for the Eastern District of Missouri denied the father's Hague Convention petition on March 23, 2009. 609 F. Supp. 867 (E.D. Mo. 2009).

are effectively respected in the other Contracting States." Hague Convention art. 1, T.I.A.S. No. 11670; *see also Silverman v. Silverman*, 338 F.3d 886, 897 (8th Cir. 2003) (en banc) (*Silverman II*); *Shalit v. Coppe*, 182 F.3d 1124, 1127 (9th Cir. 1999).

A party invokes the protections of the Convention in the United States by filing a petition in either federal or state court under ICARA (Hague petition). 42 U.S.C. § 11603(b) ("Any person seeking to initiate judicial proceedings under the Convention for the return of a child . . . may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."); *see* § 11603(a) (vesting concurrent original jurisdiction over Hague petitions in the state and federal courts). ICARA further provides that "[t]he court in which an action is brought under [§ 11603(b)] shall decide the case in accordance with the Convention." § 11603(d).

The key inquiry under the Convention is whether a child has been wrongfully removed from the country of its habitual residence or wrongfully retained in a country other than that of its habitual residence. A retention or removal is wrongful only if it meets the requirements of Article 3 of the Convention:

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

Hague Convention art. 3, T.I.A.S. No. 11670.

When deciding whether a child was wrongfully removed under this article, a court must thus determine when the removal or retention took place, what the habitual residence of the child was

immediately prior to the removal, whether the removal or retention violated the petitioner's custody rights under the law of habitual residence, and whether the petitioner was exercising those rights at the time of the removal. *See Mozes*, 239 F.3d at 1070. Once it is determined that a child who was habitually residing in a contracting state was wrongfully removed to or retained in another, the Convention requires that the country in which the child is located "order the return of the child forthwith." Hague Convention art. 12, T.I.A.S. No. 11670. Moreover, "until it has been determined that the child is not to be returned under this Convention," the authorities of the contracting state responsible for child custody determinations "shall not decide on the merits of rights of custody." *Id.* art. 16.

A case arising from a petition under the Hague Convention is not a custody proceeding. A United States district court "has authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim." *Shalit*, 182 F.3d at 1128; *see* 42 U.S.C. § 11601(b)(4); Hague Convention art. 19, T.I.A.S. No. 11670. The district court is to ascertain "only whether the removal or retention of a child was 'wrongful' under the law of the child's 'habitual residence,' and if so, to order the return of the child to the place of the 'habitual residence' for the court there to decide the merits of the custody dispute." *Shalit*, 182 F.3d at 1128.

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. . . The Hague Convention requires that state court custody proceedings be stayed until the resolution of the Hague litigation. Hague Convention art. 16, T.I.A.S. No. 11670 ("[T]he judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained *shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention*.") (emphasis added); *Yang v. Tsui*, 416 F.3d 199, 201 (3d Cir. 2005). While ICARA does not have a similar express provision, the purpose of the Convention is to "provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed."

Yang, 416 F.3d at 203. It is thus "consistent with this purpose that it is the custody determination, not the Hague Convention Petition, that should be held in abeyance if proceedings are going forward in both state and federal courts." *Id.* The pendency of state custody proceedings therefore does not support *Younger* [*v. Harris*, 401 U.S. 37 (1971)] abstention in the Hague Convention context.

Moreover, given that Sagi [the father] obtained a custody determination from an Israeli court and Tamar [the mother] has obtained a custody determination from a state court in this country, the federal district court is uniquely situated to adjudicate the question of whether Israel or Missouri is the habitual residence of the Barzilay children and whether they were wrongfully removed from that residence. *See id.* at 204; 42 U.S.C. § 11601(b)(3)(B) (emphasizing "the need for uniform international interpretation of the Convention"). Although the state clearly has an important interest in child custody matters, that interest has not been considered to be a significant factor in terms of abstention where ICARA is involved. *See Yang*, 416 F.3d at 204 ("It would make the Hague Convention and ICARA meaningless if a federal court abstained in a Hague Convention Petition because child custody was being disputed in state court.").

The parties dispute whether the state court proceedings afforded Sagi an adequate opportunity to raise the Hague Convention issues. The controlling case in our circuit is [*Silverman v. Silverman*, 267 F.3d 788, 792 (8th Cir. 2001)] *Silverman I*, which concluded that abstention was inappropriate in Hague Convention cases. 267 F.3d at 792. . . .

. . . In a later en banc proceeding we held that a state court custody order did not divest the federal district court of jurisdiction to determine whether the children had been wrongfully removed from their habitual residence. *Silverman II*, 338 F.3d at 893–95. In considering these issues, we noted that "abstention does not apply in Hague Convention cases." *Id.* at 891, *citing Silverman I,* 267 F.3d at 792.

* * * *

. . . Neither Tamar nor Sagi filed a Hague petition in state court. Tamar merely referenced the Hague Convention twice.

In her motion to modify the divorce decree, Tamar stated that Sagi used the Israeli court "to fraudulently procure a judgment giving Israel exclusive jurisdiction over the custody of the minor children . . . in blatant defiance of . . . the Hague Treaty on Child Abduction." She did not reference the terms of the Hague treaty or explain how Sagi's use of the Israeli court system implicated the treaty. In her motion for a temporary restraining order, Tamar argued that the Israeli judgment need not be respected because that court lacked subject matter jurisdiction and should have deferred to the Missouri court given its existing custody judgment and the habitual residence of the children. She also complained that Sagi's use of the Israeli court system "violated the spirit, if not the letter, of the Hague Convention."

At no time did Tamar file a Hague petition in the Missouri court. She did not request the state court to make a habitual residence determination under the Hague Convention. The determination of a child's habitual residence presents mixed questions of law and fact and requires the analysis of many factors, including the settled purpose of the move to the new country from the child's perspective, parental intent regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country. *See Silverman II*, 338 F.3d at 897–98; *Mozes*, 239 F.3d at 1971–81. She also did not allege or ask the state court to rule that Sagi had wrongfully removed the children to Israel or wrongfully retained them there. She referenced the Hague Convention only to further her argument for a temporary restraining order preventing the enforcement of the Israeli action.

Sagi's special appearance in Missouri was for the "limited purpose of opposing [the state court's] jurisdiction." . . . Sagi restricted his state court arguments to jurisdictional issues. He never raised the Hague Convention before the state court except to contest its exercise of jurisdiction. . . . Sagi never engaged in an argument in the state court on the merits of the Hague Convention considerations—habitual residence and wrongful removal. Rather, he informed the state court that he intended to file a Hague petition in federal district court to litigate the merits of the Hague issues in that forum.

. . . [T]he Missouri court made a comment on a relevant issue under the Hague Convention, even though no Hague petition was pending. Rather than analyzing the jurisdictional arguments, however, the state court simply stated without citation to legal authority that "[t]he mere presence of the minor children on vacation in Israel is insufficient to establish a 'habitual presence'." It ignored what effect, if any, the judgments of the Israeli court should have on its analysis, including the Israeli verdict formalizing the consent agreement in which the parties agreed that Israel was the habitual residence of the children. Moreover, the second part of the Hague Convention inquiry was not undertaken, for the court did not analyze whether a wrongful removal or retention had occurred. *See Shalit*, 182 F.3d at 1128 . . . .

Because neither parent filed a Hague petition in state court, we conclude that the Hague Convention issues were not properly or fully raised in that proceeding. The parties did not litigate the merits of such issues, and any statement by the state court touching on an issue under the Hague Convention inquiry is not controlling. It is "the petitioner [who] is free to choose between state or federal court," *Yang*, 416 F.3d at 203, and in the absence of a Hague petition the state court proceeding did not present an adequate opportunity to litigate ICARA issues. It was therefore an abuse of discretion for the district court to abstain.

As *Silverman I* and *Silverman II* made clear, the law in this circuit does not favor abstention in Hague Convention cases. *See* 267 F.3d at 792 ("[A]bstention principles do not permit an outright dismissal of a Hague petition."); *Silverman II*, 338 F.3d at 891 ("[A]bstention does not apply in Hague Convention cases."); 42 U.S.C. § 11603(d) ("*The court in which an action is brought under [§ 11603(b)] shall decide the case* in accordance with the Convention.") (emphasis added). Had a Hague petition been properly brought in state court and had that court rendered a decision on the merits of that petition, the proper response to a subsequent petition brought in federal court would have been to give full faith and credit to the state court decision and dismiss the petition on that basis. *See* 42 U.S.C. § 11603(g) ("Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying

the return of a child, pursuant to the Convention, in an action brought under this chapter.").

In reaching our decision we express no opinion on the issues of the habitual residence of the children or of wrongful removal or retention and leave those for the district court. At this point we only recognize the father's right under the Convention to file a Hague petition and to have those issues decided by a court of competent jurisdiction.

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Cross References

Comity issues in Alien Tort Statute case, **Chapter 5.A.2.c.**
Availability of forum non conveniens in litigation brought under the Montreal Convention, **Chapter 11.A.2.**
Application of the Tokyo and Warsaw Conventions, **Chapter 11.A.3.**

Chapter 16

Sanctions

A. IMPOSITION OF SANCTIONS

1. Burma

a. Executive Order 13464

On April 30, 2008, President George W. Bush issued Executive Order 13464, blocking property and prohibiting certain transactions relating to Burma, "in order to take additional steps with respect to the Government of Burma's continued repression of the democratic opposition in Burma." 73 Fed. Reg. 24,491 (May 2, 2008). In the annex to the executive order the President listed three entities that are subject to the sanctions set out in the order. The same day, President Bush notified Congress that the new executive order would:

> block all property and interests in property of designated individuals and entities determined to be owned or controlled by, directly or indirectly, the Government of Burma or an official or officials of the Government of Burma. This Executive Order expands existing authorities that allow the United States Government to target those who are responsible for supporting, empowering, and enriching the Burmese regime—a regime that exploits and oppresses the people of Burma.

The full text of President Bush's statement is available at 44 WEEKLY COMP. PRES. DOC. 629 (May 5, 2008). *See Digest 2007* at 808–11.

Excerpts from the order are set forth below.

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* * * *

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq*.), the Burmese Freedom and Democracy Act of 2003 (Public Law 108-61, as amended, 50 U.S.C. 1701 note), and section 301 of title 3, United States Code, and in order to take additional steps with respect to the Government of Burma's continued repression of the democratic opposition in Burma, and with respect to the national emergency declared in Executive Order 13047 of May 20, 1997, relied upon for additional steps taken in Executive Order 13310 of July 28, 2003, and expanded in Executive Order 13448 of October 18, 2007,

I, GEORGE W. BUSH, President of the United States of America, hereby order:

Section 1. Except to the extent provided in section 203(b)(1), (3), and (4) of IEEPA (50 U.S.C. 1702(b)(1), (3), and (4)), the Trade Sanctions Reform and Export Enhancement Act of 2000 (title IX, Public Law 106-387), or regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property of the following persons that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(a) the persons listed in the Annex attached and made a part of this order; and
(b) any person determined by the Secretary of the Treasury, after consultation with the Secretary of State:

(i) to be owned or controlled by, directly or indirectly, the Government of Burma or an official or officials of the Government of Burma;

(ii) to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, the Government of Burma, the State Peace and Development Council of Burma, the Union Solidarity and Development Association of Burma, any successor entity to any of the foregoing, any senior official of any of the foregoing, or any person whose property and interests in property are blocked pursuant to Executive Order 13310, Executive Order 13448, or this order; or

(iii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to Executive Order 13310, Executive Order 13448, or this order.

* * * *

The Department of the Treasury's Office of Foreign Assets Control ("OFAC") subsequently announced the designation of ten entities pursuant to the new order. 73 Fed. Reg. 45,270 (Aug. 4, 2008).

b. Tom Lantos Block Burmese JADE Act

On July 29, 2008, the President signed the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 ("JADE Act"), Pub. L. No. 110-286, 122 Stat. 2632. Section 5 of the JADE Act imposes visa and financial sanctions on certain Burmese government officials and their supporters, subject to Presidential waiver authority, until the President certifies that the Burmese regime has:

(1) unconditionally released all political prisoners, including Aung San Suu Kyi and other members of the National League for Democracy;

(2) entered into a substantive dialogue with democratic forces led by the National League for Democracy and the ethnic minorities of Burma on transitioning to democratic government under the rule of law; and

(3) allowed humanitarian access to populations affected by armed conflict in all regions of Burma.

Excerpts from the JADE Act's provisions concerning travel and financial sanctions are set forth below.*

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* * * *

SEC. 5. SANCTIONS.

(a) VISA BAN.—

(1) IN GENERAL.—The following persons shall be ineligible for a visa to travel to the United States:

(A) Former and present leaders of the SPDC [State Peace and Development Council, the ruling military regime in Burma], the Burmese military, or the USDA [Union Solidarity Development Association].

(B) Officials of the SPDC, the Burmese military, or the USDA involved in the repression of peaceful political activity or in other gross violations of human rights in Burma or in the commission of other human rights abuses, including any current or former officials of the security services and judicial institutions of the SPDC.

(C) Any other Burmese persons who provide substantial economic and political support for the SPDC, the Burmese military, or the USDA.

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* Editor's note: On January 15, 2009, President Bush, pursuant to the waiver authority provided in § 5(i) of the JADE Act, waived the financial sanctions under § 5(b) of the JADE Act with respect to those individuals and entities not included on the Department of the Treasury's List of Specially Designated Nationals and Blocked Persons. 74 Fed. Reg. 3947 (Jan. 21, 2009). *Digest 2009* will provide details on the President's waiver.

(D) The immediate family members of any person described in subparagraphs (A) through (C).

(2) WAIVER.—The President may waive the visa ban described in paragraph (1) only if the President determines and certifies in writing to Congress that travel by the person seeking such a waiver is in the national interests of the United States.

* * * *

(b) FINANCIAL SANCTIONS.—

(1) BLOCKED PROPERTY.—No property or interest in property belonging to a person described in subsection (a)(1) may be transferred, paid, exported, withdrawn, or otherwise dealt with if—

(A) the property is located in the United States or within the possession or control of a United States person, including the overseas branch of a United States person; or

(B) the property comes into the possession or control of a United States person after the date of the enactment of this Act.

(2) FINANCIAL TRANSACTIONS.—Except with respect to transactions authorized under Executive Orders 13047 (May 20, 1997) and 13310 (July 28, 2003), no United States person may engage in a financial transaction with the SPDC or with a person described in subsection (a)(1).

* * * *

Section 6 amended the Burmese Freedom and Democracy Act of 2003 ("BFDA"), Pub. L. No. 108-61, 50 U.S.C. § 1701 note, by adding a new § 3A to prohibit importation of Burmese jadeite and rubies and jewelry containing such jadeite or rubies ("Burmese covered articles"), and to place restrictions on importation of jadeite and rubies from countries other than Burma and articles of jewelry containing such jadeite or rubies ("non-Burmese covered articles"), with certain exceptions. Excerpts from the new BFDA § 3A follow.

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* * * *

(b) PROHIBITION ON IMPORTATION OF BURMESE COVERED ARTICLES.—

(1) IN GENERAL.—Notwithstanding any other provision of law, until such time as the President determines and certifies to the appropriate congressional committees that Burma has met the conditions described in section 3(a)(3),** beginning 60 days after the date of the enactment of the Tom Lantos Block Burmese JADE . . . Act of 2008, the President shall prohibit the importation into the United States of any Burmese covered article.

* * * *

(c) REQUIREMENTS FOR IMPORTATION OF NON-BURMESE COVERED ARTICLES.—

(1) IN GENERAL.—Except as provided in paragraph (2), until such time as the President determines and certifies to the appropriate congressional committees that Burma has met the conditions described in section 3(a)(3), beginning 60 days after the date of the enactment of the . . . JADE . . . Act . . . , the President shall require as a condition for the importation into the United States of any non-Burmese covered article that—

(A) the exporter of the non-Burmese covered article has implemented measures that have substantially the same effect and achieve the same goals as the measures described in clauses (i) through (iv) of paragraph (2)(B) (or their functional equivalent) to prevent the trade in Burmese covered articles; and

(B) the importer of the non-Burmese covered article agrees—

(i) to maintain a full record of, in the form of reports or otherwise, complete information relating to any act or transaction related to the purchase, manufacture, or shipment of the

** Editor's note: The conditions set forth in § 3(a)(3) of Public Law 108-61 are that (1) "the SPDC has made substantial and measurable progress to end violations of internationally recognized human rights including rape, and the Secretary of State . . . reports to the appropriate congressional committees that the SPDC no longer systematically violates workers rights, including the use of forced and child labor, and conscription of child-soldiers;" (2) the SPDC has made specified "measurable and substantial progress toward implementing a democratic government;" and (3) Burma has met statutory requirements for cooperation with counternarcotics efforts.

non-Burmese covered article for a period of not less than 5 years from the date of entry of the . . . article; and

(ii) to provide the information described in clause (i) . . . to the relevant United States authorities upon request.

(2) EXCEPTION.—

(A) IN GENERAL.—The President may waive the requirements of paragraph (1) with respect to the importation of non-Burmese covered articles from any country with respect to which the President determines and certifies to the appropriate congressional committees has implemented the measures described in subparagraph (B) (or their functional equivalent) to prevent the trade in Burmese covered articles.

(B) MEASURES DESCRIBED.—The measures referred to in subparagraph (A) are the following:

(i) With respect to exportation from the country of jadeite or rubies in rough form, a system of verifiable controls on the jadeite or rubies from mine to exportation demonstrating that the jadeite or rubies were not mined or extracted from Burma, and accompanied by officially-validated documentation certifying the country from which the jadeite or rubies were mined or extracted, total carat weight, and value of the jadeite or rubies.

(ii) With respect to exportation from the country of finished jadeite or polished rubies, a system of verifiable controls on the jadeite or rubies from mine to the place of final finishing of the jadeite or rubies demonstrating that the jadeite or rubies were not mined or extracted from Burma, and accompanied by officially-validated documentation certifying the country from which the jadeite or rubies were mined or extracted.

(iii) With respect to exportation from the country of articles of jewelry containing jadeite or rubies, a system of verifiable controls on the jadeite or rubies from mine to the place of final finishing of the article of jewelry containing jadeite or rubies demonstrating that the jadeite or rubies were not mined or extracted from Burma, and accompanied by officially-validated documentation certifying the

country from which the jadeite or rubies were mined or extracted.

(iv) Verifiable recordkeeping by all entities and individuals engaged in mining, importation, and exportation of non-Burmese covered articles in the country, and subject to inspection and verification by authorized authorities of the government of the country in accordance with applicable law.

(v) Implementation by the government of the country of proportionate and dissuasive penalties against any persons who violate laws and regulations designed to prevent trade in Burmese covered articles.

(vi) Full cooperation by the country with the United Nations or other official international organizations that seek to prevent trade in Burmese covered articles.

* * * *

2. Syria

On February 13, 2008, President Bush issued Executive Order 13460, "Blocking Property of Additional Persons in Connection with the National Emergency with respect to Syria." 73 Fed. Reg. 8991 (Feb. 15, 2008). The order takes additional steps with respect to the national emergency declared in Executive Order 13338 of May 11, 2004 ("Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria"), by imposing sanctions on persons determined by the Secretary of the Treasury "to be responsible for, to have engaged in, to have facilitated, or to have secured improper advantage as a result of, public corruption by senior officials within the Government of Syria." The order also amends one of the Secretary of the Treasury's designation authorities from Executive Order 13338. Excerpts from the new order follow. *See also Digest 2006* at 984–86 and *Digest 2004* at 900–02.

* * * *

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*)(IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code,

I, GEORGE W. BUSH, President of the United States of America, find that the Government of Syria continues to engage in certain conduct that formed the basis for the national emergency declared in Executive Order 13338 of May 11, 2004, including but not limited to undermining efforts with respect to the stabilization of Iraq. I further find that the conduct of certain members of the Government of Syria and other persons contributing to public corruption related to Syria, including by misusing Syrian public assets or by misusing public authority, entrenches and enriches the Government of Syria and its supporters and thereby enables the Government of Syria to continue to engage in certain conduct that formed the basis for the national emergency declared in Executive Order 13338. In light of these findings, and to take additional steps with respect to the national emergency declared in Executive Order 13338 of May 11, 2004, I hereby order:

Section 1. (a) Except to the extent provided in section 203(b)(1), (3), and (4) of IEEPA (50 U.S.C. 1702(b)(1), (3) and (4)), the Trade Sanctions Reform and Export Enhancement Act of 2000 (title IX, Public Law 106-387), or regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: persons determined by the Secretary of the Treasury, after consultation with the Secretary of State, to be responsible for, to have engaged in, to have facilitated, or to have secured improper advantage as a result of, public corruption by senior officials within the Government of Syria.

(b) The prohibitions in paragraph (a) of this section include, but are not limited to, (i) the making of any contribution or

provision of funds, goods, or services by, to, or for the benefit of any person designated pursuant to this order, and (ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 2. Section 3(a)(iv) of Executive Order 13338 is hereby amended to read as follows:

> "(iv) to be or to have been responsible for or otherwise significantly contributing to actions taken or decisions made by the Government of Syria that have the purpose or effect of undermining efforts to stabilize Iraq or of allowing the use of Syrian territory or facilities to undermine efforts to stabilize Iraq; or".

* * * *

OFAC subsequently announced the designation of one individual under the new order, and identified two entities owned by this individual and therefore subject to sanctions. *See* 73 Fed. Reg. 10,857 (Feb. 28, 2008) (Rami Makhluf), and 73 Fed. Reg. 48,431 (Aug. 19, 2008) (two entities in which Rami Makhluf owned a greater than 50 percent interest).

3. Zimbabwe

a. Expansion of national emergency

On July 25, 2008, President Bush issued Executive Order 13469, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe." 73 Fed. Reg. 43,841 (July 29, 2008). Excerpts follow from the order, which takes additional steps with respect to the national emergency originally declared in Executive Order 13288 of March 6, 2003, and subsequently relied upon in Executive Order 13391 of November 22, 2005. *See also Digest 2005* at 889 and *Digest 2003* at 929–30.

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* * * *

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq*.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq*.), and section 301 of title 3, United States Code,

I, GEORGE W. BUSH, President of the United States of America, find that the continued actions and policies of the Government of Zimbabwe and other persons to undermine Zimbabwe's democratic processes or institutions, manifested most recently in the fundamentally undemocratic election held on June 27, 2008, to commit acts of violence and other human rights abuses against political opponents, and to engage in public corruption, including by misusing public authority, constitute an unusual and extraordinary threat to the foreign policy of the United States, and to deal with that threat, hereby expand the scope of the national emergency declared in Executive Order 13288 of March 6, 2003, and relied upon for additional steps taken in Executive Order 13391 of November 22, 2005, and hereby order:

Section 1. (a) Except to the extent provided by statutes, or provided in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order, all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

Any person determined by the Secretary of the Treasury, after consultation with the Secretary of State:

(i) to be a senior official of the Government of Zimbabwe;
(ii) to be owned or controlled by, directly or indirectly, the Government of Zimbabwe or an official or officials of the Government of Zimbabwe;
(iii) to have engaged in actions or policies to undermine Zimbabwe's democratic processes or institutions;

(iv) to be responsible for, or to have participated in, human rights abuses related to political repression in Zimbabwe;
(v) to be engaged in, or to have engaged in, activities facilitating public corruption by senior officials of the Government of Zimbabwe;
(vi) to be a spouse or dependent child of any person whose property and interests in property are blocked pursuant to Executive Order 13288, Executive Order 13391, or this order;
(vii) to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, the Government of Zimbabwe, any senior official thereof, or any person whose property and interests in property are blocked pursuant to Executive Order 13288, Executive Order 13391, or this order; or
(viii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to Executive Order 13288, Executive Order 13391, or this order.

(b) I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to paragraph (a) of this section would seriously impair my ability to deal with the national emergency declared in Executive Order 13288, as amended, and I hereby prohibit such donations as provided by paragraph (a) of this section.

(c) The prohibitions of this section include but are not limited to (i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to Executive Order 13288, Executive Order 13391, or this order, and (ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(d) The provisions of Executive Orders 13288 and 13391 remain in effect, and this order does not affect any action taken pursuant to those orders.

Sec. 2. (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

* * * *

OFAC subsequently announced the designations of 38 entities and five individuals pursuant to the new order: (1) 17 entities, including several Zimbabwean parastatals, and one individual on July 25, 2008 (73 Fed. Reg. 45,101 (Aug. 1, 2008)); and (2) four individuals and 21 entities on November 25, 2008 (73 Fed. Reg. 73,690 (Dec. 3, 2008)).

b. Draft Security Council resolution

On July 11, 2008, Russia and China vetoed a draft resolution sponsored by the United States and 11 other states to impose Security Council sanctions relating to Zimbabwe (U.N. Doc. S/2008/447). Nine Security Council members voted for the resolution, which would have imposed an arms embargo on Zimbabwe and included an annex listing 14 individuals who would be subject to an asset freeze and a travel ban. The draft resolution also would have established a new Security Council sanctions committee and imposed an asset freeze and a travel ban on any individuals or entities that the committee designated "as having engaged in or provided support for actions or policies to subvert democratic processes or institutions in Zimbabwe since May 2005." Excerpts from the comments that Ambassador Zalmay Khalilzad, U.S. Permanent Representative to the United Nations, made to the Security Council following the vote are set forth below. The full text of Ambassador Khalilzad's remarks is available

at *www.archive.usun.state.gov/press_releases/20080711_181.html.*

The United States is disappointed that the Russian Federation and China today prevented the Security Council from adopting a strong resolution condemning and sanctioning the violent regime of Robert Mugabe.

. . . More than a majority of the Security Council members stood with the people of Zimbabwe by demanding that Mugabe put an end, an immediate end, to the violence and the start of serious negotiations with the opposition.

The draft resolution would have supported the courageous efforts of the Zimbabwean people to change their lives peacefully through democratic elections.

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The U-turn in the Russian position is particularly surprising and disturbing. Only a few days ago the Russian Federation was supportive of a G8 statement which said . . . , "We express grave concern about the situation in Zimbabwe. We deplore the fact that the Zimbabwean authorities pressed ahead with the presidential election despite the absence of appropriate conditions for free and fair voting as a result of their systematic violence, obstruction and intimidation. We recommend the appointment of a special envoy of the UN Secretary-General to report on the political, humanitarian, human rights and security situation and to support regional efforts to take forward mediation between political parties. We will take further steps, inter alia introducing financial and other measures against those individuals responsible for violence."

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There should be no doubt that what is happening in Zimbabwe affects peace and security in the region. UN Deputy Secretary-General Migiro called the situation in Zimbabwe the "single greatest challenge to regional stability in southern Africa." The African Union adopted a resolution expressing its concern about the "urgent need to prevent further worsening of the situation and

with a view to avoid the spread of conflict with the consequential negative impact on the country and the sub-region."

Three African states—Liberia, Sierra Leone and Burkina Faso—co-sponsored this resolution. In the case of Liberia and Sierra Leone, whose democratic governments emerged, after years of conflict, with the help of the UN and the Security Council, they joined in co-sponsoring the draft resolution as an indication of their concern about the impact of the situation in Zimbabwe on the region. . . .

Further, there are no serious, substantive negotiations underway between the Mugabe regime and the opposition contrary to what the representative of South Africa reported. . . .

Finally, this draft resolution would have supported regional and international mediation efforts, not . . . undercut them. This draft resolution would have empowered regional and international mediators by giving Mr. Mugabe an incentive to negotiate seriously.

The surest way for Mr. Mugabe to have avoided this sanctions resolution would have been to have acted immediately to end the violence and start serious negotiations with the opposition. He had a week since our introduction of this draft resolution to act. Unfortunately, during this time, the violence continued, as did Mr. Mugabe's bellicose rhetoric. . . .

Although this draft resolution was not adopted, we will continue to work with all the Security Council delegations to monitor closely the situation in Zimbabwe and to urge the Secretary General to appoint a Special Representative to support the negotiating process between the political parties in Zimbabwe and to report to the Council on the political, humanitarian, human rights and security situation in Zimbabwe.

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4. Stabilization Efforts in Iraq

On January 9, 2008, the Secretary of the Treasury, in consultation with the Secretaries of State and Defense, designated four individuals and one entity pursuant to Executive Order

13438, which targets certain persons who threaten stabilization efforts in Iraq. 73 Fed. Reg. 3804 (Jan. 22, 2008); *see also www.treas.gov/press/releases/hp759.htm*. On September 16, 2008, the Secretary of the Treasury, again in consultation with the Secretaries of State and Defense, designated five individuals and two entities pursuant to Executive Order 13438, including a member of Iran's Qods Force, which the Secretary of the Treasury had designated as a Special Designated Global Terrorist under Executive Order 13224 on October 25, 2007. 73 Fed. Reg. 54,896 (Sept. 23, 2008); *see also www.treas.gov/press/releases/hp1141.htm*.

5. Mauritania

On October 16, 2008, the Secretary of State imposed travel restrictions to the United States on certain members of the military junta and the government of Mauritania, as well as certain of its other supporters. The State Department issued a press statement, set forth below, describing the new restrictions. The statement is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/111027.htm*. *See* Chapter 18.A.1.c.(7) for discussion of Secretary Rice's August 2008 statement condemning the military coup in Mauritania.

The Secretary of State on October 16, 2008 imposed travel restrictions to the United States on certain members of the military junta and the government, as well as other individuals who support policies or actions that undermine Mauritania's return to constitutional rule.

On August 6, 2008 Mauritania's first democratically elected government was overthrown by a military coup. The Mauritanian people deserve the right to the democracy they worked so hard to obtain and to enjoy the security and development that can only come with democracy. The United States strongly supports the efforts of the African Union, and reiterates our call for the unconditional release of President Abdallahi and the immediate restoration of constitutional order in Mauritania.

6. Belarus Sanctions

On May 15, 2008, OFAC identified three entities as being owned by the Belarusian petrochemical conglomerate, Belneftekhim, and therefore subject to the sanctions imposed on Belneftekhim under Executive Order 13405 (2006), which targets individuals and entities who are either undermining the democratic processes or institutions or are responsible for human rights violations related to political repression in Belarus. 73 Fed. Reg. 29,849 (May 22, 2008); *see also www.treas.gov/press/releases/hp978.htm*. The Secretary of the Treasury had designated Belneftekhim under Executive Order 13405 on November 13, 2007. *See Digest 2007* at 823. On September 4, 2008, OFAC issued a general license authorizing transactions between U.S. persons and two of the entities identified on May 15, Lakokraska OAO and Politsk Steklovolokno OAO. That license was effective until March 2, 2009.* *See www.treas.gov/offices/enforcement/ofac/actions/20080904.shtml*.

7. Sudan

On December 3, 2008, Ambassador Rosemary DiCarlo, U.S. Alternate Representative to the United Nations for Special Political Affairs, addressed the Security Council after a briefing by the prosecutor of the International Criminal Court. In her remarks, Ambassador DiCarlo urged the UN Security Council sanctions committee on Sudan to use its authorities "to prevent further violence in Darfur." Excerpts from Ambassador DiCarlo's statement follow; the full text is

* Editor's note: On February 19, 2009, OFAC extended the general license until June 1, 2009, and on May 21, 2009, OFAC renewed the license until November 30, 2009. *See www.treas.gov/offices/enforcement/ofac/programs/belarus/gls/belarus_gl_1a.pdf*; *www.treas.gov/offices/enforcement/ofac/programs/belarus/gls/belarus_gl_1b.pdf*.

available at *www.archive.usun.state.gov/press_releases/20081203_352.html.*

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The United States has domestically designated, and thus barred from the U.S. financial system, seven individuals . . . for conduct or financing related to the conflict in Darfur. The UN Security Council Sanctions Committee is able to designate those who impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities, violate the arms embargo, or are responsible for offensive military overflights. The United States urges the Sanctions Committee to use responsibly the tools at its disposal in order to prevent further violence in Darfur. We encourage members of the Sanctions Committee to allow for meaningful follow up to the recommendations made by the Panel of Experts, and urge the Council to request briefings from the Permanent Representatives of Sudan and Chad.

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B. OTHER ISSUES

1. Mobile Phones Sent to Cuba as Gifts

On June 13, 2008, the Commerce Department's Bureau of Industry and Security ("BIS") issued a final rule to allow individuals to send mobile phones as gifts to members of their immediate families in Cuba. 73 Fed. Reg. 33,671 (June 13, 2008). The rule revised a license exception and related provisions in the Export Administration Regulations, 15 C.F.R. parts 736 and 740, which allowed individuals to export and reexport certain items in gift parcels to members of their immediate families in Cuba. Excerpts below from the Background section of the notice provide details on the regulatory change.

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On May 21, 2008, the President, marking the Day of Solidarity with the Cuban People, announced that, in support of "Cubans who work to make their nation democratic and prosperous and just," the relevant U.S. Government agencies would make any regulatory changes necessary "to allow Americans to send mobile phones to family members in Cuba." The Cuban government announced earlier this year that it will now permit Cubans to acquire and use mobile phones. . . .

In support of this Presidential initiative, BIS is taking regulatory action consistent with all relevant laws, including the Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD), to allow exports of mobile phones in specified circumstances. This action is consistent with the ongoing support the United States has provided to individuals who support democracy-building efforts for Cuba by enabling the free exchange of information among persons in Cuba and with persons in other countries.

Consistent with the United States embargo of Cuba, the Export Administration Regulations (EAR) require a license for exports and reexports of all items subject to the EAR to Cuba, with only a limited number of license exceptions. One of those exceptions authorizes exports and reexports of certain items in gift parcels from donors to members of the donor's immediate family in Cuba. This rule amends the terms of License Exception Gift Parcels and Humanitarian Donations (GFT) to permit mobile phones (and related software, batteries, memory cards, chargers, and other accessories for mobile phones) to be included in such gift parcels. This rule also raises the value limit on such gift parcels from $200 to $400. This increase is intended to allow the donor to choose from a variety of currently available mobile phones without having to reduce the quantity of other items, such as medicines or medical supplies in the gift parcel. All other terms of that license exception, including eligible recipients and frequency of shipments are not changed by this rule.

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2. Restrictions on Educational Travel to Cuba

On November 4, 2008, the U.S. Court of Appeals for the District of Columbia Circuit upheld a district court's dismissal of a challenge to OFAC's regulations restricting study programs in Cuba. *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4 (D.C. Cir. 2008). The appellants, a group of academics and students, charged that the new restrictions on educational travel that OFAC imposed in 2004 violated the First and Fifth Amendments to the U.S. Constitution, as well as the Administrative Procedures Act, 5 U.S.C. §§ 500–504. The United States argued that the appellants did not have standing; alternatively, the government argued among other things that OFAC's restrictions furthered an important governmental interest, were consistent with the President's inherent foreign policy powers, and were permitted under the Trading with the Enemy Act, 50 U.S.C. App. § 5(b), which provides authority for the Cuban embargo regime. Excerpts from the court's opinion rejecting the constitutional challenges to OFAC's regulations are set forth below. The U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

* * * *

In 1963, President Kennedy exercised his broad authority under the Trading with the Enemy Act, 50 U.S.C. App. § 5(b) (the "Act"), to impose a comprehensive trade embargo against Cuba. Pursuant to a presidential designation under the Act, Treasury is the agency responsible for administering the embargo regime, and Treasury has in turn delegated the promulgation and implementation of the regulations thereunder to the Office. Cuban Assets Control Regulations, 31 C.F.R. Part 515. While the regulations were initially issued in order to combat subversive activities undertaken by the Castro regime throughout Latin America, over the years, their scope and stringency have waxed and waned in response to the shifting foreign policies of succeeding presidential administrations.

The essential objective of the embargo, however, has remained the same: to isolate the Cuban government by depriving the island's economy of the benefit of U.S. dollars.

Under the present regulations, the Office authorizes travel to Cuba via the issuance of either a general or a specific license. A general license is made available for travel related to official government business and, in certain defined circumstances, for journalistic or professional research activities. Specific licenses are dispensed on a "case-by-case basis" for all other purposes, including, *inter alia*, travel connected with familial obligations, religious activities, humanitarian projects, and cultural performances or exhibitions. Under the regulations, accredited U.S. undergraduate or graduate degree-granting academic institutions are eligible to obtain a specific license so as to allow qualified individuals to engage in an enumerated list of activities, including "participation in a structured educational program in Cuba." This limited exemption for selected educational activities has been in effect since 1999.

At immediate issue in this suit are certain 2004 amendments to the Cuba travel restrictions that resulted in a diminution of this exemption. . . .

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. . . [A] durational requirement for educational programs conducted in Cuba by U.S. academic institutions was added to the travel restrictions whereby any such program must last for at least one full academic term of no fewer than ten weeks. Second, the amendments require that any student traveling to Cuba under the specific license of an academic institution must be enrolled in either an undergraduate or graduate degree program at such institution—*i.e.*, cross-registration in a course offered by another university would no longer be permitted. Finally, the amended regulations plainly state that any faculty teaching under the auspices of an academic institution's license must be "full-time permanent employees" "regularly employed in a teaching capacity at the licensed institution." . . .

* * * *

The Office's Director has stated that the purpose of the Cuban embargo, and therefore also of the Office's regulations, is to deny currency to the government of Cuba. Our government has long deemed this policy instrumental to the ultimate goal of nudging Cuba toward a peaceful transition from the oppressive policies of the Castro regime to a free and democratic society. The 2004 amendments were specifically designed to curtail tourism, a critical and much-exploited revenue source for the Cuban government. The purpose of the 2004 amendments, thus, is content-neutral. *See Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007, 1013–14 (S.D.N.Y. 1990). None of this is remotely related to the suppression of free expression, nor is any restriction whatsoever placed on the subject matter or editorial slant a professor may choose to incorporate into his teaching on Cuba.

* * * *

The Supreme Court has stated that the denial of hard currency to Cuba is "justified by weighty concerns of foreign policy." *Regan*, 468 U.S. at 242. In *Walsh*, a case involving a First Amendment challenge to the application of the Cuba travel restrictions to the news-gathering activities of an importer of political posters, we held that denial of hard currency to Cuba meets the intermediate scrutiny standard. 927 F.2d at 1235. Our sister circuits have uniformly reached similar conclusions. Denial of hard currency to hostile regimes, including Cuba, has been described as "vital," *Teague v. Regional Comm'r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968), and as "compelling," *Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs*, 459 F.2d 676, 682 (3d Cir. 1972). Further, on numerous occasions, content-neutral restrictions on travel to Cuba and other hostile nations have been upheld in the face of similar First Amendment challenges. *See*, *e.g.*, *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965) (passport validation); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441 (9th Cir. 1996) (educational travel); *Clancy v. OFAC*, No. 05-C-580, 2007 U.S. Dist. LEXIS 29232, 2007 WL 1051767, at *16 (E.D. Wis. March 31, 2007) (travel to Iraq as "human shield").

Even weaker is appellants' claim that their right to travel under the Fifth Amendment has been infringed by the regulations.

Although *Kent v. Dulles*, 357 U.S. 116, 127 (1958), did recognize the right to international travel as part of a liberty interest, subsequent cases have distinguished the right to travel within the United States—which carries greater protection—from international travel. *See, e.g., Haig v. Agee*, 453 U.S. 280, 306 (1981). . . .

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The district court's grant of appellees' motions to dismiss with prejudice is affirmed.

Cross References

Exemption of the African National Congress and certain associated individuals from terrorism-related provisions of the Immigration and Nationality Act, **Chapter 1.C.3.**
Exemption for terrorism-related visa restrictions, **Chapter 1.D.**
Terrorism sanctions, **Chapter 3.B.1.c., d., f.(2), and f.(3)**
Counternarcotics sanctions, **Chapter 3.B.2.a. and c.**
Trafficking in persons-related sanctions, **Chapter 3.B.3.**
Money laundering sanctions, **Chapter 3.B.4.**
Sudan peace process, **Chapter 17.A.6.**
Nonproliferation sanctions, **Chapter 18.B.1.f.(2) and B.12.**
Somalia sanctions, **Chapter 18.B.10.b.**

Chapter 17

International Conflict Resolution and Avoidance

A. PEACE PROCESS AND RELATED ISSUES

1. Balkans

On March 4, 2008, Daniel Fried, Assistant Secretary of State for European and Eurasian Affairs, testified before the Senate Committee on Foreign Relations about the events that led to and followed Kosovo's declaration of independence on February 17, 2008 (*see* Chapter 9.A.1.a.). In his written testimony, Ambassador Fried addressed the potential impact of Kosovo's independence on other states of the former Yugoslavia as follows:

> . . . [T]he possibility exists that some may cho[o]se to exploit developments in Kosovo. In particular, we urge the leaders of Bosnia-Herzegovina to remember that their country's future lies with Europe, and that the only barriers between them and that good future are those they may construct for themselves. While the constitutional structure of Bosnia is complex and needs improving, the United States and our European partners have been clear: we support the improvement of the Dayton arrangements through negotiation and consensus, not ultimatums. And we do not and will not support or tolerate radical calls to abolish the Dayton arrangements or the integrity of Bosnia-Herzegovina. We are prepared to work cooperatively with the leaders of the Bosniak-Croat Federation

and Republika Srpska on this basis, and have made that clear.

We have also worked closely with leaders of other nations in the region: Macedonia and Montenegro especially, and believe that Kosovo's independence will not pose a significant problem for them.

The full text of Ambassador Fried's testimony is available at *http://foreign.senate.gov/testimony/2008/FriedTestimony080304a.pdf*; *see* B.5. below for further discussion of the situation in Kosovo.

2. Israeli-Palestinian Conflict

a. Quartet Statement, December 15, 2008

On December 15, 2008, representatives of the United Nations, the European Union, the Russian Federation, and the United States, referred to as the Quartet, reaffirmed their support for the Israeli-Palestinian peace negotiations launched at the U.S.-hosted conference in Annapolis, Maryland, on November 27, 2007. *See Digest 2007* at 850–54. At the Annapolis conference, Israeli Prime Minister Ehud Olmert and Palestinian Authority President Mahmoud Abbas agreed "to immediately launch good-faith bilateral negotiations in order to conclude a peace treaty, resolving all outstanding issues, including all core issues without exception, as specified in previous agreements" and "to make every effort to conclude an agreement before the end of 2008." No agreement was completed during 2008.

Excerpts follow from the statement the Quartet issued after its December 15 meeting. The full text is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/dec/113216.htm*. Statements issued by the Quartet following its November and September meetings are available at *http://2001-2009.state.gov/secretary/rm/2008/09/110380.htm*

and *http://2001-2009.state.gov/r/pa/prs/ps/2008/nov/111664.htm*.

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The Quartet reaffirmed support for the bilateral, comprehensive, direct, uninterrupted, confidential and ongoing Israeli-Palestinian negotiations and commended Israel and the Palestinians for their continuous efforts to conclude a peace treaty resolving all outstanding issues without exception, as stated by Palestinian President Mahmoud Abbas and Israeli Foreign Minister Tzipi Livni during their November 9 briefing in Sharm el-Sheikh. The Quartet expressed its considered view that the bilateral negotiations process launched at Annapolis is irreversible and that these negotiations should be intensified in order to put an end to the conflict and to establish as soon as possible the state of Palestine, living side by side in peace and security with Israel. The Quartet affirmed that a final treaty and a lasting peace will be reached through simultaneous and mutually re-enforcing efforts on three tracks: negotiations; building the institutions of a Palestinian state—including facilitating economic development through an improvement of conditions on the ground; and implementation of the parties' obligations under the Roadmap, as stated in the Annapolis Joint Understanding.*

Taking note of the resolutions adopted by the Arab League on November 26, the Quartet re-iterated that a lasting solution to the situation in Gaza can only be achieved through peaceful means. It reiterated its previous call for all Palestinians to commit themselves to non-violence, recognition of Israel, and acceptance of previous agreements and obligations. Restoring Palestinian unity based on the commitments of the Palestinian Liberation Organization

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* Editor's note: *See Digest 2007* at 850–51 and 43 WEEKLY COMP. PRES. DOC. 1532 (Dec. 3, 2007) for the text of the Annapolis Joint Understanding, which Prime Minister Olmert and President Abbas reached at the Annapolis conference.

(PLO)—the legitimate and internationally recognized representative of the Palestinian people—would be an important factor in this process.

The Quartet reiterated its support for the Egyptian-brokered calm that came into effect on June 19, 2008, urged that it be respected and extended, and expressed the hope that it would lead to improved security and humanitarian conditions for Israelis and Palestinians alike, actions to alleviate humanitarian conditions, and the restoration of normal civilian life in Gaza. In this regard, the Quartet expressed concern that the Egyptian-brokered calm had been challenged, condemned indiscriminate attacks on Israel, and called for an immediate cessation of violence. The Quartet stated its acute concern regarding the recent increase in the closures of crossingpoints in response to violence in Gaza, which have limited the range and quantity of basic commodities, humanitarian supplies, and PA and UNRWA currency needs available in Gaza, worsening the economic and humanitarian situation on the ground. The Quartet emphasized that the provision of humanitarian supplies . . . to the people in Gaza must be assured continuously. The Quartet also reiterated its previous call for Israel to allow into Gaza sufficient materials to facilitate the resumption of stalled UN and other donor projects . . . . The Quartet called for the immediate and unconditional release of Israeli Corporal Gilad Shalit.

The Quartet called on all States to demonstrate their support for the Annapolis process and their commitment to the two-state solution by contributing to an environment conducive to an end to the conflict. In this regard, it noted that lasting peace can only be based on an enduring commitment to freedom, security, justice, dignity, respect and mutual recognition, the propagation of a culture of peace and nonviolence and the confrontation of terrorism and incitement, and the two-state solution, building upon previous agreements and obligations. . . .

The Quartet commended the Palestinian Authority for its progress in security performance and welcomed the robust Israeli-Palestinian cooperation for the expansion of security and law and order in the West Bank, most notably in Jenin and Hebron. The Quartet viewed the successful deployment of the Palestinian

security services to Hebron as the most recent demonstration of the substantial progress that has been made since Annapolis.

Reminding the parties of their renewed commitment at Annapolis to implement their Roadmap obligations, the Quartet called on the Palestinians to continue their efforts to reform the security services and dismantle the infrastructure of terrorism. The Quartet also called on Israel to freeze all settlement activities, which have a negative impact on the negotiating environment and on Palestinian economic recovery, and to address the growing threat of settler extremism. The Quartet urged further progress on the ground in the period ahead in fulfillment of the package of measures of Quartet Representative [Tony] Blair.

The Quartet offered its support for an intensification of diplomatic efforts toward peaceful co-existence among all states in the region and a just, lasting, and comprehensive peace in the Middle East based on United Nations Security Council Resolutions 242, 338, 1397, 1402 and 1515.* In this context, the Quartet welcomed efforts to reinvigorate the Arab Peace Initiative, as part of a comprehensive approach for the resolution of the Arab-Israeli conflict, and looked forward to an intensification of Israeli-Syrian negotiations. The Quartet supported, in consultation with the parties, an international meeting in Moscow in 2009.

b. Security Council Resolution 1850

On December 16, 2008, the Security Council adopted Resolution 1850 (U.N. Doc. S/RES/1850), concerning the Israeli-Palestinian peace process, which the United States and the Russian Federation sponsored. The resolution, among other things, declared the Security Council's "support for the negotiations initiated at Annapolis, Maryland on 27 November 2007 and its commitment to the irreversibility of the bilateral negotiations." The resolution also expressed the Security Council's support for "the parties' agreed principles

* Editor's note: *See Digest 2003* at 948 for a discussion of U.S. views on Resolution 1515.

for the bilateral negotiating process and their determined efforts to reach their goal of concluding a peace treaty resolving all outstanding issues, including all core issues, without exception, which confirm the seriousness of the Annapolis process." The resolution also "[u]rge[d] an intensification of diplomatic efforts to foster in parallel with progress in the bilateral process mutual recognition and peaceful coexistence between all States in the region in the context of achieving a comprehensive, just and lasting peace in the Middle East."

Secretary of State Condoleezza Rice addressed the Security Council before the adoption of Resolution 1850, as excerpted below. The full text of Secretary Rice's statement is available at *www.archive.usun.state.gov/press_releases/20081216_373.html.*

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. . . President Bush convened the Annapolis conference in November of last year, the first major Middle East peace conference in 16 years, and the only one of its kind to be held on U.S. soil. Representatives of over 50 countries, including 14 Arab states, sat with the Israeli Prime Minister, Foreign Minister, and Defense Minister to pursue a different future for the region.

Since that day, Israeli and Palestinian negotiators have bravely demonstrated their commitment to peace through continuous bilateral and substantial negotiations on all the core issues. . . .

The United States has a national interest in the conclusion of a final treaty. And it is in the long-term interest of Israel to provide a more hopeful society for Palestinians. The establishment of the state of Palestine is long overdue, and there should be an end to the occupation that began in 1967.

Above all, . . . this is a bilateral process and the two parties will have to conclude a final agreement. But it is incumbent upon the international community to provide support to their efforts and to create the political context . . . within which their negotiations can prosper.

It is for that reason that we are gathered here today to consider a resolution sponsored by the United States and the Russian Federation to chart the way forward. It builds upon the work of the international community through the Quartet, and I commend my colleagues from the UN, EU, and Russia for their service in the pursuit of peace. This resolution describes the contours of the negotiations and defines the role of the international community, which will prevent a return to violence and the hopelessness of the second intifada, when peace was a distant dream.

It has several elements. First, it confirms the irreversibility of the bilateral negotiations and endorses the parties' brave efforts. Brinksmanship and dramatic, last-minute attempts to forge a lasting peace have not succeeded in the past. There is no substitute for the Annapolis process, and stagnation is not an option. . . .

. . . The Annapolis process has advanced under the leadership of President Abbas, Prime Minister Olmert, and Foreign Minister Livni. And these advances must be preserved and built upon. . . .

As the Quartet affirmed yesterday, a lasting peace will result from mutually reinforcing efforts on the political track, on building the institutions of a Palestinian state, and of improving conditions on the ground. None of these tracks can succeed in isolation. As negotiations proceed, Israel and the Palestinians must ensure that life improves for millions of Palestinians. The international conferences in Paris and Bethlehem and Berlin were critical in supporting these efforts. And the U.S. has become the largest bilateral donor to the Palestinians, and we continue to support the PA with direct budget assistance, funding for high-impact projects, and promotion of efforts to link security, governance, and economic development.

Second, the resolution reiterates the importance of fulfilling obligations under the Roadmap. Neither party should undertake any activity that contravenes Roadmap obligations or prejudices the final status negotiations. The views of the United States have been made very clear in this regard, especially regarding settlement activity. At the same time, the Palestinian Authority has an absolute obligation to dismantle the infrastructure of terror in its territories, reform its security services, and end incitement.

Progress is being made, but it is incomplete, and sustained political will, as well as international support, is required.

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Third, the resolution underscores that peace will be built upon mutual recognition, freedom from violence and terror, the two-state solution, and previous agreements and obligations. It highlights the enduring importance of the Quartet principles and codifies the Security Council's backing of these fundamental principles. The threat of extremism and terrorism posed by Hamas is a threat to the Annapolis process and to the fulfillment of legitimate Palestinian aspirations. This is important to note.

Fourth, the resolution underlines that the solution to the Israeli-Palestinian conflict should be aligned with efforts toward broader regional peace. The Arab Peace Initiative* is an historic proposal in this regard. And as Arab states should reach out to Israel, so should Israel reach out to Arab states.

The negotiations born at Annapolis and described in this resolution give me confidence that the goal of two independent and democratic states, Israel and Palestine, living side by side in peace and security, is not just a vision, but it is a commitment of the parties and of the international community. There can be no turning back the clock. . . .

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On December 18, 2008, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, addressed the Security Council on the situation in the Middle East, including the Palestinian question. Excerpts from Ambassador Wolff's statement follow; the full text is available at *www.archive.usun.state.gov/press_releases/20081218_374.html.*

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* Editor's note: *Digest 2007* discusses the Arab Peace Initiative at 846–47 and 854–56.

. . . [W]e welcome the adoption of UN Security Council Resolution 1850. It is a positive and forward-looking document that has put the Security Council and the international community on record confirming the irreversibility of the bilateral negotiations and endorsing the parties' efforts to achieve an agreement. . . .

The resolution reiterates the importance of fulfilling those obligations and that neither party should undertake any activity that contravenes those Roadmap obligations or prejudices the final status negotiation. The United States has made very clear its view on settlement activity and on the Palestinian Authority's obligation to dismantle the infrastructure of terror in its territories, reform its security services, and end incitement.

The Quartet called December 15 for negotiations to be intensified in order to put an end to the conflict and to establish as soon as possible the state of Palestine, living side by side in peace and security with Israel.

In parallel, the resolution underlines that a solution to the conflict should be aligned with efforts toward a broader regional peace and notes the importance of the Arab Peace Initiative. . . .

. . . I would like to underscore . . . our continuing concern for the welfare of the innocent people of Gaza and in the towns and cities of southern Israel.

As the Quartet made clear at its meeting this week, a lasting solution to the situation in Gaza can only be achieved through peaceful means. Restoring Palestinian unity based on the commitments of the Palestinian Liberation Organization—the legitimate and internationally-recognized representative of the Palestinian people—to non-violence, recognition of Israel, and acceptance of previous commitments and obligations is central to this process.

The Quartet, again in its December 15 statement, expressed its concern that the Egyptian-brokered calm in Gaza had been challenged; condemned the indiscriminate attacks against Israel; and called for an immediate cessation of violence, including attacks against commercial crossings that prevent the import of humanitarian supplies and basic commodities, without which the people of Gaza will continue to suffer.

As the largest single-state contributor of aid to the Palestinian people, the United States is deeply committed to seeing through

the delivery of humanitarian aid. The U.S. calls for the continuous provision of humanitarian supplies to the people of Gaza.

Mr. President, nonetheless, the Council should not lose sight of the root cause for the current situation. While the vast majority of the people of Gaza simply want to get on with their lives, Hamas—which usurped control from the legitimate Palestinian Authority—and other groups continue to instigate violence, launching more than 200 rocket and mortar attacks in the past two months against Israel and humanitarian aid crossing points into Gaza. . . . The United States calls for an immediate and permanent end to these attacks, which represent an ongoing threat to international peace and security, and for the full dismantlement of the infrastructure of terrorism according to the agreed Roadmap obligations.

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3. Lebanon

a. Implementation of Security Council Resolution 1559

In early May 2008, the political crisis in Lebanon focusing on the country's inability to elect a president to replace Emile Lahoud, whose term ended on November 24, 2007, began to worsen. Violent protests led by Hizballah broke out in Beirut and other parts of the country. On May 8, 2008, the Security Council met to consider the situation and to hear a briefing from Terje Roed-Larsen, Special Envoy for the implementation of Security Council Resolution 1559 (2004) (U.N. Doc. S/RES/1559), on the Secretary-General's seventh semi-annual report on implementation of Resolution 1559 and subsequent developments.* Ambassador Khalilzad addressed the Security Council meeting, expressing deep concern about the potential for conflict in Lebanon. The full text of Ambassador

* Editor's note: *See Digest 2004* at 931–33 for a discussion of Resolution 1559, which the Security Council adopted on September 2, 2004.

Khalilzad's statement, excerpted below, is available at *www.archive.usun.state.gov/press_releases/20080508_103.html.*

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. . . Lebanon appears once again on the brink of conflict. The Hizballah-led opposition has confronted Lebanon's legitimate government, using violence and intimidation in an effort to usurp authority from the legitimate government of Lebanon. This situation represents a clear threat to the stability of Lebanon and the maintenance of international peace and security.

* * * *

First, it is clear that Hizballah has been constructing a state-within-a-state without regard for the authority of the Lebanese government and the safety and stability of the nation. The most recent manifestations of this state-within-a-state were the discovery, a few weeks ago, of a secret Hizballah communications network spanning much of Lebanon and Hizballah cameras installed at the Beirut International Airport. On May 6, the legitimate Lebanese Government declared Hizballah's telecom network and airport surveillance to be illegal and resolved to root out these threats to government authority and internal security. Hizballah's response was to threaten violence in an effort to intimidate the Government into backing down. Hizballah continues to refuse to disarm, despite the Ta'if Accords and resolutions of this Council, and its continued defiance is leading other political groups to consider re-arming as well. It continues to threaten regional war, when decisions about war and peace are the essential preserve of governments.

Second, we condemn Syria's refusal to take even the most basic steps to acknowledge respect for Lebanon's sovereignty, including the establishment of diplomatic relations and the delineation of borders between the two countries. . . .

On the issue of delineation of borders, we recall that Syrian President Asad promised the Secretary-General in April 2007 that Syria would start the delineation process. While Syria reports that

such talks are ongoing, in fact, as Lebanon has told the Council, none of the meetings of the Syrian-Lebanese commission have focused on the issues of delineation and demarcations. Refusing to delineate the border makes it easier for Syria to undermine Lebanese efforts to secure its borders. We see Syria's refusal to honor even its own commitments and abide by the resolutions of this Council as evidence of hostile intent towards Lebanon and proof that Syria intends to continue violating the arms embargo established in resolution 1701.*

Third, we reiterate the call made by the Friends of Lebanon on April 22 in Kuwait, for immediate Presidential elections without preconditions. . . .

Fourth, I note that with the exception of the northern part of Ghajar, Israel has fully withdrawn from Lebanese territory, and the Lebanese Armed Forces have deployed throughout the country for the first time in nearly 40 years. We applaud this historic deployment and encourage Lebanon and Israel to approve and implement UNIFIL's plan for a resolution of the situation in Ghajar as quickly as possible. I understand that the Lebanese government has approved UNIFIL's plan. We call upon Israel to do the same.

* * * *

Despite these challenges, the United States will continue to stand with the Lebanese Government as it seeks to defend Lebanon's sovereignty, political independence, territorial integrity, and security. We applaud the efforts of the Lebanese security services, especially the Armed Forces under the Leadership of General Michel Suleiman, to implement resolutions 1559 and 1701 under these very difficult circumstances.

. . . [I]n the coming weeks, this Council will have to come together to consider how we should deal with the challenges confronting Lebanon. We call upon members of this Council to reaffirm our prior resolutions and recommit themselves to helping Lebanon defend itself. Lebanon's future is critical to regional peace

* Editor's note: *See Digest 2006* at 1034–41 for a discussion of Resolution 1701, which the Security Council adopted on August 11, 2006.

and security, the future of the Middle East, and the credibility of this Council.

b. Doha Agreement

On May 21, 2008, Lebanon's political leaders reached an agreement to end Lebanon's political crisis, following meetings in Doha, Qatar, held under the auspices of the Arab League's Committee of Foreign Ministers. In a statement issued on that same date, Secretary of State Condoleezza Rice stated:

> The United States welcomes the agreement reached by Lebanese leaders in Doha, Qatar. We view this agreement as a positive step towards resolving the current crisis by electing a President, forming a new government, and addressing Lebanon's electoral law, consistent with the Arab League initiative. The United States supports the government of Lebanon and its complete authority over the entire territory of the country.
>
> * * * *
>
> We call upon all Lebanese leaders to implement this agreement in its entirety, in accordance with the Arab League initiative and in conformity with UN Security Council resolutions.

The full text of Secretary Rice's statement is available at *http://2001-2009.state.gov/secretary/rm/2008/05/105067.htm*. C. David Welch, Assistant Secretary of State for Near Eastern Affairs, provided additional details on U.S. support for the Doha Agreement and the Lebanese government at a May 21 press briefing, as excerpted below. The full text of Ambassador Welch's remarks is available at *http://2001-2009.state.gov/p/nea/rls/rm/105104.htm*.

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. . . Lebanon has been going through a significant political crisis which, very, very unfortunately, spilled over into the streets of Beirut beginning on the 5th of May. That this agreement has been reached in Doha is really a welcome development. It's a necessary and positive step toward accomplishing what the Arab League's initiative on Lebanon was designed to do, which was: first, to elect a president of Lebanon—as you know, there hasn't been someone in that office, the highest Christian office in Lebanon, since November; second, the Arab League initiative called for forming a new government and . . . the basis for that has also now been agreed in Doha; and third, the Arab initiative also asked that Lebanon's electoral law be addressed. And the Lebanese politicians gathered in Doha also agreed on that.

As you know, throughout this crisis, before, during it, and today and afterwards, the United States supports the legitimate authorities in Lebanon, including the government and its security establishment. And we believe that the Government of Lebanon and the legitimate security forces of Lebanon should extend their authority over all the country.

* * * *

Now, the next step is for [the Doha Agreement] to be implemented. We would like to see that done in its entirety. As you know, this agreement has . . . several provisions, including an important one related to security in addition to the political ones that I mentioned at the outset. We believe this should be done in accordance with what the Arab League set out at the outset and in conformity with the Security Council resolutions for Lebanon.

* * * *

QUESTION: On the issue of Hezbollah arms, how would you like to see it going from here? . . .

ASSISTANT SECRETARY WELCH: . . . [L]et me be clear that . . . there's an international standard in Security Council resolutions about what should happen with respect to weapons in the hands of militias or nongovernmental parties in Lebanon, and those are really explicit. There should be only one legal authority for security in Lebanon and that is the Government of Lebanon

and its security establishment. Militias should be disarmed. That's in 1559 and it's reflected in 1701 as well.

In the Doha agreement there are provisions that relate to the authority of the state and . . . enjoining against the use of weapons to achieve political gains. . . . [I]t says that the Lebanese have to address this. . . .

* * * *

In the months that followed, the United States continued to express support for implementation of the Doha Agreement, as well as Resolutions 1559 and 1701. For example, on June 16, 2008, following a meeting with Lebanese President Michel Suleiman and Prime Minister Fouad Siniora in Beirut, Secretary Rice addressed the press and stressed the need to resolve the dispute over the Sheba'a Farms territory.* As Secretary of Rice stated:

> In these discussions with both President Suleiman and Prime Minister Siniora, I also told them that the United States believes that the time has come to deal with the Shebaa Farms issue, and we believe that it should be dealt with in accordance with UN Security Council 1701 and other relevant resolutions. We intend to ask the UN Secretary General to lend his good offices to this effort, and we believe that the Secretary General should

* Editor's note: The Department of State Bureau of Near Eastern Affairs describes Sheba'a Farms as follows:

> Sheba'a Farms, a largely unpopulated area just south of the Blue Line opposite the Lebanese town of Sheba'a, was captured by Israel when it occupied Syria's Golan Heights in 1967. The Lebanese Government has repeatedly laid claim to the area since shortly before Israel's general withdrawal. Meanwhile, the Syrian Government has verbally stated that the Sheba'a Farms tract is Lebanese, but, as with the rest of the Lebanon-Syria border, has been unwilling to commit to a formal border demarcation in the area.

See Background Note: Lebanon, available at *www.state.gov/r/pa/ei/bgn/35833.htm*.

> intensify his work, really intensify his work, to see the full implementation of all aspects of UN Security Council Resolution 1701.

The full text of Secretary Rice's remarks is available at *http://2001-2009.state.gov/secretary/rm/2008/06/105980.htm*.

In a statement to the Security Council on July 22, 2008, Ambassador Khalilzad reiterated Secretary Rice's comments, stating,

> . . . [T]he international community must continue to work towards the full implementation of resolutions 1559 and 1701 and the Doha Agreement, in order to safeguard Lebanon's independence and security. We must continue to strongly support efforts of the Lebanese Armed Forces and Internal Security Forces to restore calm and support the legitimate government of Lebanon. We also call on outside parties to cease arming illegal militias in Lebanon.
>
> As part of the full implementation of resolution 1701, we welcome the Secretary-General's intention to strengthen the diplomatic process aimed at dealing with the issue of Sheba'a Farms, and urge him to engage directly with Israel, Lebanon and Syria on this issue. . . .

The full text of Ambassador Khalilzad's statement is available at *www.archive.usun.state.gov/press_releases/20080722_196.html*.

4. Nagorno-Karabakh

On March 14, 2008, the United States voted against a General Assembly resolution on "The situation in the occupied territories of Azerbaijan," which Azerbaijan proposed. The General Assembly adopted the resolution with 39 voting in favor, seven voting against, and 100 abstaining (U.N. Doc. A/RES/62/243). Before the vote, Ambassador Wolff explained the U.S. view that the draft resolution "threatens to undermine the peace process" in the Nagorno-Karabakh conflict. Ambassador Wolff's explanation of the U.S. vote is excerpted

below and available in full at *www.archive.usun.state.gov/press_releases/20080314_056.html.*

The political-level representatives of France, the Russian Federation, and the United States, as Co-Chairs of the OSCE [Organization for Security and Cooperation in Europe] Minsk Group dealing with the Nagorno-Karabakh (NK) conflict—jointly proposed a set of basic principles for the peaceful settlement of the Nagorno-Karabakh (NK) conflict to the sides in November 2007 on the margins of the OSCE Ministerial Council in Madrid. These basic principles are founded on the provisions of the Helsinki Final Act,* including those related to refraining from the threat or use of force, the territorial integrity of states, and the equal rights and self-determination of peoples. The proposal . . . comprises a balanced package of principles that are currently under negotiation. The sides have agreed that no single element is agreed until all elements are agreed by the parties.

Unfortunately, this draft resolution selectively propagates only certain of these principles to the exclusion of others, without considering the Co-Chairs' proposal in its balanced entirety.

Because of this selective approach, the three OSCE Minsk Group Co-Chair countries must oppose this unilateral draft resolution. They reiterate that a peaceful, equitable, and lasting settlement of the NK conflict will require unavoidable compromises among the parties that reflect the principles of territorial integrity, non-use of force, and equal rights of peoples, as well as other principles of international law.

While the three Minsk Group Co-Chair countries will vote against this unilateral draft resolution, which threatens to undermine the peace process, they reaffirm their support for the territorial integrity of Azerbaijan, and thus do not recognize the independence of NK.

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* Editor's note: Background on the Helsinki Final Act is available at *www.state.gov/r/pa/ho/time/dr/97936.htm*; the text is available at *www.osce.org/item/4046.html.*

Following the General Assembly vote, the United States continued to work with the two other Co-Chairs of the OSCE Minsk Group, France and the Russian Federation, on efforts to settle the Nagorno-Karabakh conflict on the basis of the basic principles proposed by the Co-Chairs in 2007. On November 2, 2008, Russian President Dmitry Medvedev hosted a summit with the presidents of Azerbaijan and Armenia, which all three Minsk Group Co-Chairs attended. At the summit, the three presidents signed a declaration, in which they committed themselves to seek a political resolution to the conflict and affirmed the importance of the Minsk Group Co-Chairs' efforts. As Matthew Bryza, Deputy Assistant Secretary of State for European Affairs and U.S. Co-Chair, told the OSCE on November 6, 2008, "We interpret this declaration as closing the door on the disputes over the validity of the Madrid proposals, and as a vindication of our efforts to mediate a resolution to the conflict on the basis of the Basic Principles. . . ." The full text of Mr. Bryza's statement is available at *http://osce.usmission.gov/group-statements.html*.

5. Somalia

On August 21, 2008, Robert Wood, Acting Deputy Spokesman, Department of State, issued a press statement concerning efforts to promote peace and stability in Somalia, as follows:

> The United States welcomes the implementation phase of a process begun by the Transitional Federal Government and the Alliance for the Re-liberation of Somalia to promote peace and stability in Somalia. The August 18 signing of the Djibouti Agreement by representatives of these two groups officially starts this crucial phase. We thank the government of Djibouti for hosting these important talks, and the United Nations Special Representative of the Secretary General for his leadership in facilitating them. The United States was represented at a senior level at the talks to demonstrate support for the process.

> The United States reaffirms its support for rapid deployment of a United Nations peacekeeping mission in Somalia, and calls on all Somalis who seek peace and stability to support implementation of the Djibouti Agreement.

The text of the press statement is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/aug/108787.htm*. *See also* discussion of peacekeeping efforts in Somalia in B.6. below.

6. Sudan

On September 24, 2008, Ambassador Richard Williamson, Special Envoy for Sudan, testified before the Commission on International Religious Freedom at a hearing entitled "Sudan's Unraveling Peace and the Challenge to U.S. Policy." Ambassador Williamson's written statement discussed U.S. efforts to promote full implementation of the 2005 Comprehensive Peace Agreement ("CPA") in Sudan and to end the suffering of the people of Darfur. It also addressed the July 14, 2008 application of the Office of the Prosecutor of the International Criminal Court ("ICC") for an arrest warrant against Sudanese President Bashir and its potential implications for the peace process. Excerpts follow from Ambassador Williamson's prepared statement. The full text of the statement and the hearing transcript are available at *www.uscirf.gov/index.php?option=com_content&task=view&id=2272&Itemid=121*.

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I. The CPA

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The U.S. Government was instrumental in the negotiation and ultimate signing of the CPA. As a guarantor of the agreement, we continue to work vigorously for full CPA implementation. One way the U.S. Government has supported and will continue to support the CPA is through technical, financial, and logistical

support for nationwide elections. Elections are a key milestone in implementation of the CPA. They will provide an unprecedented opportunity for all Sudanese to participate in a process to choose their leaders and to participate in the political life of their country. The United States aims to bolster the credibility of these elections nationwide, across all of Sudan. Through the work of the State Department, the U.S. Agency for International Development, and our implementing partners, we are working to support the full participation of all Sudanese in the electoral process, including residents of Darfur and internally displaced persons. But ultimately the United States and other concerned countries do not own this problem. The Sudanese do. The GOS [Government of Sudan] and the GOSS [Government of Southern Sudan in Juba] must allow access to all parts of Sudan for organizations providing elections assistance and civic and voter education work, as well as humanitarian and development aid. The GOS must lift restrictions on the media, in order to ensure that political parties, civic groups, and all Sudanese citizens are able to freely participate in the electoral process. The parties must act now to name a National Electoral Commission and put forward a transparent budget for elections to facilitate international donor assistance.

Another way that the U.S. Government is supporting the CPA is through working to strengthen Southern Sudan. . . .

Development in these areas is crucial to the strength of the CPA. As the south grows stronger, the peace grows stronger. Increasing the governance capacity of the south will allow the GOSS to properly use the oil revenue it now receives from Khartoum to provide its constituents with basic services; build roads, schools, and hospitals; and pass critically needed new laws, such as an anti-corruption law and a media law. A politically stronger south ensures that if the south votes for independence in 2011, it will be able to function as a viable state, and if the south opts for unity, it will be a full partner in a new Sudan. A militarily stronger south serves as a deterrent to aggression by the north, and ensures that if the south votes for independence in 2011, the SPLA [Sudan People's Liberation Army] will have the foundation to become a strong national military for the new state, and if the

south opts for unity, the SPLA will be a full partner in the country's joint military.

. . . In addition to assistance for the census and elections, the U.S. Government is focusing its efforts and resources on anticorruption reform, strengthening local governance, developing a strong civil society, facilitating dialogue among religious leaders, increasing access to independent media, and strengthening political parties. In the areas of social and economic development, the U.S. Government is working with the GOSS to establish basic health and education services, improve and expand infrastructure and agriculture, and develop the capacity of the private sector. The efforts of the U.S. Government are focused on the security sector of the south as well. In FY08 the U.S. Government provided more than $61 million to support improvement of the SPLA's command and control infrastructure, advise its senior officers as they produced a Defense White Paper, and provide training to build institutional and strategic capacity. In March, U.S. officials outside Juba inaugurated a $12 million facility which serves as the new headquarters of the SPLA.

II. Darfur

. . . Our efforts to ensure implementation of the CPA . . . not only can help preserve peace between north and south, but also serve as a predicate for peace for the people of Darfur. Elections, for example, can provide an opportunity for all the people of Sudan to make their voices heard. And the international community's continuing pressure on the parties to implement the CPA shows our continuing support for the agreements we encouraged, facilitated, and guaranteed. The people of Darfur desperately need a sign that the international community—and the GOS—will stand behind peace agreements both in word and in action. For the Darfuris, however, security remains the main priority. The international community needs to continue to push the Sudanese to create and sustain a lasting peace in Darfur.

* * * *

Since my last visit to Sudan in August, there has been an alarming rise in violence in Darfur. . . . The GOS, under the guise of a

new law and order campaign to bring security to Darfur, is killing innocent civilians and creating more chaos in the region. . . .

The GOS, the Arab militias, and rebel leaders all have blood on their hands. This pattern of violence leaves no room for a sustainable peace in Darfur. The United States supports the efforts of the new Chief Mediator, Djibril Bassole, who will face significant challenges in his efforts . . . given the complexity and severity of the Darfur conflict.

III. The ICC

Recent developments in the ICC on the situation in Darfur add a new dimension. . . . In particular, the application of the Office of the Prosecutor for an arrest warrant against President Bashir has raised questions about the implications for the peace process in Darfur and has reinvigorated the difficult debate on the relationship of peace and justice. The United States is not a party to the Rome Statute, and I do not want to comment here on the internal machinery or deliberations of the court.

Regardless of our position on the ICC, however, we believe strongly that there should be no impunity for the atrocities committed in Darfur. The people of Darfur have suffered for far too long. As we evaluate the situation in Darfur, it is only tangible progress by the GOS—not promises of future action—that will guide the U.S. Government.

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On December 10, 2008, Ambassador Rosemary DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, provided a statement to the Security Council following a briefing by ICC Prosecutor Luis Moreno-Ocampo on Sudan. As excerpted below, Ambassador DiCarlo stressed concerns over the situation in Sudan, U.S. support for the peace process, and U.S. backing for efforts to bring to justice persons perpetrating crimes against the people of Sudan. As discussed in Chapter 16.A.7., Ambassador DiCarlo also called for the Security Council's Sudan Sanctions

Committee to take action to prevent further violence in Darfur. The full text of Ambassador DiCarlo's statement is available at *www.archive.usun.state.gov/press_releases/20081203_352.html.* Further discussion of the ICC Prosecutor's application for an arrest warrant in the context of the Security Council's extension of the UNAMID mandate is provided below in B.3.

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First, the United States expresses its grave concerns over the situation in Sudan, particularly Darfur. The humanitarian situation remains dire and attacks on civilians, by both Government of Sudan forces and rebel groups alike[,] continue.

Second, we support the Darfur peace process efforts of United Nations/African Union Chief Mediator Bassole. Our primary and immediate goal is to see measurable improvement of the situation on the ground for the people of Darfur, not mere declarations or promises.

Third, we note with interest the Government of Sudan's announcement of a unilateral ceasefire in Darfur and its recognition that such a ceasefire should have a monitoring mechanism to enforce it. However, we are deeply disappointed by continued violence in Darfur, including attacks by rebel movements and the Sudan Armed Forces. A viable and lasting ceasefire is a vital step towards establishing peace in Darfur and the region as a whole.

Fourth, the United States remains steadfastly committed to promoting the rule of law and helping bring violators of international humanitarian law to justice, and will continue to take a leadership role in righting these wrongs. We applaud efforts to identify and bring to justice any persons perpetrating crimes against the people of Sudan. Our previous actions with respect to the terrible crimes being committed in Sudan should leave no doubt about the strength of our commitments.

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B. PEACEKEEPING AND RELATED ISSUES

1. UN Peacekeeping Mandates

On July 23, 2008, Brian H. Hook, Acting Assistant Secretary for International Organizations Affairs, testified before the Senate Committee on Foreign Relations, Subcommittee on International Organizations and Operations, Human Rights, Democracy and Global Women's Issues, concerning U.S. support for UN peacekeeping operations and efforts to enhance their effectiveness. Mr. Hook's testimony included discussion of the challenges of peacekeeping, the successful contributions of UN peacekeeping missions in Haiti, Liberia, and the Democratic Republic of Congo, and constraints on UN peacekeeping missions. Excerpts from Mr. Hook's prepared statement, discussing U.S. efforts in the Security Council to ensure that UN peacekeeping mandates are effective, follow. The full text is available at *http://foreign.senate.gov/hearing2008.html*. Additional discussion of U.S. support for UNAMID, the African Union/UN hybrid peacekeeping operation in Darfur authorized by Security Council Resolution 1769 (2007) (U.N. Doc. S/RES/1769), is provided in B.3. below.

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One of the greatest challenges for effective peacekeeping is matching a mandate, its authorities and its associated rules of engagement with the requirements in theater. Empowering a mission to respond appropriately and effectively to the conflict situation is critical. The mandate is potentially either the greatest constraint or the greatest contributor to an operation's success. The United States uses its leadership in the UN Security Council to shape peacekeeping mandates that are clear, credible, and defined to what is achievable. That said, there is no simple, one-size-fits-all formula for designing effective peacekeeping mandates.

As a case in point, we can look to the three peacekeeping operations established to deal with the inter-related conflicts in Chad and Sudan. The MINURCAT operation in Chad is primarily a police operation, charged with protecting vulnerable civilians who have fled from the sub-region's conflicts; troops from the European Union operation EUFOR provide force protection to MINURCAT, and secure a safe haven in eastern Chad. MINURCAT has no mandate to resolve the underlying conflicts in the region, but only to mitigate their effects. As MINURCAT deploys, it is on track to succeed in its limited, but vital goal of protecting vulnerable civilians. In Sudan, UNMIS is a complex multidimensional operation, charged with facilitating the implementation the Comprehensive Peace Agreement that ended two decades of civil war between the north and the south. The peace process is fragile. We can expect implementation of the Agreement's many provisions to be slow, and often contentious. Fostering reconciliation will be a long term effort. UNMIS has a distant goal, but with the continued support of the international community and of the parties themselves, it is achievable. The third operation is UNAMID, in Sudan's troubled Darfur province. Like MINURCAT, UNAMID has a mandate to protect vulnerable civilians, and, like UNMIS, it has a mandate to support a peace process. However, Darfur today is deeply factionalized and the Government of Sudan has not yet demonstrated its willingness to cooperate with UNAMID or to facilitate its objectives. These factors clearly complicate UNAMID's ability to carry out its mandate. Ideally, the peacekeeping operation would deploy only after a peace process is well underway, and all of the parties view the peacekeepers as welcomed partners in implementing a settlement. However, the brutal conflict in Darfur has caused appalling human suffering on a truly massive scale, with new fighting and displacements occurring regularly. Suffering people in such a desperate situation cannot wait for a political process to mature. For this reason, we support a two-pronged policy for Darfur—to facilitate UNAMID's rapid deployment, while simultaneously promoting the peace process.

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2. Sexual Exploitation and Abuse by UN Peacekeepers

During 2008 the United States continued to stress the importance of ensuring full compliance with the UN's zero tolerance policy on sexual exploitation and abuse by peacekeepers. For background *see Digest 2006* at 1065–68; *Digest 2007* at 319–21. For example, in a statement to the General Assembly Fifth (Administration and Budgetary) Committee on May 8, 2008, David Traystman, Adviser, U.S. Mission to the United Nations, stated:

> OIOS [UN Office of Internal Oversight Services] investigators . . . are essential in efforts to ensure full compliance with the UN's zero tolerance policy on sexual exploitation and abuse by UN peacekeepers. OIOS has proposed to concentrate its investigative capacity in three regional centers. While the United States believes that regional hubs could be effective in maximizing the use of scarce staff and budget, we also consider it necessary to place OIOS investigators in UN operations where there have been repeated reports of sexual exploitation and abuse by UN personnel. In addition, we will continue to press for substantive training and disciplinary actions by troop contributors for their national contingents to guarantee that the zero tolerance policy on sexual exploitation and abuse is fully understood, respected and enforced. . . .

The full text of Mr. Traystman's statement is available at *www.archive.usun.state.gov/press_releases/20080508_110.html*.

In his July 2008 testimony to a subcommittee of the Senate Committee on Foreign Relations, *see* B.1. *supra*, Acting Assistant Secretary of State for International Organizations Affairs Brian Hook described the sexual exploitation of women and children by UN peacekeepers as a constraint on effective UN peacekeeping. As Mr. Hook's prepared remarks stated:

> . . . *Sexual exploitation and abuse* of women and children is prevalent in far too many conflict situations in which

> UN peacekeepers are present. In most of these cases, regular troops, militias, and rebels are the perpetrators and use rape as a weapon of war. In some particularly shocking cases, UN peacekeepers are accused of perpetrating sexual exploitation and abuse, preying on the very people they are to protect. The United States has led international efforts to eliminate sexual abuse and exploitation by UN staff. With our strong encouragement, the United Nations has instituted a wide range of preventive and disciplinary actions to carry out its policy of zero tolerance towards sexual exploitation and abuse by military, police or civilian personnel. Sexual abuse is unacceptable; especially when the protectors become the perpetrators.

The full text of Mr. Hook's written statement is available at *http://foreign.senate.gov/hearing2008.html*. The U.S.-sponsored Security Council debate on women, peace, and security, at which Secretary of State Rice discussed the problem of sexual violence and abuse committed by UN peacekeepers, is discussed in Chapter 6.B.2.

3. Darfur

On July 31, 2008, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, delivered a statement after the United States abstained from the Security Council's vote to adopt Resolution 1828 (U.N. Doc. S/RES/1828). Among other things, Resolution 1828 renewed the mandate of UNAMID, the African Union/UN hybrid peacekeeping operation in Darfur, to July 31, 2009. Excerpts follow from Ambassador Wolff's statement, the full text of which is available at *www.archive.usun.state.gov/press_releases/20080731_209.html*. *See also* A.6. *supra*.

. . . [T]he United States welcomes and strongly supports the extension of UNAMID's mandate. . . . The United States abstained in

the vote because language added to the resolution would send the wrong signal to Sudanese President Bashir and undermine efforts to bring him and others to justice.

This Council cannot ignore the terrible crimes that have occurred throughout the conflict in Darfur, and the massive human suffering that the world has witnessed.

The Council addressed this tragic situation when it adopted resolution 1593 in March 2005, and the United States at that time noted the importance that we have attached, and that we continue to attach, to this Council's role in connection with ICC investigations and prosecutions.

As is well-known, the United States abstained on that resolution in light of our concerns about the ICC. But as we said when resolution 1593 was adopted, "We strongly support bringing to justice those responsible for the crimes and atrocities that have occurred in Darfur and ending the climate of impunity there. Violators of international humanitarian law and human rights law must be held accountable." Having said this, I would like to make four points concerning our continued strong support for UNAMID.

First, the United States is increasingly concerned about the situation on the ground and will remain vigilant to the situation in Darfur. We are prepared to take additional measures as necessary to ensure that UNAMID deploys rapidly and completely, and is empowered to fulfill its mandate.

Second, we deeply regret that one year after the adoption of Resolution 1769 that UNAMID has barely begun to complete its vital mission. . . . UNAMID's slow deployment is seriously interfering with its ability to protect itself and to fulfill its mandate in Darfur. The Security Council has sought to end the suffering of the people of Darfur but we have fallen far short of our responsibility to protect them.

* * * *

Third, we call on the Government of Sudan to make every effort to facilitate UNAMID's deployment. We demand that the Government of Sudan accept all troop contributions, without reservations and in the order in which UNAMID commanders deem it feasible to deploy them.

We demand that the Government of Sudan comply fully with all UN Security Council Resolutions, with the terms of the Status of Forces Agreement, and with all agreements pertaining to UNAMID.

The Government of Sudan must ensure UNAMID's free and secure movement in fulfillment of its mandate. All attacks on UNAMID personnel are unacceptable and will not be tolerated. We must hold the Government of Sudan responsible for the safety and security of UNAMID and its personnel.

Fourth, the United States will continue to keep a constant eye on the peace process, and take all measures necessary to support it. We urge all of the parties to the conflict in Darfur to reach a lasting settlement. UNAMID must fulfill its mission in tandem with a viable peace process, if there is to be an end to the terrible suffering in Darfur.

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After the Security Council meeting, Ambassador Wolff discussed the U.S. abstention with members of the press, as excerpted below. The full text of Ambassador Wolff's remarks is available at *www.archive.usun.state.gov/press_releases/20080731_210.html.*

. . . This was not an abstention related to the extension of UNAMID itself. The United States supports UNAMID, backs UNAMID, wants to do everything possible to ensure that UNAMID is fully and effectively deployed as rapidly as possible so we can do what the Council has long sought to do, is help the people of Darfur.

The reason for our abstention . . . had to do with one paragraph that would send the wrong signal at a very important time when we are trying to eliminate the climate of impunity, to deal with justice, and to address crimes in Darfur, by suggesting that there might be a way out. There is no compromise on the issue of justice. . . . [T]he United States felt that it was time to stand up on this point of moral clarity and make clear that this Permanent Member of the Security Council will not compromise on the issue of justice.

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Reporter: . . . [T]he United States has not exactly been a strong supporter of the ICC over the years so why single out this paragraph in this resolution?

Ambassador Wolff: Well let's be clear. I think the reasons for lack of support by the United States of the ICC have nothing to do with impunity, have nothing to do with the pursuit of justice, have nothing to do with opposition to any acts on crimes against humanity and in the case of Darfur, genocide. The issue here has to do with the effort to bring those indicted and those whose arrest is being sought to justice and end the climate of impunity. That's why we feel so strongly about this paragraph.

Reporter: . . . Should we read from your abstention that the U.S. is the most committed to going forward and would never agree to an Article 16 suspension of the indictment?

Ambassador Wolff: This issue has not been addressed. It is not the time to address it. The issue before us is to make clear to those who are guilty of criminal activity, those who are complicit in the horrors that have befallen the people of Darfur, that there can be no escape, that there must be accountability, that there is no impunity and anything that signals that there is a way out or an easy way to circumvent that we believe needs to be opposed.

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4. Georgia

During the conflict that broke out in Georgia in August 2008, discussed in detail in Chapter 18.A.1.c.(3), the United States made statements in the Security Council condemning the violence and expressing concern about demands for the withdrawal of the UN Observer Mission in Georgia ("UNOMIG") from the Abkhaz region of Georgia. At a Security Council meeting on August 28, 2008, Ambassador Wolff stated:

> The Abkhaz region hosts a UN presence—UNOMIG—mandated by the Security Council. In the course of Russia's invasion through Abkhazia, Russia violated a security zone patrolled by UN peacekeeping forces

> deployed by the Security Council. In Abkhazia, Russia is therefore undermining not only the territorial integrity of Georgia, but also the integrity of this Council. This Council should call on Russia to facilitate immediately the full redeployment of UNOMIG personnel to the Abkhaz region.

The full text of Ambassador Wolff's statement is available at *www.archive.usun.state.gov/press_releases/20080828_228.html.*

On October 9, 2008, the Security Council unanimously adopted Resolution 1839 (U.N. Doc. S/RES/1839), which renewed UNOMIG's mandate for a four-month period. Ambassador Khalilzad made remarks to the press about the resolution after the Security Council meeting, as excerpted below. Ambassador Khalilzad's comments are available at *www.archive.usun.state.gov/press_releases/20081009_263.html.*

. . . As you saw, we had a unanimous vote to renew the mandate of the UNOMIG for a four month period, a technical rollover. We believe this is the right outcome.

There were efforts to change the name of the mission. There were efforts to gain status for some entities and organizations that did not have such a status before, because of what has happened on the ground. And we resisted those changes, those efforts, and what we have is a simple, clear, technical rollover for four months to allow the Geneva discussions to go forward. . . . [I]t's very much the kind of outcome that we were seeking, so we're very pleased with this result.

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5. Kosovo

In the months after Kosovo's declaration of independence on February 17, 2008, the Security Council held meetings to

discuss the situation in Kosovo and to hear reports concerning the UN Interim Administration Mission in Kosovo ("UNMIK"). Kosovo's declaration of independence is discussed in Chapter 9.A.1., and U.S. participation in the EU rule of law mission in Kosovo is discussed in Chapter 9.A.1.c.

At the Security Council's meeting concerning Kosovo on July 25, 2008, Ambassador Khalilzad delivered a statement concerning UNMIK. Excerpts from Ambassador Khalilzad's statement, expressing support for the Secretary-General's decision to reconfigure UNMIK in light of new realities in Kosovo, follow. The full text of the statement is available at *www.archive.usun.state.gov/press_releases/20080725_204.html.*

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. . . [A]s this Council has remained deadlocked and unable to provide guidance to the Secretary-General regarding UNMIK's future, we welcome and fully support the Secretary-General's announced decision to reconfigure UNMIK in the light of new realities on the ground in Kosovo, particularly as Kosovo's new constitution has come into force. This decision by the Secretary-General is completely in line with his existing authorities under resolution 1244. We look forward to quick progress on UNMIK's reconfiguration and its carrying out of the residual functions as the Secretary-General has previously outlined. As we have consistently held since a broad international coalition moved to implement the plan of former Special Envoy Ahtisaari, UNMIK must adapt to the new reality of Kosovo's independence and the establishment of the International Civilian Office and the EU's Rule of Law Mission, EULEX.

Specifically, we welcome and fully support the decision by the Secretary-General to authorize transfer of responsibilities regarding rule-of-law from UNMIK to EULEX. EULEX will play a critical role in supporting the development and enforcement of rule of law throughout Kosovo. It is for that reason that the United States will contribute police and judicial personnel to the EU-led mission.

We look forward to EULEX's early deployment throughout Kosovo and encourage the UN and the EU to conclude technical negotiations that would allow for full EULEX deployment as soon as possible. All parties must recognize that the deployment of EULEX throughout Kosovo will help ensure stability for all ethnicities in Kosovo.

This Council can contribute to the preservation of UNMIK's tremendous legacy of having preserved peace and stability in Kosovo since its establishment in 1999. We call on all Council members to support the Secretary-General as he exercises authority under resolution 1244 to guide UNMIK as it makes a key transition in Kosovo. We also ask that Council Members support the members of the International Steering Group and the EU as they work to take on the responsibility of international supervision of Kosovo, and by extension the preservation of UNMIK's positive legacy.

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6. Somalia

During 2008 the Security Council reauthorized the African Union peacekeeping operation in Somalia and considered other options, including a UN peacekeeping mission. Security Council decisions during this period on authorization of the use of force to counter the pirates off the Somali coast and to maintain and strengthen the arms embargo on Somalia are discussed in Chapter 18.A.5. and B.10.b., respectively.

On February 20, 2008, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1801 (U.N. Doc. S/RES/1801), in which it decided to reauthorize for six months the African Union Mission to Somalia ("AMISOM"),

> which shall be authorized to take all necessary measures as appropriate to carry out the mandate set out in paragraph 9 of resolution 1772 (2007) [U.N. Doc. S/RES/1772] and underlines, in particular, that AMISOM is authorized to take all necessary measures as appropriate to provide

> security for key infrastructure and to contribute, as may be requested and within its capabilities, to the creation of the necessary security conditions for the provision of humanitarian assistance . . . .

The resolution welcomed the communiqué of the African Union Peace and Security Council of January 18, 2008, "which states that the African Union will extend the mandate of [AMISOM] for an additional six months" and noted that the communiqué "calls for the United Nations to deploy a peacekeeping operation to Somalia that will support the long-term stabilization and post-conflict restoration in the country." The Security Council also recalled its Presidential Statement of December 19, 2007 (U.N. Doc. S/PRST/2007/49) requesting the Secretary-General to report "on the development of contingency plans for the possible deployment of a United Nations peacekeeping operation to succeed AMISOM, as set out in resolution 1772 (2007)." *See also* Resolution 1831 of August 19, 2008, further renewing AMISOM's six-month authorization (U.N. Doc. S/RES/1831).

On October 7, 2008, the Security Council adopted Resolution 1838, recalling its Presidential Statement of September 4, 2008 (U.N. Doc. S/PRST/2008/33), which welcomed the signing of a peace and reconciliation agreement in Djibouti (between the Transitional Federal Government ("TFG") and the Alliance for the Re-Liberation of Somalia on August 19, 2008) and took note of the "parties' request in the Djibouti Agreement that the United Nations, within a period of 120 days, authorize and deploy an international stabilization force." (*See* A.5. *supra* for discussion of the Djibouti Agreement.) A joint ceasefire agreement signed on October 26, 2008, was welcomed by the Security Council in Resolution 1846 on December 2, 2008. U.N. Doc. S/RES/1846.

Secretary of State Condoleezza Rice addressed the Security Council on December 17, 2008, following adoption of Resolution 1851 (U.N. Doc. S/RES/1851) and a briefing by Secretary-General Ban Ki-moon on the situation in Somalia. As discussed in Chapter 18.A.5., in Resolution 1851 the Security

Council, among other things, for the first time authorized the use of force in Somalia itself in connection with counter-piracy efforts. Excerpts below from the Secretary's remarks address the Djibouti peace process and the AU request for a UN peacekeeping operation. Secretary Rice's remarks are available at *http://2001-2009.state.gov/secretary/rm/2008/12/113269.htm*.

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Finally—and a number of colleagues have spoken to this—we must address the root of the piracy problem. Piracy is a symptom. It's a symptom of the instability, the poverty, the lawlessness that have plagued Somalia for the past two decades. The Djibouti peace process has achieved some political headway in the last few months. And I thank you, Secretary General, for your excellent special representative, Ambassador Ould-Abdallah. But the deteriorating security and humanitarian situation on the ground is threatening that progress and threatening it every day.

The international community must make it a priority to work with the TFG, both to stabilize its internal situation and to work with the alliance for the . . . re-liberation of Somalia, and the African Union mission in Somalia to help stabilize the country's security situation. In this regard, let me note that the United States does believe that the time has come for the United Nations to consider and authorize a peacekeeping operation. This has been requested by the AU. It has been requested by countries that are taking the brunt of the difficulty on the ground. And while the conditions may not be auspicious for peacekeeping, they will be less auspicious if chaos reigns in Somalia and we have to turn at some point to peacemaking. Prevention is the issue here.

And while the United States will do everything that it can to continue the support of AMISOM—indeed, the United States provided $67 million for training and equipping and deploying AMISOM last year—we will continue to do that, and we will buttress our support to AMISOM. But I am afraid that the history of support for forces of this kind is not a very good one.

What happens is that we are not able to sustain the voluntary contributions, we're not able to sustain the voluntary training, we're not able to sustain the mechanisms to make certain that the work is flowing smoothly. That is why we have a peacekeeping operation in the UN, because it draws on the full resources of the member-states in a way that is not voluntary, but that is compulsory, to do the work of this Council.

And so, Mr. Secretary General, the United States will be, with other states, continuing to raise in consultations—not yet for consideration by the Council—but in consultations, the need for a peacekeeping force in accordance with the request of the African Union that we do so.

Let me just say finally that once peace and normalcy have returned to Somalia, we believe that Somalis can start down a path to real economic development. Offering the Somali people an alternative to piracy and criminality is, in the long run, the best sustainable strategy for combating piracy. As a part of this strategy, the United States believes in working with the international community to help Somali fishermen prosper by preventing illegal fishing and dumping in . . . Somali territorial waters.

With our meeting today and the resolution, we have sent a strong signal of commitment to combat the scourge of piracy. This current response is a good start, but we must do much more to defend freedom of navigation and trade. The shipping industry will be an important partner in those efforts. But let us make no mistake: It is governments that must lead, and we need to coordinate our efforts through a common point of contact. We need to end the impunity of Somali pirates. We need to support regional states in building capacity to prosecute pirates effectively. And we need to work to build security and stability in Somalia so that the Somali people can finally enjoy the blessings of peace and the rule of law and development.

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7. Western Sahara

On April 30, 2008, Ambassador Wolff made a statement after the Security Council unanimously adopted Resolution 1813

(U.N. Doc. S/RES/1813), which, among other provisions, extended the mandate of the UN Mission for the Referendum in Western Sahara ("MINURSO") until April 30, 2009. Ambassador Wolff's statement, excerpted below, is available at *www.archive.usun.state.gov/press_releases/20080430_097.html*. *See also* the statement issued by the Department of State Office of the Spokesman, available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/may/104267.htm*.

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Mr. President, the Western Sahara conflict has gone on too long, provoking tension, causing human suffering, and preventing progress toward regional integration in North Africa.

I am sure that all of us around this table yearn for a mutually agreed political solution to this conflict. Four rounds of discussions in the framework of the latest settlement initiative have, however, confirmed the difficulty of arriving at such a solution despite the seriousness, dedication, and sincerity of the Secretary-General's Personal Envoy, Peter Van Walsum.

In the absence of a settlement, my government judges the mission of MINURSO to be vital. We are pleased that the Council has renewed its mandate for a full year and are gratified that it did so consensually. It is our hope that this will permit the parties to engage in the search for a solution in a sustained, intensive, and creative manner. To encourage them to do so, we intend to broaden our own engagement with them over the coming weeks and months.

For our part, we do agree with Mr. Van Walsum's assessment that an independent Sahrawi state is not a realistic option for resolving the conflict and that genuine autonomy under Moroccan sovereignty is the only feasible solution.

In our view, the focus of future negotiating rounds should therefore be on designing a mutually acceptable autonomy regime that is consistent with the aspirations of the people of the Western Sahara.

In this regard, Morocco has already produced a proposal that this Council has qualified as serious and credible, and we urge the

Polisario to engage Morocco in negotiation of its details or to table a comprehensive autonomy proposal of its own.

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Cross References

International Criminal Tribunal for the Former Yugoslavia, **Chapter 3.C.1. and C.3.**
Special Tribunal for Lebanon, **Chapter 3.C.1.**
Status of Jerusalem, **Chapter 9.B.**
U.S. sanctions on Burma, **Chapter 16.A.1.**
Responsibility to protect, **Chapter 18.A.1.b.**

Chapter 18

Use of Force, Arms Control and Disarmament, and Nonproliferation

A. USE OF FORCE

1. General

a. U.S. executive branch statements

In his address to the General Assembly on September 23, 2008, President George W. Bush stated:

> . . . [T]he ideals of the charter are now facing a challenge as serious as any since the U.N.'s founding, a global movement of violent extremists. By deliberately murdering the innocent to advance their aims, these extremists defy the fundamental principles of international order. . . .
>
> To uphold the . . . words of the charter in the face of this challenge, every nation in this chamber has responsibilities. As sovereign states, we have an obligation to govern responsibly, and solve problems before they spill across borders. We have an obligation to prevent our territory from being used as a sanctuary for terrorism and proliferation and human trafficking and organized crime. We have an obligation to respect the rights and respond to the needs of our people.

The full text of President Bush's address is available at 44 Weekly Comp. Pres. Doc. 1243–47 (Sept. 29, 2008).

Statements by other members of the executive branch addressed the use of force in response to those states that do

not live up to the responsibilities described by President Bush.

In remarks to the Center for International Security and Cooperation, Stanford University, on February 8, 2008, National Security Advisor Stephen J. Hadley described a new declaratory policy to deter terrorists' acquisition and use of weapons of mass destruction:

> As part of this strategy to combat nuclear terrorism, the President has approved a new declaratory policy to help deter terrorists from using weapons of mass destruction against the United States, our friends, and allies. . . .
>
> First, a robust, layered defense can discourage or dissuade attempts to deploy weapons of mass destruction against us, by denying our enemies the benefits they seek in deploying these weapons in the first place. Second, many terrorists value the perception of popular or theological legitimacy for their actions. By encouraging debate about the moral legitimacy of using weapons of mass destruction, we can try to affect the strategic calculus of the terrorists.
>
> And finally, deterrence policy targeted at those states, organizations, or individuals who might enable or facilitate terrorists in obtaining or using weapons of mass destruction, can help prevent the terrorists from ever gaining these weapons in the first place.
>
> As many of you know, the United States has made clear for many years that it reserves the right to respond with overwhelming force to the use of weapons of mass destruction against the United States, our people, our forces and our friends and allies. Additionally, the United States will hold any state, terrorist group, or other non-state actor fully accountable for supporting or enabling terrorist efforts to obtain or use weapons of mass destruction, whether by facilitating, financing, or providing expertise or safe haven for such efforts.

The full text of Mr. Hadley's speech is available at *http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080211-6.html*.

In a speech to the Carnegie Endowment for International Peace on October 28, 2008, Secretary of Defense Robert M. Gates addressed U.S. policy on the use of force and its role in deterrence, stating: "We . . . still face the problem of weapons passing from nation-states into the hands of terrorists. After September 11th, the president announced that we would make no distinction between terrorists and the states that sponsor or harbor them." Repeating Mr. Hadley's statement on the U.S. right to respond with force to the use of weapons of mass destruction and to hold states, terrorist groups, and other non-state actors accountable for supporting or enabling terrorist efforts to obtain or use weapons of mass destruction, Secretary Gates added:

> . . . To add teeth to the deterrent goal of this policy, we are pursuing new technologies to identify the forensic signatures of any nuclear material used in an attack—to trace it back to the source.
>
> As we know from recent experience, attacks on our communications systems and infrastructure will be a part of future war. Our policy goal is obviously to prevent anyone from being able to take down our systems. Deterrence here might entail figuring out how to make our systems redundant, as with the old Nuclear Triad. Imagine easily deployable, replacement satellites that could be launched from high-altitude planes—or high-altitude UAVs [unmanned aerial vehicles] that could operate as mobile data links. The point is to make the effort to attack us seem pointless in the first place.
>
> Similarly, future administrations will have to consider new declaratory policies about what level of cyber-attack might be considered an act of war—and what type of military response is appropriate.

The full text of Secretary Gates's speech is available at *www.defenselink.mil/speeches/speech.aspx?speechid=1305*. *See also* B.1.c. below for excerpts discussing U.S. nuclear deterrence.

b. Responsibility to protect

On June 17, 2008, James B. Warlick, Principal Deputy Assistant Secretary of State for International Organization Affairs, testified before the Senate Committee on Foreign Relations, Subcommittee on International Development and Foreign Assistance, Economic Affairs and International Environmental Protection. Excerpts below address the issue of undertaking humanitarian intervention when all else fails. The full text of Mr. Warlick's testimony is available at *http://foreign.senate.gov/testimony/2008/WarlickTestimony080617p.pdf*.

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When a state is unable to assist its people and unwilling to accept foreign assistance, the international community, through the United Nations, can use diplomatic and other peaceful means to try to persuade the state to allow assistance in.

The question—what is our last resort if all else fails—poses the greatest challenge in humanitarian intervention. What if the door is barred to all: the Red Cross Movement, the UN operational agencies, the NGOs, the bilateral donors (both civilians and military), and the regional political groupings? Must the world stand by while people suffer and die because they are denied access to assistance that is waiting just over the horizon?

This is an issue that has both legal and practical dimensions. On the legal side, for example, there is no question that the international community can act, even without the consent of the host government, when acting pursuant to decisions of the UN Security Council under Chapter VII of the UN Charter. The predicate for such action is a determination by the UN Security Council that the situation presents a threat to international peace and security.

The language on responsibility to protect that was adopted by heads of state and government in the World Summit Document of September 2005 [U.N. Doc. A/RES/60/1] makes an important contribution in this regard. It is based on the recognition that certain situations that might in one sense be viewed as presenting internal threats—war crimes, genocide, crimes against humanity, and ethnic cleansing—do in fact present a threat to international peace and security. They are therefore proper subjects of concern to the international community as a whole, and proper subjects of action by the UN Security Council. While the Summit Document was focused on these four particular categories of atrocities, the broader principle—that seemingly internal actions can threaten international peace and security—is an important one.

But there is a practical dimension as well. Forced intervention for the purpose of delivering humanitarian aid may have unintended consequences, putting more people at risk and cutting back on whatever assistance might already be flowing in. Military intervention may well involve interruption of commercial activity, including the delivery of private aid, and displacement of previously unaffected portions of the population. Hostilities could erupt, putting U.S. forces and local civilians in harm's way. Even the use of civilian airdrops could draw hostile fire and prompt a government to expel or restrict humanitarian agencies already working on the ground. Thus, while humanitarian intervention without the consent of the host government cannot be ruled out as a policy option of last resort, its risks can be grave and its impact uncertain.

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c. Use of force issues related to specific conflicts

(1) U.S. presence in Iraq

(i) U.S. constitutional authority

On March 4, 2008, Ambassador David M. Satterfield responded to a question concerning constitutional authority for U.S. combat operations in Iraq posed during a hearing on that date by Representative Gary Ackerman, Chairman of the

Subcommittee on the Middle East and South Asia, House of Representatives Committee on Foreign Affairs. The full text of the question and of Ambassador Satterfield's response, attached to a letter to Chairman Ackerman from Jeffrey T. Bergner, Assistant Secretary of State for Legislative Affairs, is set forth below. The letter and attachment are available at *www.state.gov/s/l/c8183.htm*.

Chairman Ackerman: Does the Administration believe it has the constitutional authority to continue combat operations in Iraq beyond the end of this year absent explicit authorization from the Congress?

Ambassador Satterfield: Yes. The United States remains actively engaged in our efforts to assist the Iraqi people in their transition to a working democracy that will be a source of stability in the region and that will not pose a threat to the national security of the United States or to our allies. Whether or not the authorization for the Multi-National Force in Iraq in United Nations Security Council Resolution (UNSCR) 1790 (2007) is extended, the U.S. military has the authority to continue its mission beyond the end of this year under the laws passed by Congress and the President's authority as Commander in Chief under the Constitution. Congress expressly authorized the use of force to "defend the national security of the United States against the continuing threat posed by Iraq" as well as to enforce all relevant UNSCRs concerning Iraq. Pub. L. 107-243 (Oct. 16, 2002). Congress also has authorized the President to use all necessary and appropriate force against nations, organizations, or persons involved in the September 11, 2001 attacks on the United States, "in order to prevent any future acts of international terrorism against the United States" by those same entities. Pub. L. 107-40 (Sept. 18, 2001). On March 18, 2003, when the President made the determinations required by Pub. L. 107-243, he determined that the military operations in Iraq were "consistent with the United States and other countries continuing to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the

terrorist attacks that occurred on September 11, 2001." In addition, Congress has repeatedly provided funding for the Iraq war, both in regular appropriations cycles and in supplemental appropriations.

(ii) Agreements with Iraq

On November 17, 2008, the United States and Iraq signed two agreements: the Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq ("SFA") and the Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq ("Security Agreement"). On December 4, 2008, the White House released a fact sheet noting that the two agreements were the result of Iraq's August 26, 2007 communiqué requesting "an end to Chapter VII status under the U.N. Security Council and the establishment of a long-term relationship with the United States" and the U.S.–Iraq Declaration of Principles signed November 26, 2007, "which laid out a 'table of contents' that the United States and Iraq would discuss in official negotiations." *See http://georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081204-6.html.*

The SFA and Security Agreement were approved by the Iraqi Cabinet and the Council of Representatives on November 27, 2008, and Iraq's three-person Presidency Council endorsed the Council of Representatives' vote on December 4. Following a December 12 exchange of notes confirming that the Parties had completed procedures necessary for entry into force, the agreements entered into force on January 1, 2009. *See http://2001-2009.state.gov/r/pa/prs/ps/2008/dec/112864.htm.* The text of the SFA is available at *http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SFA.pdf*; the text of the Security Agreement is available at *http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf*. The text of the Declaration of Principles is available at 43 WEEKLY COMP. PRES. DOC. 1532 (Dec. 3, 2007); *see Digest 2007* at 990–95.

Further excerpts from the White House fact sheet describing the agreements follow.

The United States and the government of Iraq have negotiated two historic agreements: a Strategic Framework Agreement (SFA) that covers our overall political, economic, and security relationship with Iraq, and a Security Agreement—otherwise known as the Status of Forces Agreement (SOFA)—that implements our security relationship.

- **Both agreements protect U.S. interests in the Middle East, help the Iraqi people stand on their own, and reinforce Iraqi sovereignty.**
- **The SFA normalizes the U.S.–Iraqi relationship with strong economic, diplomatic, cultural, and security ties—and serves as the foundation for a long-term bilateral relationship based on mutual goals.**
- **The Security Agreement guides our security relationship with Iraq and governs the U.S. presence, activities, and eventual withdrawal from Iraq.** This agreement ensures vital protections for U.S. troops and provides operational authorities for our forces so we can help sustain the positive security trends as we continue to transition to a supporting role.

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To Ensure That The Security Agreement Is Consistent With The Capacity Of Iraq's Security Forces, The Dates Included In This Agreement Were Discussed With The Iraqis, General Petraeus, And General Odierno—They Allow For The Continued Transition Of Security Responsibilities To The Iraqis

As we further transition security responsibilities to the Iraqi Security Forces, military commanders will continue to move U.S. combat forces out of major populated areas so that they are all out by June 30, 2009.

- **The Security Agreement also sets a date of December 31, 2011, for all U.S. forces to withdraw from Iraq.** This date reflects the increasing capacity of the Iraqi Security Forces as

demonstrated in operations this year throughout Iraq, as well as an improved regional atmosphere towards Iraq, an expanding Iraqi economy, and an increasingly confident Iraqi government.

- **These dates therefore are based on an assessment of positive conditions on the ground and a realistic projection of when U.S. forces can reduce their presence and return home without . . . sacrificing the security gains made since the surge.**

The Security Agreement Will Protect The United States And Our Troops And Incorporates The Visions Of An Independent And Bipartisan Commission

- **U.S. soldiers and civilians on the ground will continue to have uninterrupted and essential protections while serving in Iraq.** Our troops will also continue to have essential operational authorities to sustain positive security trends seen in Iraq over the past year.
- **The Security Agreement also reflects the Baker–Hamilton Iraq Study Group's recommendation that the Security Agreement include authorities for the United States to continue fighting al Qaeda and other terrorist organizations in Iraq, continued support for Iraqi Security Forces, and political reassurances to the government of Iraq.**

These Agreements Will Advance A Stable Iraq In The Heart Of The Middle East

- **The SFA and Security Agreement with Iraq move us closer to the strategic vision we all hope for in the Middle East:** a region of independent states, at peace with one another, fully participating in the global market of goods and ideas, and an ally in the War on Terror.
- **The SFA implements the Iraqi and U.S. desire for a long-term relationship based on cooperation and friendship as set out in the Declaration of Principles signed in November 2007.** The SFA also includes commitments on:
  - Defense, security, law enforcement, and judicial cooperation and development.

- Further improvement of political, diplomatic, and cultural cooperation.
- Economic, energy, health, environment, technology, and communications cooperation.
- Joint Cooperation Committees to monitor the implementation of the SFA.

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(2) Iran: Straits of Hormuz

On January 7, 2008, the U.S. Department of Defense reported that on January 6 local time, five armed high-speed boats assessed to belong to the Iranian Revolutionary Guard Navy maneuvered aggressively around three U.S. Navy warships in international waters in the Strait of Hormuz. Vice Admiral Kevin Cosgriff explained that the three U.S. ships were making a routine transit of a strait in international waters:

> . . . [I]t was a transit passage in international waters incidental to a routine inbound transit of the Strait of Hormuz. The U.S. ships were clearly marked, at daylight, decent visibility. The behavior of the Iranian ships was, in my estimation, unnecessary, without due regard for safety of navigation and unduly provocative in the sense of the aggregate of their maneuvers, the radio call and the dropping of objects in the water.

The full text of Admiral Cosgriff's briefing is available at *www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4116*. A press release by the U.S. Navy on the same date explained the legal situation:

> U.S. Navy ships USS Port Royal (CG 73), USS Hopper (DDG 70) and USS Ingraham (FFG 61) were steaming in formation at approximately 8 a.m. as they finished a routine Strait of Hormuz transit when five boats, suspected to be from the Islamic Republic of Iran Revolutionary Guard Navy (IRGCN), maneuvered aggressively in close

> proximity of the Hopper. Following standard procedure, Hopper issued warnings, attempted to establish communications with the small boats and conducted evasive maneuvering.
>
> Coalition vessels, including U.S. Navy ships, routinely operate in the vicinity of both Islamic Republic of Iran Navy and IRGCN vessels and aircraft. These interactions . . . reflect a commitment to accepted tenets of international law and common practice.

The full text of the press release is available at *www.navy.mil/search/display.asp?story_id=34207*. A January 15 press release explained further that the "U.S. Navy's regular transit through the Strait of Hormuz is to support regional stability. 'We're here with the 19 other Coalition countries to keep the sea lanes open for international traffic,' [the commanding officer of the USS Port Royal] said." *See www.navy.mil/search/display.asp?story_id=34339*.

(3) Russia/Georgia

In August 2008 shooting broke out between Georgia and South Ossetian armed forces in the Georgian province of South Ossetia. Russian forces in Abkhazia and South Ossetia, whose independence from Georgia Russia has long supported, moved into other parts of Georgian territory. In testimony before the Senate Committee on Foreign Relations on September 17, 2008, Under Secretary of State for Political Affairs William J. Burns addressed the conflict, as excerpted below. The full text of Ambassador Burns's testimony is available at *http://foreign.senate.gov/testimony/2008/BurnsTestimony080917a.pdf*.

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The causes of this conflict—particularly the dispute between Georgia and its breakaway regions of South Ossetia and Abkhazia—are complex, with mistakes and miscalculations on all sides. But key facts are clear: Russia's intensified pressure and provocations against

Georgia—combined with a serious Georgian miscalculation—have resulted not only in armed conflict, but in an ongoing Russian attempt to dismember that country. Russia sent its army across an internationally recognized boundary, to attempt to change by force the borders of a country with a democratically-elected government.

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. . . On the night of August 7, shooting broke out between Georgia and South Ossetian armed forces in South Ossetia. Georgia declared a ceasefire, but it did not hold. The Georgians told us that South Ossetians had fired on Georgian villages from behind the position of Russian peacekeepers. The Georgians also told us that Russian troops and heavy military equipment were entering the Roki Tunnel border crossing with Russia.

We had warned the Georgians many times in the previous days and weeks against using force, and on August 7, we warned them repeatedly not to take such a step. We pointed out that use of military force, even in the face of provocations, would lead to a disaster. . . .

Georgia's move into the South Ossetian capital provided Russia a pretext for a response that quickly grew far out of proportion to the actions taken by Georgia. There will be a time for assessing blame for what happened in the early hours of the conflict, but one fact is clear—there was no justification for Russia's invasion of Georgia. There was no justification for Russia to seize Georgian territory, including territory well beyond South Ossetia and Abkhazia, in violation of Georgia's sovereignty, but that is what occurred. On August 8, the Russians poured across the international border, crossed the boundaries of South Ossetia past where the conflict was occurring, and pushed their way into much of the rest of Georgia. Several thousand Russian forces moved into the city of Gori and other areas far from the conflict zone, such as Georgia's main port of Poti, over 200 kilometers from South Ossetia. Russia also seized the last Georgian-held portion of Abkhazia, where there had been no fighting.

The full story of that invasion and what occurred is still not fully known. . . . [S]ome Human Rights Watch researchers were able to reach the area and reported that the Russian military had used "indiscriminate force" and "seemingly targeted attacks on civilians," including civilian convoys. They said Russian aircraft dropped cluster bombs in populated areas and allowed looting, arson attacks, and abductions in Georgian villages by militia groups. The researchers also reported that Georgian forces used "indiscriminate" and "disproportionate" force during their assault on South Ossetian forces in Tskhinvali and neighboring villages in South Ossetia. Senior Russian leaders have sought to support their claims of Georgian "genocide" against the South Ossetian people by claiming that 2,000 civilians were killed by Georgian forces in the initial assault. Human Rights Watch has called this figure of 2,000 dead "exaggerated" and "suspicious." Other subsequent Russian government and South Ossetian investigations have suggested much lower numbers. We are continuing to look at these and other reports while we attempt to assemble reliable information about who did what in those days.

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[A ceasefire agreement negotiated by French President Sarkozy] was signed—and should have been honored immediately—by Russian President Medvedev, who had promised to French President Sarkozy Russia's immediate withdrawal upon President Saakashvili's signature of the Ceasefire. Yet Russia has still not lived up to the requirements of the Ceasefire Agreement. In these circumstances, with Russia's having failed to honor the terms of the Ceasefire Agreement and its promise to withdraw its forces, Secretary Rice flew to Brussels for an emergency NATO meeting on August 19 and, with our Allies, produced a statement in support of Georgia's territorial integrity and sovereignty—a statement that was stronger than anyone thought possible.*

* Editor's note: The NATO ministers stated in part: "The North Atlantic Council met in special Ministerial session on 19 August 2008, expressed its grave concern over the situation in Georgia and discussed its

Russia recognized the independence of Abkhazia and South Ossetia on August 26. It did so despite numerous United Nations Security Council resolutions that Russia approved and that explicitly affirmed Georgia's territorial integrity, and that the underlying separatist conflicts must be resolved peacefully, through international negotiations. This irresponsible action was condemned by the EU, NATO's Secretary General, and key Allies.

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On August 8, 2008, Secretary of State Condoleezza Rice issued a statement calling for a ceasefire, "underscor[ing] the international community's support for Georgia's sovereignty and territorial integrity within its internationally recognized borders, as articulated in numerous U.N. Security Council resolutions, including most recently UNSCR 1808 in April 2008." *See http://2001-2009.state.gov/secretary/rm/2008/08/108083.htm.*

On August 9, President Bush reinforced the call for a ceasefire, urging a peaceful resolution to the crisis:

> This situation can be resolved peacefully. We've been in contact with leaders in both Georgia and Russia at all levels of government. Georgia is a sovereign nation and its territorial integrity must be respected. We have urged an immediate halt to the violence and a stand-down by all troops. We call for an end to the Russian bombings, and a return by the parties to the status quo of August the 6th.

See http://georgewbush-whitehouse.archives.gov/news/releases/2008/08/20080809-2.html.

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wider implications for Euro-Atlantic stability and security. A peaceful and lasting solution to the conflict in Georgia must be based on full respect for the principles of Georgia's independence, sovereignty and territorial integrity recognised by international law and UN Security Council resolutions." The full text is available at *www.nato.int/docu/pr/2008/p08-104e.html.*

On August 11, President Bush denounced what appeared to be "an effort . . . to depose [Georgia]'s duly elected Government":

> Russia has invaded a sovereign neighboring state and threatens a democratic government elected by its people. Such an action is unacceptable in the 21st century.
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> * * * *
>
> . . . The Russian Government must reverse the course it appears to be on, and accept this peace agreement as a first step toward resolving this conflict.

See 44 Weekly Comp. Pres. Doc. 1128, 1130, and 1131 (Aug. 18, 2008).

On August 16, President Bush addressed "Russia's contention that the regions of South Ossetia and Abkhazia may not be a part of Georgia's future," as excerpted below. The full text of President Bush's statement is available at 44 Weekly Comp. Pres. Doc. 1138 (Aug. 25, 2008).

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A major issue is Russia's contention that the regions of South Ossetia and Abkhazia may not be a part of Georgia's future. But these regions are a part of Georgia, and the international community has repeatedly made clear that they will remain so. Georgia is a member of the United Nations, and South Ossetia and Abkhazia lie within its internationally recognized borders. Georgia's borders should command the same respect as every other nation's.

There's no room for debate on this matter. The United Nations Security Council has adopted numerous resolutions concerning Georgia. These resolutions are based on the premise that South Ossetia and Abkhazia remain within the borders of Georgia and that their underlying conflicts will be resolved through international negotiations. These resolutions are based on the premise that South Ossetia and Abkhazia are to be considered a part of the Georgian territory, and to the extent there [are] conflicts they will be resolved peacefully.

These resolutions reaffirm Georgia's sovereignty and independence and territorial integrity. Russia itself has endorsed these resolutions. The international community is clear that South Ossetia and Abkhazia are part of Georgia, and the United States fully recognizes this reality.

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On August 26, 2008, Russia announced its recognition of South Ossetia and Abkhazia as independent states. President Bush issued a press release on the same date condemning the action, set forth below. *See* 44 WEEKLY COMP. PRES. DOC. 1157 (Sept. 1, 2008).

The United States condemns the decision by the Russian President to recognize as independent states the Georgian regions of South Ossetia and Abkhazia. This decision is inconsistent with numerous United Nations Security Council Resolutions that Russia has voted for in the past, and is also inconsistent with the French-brokered six-point ceasefire agreement which President Medvedev signed on August 12, 2008. The six-point agreement offered a peaceful way forward to resolve the conflict. We expect Russia to live up to its international commitments, reconsider this irresponsible decision, and follow the approach set out in the six-point agreement.

The territorial integrity and borders of Georgia must be respected, just as those of Russia or any other country. Russia's action only exacerbates tensions and complicates diplomatic negotiations. In accordance with United Nations Security Council resolutions that remain in force, Abkhazia and South Ossetia are within the internationally recognized borders of Georgia, and they must remain so.

During this period, several resolutions were introduced in the Security Council, although none was ultimately adopted. On August 28, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, delivered a statement in the Security Council calling for action on Russia's recognition of the two Georgian entities. The full text of the

statement is available at *www.archive.usun.state.gov/press_releases/20080828_228.html.*

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The Council meets today for the sixth time in an emergency session since the outbreak of hostilities in Georgia on August 7. This time the immediate development that compels us to meet is Russia's decision to recognize the Georgian entities of Abkhazia and South Ossetia as independent states. The United States categorically condemns this decision.

Over the course of these meetings, certain facts have not changed. One, Russia's military invasion of Georgia; two, Russia's continued occupation of parts of Georgia in contravention of the Ceasefire Agreement negotiated by President Sarkozy on behalf of the EU; and, three, Russia's disregard for Georgia's territorial integrity. We now recognize those stubborn facts for what they were—a prelude to Russia's illegal attempt to redraw the borders of its neighbor.

Russia's recognition of South Ossetia and Abkhazia as independent states is incompatible with the UN Charter and at odds with numerous United Nations Security Council resolutions. Just under five months ago, on April 15 of this year, the Security Council adopted Resolution 1808, which spelled out, as had many previous resolutions, the following language as its first operative paragraph:

> "The Security Council reaffirms the commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders . . ."

Mr. President, that simple statement, incapable of being misinterpreted, was unanimously supported by all members of the Security Council. And it is now being single-handedly disregarded by the Russian Federation.

Russia's decision to recognize Abkhazia and South Ossetia in contravention of its own commitments and obligations could portend further disregard of this institution and its undertakings by one of its permanent members. This should be a source of concern and reprobation not only for the members of the Council, but for every member of the United Nations, whose Charter requires that all member states 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 the purposes of the United Nations. If this wanton effort to dismember Georgia through military force under the guise of self-defined "peacekeeping" cannot be condemned, the very foundations of the international order that this organization was founded to uphold will be in jeopardy.

We should all be concerned by the manner in which Russia has acted, just as much as we are concerned with what Russia has done. Russia did not call for this body or other international institutions to consider facts regarding Abkhazia or South Ossetia as Russia perceives those facts. Russia did not work through legitimate international institutions available to it to deal with the concerns it has raised since August 7. And Russia did not need to recognize two Georgian regions—a decision made possible by its overwhelming military might—to fulfill what it had claimed was its initial reason for taking over Georgian territory, namely, the protection of its peacekeepers and civilians in the South Ossetian region of Georgia. Rather, Russia presumed to confer independence on these two separatist entities as a political act that challenges the post-Soviet borders for the first time since the former Soviet republics gained their independence.

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(4) United States and Pakistan

On September 22, 2008, White House spokeswoman Dana Perino responded to a question concerning U.S.–Pakistan cooperation, following the September 20 terrorist attack on the Marriott hotel in Islamabad in which more than 50 people

were killed, including three Americans. The full text of Ms. Perino's comments is available at *http://georgewbush-whitehouse.archives.gov/news/releases/2008/09/20080922-1.html*.

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. . . We have extensive coordination and cooperation that is ongoing with Pakistan, and for good reason. . . . [T]he terrorists showed again this weekend why we need to make sure that we are helping train up their forces, that we are sharing information, and that we can work together to try to protect innocent people.

The terrorists are trying to kill innocent people to advance their political objectives. And we will remain committed to working with Pakistan, and President Zardari has said the same, that he wants to work with us, as well. . . .

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. . . President Zardari, based on his comments from when he was elected, understands the serious situation that they're in. Innocent people here in America, in the West, and in Pakistan itself are at risk because of these terrorists, and they know that they need to do more and do a better job, and that we're going to be there to support them. But we also recognize their sovereignty. And that is why the coordination and cooperation, not just on that border region but also within the cities between our forces—or our services like our intelligence services, our military, and also our law enforcement services—are working closely with them to . . . try to prevent attacks, but also to investigate attacks after they occur.

(5) Kurdistan Workers' Party ("PKK") attack in Turkey

On October 4, 2008, Robert Wood, Deputy Spokesman, U.S. Department of State, issued a press statement condemning a PKK attack in Simdinli, Turkey. *See http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110624.htm*. On October 7, the State Department Office of the Spokesman provided a

response to a taken question on possible trilateral talks on combating the PKK:

> The United States condemns the PKK terrorist attack on the night of October 3–4 in Simdinli. The United States considers the PKK a common enemy of Turkey, the United States, and Iraq. We reiterate our longstanding call for the PKK to lay down its arms and cease its violence once and for all, and our commitment to work with Turkey and Iraq to defeat PKK terrorists.
>
> Turkey's retaliatory fire following this latest PKK terrorist attack inflicted serious damage to a failing organization. The United States remains firmly committed to sustaining its information sharing with Ankara and to deepening our cooperation with both Turkey and Iraq against the PKK.

See http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110722.htm.

(6) Sudan

On October 28, 2008, Ambassador Zalmay Khalilzad, U.S. Permanent Representative to the United Nations, addressed the Security Council on violence in Sudan. Ambassador Khalilzad's remarks, excerpted below, are available in full at *www.archive.usun.state.gov/press_releases/20081028_293.html*. Chapter 16.A.7. discusses the U.S. call for the Security Council's Sudan Sanctions Committee to take action to prevent further violence in Darfur, and Chapter 17.A.6. and B.3. provide further discussion of U.S. concerns about violence in Darfur.

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The United States reiterates its condemnation of all violence in Sudan. Violence by the government and violence by the rebels. All parties must refrain from violence in favor of peace and dialogue.

In this regard, the government of Sudan has a special responsibility. It must cease engaging in those areas of concern documented in the Sudan panel of experts' most recent report, including:

- Violating the limited arms embargo on Darfur.
- Using aircraft painted to resemble UN humanitarian aircraft[.]
- Conducting offensive overflights in Darfur.
- And failing to implement the Security Council-mandated sanctions.
- And not accepting that there is no impunity for war crimes and crimes against humanity.

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(7) Military coup in Mauritania

On August 6, 2008, Secretary of State Rice issued a statement condemning "the Mauritanian military's overthrow of the democratically-elected Government of Mauritania." Secretary Rice

> welcome[d] the statements by the African Union and the European Union condemning the coup. We oppose any attempts by military elements to change governments through extra-constitutional means. We call on the military to release President Sidi Mohamed Ould Cheikh Abdallahi and Prime Minister Yahya Ould Ahmed Waghef and to restore the legitimate, constitutional, democratically-elected government immediately. The United States looks to all of our international partners to condemn this anti-democratic action.

See http://2001-2009.state.gov/secretary/rm/2008/08/107980.htm. Chapter 16.A.5. discusses travel restrictions that the Secretary of State subsequently imposed as a result of the coup.

d. North Atlantic Treaty Organization

On September 10, 2008, Assistant Secretary of State for European and Eurasian Affairs Daniel Fried testified before the Senate Committee on Foreign Relations on the role of NATO and on NATO enlargement.* Ambassador Fried's discussion of the role of NATO is excerpted below; the full text of his testimony is available at *http://foreign.senate.gov/testimony/2008/FriedTestimony080910a.pdf*.

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NATO's Purpose

NATO, the world's most successful military alliance, has been and remains the principal security instrument of the transatlantic community of democracies. It is both a defensive alliance and an alliance of values. While it was created in the context of Soviet threats to European security, it is in fact not an alliance directed against any nation. . . .

Article 5 remains the core of the Alliance. Throughout most of the Alliance's history, we had expected that if Article 5 were ever invoked, it would have been in response to a Soviet armored assault on Germany. We never expected that Article 5 would be invoked in response to an attack on the United States originating in Afghanistan. But that is what occurred. NATO's response was swift and decisive. The United States was attacked on September 11, 2001, and on September 12, NATO invoked Article 5 for the first time in its history. In fact, while NATO's purpose of collective defense has remained constant, new threats have arisen.

* Editor's note: On September 25, 2008, the Senate gave advice and consent to the Protocols to the North Atlantic Treaty of 1949 on the Accession of the Republic of Albania and of the Republic of Croatia, both adopted at Brussels on July 9, 2008, and signed that day on behalf of the United States (S. Treaty Doc. No. 110-20), subject to Presidential certifications related to the budgetary effect on the U.S. participation in NATO and the ability of the United States to meet or fund military requirements outside the NATO area. 154 Cong. Rec. S9556–S9557 (2008).

NATO thus has been required to carry out its core mandate in new ways, developing an expeditionary capability and comprehensive, civil-military skills. NATO is now "out of area" but very much in business—fielding major missions in Afghanistan and Kosovo, and a training mission on the ground in Iraq. . . .

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NATO Enlargement & Russia

NATO enlargement was intended to achieve emergence of a Europe whole, free and at peace: all of Europe, not just its Western half. It was not directed against Russia. Quite the contrary: NATO enlargement was designed to welcome new democracies in Europe in parallel to efforts to reach out to Russia and develop a new NATO–Russia relationship. In designing NATO's new role for the post-Cold War world, the United States and NATO Allies have sought to advance NATO–Russia relations as far as the Russians would allow it to go.

We wanted a new Europe and a new relationship with Russia at the same time. We sought to go forward, not backwards. Through the establishment of the NATO–Russia Council (NRC) in 2002—the same year we invited seven eastern European countries to join NATO—we presented Russia the path toward building a partnership with NATO to strengthen the common security of all. Allies also decided not to shut the door to the possibility of even Russia itself becoming a member of NATO at some time in the future.

We assumed that we had in Russia a partner that was, over time, even if perhaps unevenly, moving toward more democracy at home and more cooperation with its neighbors and the world. But developments in recent years have forced us to question this assumption. Russia has turned toward authoritarianism at home and pressure tactics toward its neighbors. Now, by attacking Georgia, Russia has sought to change international borders by force, bringing into question the territorial settlement of the breakup of the USSR in 1991. . . . We want to have a partner in a Russia that contributes to an open, free world in the 21st century, not a Russia that behaves as an aggressive Great Power in a 19th century sense that asserts—as President Medvedev recently

did—a sphere of influence or "privileged interests" over its neighbors and beyond.

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e. Security contractors

In a March 10, 2008 statement to the Human Rights Council Working Group on the Use of Mercenaries, the United States objected to the use of the term "mercenary" as applying to private and military security companies, stating:

> By addressing and promoting accession to the Convention against the Recruitment, Use, Financing and Training of Mercenaries in the context of a report on private and military security companies (PMSCs), the Working Group fails to distinguish between PMSCs and mercenaries, and wrongly implies that PMSCs are mercenaries. Whether relying on the definition found in the Convention or in Additional Protocol I [to the Geneva conventions], to neither of which the United States is a Party, or on traditional understandings of what constitutes a mercenary, it is clear that the individuals and groups described in the Working Group's report are not "mercenaries."
>
> The Working Group's Report fails to recognize that there is a long history of using contractors in support of military operations, and that there are legitimate reasons why modern military forces require contractor support not only for national military forces involved in defense, but also in peacekeeping operations, as do humanitarian relief agencies.

The U.S. statement, available in full at *www.usmission.ch/Press2008/March/0310Mercenaries.html*, indicated that it understood "the concern expressed . . . for promoting accountability of private security contractors":

> . . . We are committed to addressing the legal and logistical challenges in order to maximize the safety and effectiveness of our diplomatic and[ ] military operations

overseas, while minimizing any negative effects on the local population and promoting accountability.

. . . We would . . . like to emphasize that the United States only permits its security contractors to use deadly force defensively and when necessary, and they are not involved in offensive combat operations.

In addition, the Executive and Legislative branches are working together to enhance the existing framework of U.S. federal jurisdiction to hold security contractor personnel accountable for crimes committed in Iraq, Afghanistan, and elsewhere.

Moreover, the U.S. Department of Defense is continuing to update its regulations governing private security contractors operating in combat zones.

2. Convention on Certain Conventional Weapons

a. Cluster munitions

(1) Negotiation of CCW protocol

During 2008 the United States participated in meetings of the Group of Governmental Experts ("GGE") to negotiate a new protocol to the Convention on Certain Conventional Weapons ("CCW") to address the issue of humanitarian harm that can be caused by cluster munitions. A chairman's text produced October 31, 2008, served as the basis for discussions in the GGE November meeting. Excerpts below from interventions delivered by Stephen Mathias, head of the U.S. delegation, to the GGE on November 6 and 7, 2008, provide the U.S. views on the humanitarian benefit of the draft protocol and the current status of relevant international law. U.S. interventions are available at *http://ccwtreaty.state.gov*. *See also Digest 2007* at 899–905.

Intervention of November 6, 2008

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- In our view, the appropriate standard by which to judge the adequacy of an eventual protocol is whether it will have a significant humanitarian benefit on the ground.
- The U.S. delegation is convinced that the Chairman's draft that we are working on meets this standard.
- The most significant humanitarian benefit can be found in paragraphs 1 and 2 of Article 4. These paragraphs would have the effect of forcing States Parties to make major changes in their cluster munitions arsenals.
  - Paragraph 2(a) would require not only that submunitions include at least one of a specified list of safeguards, but also that such safeguards effectively ensure that unexploded submunitions no longer function as explosive submunitions. This is a very high standard.
  - Many, if not most, of the cluster munitions that currently exist do not even have one safeguard. To meet this new requirement will require most of the cluster munitions in existing arsenals to be removed from active stocks.
  - Paragraph 2(b) also sets a very high standard for future cluster munitions. As we have said regarding our own policy, this new standard will affect almost our entire arsenal. Over 95% of our cluster munitions stocks will have to be replaced to meet this new standard.
  - Further, the requirement to achieve this result over the range of intended operational environments addresses the issue raised by many regarding the discrepancy between results achieved in testing and real results on the ground in situations of armed conflict.
- Furthermore, the requirements in paragraph 4 of Article 4 take effect immediately and are not subject to the transition period that is available with respect to paragraphs 1 and 2. These provisions will immediately move the development and use of new cluster munitions in a positive, more humanitarian direction.
- The requirements in Article 7 dealing with clearance and destruction are compatible with similar requirements in Protocol V on explosive remnants of war and address one of

the main humanitarian effects of cluster munitions, their impact on civilians after a conflict.

- There are also a number of important restrictions on transfers that take effect immediately, without regard to the transition period in Article 4. For example, the proposed cut-off date for the transfer of cluster munitions (those manufactured before 1990) is significant. We believe that the bulk of the world's cluster munitions, many of which were created during the Cold War, would be affected by this immediate transfer ban. To illustrate, approximately three-quarters of U.S. Army cluster munitions were manufactured before 1990. Furthermore, the ban on transfers to non-state actors is an important provision that will likely produce significant benefits.
- A number of delegations have argued against a long transition period. Without entering into the debate over exactly how long the transition period should be, it is worth noting that the very fact that a number of countries need a long transition period to meet the obligations of Article 4 is a sign of the significance of these requirements. If countries did not believe that they would need to make significant changes to their arsenals to comply with these requirements, there would be no need for them to insist on a lengthy transition period, as they have.
- There are numerous other provisions in the draft text that would have a significant positive impact. For example, the provisions on international humanitarian law provide important guidance on the appropriate use of cluster munitions, particularly in the context of non-international armed conflicts and for States that are not parties to Additional Protocol I to the Geneva Conventions. Article 5 on storage and destruction, Article 8 on recording, retaining, and transmission of information, and Article 10 on victims assistance are all also significant.
- Stepping back from this discussion of the specific provisions in the draft text, it is also important to keep in mind the context in which we are operating. Approximately 90% of the world's stockpiles of cluster munitions are held by countries

that do not support a complete ban on cluster munitions. Therefore, keeping in mind the points we have just made, if we can achieve consensus on a text along the lines of the one we are working on, it is likely to have a very significant humanitarian impact.

- It would be deeply disappointing if some states turn their backs on the possibility of achieving consensus on a text that would have a significant humanitarian benefit because it does not go as far as they would like. This would be a real tragedy.

Intervention of November 7, 2008

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. . . My delegation would like to reiterate why a complete ban or a copy of the Oslo Convention* is simply not an acceptable approach to my country, and to many other countries in this room.

A number of countries, including the United States, have critical national security interests at stake in these negotiations. Cluster munitions are lawful weapons under existing international humanitarian law, they have significant military utility, and they are a critical capability in many countries' defense planning. It is unrealistic to expect that countries with such critical security interests at stake will immediately agree to a sweeping ban. Accordingly, before particular types of cluster munitions can be banned, countries in this position will require transition periods to allow for the replacement of these weapons with other weapons that can satisfy their national security interests. The need for such transition periods should not be viewed as a sign that the text is too weak. Instead, the fact that countries need an extensive transition period highlights the fact that they are willing to undertake significant obligations that will require massive overhauls to their stockpiles. Such changes are both expensive and time-consuming.

Furthermore, during the transition period, it is unrealistic to expect that countries will agree to restrictions that will put their national security at risk. To illustrate, a country that relies on

* Editor's note: *See* 2.a.(2) below.

cluster munitions in its defense strategy and is attacked during the transition period may be forced to use these munitions to defend itself, and may well have the need to acquire new cluster munitions after repelling the attack, to ensure that it is not vulnerable to new attacks. Accordingly, the ability to produce or to transfer such weapons will still be necessary during the transition period.

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In closing remarks to the meeting of states parties on November 13, 2008, following failure to adopt a text, Mr. Mathias provided the U.S. views as set forth below. The full text is available at *http://ccwtreaty.state.gov*.

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Mr. Chairman, my delegation finds it deeply disappointing that a group of states has blocked progress on this important humanitarian effort because they have remained completely focused on unrealistic results here and have not worked constructively to achieve a balanced, positive result. During the course of the negotiations these last two weeks, and in particular over the last couple of days, it has become clear that further progress in 2008 is impossible given this approach by a number of delegations.

Our failure is all the more disappointing because the opportunity to agree to a protocol that would have had substantial humanitarian benefits was within our grasp. Let me be quite precise on the substance of the benefits that we have let slip by.

- The major users, producers, and stockpilers of cluster munitions were ready to agree to a protocol that would have required a major overhaul of the existing stocks of cluster munitions in order to meet tough new technical standards. Last week you heard from both my delegation and the Russian delegation—arguably two of the largest stockpilers of cluster munitions—that the provisions of Article 4 would require both nations to significantly overhaul their existing stocks.
- The Chairman's text would have prevented the transfer of any and all cluster munitions to non-state actors. Today, and in the foreseeable future, there is no international legal

prohibition that will prevent non-state actors from acquiring or a state from transferring cluster munitions. Non-state actors frequently ignore the IHL principles of distinction, discrimination, proportionality, and often times purposely target civilians and civilian objects. The significant humanitarian benefit of prohibiting transfers to these non-state actors has been lost.

- Most of the current stockpiles of cluster munitions do not even have a single safeguard. To address the existing stockpiles, the chairman's text created restrictions during a transition period concerning use, stockpile management, and transfer of these munitions. Left on the table was a means of realistically and constructively addressing the current stocks of cluster munitions. The technical improvements and other restrictions outlined in the chairman's text would have saved lives and contributed to a substantial humanitarian benefit.
- Additionally, the approach taken in the chairman's text established an effective balance between the national security obligations of states and the potential humanitarian impact of cluster munitions, which is precisely the objective of the framework of the CCW and exactly what our mandate demanded of us. So, not only have we left humanitarian benefits on the table, but we have proceeded in these negotiations in a manner that impacts the credibility of the CCW framework.

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Because we continue to believe that an agreement is within reach if all delegations want to achieve it, we are prepared to see the negotiations resume next year. . . .

. . . [W]e should work on the basis of the excellent draft prepared by the Chair prior to the beginning of the session last week. Of course, delegations will all be free to make proposals to add to this draft and the new Chair will be in a position to reflect his or her own changes to it—no one would suggest otherwise—but this draft remains the best place to start our work.

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(2) U.S. objections to separate Convention on Cluster Munitions

The United States has made clear its preference for any new instrument addressing cluster munitions to be negotiated within the CCW framework, as discussed above. It did not participate in negotiation of the separate Convention on Cluster Munitions ("CCM" or "Oslo Convention") that opened for signature in Oslo on December 3, 2008. In a press release of December 2, 2008, the State Department Office of the Spokesman responded to a question on U.S. views on the CCM and on what the United States is doing to address the humanitarian concerns associated with cluster munitions, stating:

> The CCM constitutes a ban on most types of cluster munitions; such a general ban on cluster munitions will put the lives of our military men and women, and those of our coalition partners, at risk.

See also excerpts from intervention of November 7 in a.(1) *supra*. The full text of the press release, further excerpted below, is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/dec/112561.htm*.

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- The United States shares the concerns of many states regarding the unintended harm to civilians caused by the use of cluster munitions.
- Such concerns are behind the DoD Policy on Cluster Munitions and Unintended Harm to Civilians, signed by Secretary Gates on June 19, 2008, as well as U.S. Government contributions of well over $1.4 billion since 1993 to clean up landmines and all other explosive remnants of war, including unexploded cluster munitions.
- Although we share the humanitarian concerns of states signing the CCM, we will not be joining them.

* * * *

The new DOD cluster munitions policy referred to in the press release is available at *www.defenselink.mil/news/d20080709cmpolicy.pdf*. A press release of June 19 explained the basis for the new policy and anticipated use of the policy in negotiations, as excerpted below. The press release is available at *www.defenselink.mil/Releases/Release.aspx?ReleaseID=12049*.

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* * * *

Cluster munitions are legitimate weapons with clear military utility in combat. They provide distinct advantages against a range of targets, where their use reduces risks to U.S. forces and can save U.S. lives. These weapons can also reduce unintended harm to civilians during combat, by producing less collateral damage to civilians and civilian infrastructure than unitary weapons. Because future adversaries will likely use civilian shields for military targets—for example by locating a military target on the roof of an occupied building—use of unitary weapons could result in more civilian casualties and damage than cluster munitions. Blanket elimination of cluster munitions is therefore unacceptable due not only to negative military consequences but also due to potential negative consequences for civilians.

Post-combat, the impact of cluster munitions is limited in scope, scale and duration compared to other explosive remnants of war (ERW). According to the Feb. 15, 2008, State Department white paper ("Putting the Impact of Cluster Munitions in Context with the Effects of All Explosive Remnants of War"), in 2006 fewer than 400 casualties were attributable to cluster munitions out of a global total of 5,759 reported for all ERW.

A key facet of the DoD policy establishes a new U.S. technical norm for cluster munitions, requiring that by the end of 2018, DoD will no longer use cluster munitions which, after arming, result in more than one percent unexploded ordnance across the range of intended operational environments. Additionally, cluster munitions sold or transferred by DoD after 2018 must meet this standard. Any munitions in the current inventory that do not meet this standard will be unavailable for use after 2018. As soon as

possible, military departments will initiate removal from active inventory [of] cluster munitions that exceed operational planning requirements or for which there are no operational planning requirements. These excess munitions will be demilitarized as soon as practicable within available funding and industrial capacity. Effective immediately through 2018, any U.S. use of cluster munitions that do not meet the one percent unexploded ordnance standard must be approved by the applicable combatant commander. Previous DoD policy required military departments to design and procure "future" (after 2005) submunitions to a 99 percent reliability rate, but did not address use and removal of current munitions.

* * * *

b. Ratification of CCW-related instruments

In September 2008 the Senate gave advice and consent to ratification of four CCW-related instruments. *See* S. Treaty Doc. No. 109-10 (2006), discussed in *Digest 2006* at 1094–100, for further discussion of the instruments at the time of the President's transmittal to the Senate. The instruments entered into force for the United States in early 2009.

The Senate provided advice and consent to CCW Protocols III and IV on incendiary weapons and blinding laser weapons and an amendment to the CCW to extend its scope to non-international armed conflicts on September 23. 154 Cong. Rec. S9332–S9333 (2008).

The Senate's approval of Protocol III was subject to one reservation, an understanding, and a declaration, as follows:

> The United States of America, with reference to Article 2, paragraphs 2 and 3, reserves the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing will take all feasible precautions with a view to limiting the incendiary effects

> to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.
>
> It is the understanding of the United States of America that any decision by any military commander, military personnel, or any other person responsible for planning, authorizing or executing military action shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.
>
> This Protocol is self-executing. This Protocol does not confer private rights enforceable in United States courts.

The Senate's advice and consent to Protocol IV was not subject to a reservation but was subject to the same understanding and declaration as was Protocol III above. Advice and consent to the amendment to Article 1 was subject only to a self-execution declaration.

The Senate provided advice and consent to CCW Protocol V on explosive remnants of war on September 26. 154 Cong. Rec. S9850 (2008). The Senate's advice and consent was subject to one understanding and one declaration:

> It is the understanding of the United States of America that nothing in Protocol V would preclude future arrangements in connection with the settlement of armed conflicts, or assistance connected thereto, to allocate responsibilities under Article 3 in a manner that respects the essential spirit and purpose of Protocol V.
>
> With the exception of Articles 7 and 8, this Protocol is self-executing. This Protocol does not confer private rights enforceable in United States courts.

Written testimony by State Department Legal Adviser John B. Bellinger, III, before the Senate Committee on Foreign

Relations in support of these four treaties and the Hague Cultural Property Convention, discussed in 3.a. below, included comments on broad issues related to the treaties as excerpted here. The full text of Mr. Bellinger's prepared testimony is available at *www.state.gov/s/l/c8183.htm*.

* * * *

The United States has been a long-standing and historic leader in the law of armed conflict, and we played a significant role in shaping the treaties before you now. At the same time, due to the complexity of the law in this field and the involvement of our military forces in armed conflict, we subject all treaties dealing with the law of armed conflict to close examination, even after adoption of the texts. I would note that in some cases the United States has taken more time than many of our friends and allies in ratifying the treaties we initiate, negotiate, support and with which we generally comply, even where we have not formally become a party. But we believe that such close examination is necessary, and allows us to be sure that the treaties we propose to ratify are in our national interests.

Some may question why it is important to ratify these treaties now after they have entered into force for other nations long ago. The answer, in part, is that over time we have seen how these treaties operate and we are confident that they promote U.S. national interests and are consistent with U.S. practice. Another reason for the United States to ratify these treaties is that ratification would promote U.S. international security interests in vigorously supporting, along with our friends and allies, both the rule of law and the appropriate development of international humanitarian law. Additionally, when the United States ratifies a treaty, other nations are more likely to ratify as well, with the result that overall implementation of and compliance with these norms will improve over time, which ultimately helps to protect our forces.

Ratification will also specifically enhance U.S. leadership in international humanitarian law and increase our ability to work with other states to promote effective implementation of these

treaties in at least two ways. First, after ratification, the United States will be able to participate fully in meetings of states parties aimed at implementation of these treaties and, thereby, more directly affect how the practice under these treaties develops. Second, becoming a party to these treaties will significantly strengthen our negotiating leverage and credibility in our work on other law of war treaties, to the extent other states ask why they should cede to U.S. positions if we do not ratify those treaties after they do so. We hope to change that situation with the ratification of the five instruments under consideration today.

* * * *

3. Other Treaty Actions

a. Cultural property

On September 25, 2008, the Senate gave advice and consent to ratification of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Convention") concluded on May 14, 1954. 154 Cong. Rec. S9555 (2008). The Senate's approval was subject to four understandings and a declaration, as set forth below. *See Cumulative Digest 1991–1999* at 2197–206 for discussion of the President's transmittal of the Convention and related protocol in S. Treaty Doc. No. 106-1 (1999).

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* * * *

Section 2. Understandings. . . .
(1) It is the understanding of the United States of America that "special protection," as defined in Chapter II of the Convention, codifies customary international law in that it, first, prohibits the use of any cultural property to shield any legitimate military targets from attack and, second, allows all property to be attacked using any lawful and proportionate means, if required by military necessity and notwithstanding possible collateral damage to such property.

(2) It is the understanding of the United States of America that any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action or other activities covered by this Convention shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.

(3) It is the understanding of the United States of America that the rules established by the Convention apply only to conventional weapons, and are without prejudice to the rules of international law governing other types of weapons, including nuclear weapons.

(4) It is the understanding of the United States of America that, as is true for all civilian objects, the primary responsibility for the protection of cultural objects rests with the Party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose.

Section 3. Declaration. . . .

With the exception of the provisions that obligate the United States to impose sanctions on persons who commit or order to be committed a breach of the Convention, this Convention is self-executing. This Convention does not confer private rights enforceable in United States courts.

b. Counterterrorism treaties

As discussed in Chapter 3.B.1.e., on September 25, 2008, the Senate also gave advice and consent to four counterterrorism treaties: the Amendment to the Convention on the Physical Protection of Nuclear Material; the Protocols of 2005 to the Convention Concerning Safety of Maritime Navigation and to the Protocol Concerning Safety of Fixed Platforms on the Continental Shelf; and the International Convention for Suppression of Acts of Nuclear Terrorism. 154 Cong. Rec. S9555–S9556 (2008).

Each of the four resolutions of advice and consent contained substantially similar understandings related to the provision in each treaty that it "will not apply to the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law." The understandings to the Amendment to the Convention on the Physical Protection of Nuclear Material are set forth below. An additional understanding to the 2005 Protocol to the Convention Concerning Safety of Maritime Navigation is discussed in B.1.b. below.

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* * * *

Section 3. Understandings. . . .

(1) The United States of America understands that the term "armed conflict" in Paragraph 5 of the Amendment (Article 2 of the Convention on the Physical Protection of Nuclear Material, as amended) does not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.

(2) The United States of America understands that the term "international humanitarian law" in Paragraph 5 of the Amendment (Article 2 of the Convention on the Physical Protection of Nuclear Material, as amended) has the same substantive meaning as the law of war.

(3) The United States of America understands that, pursuant to Paragraph 5 of the Amendment (Article 2 of the Convention on the Physical Protection of Nuclear Material, as amended), the Convention on the Physical Protection of Nuclear Material, as amended, will not apply to: (a) the military forces of a State, which are the armed forces of a State organized, trained, and equipped under its internal law for the primary purpose of national defense or security, in the exercise of their official duties; (b) civilians who direct or organize the official activities of military forces of a State; or (c) civilians acting in support of the official activities of the military forces of a State, if the civilians are under the formal command, control, and responsibility of those forces.

4. Detainees

a. U.S. court decisions and other proceedings

(1) Detainees at Guantanamo: Boumediene v. Bush

(i) Supreme Court decision

On June 12, 2008, the U.S. Supreme Court ruled that detainees held as enemy combatants at Guantanamo have a right under the U.S. Constitution to seek a writ of habeas corpus in light of the extent of U.S. control over the Guantanamo military base. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The Court reversed a decision of the U.S. Court of Appeals for the District of Columbia Circuit and remanded "for proceedings consistent with this opinion." The Court summarized its holding as follows:

> Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2.* We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C.A. § 2241(e) (Supp. 2007),** operates as an

* Editor's note: Article I, § 9, cl. 2 of the U.S. Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

** Editor's note: Section 2241(e)(1) provides: "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

> unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.
>
> As to the question of sovereignty, the Court explained:
>
> [F]or purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. As we did in *Rasul* [*v. Bush*, 542 U.S. 466 (2004)], however, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory. . . .

The Court reviewed the role of the writ of habeas corpus at the time of the U.S. Constitution in 1789, stating that "to the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases." It found no such directly relevant practice, however, and concluded that "given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age . . . [w]e decline . . . to infer too much, one way or the other, from the lack of historical evidence on point."

Excerpts follow from the Court's analysis of sovereignty and the extraterritorial application of the Constitution as well as the separation of powers issues arising in the context of a military conflict. A supplemental brief filed by the United States in March 2008 is available at *www.usdoj.gov/osg/briefs/2007/3mer/2mer/2006-1195.mer.sup.Mar.2008.html*. For discussion of the history of this case and related litigation, *see Digest 2007* at 938–43, *Digest 2006* at 1179–83, and *Digest 2005* at 1008–16.

* * * *

IV

Drawing from its position that at common law the writ [of habeas corpus] ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United States. See DTA § 1005(g), 119 Stat. 2743. And under the terms of the lease between the United States and Cuba, Cuba retains "ultimate sovereignty" over the territory while the United States exercises "complete jurisdiction and control." See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.–Cuba, Art. III, T. S. No. 418 (hereinafter 1903 Lease Agreement); *Rasul*, 542 U.S., at 471. Under the terms of the 1934 Treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base. See Treaty Defining Relations with Cuba, May 29, 1934, U.S.–Cuba, Art. III, 48 Stat. 1683, T.S. No. 866.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government's position well before the events of September 11, 2001. *See*, *e.g.*, Brief for Petitioners in *Sale v. Haitian Centers Council, Inc.*, O. T. 1992, No. 92–344, p. 31 (arguing that Guantanamo is territory "*outside* the United States"). And in other contexts the Court has held that questions of sovereignty are for the political branches to decide. . . . Even if this were a treaty interpretation case that did not involve a political question, the President's construction of the lease agreement would be entitled to great respect.

We therefore do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory. As commentators have noted, "'[s]overeignty' is a term used in many senses and is much abused." See 1 Restatement (Third) of Foreign Relations Law of the United States § 206, Comment *b*, p. 94 (1986). When we have stated that sovereignty is a political question, we have referred not to

sovereignty in the general, colloquial sense, meaning the exercise of dominion or power, see Webster's New International Dictionary 2406 (2d ed. 1934) ("sovereignty," definition 3), but sovereignty in the narrow, legal sense of the term, meaning a claim of right, see 1 Restatement (Third) of Foreign Relations, *supra,* § 206, Comment *b,* at 94 (noting that sovereignty "implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there"). Indeed, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. This condition can occur when the territory is seized during war, as Guantanamo was during the Spanish-American War. . . . Accordingly, for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory. See 542 U.S., at 480; *id.*, at 487 (KENNEDY, J., concurring in judgment).

Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends.

The Framers foresaw that the United States would expand and acquire new territories. . . . Article IV, § 3, cl. 1, grants Congress the power to admit new States. Clause 2 of the same section grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." . . .

Fundamental questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and the Philippines—ceded to the United States by Spain at the conclusion of the Spanish-American War—and Hawaii—annexed by the United States in 1898. At this point Congress chose to discontinue its previous practice of extending constitutional rights to the territories by statute. See, *e.g.*, An Act Temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes, 32 Stat. 692 (noting that Rev. Stat. § 1891 did not apply to the Philippines).

In a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. . . . The Court held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position.

Prior to their cession to the United States, the former Spanish colonies operated under a civil-law system, without experience in the various aspects of the Anglo-American legal tradition, for instance the use of grand and petit juries. At least with regard to the Philippines, a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory. . . . The Court thus was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories. . . .

These considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in

part in unincorporated Territories. . . . As the Court later made clear, "the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922). . . . [A]s early as *Balzac* in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants "guaranties of certain fundamental personal rights declared in the Constitution." . . . Yet noting the inherent practical difficulties of enforcing all constitutional provisions "always and everywhere," *Balzac, supra*, at 312, the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter.

Practical considerations likewise influenced the Court's analysis a half-century later in *Reid* [*v. Covert*], 354 U.S. 1. The petitioners there, spouses of American servicemen, lived on American military bases in England and Japan. They were charged with crimes committed in those countries and tried before military courts, consistent with executive agreements the United States had entered into with the British and Japanese governments. *Id.*, at 15–16, and nn.29–30 (plurality opinion). Because the petitioners were not themselves military personnel, they argued they were entitled to trial by jury.

Justice Black, writing for the plurality, contrasted the cases before him with the Insular Cases, which involved territories "with wholly dissimilar traditions and institutions" that Congress intended to govern only "temporarily." *Id.,* at 14. Justice Frankfurter argued that the "specific circumstances of each particular case" are relevant in determining the geographic scope of the Constitution. *Id.*, at 54 (opinion concurring in result). And Justice Harlan, who had joined an opinion reaching the opposite result in the case in the previous Term, *Reid v. Covert*, 351 U.S. 487 (1956), was most explicit in rejecting a "rigid and abstract rule" for determining where constitutional guarantees extend. *Reid,* 354 U.S., at 74 (opinion concurring in result). He read the

Insular Cases to teach that whether a constitutional provision has extraterritorial effect depends upon the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" and, in particular, whether judicial enforcement of the provision would be "impracticable and anomalous." *Id.* at 74–75 . . . .

That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States. But practical considerations, related not to the petitioners' citizenship but to the place of their confinement and trial, were relevant to each Member of the *Reid* majority. And to Justices Harlan and Frankfurter (whose votes were necessary to the Court's disposition) these considerations were the decisive factors in the case.

* * * *

Practical considerations weighed heavily as well in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. . . .

* * * *

. . . [B]ecause the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, . . . , it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. . . . Even if we assume the *Eisentrager* Court considered the United States' lack of formal legal sovereignty over Landsberg Prison as the decisive factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects, at least to some extent, the political branches' control over that territory. *De jure* sovereignty is a factor that bears upon which constitutional guarantees apply there.

. . . [I]f the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid*'s) functional

approach to questions of extraterritoriality. We cannot accept the Government's view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. . . . A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the Insular Cases, *Eisentrager*, and *Reid:* the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.

* * * *

[C] Based on . . . language from *Eisentrager*, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were "enemy alien[s]." *Ibid*. In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager, supra*, at 766, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. . . .

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. . . .

As to the second factor relevant to this analysis, the detainees here are similarly situated to the *Eisentrager* petitioners in that the sites of their apprehension and detention are technically outside

the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces. See Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, June 5, 1945, U.S.–U.S.S.R.–U.K.–Fr., 60 Stat. 1649, T.I.A.S. No. 1520. The United States was therefore answerable to its Allies for all activities occurring there. Cf. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) *(per curiam)* (military tribunal set up by Gen. Douglas MacArthur, acting as "the agent of the Allied Powers," was not a "tribunal of the United States"). The Allies had not planned a long-term occupation of Germany, nor did they intend to displace all German institutions even during the period of occupation. See Agreements Respecting Basic Principles for Merger of the Three Western German Zones of Occupation, and Other Matters, Apr. 8, 1949, U.S.–U.K.–Fr., Art. 1, 63 Stat. 2819, T.I.A.S. No. 2066 (establishing a governing framework "[d]uring the period in which it is necessary that the occupation continue" and expressing the desire "that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation"). The Court's holding in *Eisentrager* was thus consistent with the Insular Cases, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States. . . .

As to the third factor, we recognize, as the Court did in *Eisentrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. . . . The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light

of the plenary control the United States asserts over the base, none are apparent to us.

The situation in *Eisentrager* was far different, given the historical context and nature of the military's mission in post-War Germany. When hostilities in the European Theater came to an end, the United States became responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million. . . . In retrospect the post-War occupation may seem uneventful. But at the time *Eisentrager* was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain "enemy elements, guerrilla fighters, and 'werewolves.'" 339 U.S., at 784.

Similar threats are not apparent here; nor does the Government argue that they are. . . . At present, dangerous as they may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.

There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be "impracticable or anomalous" would have more weight. See *Reid*, 354 U.S., at 74 (Harlan, J., concurring in result). Under the facts presented here, however, there are few practical barriers to the running of the writ. To the extent barriers arise, habeas corpus procedures likely can be modified to address them. . . .

It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. See Oxford Companion to

American Military History 849 (1999). The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. . . . This Court may not impose a *de facto* suspension by abstaining from these controversies. . . . The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

* * * *

VI A

In light of our conclusion that there is no jurisdictional bar to the District Court's entertaining petitioners' claims the question remains whether there are prudential barriers to habeas corpus review under these circumstances.

* * * *

The cases before us . . . do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. . . .

. . . Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.

B

* * * *

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). . . .

* * * *

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism. . . .

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. . . .

(ii) District court on remand

On remand from the Supreme Court, the U.S. District Court for the District of Columbia on November 20, 2008, granted

a writ of habeas corpus for five out of the six Algerian detainees arrested in Bosnia who were petitioners in the case, and directed the government to facilitate their release "forthwith." *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008). The district court found that the United States had failed in the five cases to meet its "burden of proving 'by a preponderance of the evidence, the lawfulness of the petitioner's detention.'" In those cases, the court found that the United States had relied exclusively on information in "a classified document from an unnamed source" and the court could not "adequately assess the credibility and reliability of the sole source information relied upon . . . ." The court denied the petition for the sixth petitioner, finding that the Government had met its burden of proof by providing corroborating evidence in addition to the same unnamed source. The United States declined to appeal the decision relating to the five detainees.

*(2) Other post-*Boumediene *decisions related to Guantanamo detainees*

(i) Direct judicial review of Combatant Status Review Tribunal designations under the Detainee Treatment Act

(A) Parhat v. Gates

On June 20, 2008, the U.S. Court of Appeals for the District of Columbia Circuit conducted the first federal appellate review of an enemy combatant designation by a Combat Status Review Tribunal ("CSRT"), as provided under § 1005(e)(2) of the Detainee Treatment Act ("DTA"), 10 U.S.C. § 801 note. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008). The court concluded that "the Tribunal's decision in Parhat's case was not valid":

> Congress has directed this court "to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A). In so doing, we are to "determine," inter alia, whether the CSRT's decision

> "was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals[,] including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence." *Id.* § 1005(e)(2)(C)(i). A CSRT's decision regarding enemy combatant status was not consistent with those standards and procedures unless the Tribunal had—and took—the opportunity to assess the reliability of the evidence that the government presented to it. Nor can this court conclude that such a decision was consistent with those standards and procedures unless we, too, are able to assess the reliability of the government's evidence. Because the evidence that the government submitted to Parhat's CSRT did not permit the Tribunal to make the necessary assessment, and because the record on review does not permit the court to do so, we cannot find that the government's designation of Parhat as an enemy combatant was consistent with the specified standards and procedures and is supported by a preponderance of the evidence.

The court "direct[ed] the government to release Parhat, to transfer him,[19] or to expeditiously convene a new CSRT to consider evidence submitted in a manner consistent with this opinion. If the government chooses the latter course, it must—to obviate the need for another remand—present to that Tribunal the best record of Parhat's status as an enemy combatant that it is prepared to make." The court also noted that "DTA review is not Parhat's only, or his best, path to release" because *Boumediene,* decided a week earlier, made it quite clear that, at least for a detainee like Parhat who has been imprisoned for a lengthy period and has already had a CSRT, a habeas corpus proceeding in the district court is also available.

[19] The government is under a district court order to give 30 days' notice of intent to remove Parhat from Guantanamo. *See Kiyemba v. Bush*, No. 05-1509, Mem. Order at 2–3 (D.D.C. Sept. 13, 2005). [Editor's note: *See* discussion of thirty-day notice in (2)(iv) below.]

For further developments concerning Chinese Uighurs held at Guantanamo, including Parhat, *see* (2)(ii) below.

(B) Nullification of direct review provision of DTA: Gates v. Bismullah

On June 23, 2008, the Supreme Court granted a U.S. petition for writ of certiorari in a case brought by Guantanamo detainees seeking direct review of their CSRT determinations under § 1005(e)(2) of the DTA, vacated the D.C. Circuit judgment and remanded for further consideration in light of the Supreme Court decision in *Boumediene*. *Gates v. Bismullah*, 128 S. Ct. 2960 (2008). The United States had filed its petition prior to *Boumediene*, challenging the court of appeals' decision on the scope of the record for DTA direct review of a CSRT decision.* The U.S. petition filed in February 2008 and Reply filed in March 2008 are available at *www.usdoj.gov/osg/briefs/2007/2pet/7pet/toc3index.html*.

On remand from the Supreme Court, the D.C. Circuit reinstated its decision establishing procedures for DTA review. The United States petitioned the circuit court for rehearing, arguing that, in light of *Boumediene*, the court of appeals no longer had jurisdiction over petitions for review filed pursuant to the DTA because in passing the Military Commissions Act, Congress had clearly intended to limit avenues for judicial review. On November 5, 2008, the court granted the U.S. petition for rehearing and scheduled oral

* Editor's note: The Supreme Court in *Boumediene* described the issues pending in *Bismullah* at that time as follows:

> On its face the statute allows the Court of Appeals to consider no evidence outside the CSRT record. In the parallel [direct review] litigation, however, the Court of Appeals determined that the DTA allows it to order the production of all "'reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant,'" regardless of whether this evidence was put before the CSRT. See *Bismullah I*, 501 F.3d, at 180. The Government, . . . with support from five members of the Court of Appeals, see *Bismullah III*, 514 F.3d, at 1299 . . . disagrees with this interpretation. . . .

argument for November 20, 2008, limited to that issue. *Bismullah v. Gates*, 2008 U.S. App. LEXIS 23984 (D.C. Cir. 2008).

On January 9, 2009, the D.C. Circuit dismissed the detainees' petitions for review, holding that it no longer had jurisdiction over those petitions:

> [W]e are confident the Congress would not have enacted DTA § 1005(e)(2) in the absence of the statutory provision banning the courts from exercising jurisdiction over a detainee's habeas petition. Because the latter provision has been held unconstitutional, the former must also fall. Accordingly, we hold this court lacks subject matter jurisdiction over the detainees' petitions for review of their status determinations by a CSRT. . . .

Bismullah v. Gates, 551 F.3d 1068 (D.C. Cir. 2009).

(ii) Habeas petitions: Uighurs

On October 8, 2008, the U.S. District Court for the District of Columbia granted the writ of habeas corpus to 17 Uighurs held at Guantanamo Bay, including Parhat, discussed *supra*. A redacted version of the court's memorandum and opinion was released on October 9. The court noted that the United States had decided that it would no longer consider the Uighurs to be enemy combatants and ordered their immediate release into the United States. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008). The United States appealed, as discussed below.

Excerpts follow from the district court decision (citations to other submissions in the case and footnotes omitted).

I. INTRODUCTION

There comes a time when delayed action prompted by judicial deference to the executive branch's function yields inaction not consistent with the constitutional imperative. Such a time has

come in the case of the 17 Uighurs in Guantanamo Bay, Cuba ("Guantanamo") whom the government has detained for 7 years without an opportunity for judicial redress until recently. In reviewing the evidence leading to the designation of one Uighur petitioner as an enemy combatant, the D.C. Circuit described the evidence supporting that determination as "lack[ing] sufficient indicia of . . . reliability." *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008). Prompted by the *Parhat* decision, the government decided that it would no longer consider the 17 Uighur detainees enemy combatants. In light of developments and the Supreme Court's recent ruling in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), restoring the court's jurisdiction over detainee habeas petitions, the detainees filed motions alleging that their continued detention is unlawful and requesting that the court order the government to release them into the United States. Because the Constitution prohibits indefinite detention without just cause, this court rules that the government's continued detention of the petitioners is unlawful. Furthermore, because separation-of-powers concerns do not trump the very principle upon which this nation was founded—the unalienable right to liberty—the court orders the government to release the petitioners into the United States.

* * * *

III. ANALYSIS

A. Legality of Detention

1. Enemy Combatant Status

* * * *

. . . [T]he Supreme Court has made clear that habeas is not available "the moment a prisoner is taken into custody," *Boumediene*, 128 S. Ct. at 2275, and in any event, the record is too undeveloped as to the circumstances regarding their transfer from Pakistan to United States custody to determine whether they were, at the time of their capture, lawfully detained . . . . Accordingly, the court assumes, for the sake of this discussion, that the petitioners were lawfully detained and that the Executive does have some inherent authority to "wind up" wartime detentions.

2. "Wind-up" Authority

The parties strongly disagree over how long the Executive may detain individuals pursuant to its "wind-up" authority. The petitioners contend that the government determined long ago that it cannot effect transfer and after 5 years of failed efforts, any "wind-up" authority has been "used up." The government, on the other hand, recites examples of past wars in which the United States has detained prisoners of war for "several years" after the end of hostilities. The government then concludes that because it determined "only days ago to forego its option of attempting to conduct[] a new CSRT," that continued detention is constitutional.

In a case addressing this same issue, the court in *Qassim* evaluated the appropriate length of detention under the Executive's "wind-up" authority by comparing the length of detention allowed under analogous immigration statutes. *Qassim*, 407 F. Supp. 2d at 201. Observing that the presumptive limit to detain an inadmissible or removable alien is 6 months, the court held unlawful the government's 9-month detention of the petitioners after determining that they were no longer enemy combatants. *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Clark v. Martinez*, 543 U.S. 371 (2005)). The *Zadvydas* and *Clark* cases cited in *Qassim*, however, are not strictly analogous to the present inquiry. Both *Zadvydas* and *Clark* interpret an immigration statute as authorizing the government to detain aliens for 6 months—a presumptively reasonable period. *Clark*, 543 U.S. at 384–87. The Court chose not to read the statute to authorize indefinite detention because such as reading "would approach constitutional limits." *Id.* at 384. These constitutional limits, not the immigration statute, are at issue in this case.

The government argues that *Shaughnessy v. United States ex rel. Mezei*, 453 U.S. 206 (1953) provides a better read on the constitutional limits to detention than either *Zadvydas* or *Clark*. The *Mezei* case "concerns an alien immigrant permanently excluded from the United States on security grounds but stranded in his temporary haven on Ellis Island because other countries will not take him back." 345 U.S. at 207. The government would not disclose to the courts the evidence by which it considered the petitioner to be a threat to the public interest. *Id.* at 209. Nevertheless, the Supreme Court, in a 5-4 decision, deemed the

petitioner's detention on Ellis Island the equivalent of being stopped at the border. *Id.* at 215. It held that "times being what they are" (i.e., the Cold War), and "[w]hatever our individual estimate of [Congress's policy of excluding certain aliens] and the fears on which it rests, [the petitioner's] right to enter the United States depends on congressional will, and the courts cannot substitute their judgment for the legislative mandate." *Id.* at 216.

The court disagrees with the government's assertion that the reasoning in *Mezei* governs the reasoning in this case. The opening sentence of the *Mezei* decision indicates that the Court was not intending to tackle the constitutionality of indefinite detention. . . . To the extent the *Mezei* Court did make a determination as to indefinite detention it has either been distinguished or ignored by subsequent courts. . . . For example, the *Clark* Court did not bother distinguishing its holding from the holding in *Mezei*, and the *Zadvydas* Court explained that the cases differed in that the alien in *Mezei* was stopped at the border, seeking re-entry, whereas the alien in *Zadvydas* was already inside the United States. *Zadvydas*, 533 U.S. at 668–69.

Moreover, some very important distinctions exist between *Mezei* and this case. First, the *Mezei* Court was unaware of what evidence, if any, existed against the petitioner. *Mezei*, 345 U.S. at 209. And because the Court accepted the government's unsupported allegations as true, the *Mezei* Court's determination regarding continued detention is categorically different from the determination facing this court. Here, pursuant to the Detainee Treatment Act and *Boumediene*, the government presented evidence justifying its detention of the petitioners, but failed to meet its burden. *See generally Parhat*, 532 F.3d 834. Second, the *Mezei* petitioner, unlike the current petitioners, came voluntarily to the United States, seeking admission. *Mezei*, 345 U.S. at 208.

Drawing from the principles espoused in the *Clark* and *Zadvydas* cases and from the Executive's authority as Commander in Chief, the court concludes that the constitutional authority to "wind up" detentions during wartime ceases once (1) detention becomes effectively indefinite; (2) there is a reasonable certainty that the petitioner will not return to the battlefield to fight against the United States; and (3) an alternative legal justification has not been provided for continued detention. Once these elements are

met, further detention is unconstitutional. The court addresses each element in turn.

First, in determining whether detention has become effectively indefinite, the court considers what efforts have been made to secure release for the petitioners and then uses that to evaluate the likelihood that these efforts (or any supplemental efforts) will be successful in the future. Looking back, the government cleared 10 of the petitioners for release by the end of 2003. The government cleared an additional 5 for release or transfer in 2005, 1 for transfer in 2006 and 1 for transfer in May of this year. Throughout this period, the government has been engaged in "extensive diplomatic efforts" to resettle the petitioners. These efforts over the years have remained largely unchanged, and the government has not indicated that its strategy or efforts have been or will be altered now that the petitioners are no longer treated as enemy combatants. Furthermore, the government cannot provide a date by which it anticipates releasing or transferring the petitioners. Accordingly, their detention has become indefinite.

The second element has already been resolved by the Circuit's *Parhat* decision. The Circuit observed that "[i]t is undisputed that [the petitioner] is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies," thus dispelling any concerns that the petitioners would return to the field of battle. *Id.* at 835. Finally, as to the last element, the government acknowledges that it no longer considers the petitioners to be enemy combatants. And it has only presented one alternative theory for detaining the petitioners: "wind-up" authority. Therefore, this element, too, has been satisfied, and the court concludes that the government's detention of the petitioners is unlawful.

B. An Effective Remedy

* * * *

2. The Authority to Admit Aliens: Historically a Political Inquiry

The U.S. Constitution grants Congress the authority "[t]o establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. The Supreme Court has "repeatedly emphasized that

over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal quotations omitted) . . . . This power is "necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security." *Galvan v. Press*, 347 U.S. 522, 530 (1965). And when the Executive acts to exclude an alien, there is no question of improper delegation of authority because this power is "inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). "[T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo*, 430 U.S. at 792 (citing *Mezei*, 345 U.S. at 210). These powers, however, are not absolute: "the Government must respect the procedural safeguards of due process," *Galvan*, 347 U.S. at 531, meaning "No person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends," *Japanese Immigrant Case*, 189 U.S. 86, 101 (1903).

3. Separation of Powers Secures Personal Liberty

Under its broad constitutional authority, Congress has authorized the Secretary of Homeland Security to parole and/or admit aliens into the United States. 8 U.S.C. § 1252(a)(2)(B)(ii). It is undisputed that he has not acted upon this authority with respect to the petitioners in this case. Normally, the discussion would end here, and the court would have no reason to insinuate itself into a field normally dominated by the political branches. However, the circumstances now pending before the court are exceptional: the government captured the petitioners and transported them to a detention facility where they will remain indefinitely. The government has not charged these petitioners with a crime and has presented no reliable evidence that they pose a threat to U.S. interests. Moreover, the government has stymied its own efforts to resettle the petitioners by insisting (until recently) that they were enemy combatants, the same designation given to terrorists willing to detonate themselves amongst crowds of civilians.

* * * *

On October 20, 2008, the D.C. Circuit granted a U.S. request for an order staying release of the 17, ordered expedited briefing, and scheduled argument in the case for November 24, 2008. *Kiyemba v. Bush*, 2008 WL 4898963 (D.C. Cir. 2008).*

In a brief filed in *Kiyemba* on November 7, the United States summarized its argument in the case as set forth below (footnote omitted). The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

Petitioners and their amici curiae frame their arguments in terms of the simple right to "release" in habeas, but they in fact claim an entitlement to something fundamentally different: release *plus* an order requiring the Government to bring them into the United States. The Constitution's separation of powers and existing Supreme Court precedent preclude the entry of such extraordinary relief. And nothing in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), or the law of habeas corpus, sanctions any different result.

The district court erred in claiming the power to order the Government to bring petitioners into the country and to release them here. The power to allow aliens into the United States from abroad rests exclusively in the political branches in their exercise of plenary authority over foreign relations and national security. The Government has been pursuing—and, despite petitioners' suggestions to the contrary, continues to pursue vigorously—diplomatic efforts to identify a third country for petitioners' resettlement. However, the political branches have made a judgment that petitioners should remain housed in relatively unrestricted conditions at Guantanamo, pending the successful conclusion of

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* Editor's note: The D.C. Circuit reversed the district court's judgment on February 18, 2009, and remanded the case for further proceedings consistent with its opinion. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009). On October 21, 2009, as this edition was going to press, the Supreme Court granted certiorari. 2009 U.S. LEXIS 7566 (2009). *Digest 2009* will discuss relevant developments.

those diplomatic efforts. Because petitioners have no statutory or constitutional right to be brought into the United States, that considered judgment should be the end of the matter.

A. The Supreme Court's decision in *Shaughnessy v. United States ex. rel Mezei*, 345 U.S. 206 (1953), compels this conclusion. There, the Supreme Court upheld the potentially indefinite detention of an alien excludable from the United States but housed at Ellis Island because he could not find another country willing to take him. *A fortiorari*, that holding—which involved an alien who had been granted a visa by the U.S. Government, who was a previous long-term resident with a citizen wife and children and other substantial ties to this country, and who was physically present in the United States—applies to petitioners, who are aliens wholly outside the United States with no voluntary connections to this country. Petitioners question *Mezei*'s ongoing validity and also assert that it is factually distinguishable, but neither argument undermines its binding force on this Court.

Petitioners repeatedly argue that the Suspension Clause entitles them to a remedy of "release." But petitioners seek release *plus* an order requiring the Government to bring them into the United States. And they remain overseas at Guantanamo precisely because they do not wish to return to their home country. The Government has agreed for their own protection not to return them against their will, and is housing them at Guantanamo under relatively unrestricted conditions pending efforts to locate another country for their resettlement. The salient point is that petitioners do not seek simple release, but instead an unprecedented order requiring the Government to bring them into the United States, and to permit them to remain here without regard for the operation of the immigration laws. A judicial order requiring the Executive to bring an alien located abroad into the United States violates our separation of powers. And nothing in the office or tradition of the writ of habeas corpus would permit a court to grant such extraordinary relief.

Petitioners concededly have not established eligibility under the immigration laws to come from a foreign country into the United States. But beyond that, the district court lacked authority to issue the order under review because it is contrary to the

political branches' undisputed and inherent sovereign power to prevent aliens outside the United States from reaching or crossing our Nation's borders. At a bare minimum, a court would need a positive grant of authority to order that aliens held overseas be brought into this country, and there is no such grant of authority governing the situation here.

* * * *

(iii) Former detainees: Civil suit against U.S. officials

On December 15, 2008, the Supreme Court granted certiorari in a case filed by four former Guantanamo detainees against the U.S. Secretary of Defense and certain military officers alleging illegal detention and torture, vacated the circuit court decision dismissing all claims, and remanded for further consideration in light of *Boumediene*. *Rasul v. Myers*, 129 S. Ct. 763 (2008). In its January 11, 2008, opinion, the U.S. Court of Appeals for the District of Columbia Circuit had upheld a lower court's dismissal of claims based on the Alien Tort Statute, the Geneva Conventions, and the Fifth and Eighth Amendments and also dismissed claims under the Religious Freedom Restoration Act ("RFRA"). 512 F.3d 644 (2008). As to the claims based on the Fifth and Eighth Amendments, the D.C. Circuit stated:

> We held in *Boumediene* [*v. Bush*, 476 F.3d 981 (D.C. Cir. 2007)] that neither the DTA nor the MCA violates the Suspension Clause [of the U.S. Constitution] based in part on our determination that "[p]recedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States." . . . We concluded in *Boumediene* that any difference between Guantanamo and the United States army prison in Germany was "immaterial" because "[t]he text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not

> the United States—has sovereignty over Guantanamo Bay." . . .

At the end of 2008, the case remained pending in the D.C. Circuit on remand.

(iv) Thirty-day notice orders

On September 13, 2005, the U.S. District Court for the District of Columbia issued a memorandum order that, among other things, ordered that certain detainees held at Guantanamo could not be removed from Guantanamo "unless this court and counsel for petitioners . . . receive thirty days' advance notice of such removal . . . ." *Kiyemba v. Bush*, Civ. Action No. 05-1509 (RMU). The unpublished order is available at *www.state.gov/s/l/c8183.htm*.

On September 25, 2008, the D.C. Circuit heard oral argument on the U.S. government's appeal from the 2005 order (Nos. 05-5487, 05-5488), consolidated with an appeal from *Mamet v. Bush* (Nos. 05-5489, 05-5490).* The United States filed supplemental briefs in the D.C. Circuit on August 21 and September 4, 2008, available in full at *www.state.gov/s/l/c8183.htm*.

In its supplemental briefs, the United States argued that the detainees did not have a right to 30-day advance notice prior to transfer because the Military Commissions Act ("MCA") stripped the courts of jurisdiction over actions based on transfer issues, and the Supreme Court's decision in *Boumediene*, *supra*, was limited to the habeas-stripping provision of the MCA and did not affect the jurisdictional provision on transfer actions. Furthermore, the United States

* Editor's note: The D.C. Circuit had ruled in the consolidated case on March 22, 2007, but issued an order vacating that decision on July 31, 2008, in light of the Supreme Court decision in *Boumediene v. Bush*. *See* unpublished order of July 31, 2008, available at *www.state.gov/s/l/c8183.htm*.

argued that decisions concerning transfer, including assessments of treatment by a receiving country, are for the executive, not the judiciary, to make. As to concerns relating to torture, the United States argued that

> *Munaf* [*v. Geren*, 128 S. Ct. 2207 (2008)]** has now made clear that generalized allegations of potential mistreatment are insufficient in the face of the United States' express policy not to transfer an individual where the Government believes it is more likely than not that he would be tortured. . . . *Munaf* explained that the United States had concerns regarding 'some sectors of the Iraqi government,' but had concluded that the specific Iraqi government department receiving the petitioner and the specific facilities in which the petitioner would be held were not likely to result in the petitioner being tortured. . . .

U.S. Supplemental brief of August 21, 2008 at 32.

(3) Military commission trial: United States v. Hamdan

On July 18, 2008, the U.S. District Court for the District of Columbia denied a motion for preliminary injunction filed by Salim Ahmed Hamdan. *Hamdan v. Gates*, 565 F. Supp. 2d 130 (D.D.C. 2008). As described by the court, Hamdan, a Yemeni national who served as a driver to Osama bin Laden, sought "to stop his trial by military commission pending federal court review of the military commission's determination that he is an unlawful enemy combatant and of his claims that the trial will violate the Constitution and the Geneva Conventions." The court explained its conclusion:

> . . . Article III judges do not have a monopoly on justice, or on constitutional learning. A real judge is presiding over the pretrial proceedings in Hamdan's case [before the military commission] . . . . He will have difficult decisions

** Editor's note: *See* discussion in a.(5) below.

> to make, as judges do in nearly all trials. The questions of whether Hamdan is being tried *ex post facto* for new offenses, whether and for what purposes coerced testimony will be received in evidence, and whether and for what purpose hearsay evidence will be received, are of particular sensitivity. If the Military Commission judge gets it wrong, his error may be corrected by the CMCR. If the CMCR gets it wrong, it may be corrected by the D.C. Circuit. And if the D.C. Circuit gets it wrong, the Supreme Court may grant a writ of *certiorari*.

On August 6, 2008, Hamdan was convicted by a military commission of providing support to terrorism and acquitted of conspiracy charges by a military commission at Guantanamo Bay and sentenced to 66 months of detention. *See www.defenselink.mil/releases/release.aspx?releaseid=12128*. Hamdan was given credit for the time he had already been detained by the military, leaving less than five months to be served in the facility for those convicted of war crimes at Guantanamo. A U.S. motion to reconsider the crediting of time spent in detention was denied on October 29, 2008. *United States v. Hamdan*, Case P-009, Ruling on Motion for Reconsideration and Resentencing. On November 26, 2008, the United States announced that it was transferring Hamdan to Yemen to serve his final month of incarceration. *See www.defenselink.mil/releases/release.aspx?releaseid=12372*.

(4) Detainee held in the United States: Al-Marri v. Pucciarelli

In 2007 the U.S. Court of Appeals for the Fourth Circuit reversed a lower court's denial of a writ of habeas corpus filed by a detainee arrested and detained in the United States and ordered that his military detention cease. *Al-Marri v. Pucciarelli*, 487 F.3d 160 (4th Cir. 2007); *see Digest 2007* at 968–75. Following rehearing en banc at the request of the United States, on July 15, 2008, the Fourth Circuit issued a per curiam opinion replacing the 2007 judgment, holding that the President has authority under the Authorization of Use of

Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), to detain al-Marri but that al-Marri, who was arrested in the United States and was being held in the Charleston naval brig, was entitled to a new opportunity in federal court to challenge his detention as an enemy combatant.

The court therefore reversed the district court, as it had done before, and remanded. The 2008 opinion split 5-4 on the two key points. Because Judge Traxler provided the tie-breaking vote on each point, his opinion is considered controlling. Judge Traxler determined that (1) "[i]f the allegations against al-Marri are true, al-Marri is a foreign national and member of al Qaeda who entered the United States with a purpose to commit additional hostile and war-like acts within our homeland, and he may therefore be detained as an enemy combatant under the AUMF" and (2) "because al-Marri was present within our borders at the time our intelligence sources identified him as an enemy combatant, . . . the process al-Marri received was constitutionally insufficient."

Al Marri filed a petition for writ of certiorari in the Supreme Court challenging the court of appeals' decision that the AUMF authorized his detention. The United States opposed the grant of certiorari, arguing that the court of appeals had decided the issue correctly. *See www.usdoj.gov/osg/briefs/2008/0responses/2008-0368.resp.html*. On December 5, 2008, the U.S. Supreme Court granted certiorari. 129 S. Ct. 680 (2008).*

(5) Detainees held by Multinational Force–Iraq: Munaf v. Geren

As discussed in Chapter 3.A.1.g., on June 12, 2008, the U.S. Supreme Court found jurisdiction over petitions for writs of habeas corpus brought by two U.S. citizens being held by the

* Editor's note: On March 6, 2009, the Supreme Court granted an application of the Acting Solicitor General "seeking to release [Al-Marri] from military custody and transfer him to the custody of the Attorney General." *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009). Relevant developments will be discussed in *Digest 2009*.

Multinational Force–Iraq ("MNF–I") but determined that the petitioners were not entitled to the relief they sought. *Munaf v. Geren*, 128 S. Ct. 2207 (2008). The Court therefore refused to enjoin the transfer of the two detainees to the Government of Iraq for criminal proceedings and denied their requests for release because "[b]oth of these requests would interfere with Iraq's sovereign right to 'punish offenses against its laws committed within its borders.'" As to the jurisdictional issue, the Court found "[the] [U.S.] Government's argument—that the federal courts have no jurisdiction over American citizens held by American forces operating as multinational agents—is not easily reconciled with the text of [the federal habeas statute, 28 U.S.C. § 2241(c)(1) . . . which] makes clear that actual custody by the United States suffices for jurisdiction, even if that custody could be viewed as 'under . . . color of' another authority, such as the MNF–I."

The Court also rejected reliance by the courts below on *Hirota v. MacArthur*, 338 U.S. 197 (1948), a case involving Japanese citizens who sought permission to file habeas corpus applications in the Supreme Court after conviction and sentencing by the International Military Tribunal for the Far East. The Court concluded that "[e]ven if the Government is correct that the international authority at issue in *Hirota* is no different from the international authority at issue here, . . . [t]hese cases concern American citizens while *Hirota* did not, and . . . we decline to extend our holding in *Hirota* to preclude American citizens held overseas by American soldiers subject to a United States chain of command from filing habeas petitions." The Court explained:

> The Multinational Force–Iraq (MNF–I) is an international coalition force operating in Iraq composed of 26 different nations, including the United States. The force operates under the unified command of United States military officers, at the request of the Iraqi Government, and in accordance with United Nations (U.N.) Security Council Resolutions. Pursuant to the U.N. mandate, MNF–I forces detain individuals alleged to have committed

> hostile or warlike acts in Iraq, pending investigation and prosecution in Iraqi courts under Iraqi law.
>
> These consolidated cases concern the availability of habeas corpus relief arising from the MNF–I's detention of American citizens who voluntarily traveled to Iraq and are alleged to have committed crimes there.
>
> We conclude that the habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition. . . .

The Court found that "[u]nder circumstances such as those presented here, however, habeas corpus provides petitioners with no relief." The Court rejected the detainees' arguments despite their allegations that their transfer to Iraqi custody was likely to result in torture, finding that the cases "involv[e] the transfer to a sovereign's authority of an individual captured and already detained in that sovereign's territory." In the course of its analysis, the Court noted that the issues "arise in the context of ongoing military operations conducted by American Forces overseas" and that "'courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.'" *See* Chapter 3.A.1.g. for further discussion of these and other aspects of the opinion.

b. Inapplicability of Convention on Elimination of All Forms of Racial Discrimination

As discussed in Chapter 6.B.1.a., the United States submitted responses to questions put by the Rapporteur in connection with consideration of the Combined Fourth, Fifth, and Sixth Periodic Reports of the United States (CERD/C/USA/6) to the UN Committee on the Elimination of Racial Discrimination. The reports under consideration addressed U.S. implementation of its obligations under the Convention on the Elimination of All Forms of Racial Discrimination. Set forth below is the

U.S. response to a question concerning access to judicial review by detainees. The full text of the U.S. responses as well as other documents submitted on compliance with CERD and other human rights treaties are available at *www.state.gov/g/drl/hr/treaties/index.htm*.

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29. According to information received, the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 deprive foreign detainees held as "enemy combatants" of their right to judicial review of the lawfulness and conditions of detention, as well as their right to remedy for human rights violation. Please comment on the compatibility of these Acts with the Convention, and in particular with article 5 (a) and 6.

Answer:

As the United States has explained at length to the Human Rights Committee and the Committee Against Torture, the treatment of foreign enemy combatants is governed under the law of armed conflict as *lex specialis*. In any event, by its own terms the Convention would be inapplicable to allegations of unequal treatment of foreign detainees, as Article 1(2) of the Convention clearly provides that "[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."

As a courtesy to the Committee, we note further that in fact the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 create a substantial judicial review mechanism for detainees held at Guantanamo Bay, which applies to all foreign combatants subject to the reach of those statutes without any distinctions in treatment among them on the basis of race, color, descent, or national or ethnic origin. Under these statutes, all detainees held at Guantanamo Bay are entitled to review in the U.S. federal courts of the legal basis for their detention, including whether the detention is consistent with the laws and Constitution of the United States, to the extent applicable. The federal courts are also empowered to review whether the determination that a

detainee is an enemy combatant is supported by a preponderance of the evidence. Detainees can appeal adverse decisions by the lower federal courts to the U.S. Supreme Court. As far as we are aware, these are the most extensive procedural protections provided combatant detainees captured in armed conflict in history.

c. Role of diplomatic assurances in implementing obligations under Convention Against Torture

On June 10, 2008, State Department Legal Adviser John B. Bellinger, III, testified before the Subcommittee on International Organizations, Human Rights and Oversight of the House Foreign Affairs Committee on "Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department's Legal Adviser." In his testimony, Mr. Bellinger first explained the legal basis for the U.S. obligations under the Convention Against Torture. Mr. Bellinger noted at the outset that the use of diplomatic assurances in the practice of the Department of State "arises in three different contexts: (1) in the surrender of fugitives by extradition from the United States; (2) in immigration removal proceedings initiated by the Department of Homeland Security; and (3) in the transfer of terrorist combatants from detention at the Department of Defense detention facility at Guantanamo Bay, Cuba." *See* Chapter 6.F.2.

5. Piracy

During 2008 the UN Security Council adopted four resolutions under Chapter VII of the UN Charter (Resolutions 1816, 1838, 1846, and 1851) authorizing states cooperating with the Somali Transitional Federal Government ("TFG") to enter into the territorial waters of Somalia and to use "all necessary means to repress piracy and armed robbery." Resolution 1851 also authorized operations in Somalia's territory, including its airspace. The resolutions specified that the actions were applicable only to those states that were cooperating with the

TFG, were to be taken consistent with relevant provisions of international law, and were authorized only as to the situation in Somalia and were not to be "considered as establishing customary international law."

On June 2, 2008, the Security Council adopted Resolution 1816, co-sponsored by the United States. U.N. Doc. S/RES/1816. In the resolution, the Security Council provided in part that it:

> 7. *[d]ecides* that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General, may:
>
> (a) [e]nter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
>
> (b) [u]se, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;
>
> 8. *[r]equests* that cooperating states take appropriate steps to ensure that the activities they undertake pursuant to the authorization in paragraph 7 do not have the practical effect of denying or impairing the right of innocent passage to the ships of any third State; [and]
>
> 9. *[a]ffirms* that the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law, and affirms further that this

> authorization has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the TFG.
>
> In operative paragraph 11, Resolution 1816 also called for states "and in particular flag, port and coastal States of the nationality of victims and perpetrators o[f] piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law . . . ."
>
> On October 2, 2008, the Department of State Office of the Spokesman responded to a question taken at the daily press briefing, concerning whether "the Somali foreign ministry granted the United States, or any other country, permission to use force against pirates operating in Somali sovereign waters?" The response, set forth below, is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110575.htm.*

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Answer: The Somali Government has repeatedly asked for assistance combating piracy in Somali territorial waters.

On February 27, 2008, the Permanent Representative of the Somali Republic to the United Nations (UN) wrote to the UN Security Council conveying the consent of the Transitional Federal Government of Somalia (TFG) for urgent assistance in securing the territorial and international waters off the coast of Somalia for the safe conduct of shipping and navigation.

On June 2, 2008, the UN Security Council passed a Chapter VII resolution, Resolution 1816, authorizing States cooperating with the TFG to use all necessary means to repress acts of piracy and armed robbery within the territorial waters of Somalia,

provided that the cooperating States notify the UN Secretary General in advance.

On September 1, 2008, the President of the Federal Republic of Somalia wrote to UN Secretary General Ban Ki-moon to notify him pursuant to Resolution 1816 that Canada, Denmark, France, Spain and the United States are cooperating with the TFG in the fight against piracy and armed robbery off the coast of Somalia.

On September 26, during the United Nations 63rd General Assembly Session, Minister of Foreign Affairs and International Cooperation of the Somali Republic Ali Ahmed Jama Jengeli reiterated the TFG's request to the international community to take resolute action against piracy off the coast of Somalia, consistent with the provisions in Resolution 1816.

> On October 7, 2008, the Security Council adopted Resolution 1838 (also co-sponsored by the United States), which, among other things, stated its concern with increasingly violent acts of piracy "demonstrating more sophisticated organization and methods of attack" and expressed its determination to ensure the long-term security of World Food Programme ("WFP") deliveries to Somalia. U.N. Doc. S/RES/1838. It also recalled the Presidential Statement of September 4, 2008 (U.N. Doc. S/PRST/2008/33), which welcomed the signing of a peace and reconciliation agreement in Djibouti and took note of the parties' request that the United Nations "deploy an international stabilization force." For further discussion of the peacekeeping force for Somalia, *see* Chapter 17.B.6.
>
> Among other things, Resolution 1838 "[c]all[ed] upon States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia to use on the high seas and airspace off the coast of Somalia the necessary means, in conformity with international law, as reflected in the [Law of the Sea] Convention, for the repression of acts of piracy" and "[u]rg[ed] States that have the capacity to do so to cooperate with the TFG in the fight against piracy and armed robbery at sea in conformity with the provisions of resolution 1816 . . . ."

On November 20, 2008, the Security Council adopted Resolution 1844, providing new targeted sanctions against entities designated by the Committee established pursuant to Resolution 751 of 1992 (U.N. Doc. S/RES/751) on grounds related to acts that threaten the peace, security or stability of Somalia, in violation of the arms embargo, or that obstruct the delivery of humanitarian assistance to or within Somalia. U.N. Doc. S/RES/1844. Preambular paragraph 5 expressed the Security Council's "grave concern over the recent increase in acts of piracy and armed robbery at sea against vessels off the coast of Somalia, and not[ed] the role of piracy may play in financing embargo violations by armed groups. . . ."

In remarks to the press on November 20, 2008, following Security Council consideration of the Report of the Secretary-General on the situation in Somalia (U.N. Doc. S/2008/709), Ambassador Rosemary DiCarlo, U.S. Alternate Representative to the United Nations for Special Political Affairs, stated that the United States "has taken the lead and circulated a draft resolution on piracy." Ambassador DiCarlo explained:

> An important aspect of this resolution is to deal with the issue of jurisdiction and accountability. We are calling on states and urging them to join the [1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention")]. The SUA Convention allows countries to establish jurisdiction for those who commit acts of piracy.
>
> * * * *
>
> [Cases of pirates who were captured and then had to be released are] precisely what the SUA convention is aiming at and why we are highlighting it in this resolution. Because there are already authorities existing in international law that would allow states to establish jurisdiction, and claim these acts as criminal offenses allowing for prosecution, and in some cases extradition.

The full text is available at *www.archive.usun.state.gov/press_releases/20081120_327.html*.

That draft resolution was adopted by the Security Council as Resolution 1846 on December 2, 2008. U.N. Doc. S/RES/1846. It extended the authorization for state action contained in Resolution 1816 for an additional 12 months. In paragraph 6 the Security Council

> *[w]elcom[ed]* initiatives by Canada, Denmark, France, India, the Netherlands, the Russian Federation, Spain, the United Kingdom, the United States of America, and by regional and international organizations to counter piracy off the coast of Somalia pursuant to resolutions 1814 (2008), 1816 (2008) and 1838 (2008), the decision by the North Atlantic Treaty Organization (NATO) to counter piracy off the Somalia coast, including by escorting vessels of the [World Food Program ("WFP")], and in particular the decision by the EU on 10 November 2008 to launch, for a period of 12 months from December 2008, a naval operation to protect WFP maritime convoys bringing humanitarian assistance to Somalia and other vulnerable ships, and to repress acts of piracy and armed robbery at sea off the coat of Somalia.

Paragraph 15 addressed the issue of jurisdiction over pirates, stating that the Security Council:

> *[n]ote[d]* that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation; urge[d] States parties to the SUA Convention to fully implement their obligations under said Convention and cooperate with the Secretary-General and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.

Following adoption of Resolution 1846, Ambassador DiCarlo addressed reporters as excerpted below. The full text of Ambassador DiCarlo's exchange with reporters is available at *www.archive.usun.state.gov/press_releases/20081202_351.html.*

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* * * *

I just want to say that we're very pleased that the Security Council adopted today Resolution 1846 that renews the mandate for combating piracy off the shores of Somalia. The United States took the lead in this resolution. We're very happy to see . . . there were 18 cosponsors. The resolution is the beginning for setting a comprehensive approach for dealing with piracy in that region. We took the issue a step further today by including the issue of jurisdiction. . . . [T]he issue of jurisdiction, how do we prosecute pirates once they are captured, is a difficult one and is absolutely essential to resolve, so that we can end this problem once and for all.

We have noted in our resolution the SUA Convention—called the Suppression of Unlawful Acts Against Maritime Security—that we believe allows for prosecuting pirates, provides the jurisdiction for states party to the convention. There are . . . I believe, almost 150 countries now that have signed on. We are urging those who are states party to the convention to use the authorities in that convention to deal with this issue.

* * * *

On December 11, 2008, the Department of State Office of the Spokesman described a new draft resolution circulated by the United States in response to a question taken at the daily press briefing as follows. *See http://2001-2009.state.gov/r/pa/prs/ps/2008/dec/113145.htm.*

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* * * *

The United States recently circulated to Security Council members a draft resolution that would encourage the establishment of

improved international cooperation between and among states, expand efforts to build judicial capacity to prosecute and incarcerate pirates, and affirm that those engaged in acts of piracy may be designated under the existing Security Council Somalia sanctions regimes.

The U.S. draft would also provide member states and regional organizations, in cooperation with the Somalia Transitional Federal Government, [authority] to extend . . . piracy interdiction efforts to include potential operations on Somali territory.

We believe that this resolution would mark an important step forward in the international community's efforts to suppress and prevent acts of piracy off the coast of Somalia.

> On December 16, 2008, the Security Council adopted U.S.-led Resolution 1851. U.N. Doc. S/RES/1851. In response to a question from the press, the Office of the Department of State Spokesman stated on December 17 that Resolution 1851 "authorizes states cooperating with the Somali Transitional Federal Government to extend counter-piracy efforts to include potential operations in Somali territorial land and airspace, to suppress acts of piracy and armed robbery at sea. The resolution urges countries to establish an international cooperation mechanism as a common point of contact for counter-piracy activities near Somalia, and to [make] efforts to enhance the judicial capacity of regional states to combat piracy, including the judicial capacity to prosecute pirates. We believe this resolution marks an important step forward in the international community's efforts to suppress and prevent acts of piracy off the coast of Somalia." *See http://2001-2009.state.gov/r/pa/prs/ps/2008/dec/113291.htm.*
>
> The resolution authorized the expanded operations for the 12-month period authorized by Resolution 1846, beginning December 2, 2008. Paragraph 6 provided in part:
>
> > . . . States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advanced notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia,

> for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.
>
> In addition, paragraph 3 invited states and regional organizations fighting piracy off the coast of Somalia "to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ("shipriders") from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained . . . , provided that the advance consent of the TFG is obtained for the exercise of third state jurisdiction by shipriders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention."
>
> Secretary of State Condoleezza Rice addressed the Security Council on December 17, 2008, following adoption of Resolution 1851 and a briefing by Secretary-General Ban Ki-moon. Among other things, Secretary Rice referred to the fact that the language of Resolution 1851 authorizes states to "pursue pirates into their places of operation on land." The full text of Secretary Rice's remarks, excerpted below, is available at *http://2001-2009.state.gov/secretary/rm/2008/12/113269.htm*.

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* * * *

. . . I do believe that the resolution that we have passed today will help us go a long way toward a coordinated response to the scourge of piracy.

We have noted that several factors have been limiting the effectiveness of our response, although a number of countries have been responding. The United States has been a part of that response, as has the EU, NATO, and a number of other countries

in this chamber. But because there has been no existing mechanism for states to coordinate their actions effectively, I believe that our response has been less than the sum of its parts.

I would like to announce that the United States intends to work with partners to create a Contact Group on Somali piracy. We envision the Contact Group serving as a mechanism to share intelligence, coordinate activities, and reach out to other partners, including those in shipping and insurance industries. And we look forward to working quickly on this initiative.

A second factor limiting our response is in the impunity that the pirates enjoy. Piracy currently pays. But worse, pirates pay few costs for their criminality. Their dens in Somalia provide refuge from the naval ships in the Gulf of Aden, and as we saw with the hijacking of the Sirius Star 500 nautical miles from Mombasa, and with the recent unsuccessful attacks even further south off the Tanzanian coast, pirates are adapting to the naval presence in the Gulf of Aden by traveling farther to attack unsuspecting ships.

To make piracy costlier and more difficult to undertake, the United States, with the agreement of the Somali Transitional Federal Government, believes that the Security Council's authorization today that states may pursue pirates into their places of operation on land will have a significant impact. History has demonstrated again and again that maritime operations alone are insufficient to combating piracy.

Mr. President, we also have a problem concerning the steps that must be taken to facilitate the delivery, detention, and prosecution of captured pirates. Through international law reflected in the UN Convention on the Law of the Sea, Security Council Resolutions 1846 and 1816, and the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, SUA, the international community already has sufficient legal authority and available mechanisms to apprehend and prosecute pirates, but sometimes the political will and the coordination has not been there to do so. This problem of capacity is especially pronounced in the regional states. Their proximity to piracy makes them an obvious choice to cite prosecutions, but many lack the necessary judicial and law enforcement capacities to do so.

So we call on all states, particularly those victimized by Somali piracy, to contribute generously to building the legal capacity of regional SUA states. In the resolution, we also ask the United Nations to explore what can be done to build legal capacity in those states.

At the same time as we expect regional states to play a critical role, victim states also need to bear equal responsibility for prosecuting pirates. States who flagged hijacked vessels, whose nationals own hijacked vessels, or who have crew members on hijacked vessels, must honor their SUA obligations in relation to receiving and prosecuting suspected pirates.

Fourth, we must ask the maritime industry to promote capabilities to enhance ship self-defense. Once a hostage situation develops, the stakes in military operations increase. Consequently, an important part of counter-piracy efforts must be measured in enhancing self-defense capabilities of commercial vessels, increasing the odds of success against pirates until warships arrive.

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B. NONPROLIFERATION, ARMS CONTROL, AND DISARMAMENT

1. Nuclear Nonproliferation

a. Treaty on Nonproliferation of Nuclear Weapons

(1) Fortieth anniversary of NPT

On July 1, 2008, President Bush, in a statement marking the fortieth anniversary of the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT"), "reaffirm[ed] the strong support of the United States for the Treaty and our commitment to work diligently to strengthen it further." The full text of the statement, excerpted below, is available at 44 WEEKLY COMP. PRES. DOC. 938 (July 7, 2008). *See also* remarks by Garold N. Larson, Deputy Permanent Representative of the United States to the Conference on Disarmament, July 1, 2008, available

at *http://geneva.usmission.gov/CD/updates/0701LarsonAtCD.html*.

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NPT Parties must take strong action to confront noncompliance with the Treaty in order to preserve and strengthen its nonproliferation undertakings. We cannot allow nations to violate their commitments and undermine the NPT's fundamental role in advancing international security. The International Atomic Energy Agency (IAEA), through its safeguards system, plays a vital role in supporting the Treaty by uncovering and reporting violations of nuclear safeguards. The United States is committed to ensuring the IAEA has the tools and access it needs to do its work, especially in support of universal adherence to the Additional Protocol.

The United States remains firmly committed to continued compliance with our own obligations under the NPT. Our record demonstrates this commitment, including to the disarmament goals expressed in the Preamble and Article VI of the Treaty. . . .

The United States supports the global expansion of peaceful nuclear energy as a means of meeting growing energy demand and utilizing this zero-emission source of energy to help meet the challenge of climate change. This expansion of nuclear energy must be safe, secure and not contribute to nuclear proliferation.

It is essential in these times of great challenges to the security of the international community, particularly when terrorists and state sponsors of terrorism seek to acquire weapons of mass destruction, that NPT parties work together to confront the dangers of nuclear proliferation. I call upon all Parties to act promptly and effectively to meet these challenges and ensure that the Treaty remains an effective instrument of global security.

(2) Preparatory committee for 2010 Review Conference

On May 2, 2008, the United States submitted a working paper to the second session of the preparatory committee for the 2010 Review Conference of the NPT. The introduction of

the paper summarized four threats posed by noncompliance with the NPT's core nonproliferation obligations and concluded:

> It is imperative that States Party to the NPT place at the top of their agenda for this review cycle the development and implementation of vigorous and sustained efforts to detect violations of the Treaty's nonproliferation obligations, to return violators to compliance, and to deter other would-be violators from following such a path. If the Treaty regime cannot accomplish these tasks, it will have failed in its primary purpose—and will therefore also likely fail in promoting its other goals.

The description of the four threats is excerpted below; the full text of the U.S. paper is available at *http://2001-2009.state.gov/t/isn/rls/rm/111181.htm*. *See also* opening remarks to the 2008 NPT Preparatory Committee in Geneva, April 28, 2008, by Christopher A. Ford, U.S. Special Representative for Nuclear Nonproliferation, available at *http://2001-2009.state.gov/t/isn/rls/rm/111190.htm*.

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* * * *

First, noncompliance directly undermines the most important benefit that the NPT offers to States Party: assurance against the further proliferation of nuclear weapons and, thus, also against the emergence or resurgence of nuclear arms races and against the catastrophe of nuclear warfare. . . .

Second, . . . [w]ithout assurances that transfers of nuclear technology will occur within the framework of appropriate safeguards and as part of a system that helps ensure the employment of such technology for exclusively peaceful purposes, such transfers would become more difficult, or even impossible—and mankind increasingly would lose the benefits that such technology can bring.

Third, noncompliance with the Treaty's core of nonproliferation obligations undermines efforts to bring about universal adherence to the NPT. . . .

Fourth, noncompliance undercuts the aspirations of States Party to nuclear and general disarmament, as expressed in the

Preamble to the NPT and in its Article VI. . . . [U]naddressed and unresolved noncompliance with the Treaty's nonproliferation obligations quickly could create a vastly more insecure, dangerous, and impoverished world.

On May 6, 2008, Christopher Ford, U.S. Special Representative for Nuclear Nonproliferation, addressed the second session of the preparatory committee in Geneva on regional issues, stating:

> While recognizing that agreeing to adhere to the NPT is a sovereign decision, the United States continues to hold the view that States Party should support and reinforce the goal of universal NPT adherence. We welcome and encourage all non-Parties to accede to the NPT as non-nuclear weapon states as soon as possible, and we continue to support the goal of universal adherence by seeking to strengthen the nonproliferation regime, by encouraging the three countries that have not joined the NPT to exercise nuclear restraint, and by insisting that all Treaty parties comply with their obligations. Ultimately, a rigorous approach to compliance will help strengthen the regime and promote NPT universality by demonstrating to non-parties that the Treaty can indeed provide meaningful and enduring security benefits.

The full text of Dr. Ford's remarks is available at *http://2001-2009.state.gov/t/isn/rls/rm/111178.htm*. *See also* Dr. Ford's statement on April 30, 2008, in which he laid out "four aspects of our exemplary disarmament record that have received, so far, insufficient attention in NPT fora: (1) our dismantlement of nuclear warheads at accelerated rates; (2) our pursuit of ways to allow further reductions in our non-deployed stockpile while improving safety and reliability of our remaining weapons until disarmament is achieved; (3) our moves to reduce reliance upon nuclear weapons; and (4) our contributions to developing realistic and practical approaches to nuclear disarmament." The full text is available at *http://2001-2009.state.gov/t/isn/rls/rm/111185.htm*. On U.S. nuclear arms reduction and deterrence, *see* 1.d. below.

On May 7, 2008, Dr. Ford addressed issues including NPT withdrawal by violators and reforms of the NPT review cycle proposed by others, as excerpted below. The full text of Dr. Ford's statement is available at *http://2001-2009.state.gov/t/isn/rls/rm/114108.htm*. *See also* statement by Dr. Ford on May 7, 2008, on responsible peaceful nuclear cooperation, available at *http://2001-2009.state.gov/t/isn/rls/rm/111177.htm*.

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One of [the] "ripe" areas [offering the prospect of agreement in 2010], we believe, is the issue of deterring and responding to withdrawal by NPT violators. Let me be clear about what we mean. We do not believe that consensus will be possible upon any measures designed to make withdrawal from the Treaty, in itself, more difficult. All States Party possess a clear right to withdraw, which cannot be eliminated without amending the Treaty. We also do not believe that it would be appropriate to penalize withdrawal per se—for the drafters of the Treaty clearly (and reasonably) envisioned that circumstances of supreme national interest could arise in which a State Party would feel the need to withdraw from the NPT when confronted with a threat to its supreme interest. We appreciate that there are some who believe that all withdrawal should be made more difficult, but we have focused our efforts upon the narrower issue of withdrawal specifically by violators—where we believe there is the most common ground among States Party.

Withdrawal from a treaty does not absolve a state of any violation of the treaty that it committed while still a party. Therefore, should a Party withdraw from the NPT before it remedies its noncompliance, it must remain accountable for those violations. Accordingly, the international community should respond appropriately to withdrawal by a violator of the NPT—especially where the perpetrator wishes to continue the course of action that created the violation in the first place. Moreover, to the extent that we are prepared, collectively and effectively, to respond to such

circumstances, we will help make them less likely. Our preparedness thus will help strengthen the NPT regime, both by deterring violators from withdrawing, and by helping us better cope with the challenges that they would present if such deterrence failed.

* * * *

Mr. Chairman, the United States has made clear its specific views and recommendations on the withdrawal issue on multiple occasions, so I will not belabor them here today. In a nutshell, in the event of a notice of withdrawal, the U.N. Security Council should review the matter immediately, consider the consequences, and take any action in response that may be appropriate and consistent with the U.N. Charter. The International Atomic Energy Agency (IAEA) should work to ensure that violators withdrawing from the Treaty do not profit from their ties to the Agency, even as the Security Council seeks to ensure that nuclear material and technology continue to be subject to safeguards.

Unless the Security Council endorses such a step, no government should continue any nuclear supply to a country in violation of the NPT—and any such Security Council endorsement should be revisited in the event that a violator announces its intention to withdraw. No withdrawing or withdrawn violator should be allowed to benefit from materials and equipment that it imported while an NPT Party, and supplier states and the IAEA should seek to halt the use of nuclear material and equipment previously supplied, and to secure the elimination or return of such items.

This hardly exhausts the list of potentially useful responses to withdrawal, Mr. Chairman. Our Delegation urges anyone interested in further details to refer to our remarks and working papers on this subject from both this and last year's sessions of the Preparatory Committee (PrepCom). . . .

Review Cycle Process

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We do not need standing bodies or additional mechanisms as much as we need more serious and thoughtful articulation and sharing of views about the substantive issues at the heart of the nonproliferation enterprise. . . .

Moreover, it would be wrong to argue that no "institutions" exist to deal with the issues confronting the NPT regime today. The IAEA is an international organization entrusted with implementing the nuclear safeguards required pursuant to Article III of the Treaty, and it has shown itself able to report noncompliance with these obligations to the Security Council. The Council itself has broad jurisdiction over threats to international peace and security, a category that certainly could include instances of NPT noncompliance, as well as significant violations of safeguards obligations. Article X of the Treaty also guarantees some degree of Security Council involvement, inasmuch as notifications of intent to withdraw from the NPT must be submitted to that body.

Furthermore, as we have seen with the development of the "EU-3 plus Three" process with Iran, and with the Six-Party Talks involving North Korea, the international community clearly is capable of developing broad, yet tailored, diplomatic responses to specific proliferation challenges as they arise. It therefore is hard to see what NPT institutional "gap" really exists that needs to be filled, or that would be better addressed by the establishment of an additional body under specific Treaty auspices.

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On May 9, 2008, the five nuclear weapon states under the NPT (United States, United Kingdom, France, Russia, and China) submitted a statement reaffirming their "strong and continuing support" for the NPT. The full text of the statement, excerpted below, is available at *www.un.org/NPT2010/SecondSession/delegates%20statements/P5%20Statement.pdf.*

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The proliferation of nuclear weapons constitutes a threat to international peace and security. The NPT has served the global community well over the last four decades. It remains a key instrument for collective security and the bedrock on which the international architecture to prevent proliferation of nuclear weapons is built. . . .

We wish to address the proliferation challenges through Treaty-based multilateralism and through partnerships and relevant initiatives in which we all participate. The NPT's central role in promoting security for all depends on concerted action by all States Party to ensure compliance and respond quickly and effectively to non-compliance. We attach great importance to achieving the universality of the NPT and call on those countries remaining outside to accede to the Treaty as non-nuclear weapon States.

We stress the importance of the IAEA Safeguards system, which should be adequately funded. We seek universal adherence to IAEA comprehensive safeguards, as provided for in Article III, and to the Additional Protocol and urge the ratification and implementation of these agreements. We are actively engaged in efforts toward this goal, and are ready to offer necessary support.

We reaffirm that all States Party must ensure strict compliance with their non-proliferation obligations under the NPT. The proliferation of nuclear weapons undermines the security of all nations, imperils prospects for progress on other important NPT goals such as nuclear disarmament, and hurts prospects for expanding international nuclear co-operation. The proliferation risks presented by the Iranian nuclear programme continue to be a matter of ongoing serious concern to us. We recall that the United Nations Security Council recently sent for the third time a strong message of international resolve to Iran by adopting sanctions resolution 1803 on Iran's nuclear programme under Article 41 of Chapter VII of the United Nations Charter as part of a dual-track strategy. We call for Iran to respond to the concerns of the international community through prompt and full implementation of the relevant United Nations Security Council Resolutions and the requirements of the IAEA. We are fully behind the E3+3 process to resolve this issue innovatively through negotiations on the basis of the offer agreed in London on 2 May 2008. We also restate our support for the Six-Party Talks process moving towards the verifiable denuclearization of the Korean Peninsula, urge the implementation of relevant United Nations Security Council Resolutions and call on the relevant Six-Party members to continue their cooperation through

the full implementation of the Joint Statement of 19 September 2005. We confirm our determination to achieve satisfactory resolution of these dossiers through dialogue and negotiation.

We reiterate our enduring commitment to the fulfilment of our obligations under Article VI of the NPT and note that these obligations apply to all NPT States Party. We note the unprecedented progress made by Nuclear Weapon States since the end of the Cold War in the field of nuclear disarmament, which has enhanced global security and advanced the goals of the NPT. Our individual contributions to systematic and progressive efforts in nuclear disarmament, including the reduction of the number of nuclear weapons in the world, have been and will be highlighted by each of us nationally.

We restate our support for the 1995 NPT resolution on the Middle East, which, *inter alia,* advocates a Middle East zone free of nuclear weapons as well as other weapons of mass destruction. We welcome efforts to support the principles and objectives of the Middle East peace process, which contribute toward this end. We note that significant security challenges remain in the region.

We reaffirm our determination to abide by our respective moratoria on nuclear test explosions. We recognise that one element in the effective implementation of Article VI and in the prevention of nuclear proliferation is a treaty banning the production of fissile material for use in nuclear weapons or other explosive devices. We urge all members of the Conference on Disarmament to show the necessary flexibility to get the Conference back to work.

We reaffirm the inalienable right of all States Party to the NPT under Article IV to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in accordance with the relevant provisions of the Treaty and the relevant principles on safeguards. We note that a growing number of States Party [are] showing interest in developing nuclear programmes aimed at addressing their long-term energy requirements and other peaceful purposes. We are ready to co-operate with States Party in the development of nuclear energy for peaceful uses and we emphasise the requirement for compliance with non-proliferation obligations and for development of research, use and production of nuclear energy to be solely for peaceful purposes. We believe such

international co-operation should contribute to the full implementation of the NPT and enhance the authority and effectiveness of the global non-proliferation regime.

We welcome the work of the International Atomic Energy Agency on multilateral approaches to the nuclear fuel cycle and encourage efforts towards a multilateral mechanism to assure access for all countries to nuclear fuel services as a viable alternative to the indigenous development of enrichment and reprocessing. We note the various proposals that have been put forward. Such an approach would support implementation of the right to peaceful uses of nuclear energy in a safe and secure fashion, preserve the existing competitive open market, respond to the real needs of recipient countries and simultaneously strengthen the non-proliferation regime. We hope States Party will contribute to discussion and development of this agenda in an open-minded and constructive manner. We stress the necessity for the 2010 Review Conference to address this issue.

We support, and will work to uphold and strengthen, the framework for the safe and secure uses of nuclear and radioactive materials for peaceful purposes. We reaffirm our commitment to safe and secure regulatory infrastructures, and our determination to develop innovative nuclear energy systems via our respective joint and national initiatives, which will underpin clean and affordable nuclear development, increase energy security, minimise the impact on the environment and the production of radioactive waste, and provide greater protection against proliferation through the provision of reliable fuel services, proliferation-resistant reactor technologies and strengthened international safeguards.

b. 2005 Protocol to the UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

As discussed in Chapter 3.B.1.e. and in A.3.b. *supra*, on September 25, 2008, the Senate gave advice and consent to the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("2005 SUA Protocol"). The resolution of advice and consent

for the 2005 SUA Protocol contained one understanding, provided below, concerning the savings clauses in Article 3 and Article 4(5) of the 2005 SUA Protocol relating to the NPT. The relevant paragraphs of Article 3 and Article 4(5) provide, respectively:

> Nothing in this Convention shall affect the rights, obligations and responsibilities under the Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London and Moscow on 1 July 1968, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, done at Washington, London and Moscow on 10 April 1972, or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris on 13 January 1993, of States Parties to such treaties.
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> * * * *
>
> It shall not be an offence within the meaning of this Convention to transport an item or material covered by paragraph 1(b)(iii) or, insofar as it relates to a nuclear weapon or other nuclear explosive device, paragraph 1(b)(iv), if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons where:
>
> (a) the resulting transfer or receipt including internal to a State, of the item or material is not contrary to such State Party's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons and,
>
> (b) if the item or material is intended for the delivery system of a nuclear weapon or other nuclear explosive device of a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, the holding of such weapon or device is not contrary to that State Party's obligations under that Treaty.

The full text of the resolution of advice and consent is available at *www.state.gov/s/l/c8183.htm*. For background on the nonproliferation provisions of the 2005 SUA Protocol, *see Digest 2007* at 1062–71.

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Section 2. Understandings. . . .

(4) The United States of America understands that:

A. Article 3 and Article 4(5) of the 2005 SUA Protocol (which add, inter alia, Article 2bis(3) and Article 3bis(2), respectively, to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (together referred to as "the NPT savings clauses")) protect from criminal sanction under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, the transport of source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use, or production of special fissionable material:

i. from the territory of, or otherwise under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") to the territory of, or otherwise under the control of, another NPT State Party or a state that is not an NPT party; and

ii. from the territory of, or otherwise under the control of, a state that is not an NPT party to the territory of, or otherwise under the control of, an NPT State Party,

where the resulting transfer or receipt of such items or materials is not contrary to the NPT obligations of the NPT State Party.

B. The following are illustrative examples of transport of source material, special fissionable material, and equipment or material especially designed or prepared for the processing, use, or production of special fissionable material that would not constitute offenses under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, by virtue of the savings clauses:

i. Transport of source material or special fissionable material (from either an NPT State Party or a State that is not an NPT party)

to an NPT nuclear-weapon State Party, as that term is defined in the NPT, regardless of whether the source material or special fissionable material will be under safeguards in the NPT nuclear-weapon State Party, because the resulting receipt of the material is not contrary to the NPT obligations of the nuclear-weapon State Party;

ii. Transport of source material or special fissionable material to a non-nuclear-weapon State Party, as such term is used in the NPT, for non-nuclear use without safeguards, in accordance with the provisions of the recipient country's IAEA comprehensive safeguards agreement allowing for exemption of the source material or special fissionable material from safeguards or the non-application or termination of safeguards (e.g., for specified de minimis amounts, or for use in a non-proscribed military activity which does not require the application of IAEA safeguards or in a non-nuclear use such as the production of alloys or ceramics);

iii. Transport of source material or special fissionable material or especially designed or prepared equipment, as described in Article 4(5) of the 2005 SUA Protocol (which adds Article 3bis(1)(b)(iii) to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation), from an NPT State Party to a State that is not an NPT party, so long as the relevant material is for peaceful purposes and placed under IAEA safeguards, consistent with the NPT State Party's obligations under Article III.2 of the NPT. If the source or special fissionable material transferred for peaceful purposes is subject to an IAEA safeguards agreement but is not required by that agreement actually to be under safeguards (e.g., under an exemption for de minimis amounts or a provision permitting safeguards termination for non-nuclear use), the transport would not constitute an offense under Article 3bis(1)(b)(iii) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005.

c. U.S.–IAEA Safeguards Agreement Additional Protocol

During 2008 the United States took the final steps to enable the Protocol Additional to the Agreement Between the United States and the International Atomic Energy Agency for the Application of Safeguards in the United States of America

("Additional Protocol") to enter into force. The protocol entered into force on January 6, 2009, upon receipt by the IAEA of written notification that the statutory and constitutional requirements of the United States for entry into force had been met. Several steps were required before the United States could ratify the Additional Protocol, including (1) obtaining Senate advice and consent to ratification, which was given on March 31, 2004; (2) enactment of implementing legislation, which was signed by the President on December 18, 2006 (The U.S. Additional Protocol Implementation Act of 2006 (Pub. L. No. 109-401, 120 Stat. 2726); (3) issuance of an Executive Order designating U.S. agency implementing authorities, which was issued as Executive Order 13458 of February 4, 2008 (73 Fed. Reg. 7181 (Feb. 6, 2008)); and (4) certification by the President that the conditions contained in the Senate resolution of advice and consent had been met. The Senate resolution required the President to certify, among other things, that, within 180 days of deposit of the instrument of ratification, procedures would be in place for use of the national security exclusion and for managed access, and that the necessary counterterrorism training and site vulnerability assessments had been completed. The national security exclusion permits the United States to except from application of the Additional Protocol activities of direct national security significance, as well as associated locations and information. The President so certified on December 30, 2008.

In keeping with Executive Order 13458, on October 21, 2008, the Department of Commerce Bureau of Industry and Security issued Additional Protocol Regulations ("APR"), 73 Fed. Reg. 65,120 (Oct. 31, 2008), and established a homepage to provide resources to assist locations engaged in nuclear fuel cycle-related activities to comply with the APR. *See www.ap.gov*. The Summary and Background sections of the Federal Register publication explained the applicability of the APR and provided a history of U.S. safeguards undertakings, as excerpted below.

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The Department of Commerce's Bureau of Industry and Security (BIS) is establishing these Additional Protocol Regulations (APR) to implement the provisions of the Additional Protocol affecting U.S. industry and other U.S. persons engaged in certain civil nuclear fuel cycle-related activities, which are not regulated by the U.S. Nuclear Regulatory Commission (NRC) or its domestic Agreement States, and are not located on certain U.S. government locations. . . .

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. . . The IAEA completed formulation of detailed provisions for a model NPT Safeguards Agreement in 1971. The safeguards system, as embodied in the comprehensive safeguards agreements concluded between the IAEA and individual non-nuclear weapon states ("NNWS") States Parties to the NPT, consists of nuclear material accountancy and nuclear material verification measures by which the IAEA independently verifies declarations made by individual States Parties about their nuclear material and activities to ensure that nuclear material inventories and flows have been accurately declared and are not being used to further any proscribed purpose.

During deliberations on the NPT, several major industrialized nations expressed concern that the absence of requirements for IAEA safeguards in nuclear weapon states ("NWS") would place NNWS at a commercial and industrial disadvantage in developing nuclear energy for peaceful purposes. Specifically, the NNWS were concerned that application of safeguards would interfere with the efficient operations of their commercial activities and would possibly compromise industrial and trade secrets as a result of access by IAEA inspectors to their facilities and records. In order to allay these concerns, the United States voluntarily offered in 1967 to permit the IAEA to apply safeguards to civil nuclear facilities in the United States. The U.S. "Voluntary Offer" is set forth in the "Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America" (also known as the "U.S.–IAEA Safeguards Agreement"). Since then, the other four NWS recognized under the NPT (China, France, the Russian

Federation, and the United Kingdom) also agreed to make all or part of their civil nuclear activities eligible for IAEA safeguards.

The U.S.–IAEA Safeguards Agreement was signed on November 18, 1977, and entered into force on December 9, 1980. . . .

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In the aftermath of the 1991 Persian Gulf War, the IAEA determined that Iraq had been engaged in a clandestine nuclear weapons development program at locations not directly subject to routine IAEA safeguards inspections. The international community determined that the safeguards system needed to be strengthened, and negotiated a Model Additional Protocol to amend existing bilateral safeguards agreements (i.e., the "Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards," INFCIRC/540 (Corrected) September 1997). The Model Additional Protocol requires enhanced information collection and access to sites and other locations involved in nuclear fuel-cycle related activities and covers almost all of a state's nuclear fuel cycle, thereby providing IAEA inspectors with greater ability to detect clandestine nuclear activities in NNWS facilities, sites, and locations that are involved in nuclear fuel cycle activities. In an effort to encourage adoption of the Additional Protocol among NNWS, the United States signed the Additional Protocol on June 12, 1998. In the Additional Protocol, the United States accepts all of the measures of the Model Additional Protocol, except where their application would result in access by the IAEA to activities of direct national security significance to the United States or to locations or information associated with such activities. By subjecting itself to the same safeguards on all of its civil nuclear activities that NNWS are subject to (with the exception of those activities of direct national security significance), the United States intends to encourage widespread adherence to the Model Additional Protocol and demonstrate that adherence does not place other countries at a commercial disadvantage.

The Additional Protocol will enter into force when the United States notifies the IAEA that the statutory and constitutional

requirements for entry into force have been met. These requirements include: (1) Ratification, to which the Senate provided advice and consent with certain conditions and understandings on March 31, 2004; (2) enactment of implementing legislation, which was signed by the President on December 18, 2006 (The U.S. Additional Protocol Implementation Act of 2006 (Pub. L. 109-401, 120 Stat. 2726 (2006)); (3) issuance of an Executive Order, which was issued as Executive Order 13458 of February 4, 2008 (73 FR 7181, February 6, 2008); (4) issuance of agency regulations by the Departments of Commerce, Defense, and Energy, and by the Nuclear Regulatory Commission (DOC, DOD, DOE, and NRC); and (5) certification by the President that certain Senate conditions have been met. The United States' instrument of ratification may be deposited with the IAEA only after the President has certified that two Senate conditions, which address the application of the national security exclusion in Articles 1.b and 1.c of the Additional Protocol (i.e., managed access, security and counterintelligence training, and preparation at locations of direct national security significance) and the completion of site vulnerability assessments concerning activities, locations, and information of direct national security significance, will be met within 180 days after deposit of the United States' instrument of ratification.

* * * *

d. U.S. response to nuclear threat

On February 8, 2008, National Security Advisor Stephen J. Hadley addressed the Center for International Security and Cooperation at Stanford University, focusing on "one particular challenge to the security of the nation and of the world, indeed: the proliferation of nuclear weapons and nuclear materials into the hands of nations or individuals who would do us harm." The full text of Mr. Hadley's remarks, excerpted below, is available at *http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080211-6.html*. *See also* excerpts relating to a "new declaratory policy to help deter terrorists from using weapons of mass destruction"

(A.1.a. *supra*) and on negotiations concerning extension of the Strategic Arms Reduction Treaty of 1991 (B.7. below).

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The threat of a nuclear attack on the American homeland remains very real—though the nature of the threat has changed dramatically over the last two decades. The Cold War is over. . . .

Yet new nuclear threats have emerged. North Korea has developed and tested nuclear weapons—and withdrawn from the Non-Proliferation Treaty that otherwise prohibited it from doing so. Iran continues to enrich uranium—in defiance of the international community—which could give it the capability to produce nuclear materials required for a nuclear weapon. And terrorists continue to seek to acquire nuclear weapons and nuclear materials so they can advance their ideological agenda of oppression and fear by threatening the slaughter of innocents in many nations, including our own.

Early in his term, President Bush recognized that this new strategic environment required a rethinking of U.S. nuclear proliferation policy—and in three important ways. . . .

First, to reduce the risk of nuclear proliferation, we need to reduce the legacy nuclear stockpiles of the Cold War and better secure nuclear materials around the world.

President Bush took office determined to reduce the extent to which we have to rely on nuclear weapons to ensure the safety and security of our country. . . .

This work resulted in the Nuclear Posture Review, or NPR, which the President adopted as the foundation of U.S. strategic doctrine. Briefly, the NPR concluded that nuclear weapons would remain necessary to deter aggressors from threatening the United States—and U.S. allies that do not possess nuclear weapons—and to reduce the risk of regional nuclear arms races.

Yet the Nuclear Posture Review also concluded that the United States could accomplish all of these objectives while reducing our nation's reliance on nuclear weapons. The NPR proposed a "New Triad," if you will, of strategic capabilities that expanded

beyond our narrow focus on nuclear weapons to include greater reliance on effective conventional non-nuclear weapons, greater reliance on missile defenses, and a more limited but still sustainable nuclear weapons capability.

And based on the strategic logic of this New Triad, President Bush proposed to President Putin that both nations reduce their nuclear weapons inventories. Subsequent negotiations resulted in the Moscow Treaty of 2002, in which the United States and Russia agreed to draw down their respective operationally deployed strategic nuclear weapons to between 1,700 and 2,000 weapons by 2012. Our two nations are now implementing the Moscow Treaty. They are ahead of schedule. And today, the United States has fewer than 3,800 operationally deployed strategic nuclear weapons, its lowest level since the Eisenhower administration, and at the early days of the nuclear standoff.

The United States and Russia have also made progress in reducing their stockpiles of fissile material—that is, highly enriched uranium and plutonium—the materials from which nuclear weapons can be made. . . . This means that more than 22,000 nuclear weapons which could have been made using this material will not be made.

We are also helping Russia reduce its stockpile of fissile material. Working together, Russia and the United States will each convert 34 metric tons of weapons-grade plutonium into fuel for use in civilian nuclear power plants. The United States has also purchased more than 300 metric tons of Russian highly-enriched uranium, and blended it down for use as fuel in civilian nuclear reactors. . . . [O]ne in ten light bulbs in America is powered by nuclear material from weapons that used to be aimed at our country.

Other joint efforts with Russia to better secure and safeguard nuclear weapons and nuclear materials are delivering results as well. . . .

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The United States is also partnering with other nations, including former Soviet republics, to better secure nuclear materials around the globe. . . .

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The second challenge we need to address are the proliferation risks associated with the growing demand for peaceful nuclear energy around the world.

Nuclear energy is safe and clean. Nuclear energy offers both developed and developing nations the electric power they need to grow their economies without releasing gaseous emissions harmful to the environment. . . .

Yet nuclear energy can carry with it the risk of nuclear proliferation. The same technology used to enrich uranium for use in civilian nuclear power reactors, and to recover plutonium from spent nuclear power reactor fuel, can be used to produce the fissile material for nuclear weapons.

The Non-Proliferation Treaty allows access to peaceful nuclear energy for all nations that abide by its terms—but nations cheat. They use the cover of a peaceful nuclear program to develop enrichment and reprocessing capability, and then use that capability to produce the material needed for nuclear weapons. North Korea has separated plutonium from spent fuel from its nuclear reactor at Yongbyon, and then used that plutonium to make nuclear weapons.

And cheating is what we fear Iran will do. The Iranian regime claims to be pursuing only a peaceful nuclear energy program. Yet for over a decade they hid from the world key elements of that program. And Iran is not fully cooperating with the investigation into their past nuclear activities now being conducted by the International Atomic Energy Agency, or the IAEA, as it's called. And the regime continues to enrich uranium in defiance of the United Nations Security Council.

The long-term solution to the cheating risk is to make available an assured fuel supply for peaceful nuclear energy. . . .

To make available an assured fuel supply, . . . President Bush endorsed creation of a nuclear fuel supply mechanism in 2004. We have been working continually with partners and with the IAEA to bring that kind of assured fuel supply into being.

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Finally, to reduce the risk of nuclear proliferation, we need to address the threat of nuclear terrorism. After the terrorist attacks of September 11, 2001, President Bush directed his national

security team to develop a comprehensive strategy to meet the threat of terrorists acquiring and using the world's most dangerous weapons. The strategy drew upon the collective wisdom of both the counter proliferation community, which was focused on the spread of nuclear weapons to rogue nation states, and the counterterrorism community, which is focused on individual terrorists and terrorist networks.

The President's strategy calls for a comprehensive, robust, layered defense against nuclear terrorism. The defense calls for: Expanded intelligence efforts, so we can get a better picture of the capabilities and intentions of terrorist groups seeking nuclear or radiological weapons and the information we need to disrupt those efforts; focused interdiction, to deny terrorists access to the nuclear material, expertise, or other capabilities they seek by disrupting their efforts to acquire them; a declaratory policy to put the terrorists on notice of how we will respond if attacked and to deter those who might be tempted to transfer or facilitate the transfer of nuclear weapons to terrorists; expanded efforts to prevent nuclear material or nuclear weapons from being moved into U.S. territory; strengthened nuclear forensics capabilities, so if the worst should happen, and a nuclear attack should occur on U.S. soil, we would be able to identify those responsible quickly and accurately; robust, effective response and recovery plans, so that again, if the worst should happen, we would be able to respond quickly to minimize casualties and help impacted communities rebuild.

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The President has . . . created strong international partnerships to address the threat of nuclear terrorism. In 2003, he launched the Proliferation Security Initiative to stem the flow of illicit materials used for weapons of mass destruction programs. More than 85 nations are now partners in this effort to coordinate their individual national capabilities to detect and interdict illicit materials—whether moving by land, sea, or air.

In 2004, the United States cosponsored and helped secure the approval of U.N. Security Council Resolution 1540. This resolution requires states to enact and enforce effective export controls for dangerous weapons and materials, and to prosecute those who

transfer weapons of mass destruction or sensitive technologies to terrorists.

And in 2006, the United States and Russia launched the Global Initiative to Combat Nuclear Terrorism, which is helping to build international capacity to prevent, defend against, and respond to nuclear terrorism. . . .

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On October 28, 2008, Secretary of Defense Robert M. Gates addressed the Carnegie Endowment for International Peace, discussing successful steps taken by the United States to reduce its nuclear arsenal and explaining the need to retain some nuclear weapons "to deter potential adversaries and to reassure over two dozen allies and partners who rely on our nuclear umbrella for their security—making it unnecessary for them to develop their own." The full text of Secretary Gates's remarks is available at *www.defenselink.mil/speeches/speech.aspx?speechid=1305*. *See also* statement by Ambassador Christina Rocca, Permanent Representative of the United States of America to the Conference on Disarmament, to the UN General Assembly First Committee on October 8, 2008, available at *www.archive.usun.state.gov/press_releases/20081008_260.html*.

e. Applicability of U.S. antidumping law to imports of low-enriched uranium

On April 21, 2008, the U.S. Supreme Court granted certiorari to the U.S. Court of Appeals for the Federal Circuit in a case concerning the applicability of the U.S. antidumping law to the importation of low-enriched uranium for use by U.S. domestic utilities. The Court granted and consolidated two petitions, *United States v. Eurodif, S.A.*, 128 S. Ct. 2054 (2008), and *USEC Inc. v. Eurodif, S.A.*, 128 S. Ct. 2056 (2008).*

* Editor's note: On January 26, 2009, the Supreme Court issued its decision reversing the Federal Circuit decision and remanding. 129 S. Ct. 878 (2009). The Court did not address the issues of foreign policy and national security raised by the United States.

The U.S. antidumping law provides for duties on "foreign merchandise" sold in the United States at less than fair value, but does not apply to sales of services. 19 U.S.C. § 1673. The United States argued that the Federal Circuit (in a decision reversing a determination by the Department of Commerce) erred in deciding that "SWU contracts" constituted contracts for services and were thus exempt from the antidumping law. The U.S. petition for certiorari described SWU contracts as those in which the U.S. utility "deliver[s] a quantity of unenriched uranium . . . to an enricher, and pay[s] the enricher for 'separative work units' (SWUs), in exchange for a quantity of LEU at a given U-235 concentration, or 'assay.'"

Among other things, the United States argued that the Federal Circuit decision threatened U.S. foreign policy and national security interests for two reasons: because the decision threatened to undermine the U.S.–Russia Highly Enriched Uranium ("HEU") Agreement, "a key element of U.S. nuclear nonproliferation policy," and because it threatened the ongoing economic viability of USEC, "the only domestic entity that enriches uranium[, and] . . . the only facility in the world that can produce nuclear materials for U.S. military use." Excerpts from the U.S. petition on these points follow. The full text of the U.S. petition is available at *www.usdoj.gov/osg/briefs/2007/2pet/7pet/2007-1059.pet.aa.html*. For more information on the U.S.–Russia Highly Enriched Uranium Agreement, *see Digest 2005* at 1090–91; *Digest 2004* at 1137–38; *Digest 2003* at 1110–12; and *II Cumulative Digest 1991–99* at 2303–07.

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III. THE DECISION BELOW THREATENS U.S. FOREIGN POLICY AND NATIONAL SECURITY INTERESTS

The consequences of the decision below go far beyond the substantial adverse effect on the effective administration of the trade laws. The decision below, in a truly unprecedented manner for a trade case, threatens to undermine U.S. foreign policy and national

security interests in the remarkably sensitive context of nuclear fuel, nonproliferation, and ensuring domestic supplies for nuclear weaponry. Because enriched uranium is essential to nuclear power, the government's ability to regulate its entry into the United States is a matter of great significance. The court's decision in this case puts at risk full implementation of an international nuclear nonproliferation agreement and the continued survival of the only domestic source of nuclear materials for military uses. Those consequences further justify this Court's intervention.

1. First, the decision below threatens to undermine the United States' Highly Enriched Uranium (HEU) Agreement with the Russian Federation, a key element of U.S. nuclear nonproliferation policy, which is dependent on the proper application of antidumping law to imported LEU.

Under the HEU Agreement, signed in 1993, the Russian Federation has undertaken by 2013 to convert 500 metric tons of weapons-grade HEU—enough for approximately 20,000 Russian nuclear warheads—into LEU for use in generating electricity in the United States. In return, the United States has agreed to purchase LEU downblended from 30 metric tons of weapons-grade HEU each year through 2013. See Agreement Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, U.S.-Russ., Feb. 18, 1993, State Dep't No. 93-59, 1993 WL 152921. USEC, the sole domestic enricher of LEU, serves as the U.S. Executive Agent under the agreement. In that capacity, USEC purchases the downblended LEU, resells the material to U.S. utilities, and uses the proceeds to pay the Russian Government.

The foundation for the HEU Agreement was laid in 1992, when Commerce agreed to suspend an antidumping investigation into Russian uranium that had been prompted by a surge of low-price Russian uranium imports into the United States. See *Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed. Reg. 49,235 (1992) (notice of suspension of investigations and amendment of preliminary determinations). The antidumping suspension agreement restricts imports of Russian LEU produced through commercial enrichment processes, but exempts from those restrictions "any or all" HEU, and LEU produced through a process of downblending HEU "resulting

from the dismantlement of nuclear weapons." *Id.* at 49,237. The suspension agreement, which was negotiated in parallel with the HEU Agreement, thus provides an important incentive for the Russian Federation to produce LEU for export through a process of downblending, rather than through the less costly (and hence more profitable) method of enriching natural uranium through commercial processes.

The court of appeals' decision critically undermines the effectiveness of the antidumping suspension agreement as it affects enriched (as opposed to downblended) LEU, and thereby threatens the effectiveness of the HEU Agreement as well. Suspension agreements apply only to merchandise subject to the antidumping-duty law. . . . If LEU purchased pursuant to SWU contracts is not subject to the antidumping-duty law, as the Federal Circuit has held, Russia will have a strong economic incentive to avoid application of the antidumping suspension agreement by structuring transactions as the French enrichers and utilities did in this case.

If such an effort is successful, Russia would have far less incentive to continue to produce LEU via the relatively more expensive process of dismantling nuclear warheads, rather than producing LEU by commercial enrichment. See Memorandum from Joseph A. Spetrini, Deputy Assistant Secretary for Policy and Negotiations, to David M. Spooner, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Sunset Review of the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation 6 (June 6, 2006) <ia.ita.doc.gov/frn/summary/RUSSIA/E6-8758-1.pdf> (Sunset Review Memorandum); *Final Results of Five-Year Sunset Review of Suspended Antidumping Duty Investigation on Uranium from the Russian Federation*, 71 Fed. Reg. 32,517 (2006). Russia is the largest enricher of uranium in the world, and enriching natural uranium for commercial LEU sales is the most economically viable use of its vast enrichment capacity. Sunset Review Memorandum 6. Today Russia has substantially more enrichment capacity than necessary to supply its own domestic market, and other markets—notably in the European Union and Asia—have imposed restrictions on imports of Russian uranium products. *Ibid.* Absent full implementation of the antidumping suspension agreement, Russia would have a

strong financial incentive to direct its enrichment capacity toward commercial enrichment of natural uranium for the U.S. market, rather than downblending weapons-grade uranium, for the same market at higher cost. *Ibid*. It might terminate the HEU Agreement after one year's notice, as permitted under the Agreement, or it might halt or slow its performance under the Agreement, to the detriment of U.S. foreign policy and national security interests.

Even if Russia continued full performance under the HEU Agreement, the Agreement might still be threatened by a failure fully to implement the antidumping suspension agreement. Competition from commercially enriched Russian LEU would threaten USEC's ability to resell some or all of the downblended LEU that it is committed to purchase in its capacity as the U.S. Executive Agent under the HEU Agreement, which would, in turn, threaten USEC's ability to continue to raise the revenue necessary to purchase that material from Russia.

In short, successful implementation of the HEU Agreement depends in significant part on the government's ability to use the antidumping laws to regulate the entry of LEU from foreign sources, so that downblending of weapons-grade HEU remains commercially feasible. The decision below effectively obliterates a crucial part of the framework that underlies the HEU Agreement, and thus stands as an obstacle to accomplishing the Agreement's objective of converting Russian nuclear warheads to peaceful uses.

2. Second, the court of appeals' decision threatens the ongoing economic viability of USEC, the only domestic entity that enriches uranium. Because other countries generally require that their nuclear products and technology be used only for peaceful purposes, USEC operates the only facility in the world that can produce nuclear materials for U.S. military use. Its continued survival is, accordingly, a matter of compelling importance to U.S. national security interests.

The government relies on USEC to supply enriched uranium for a variety of military purposes. USEC is the sole supplier of the LEU used to fuel the government-owned nuclear reactors that produce tritium, a radioactive isotope necessary to maintain the U.S. nuclear arsenal. USEC also supplies the enriched uranium required for the operation of the space nuclear program. In addition,

the U.S. Navy's nuclear-powered submarines and aircraft carriers are fueled with HEU and rely upon its availability. When the current supply of that material is depleted, the Navy will require a sustainable domestic provider of HEU. Today, USEC is the only domestic provider of enrichment services.

USEC currently operates only one facility in the United States that can be used to produce enriched uranium for military purposes. That facility, which is located in Paducah, Kentucky, enriches uranium through gaseous diffusion, a process that is commercially obsolete at current prices. USEC is presently planning to replace the Paducah facility with a new centrifuge facility to produce LEU in Piketon, Ohio, for which USEC must raise significant capital in commercial markets. It will be difficult or impossible for USEC to raise that capital if investors do not view the U.S. market for enriched uranium as stable and profitable. If left unreviewed, the decision below would destabilize that market, threatening both the economic viability of the facility that USEC already operates as well as its plans to replace that facility with updated and more cost-effective technology. As a result, the decision below, far from a garden-variety trade case, threatens the United States' ability to produce materials critical to military operations.

3. Finally, by radically limiting domestic industry's protection from imports of dumped enriched uranium, the decision below threatens to increase the United States' dependence on foreign energy sources. If Russia enjoys unfettered access to the market for LEU in the United States, its vast capacity for enrichment will weaken financial support for expansion of domestic enrichment capacity and leave the Russian Federation as the predominant supplier of enriched uranium for domestic electricity generation.

* * * *

In its October reply brief on the merits, the United States reported on recently enacted legislation that would partially address the issues raised in its petition and responded to an argument that the United States could renationalize USEC,*

* The July 2008 U.S. brief on the merits explained: "USEC is a private, for-profit corporation that has assumed enrichment operations formerly performed by the Department of Energy. *See* USEC Privatization Act, 42 U.S.C. 2297h *et seq*."

as excerpted below (citations to other submissions omitted). The full text of the U.S. reply brief is available at *www.usdoj.gov/osg/briefs/2008/3mer/2mer/2007-1059.mer.rep.html.*

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* * * *

2. The prospect of evasion of the fair trade laws is, as the government has previously explained, a matter of considerable concern, particularly in the sensitive context of trade in enriched uranium. After our opening brief was filed, Congress passed, and the President signed into law, legislation that addresses imports of LEU from Russia through 2020. See Department of Defense Appropriations Act, 2008, Pub. L. No. 110-329, Div. C, § 8118, 122 Stat. 3647 (to be codified at 42 U.S.C. 3112A). That law provides incentives for the Russian Federation to continue full implementation of its 1993 agreement with the United States to downblend weapons-grade uranium into LEU for purposes of generating electricity, and to continue to downblend such uranium after the expiration of the HEU Agreement in 2013, by imposing import quotas on LEU (including LEU obtained under SWU contracts) through 2020 that are independent of the quotas established in Commerce's order suspending an antidumping investigation into imports of Russian LEU. *Ibid.*; see [U.S.–Russia HEU Agreement] . . . cf. *Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed. Reg. 49,235 (Dep't of Commerce 1992) (notice of suspension of investigations and amendment of preliminary determinations).

The legislation thus responds to one of the most significant implications of the decision below: the potential for undermining full implementation of the HEU Agreement, a key element of this Nation's nonproliferation policy. It remains the case, however, that the proper application of this Nation's fair trade laws generally, and their application to trade in enriched uranium in particular, is a matter of considerable importance. As the government explained in its petition for a writ of certiorari . . . , the United States relies on the availability of domestic sources of enriched uranium for certain military purposes, including the production of tritium, a radioactive isotope necessary to maintain the United States'

nuclear arsenal, and as a prospective source of fuel for the Navy's nuclear-powered submarines and aircraft carriers. Unchecked by the fair trade laws, unfairly priced imports would threaten the viability of the domestic enrichment industry, and thus the United States' ability to acquire materials critical to military operations.

Respondents suggest that the government already has a sufficient "stockpile" of enriched uranium, can "recycl[e]" the materials it already has, and could, if necessary, undertake to operate USEC's enrichment facilities itself. Respondents, like the courts, are particularly ill-positioned to make such assessments. And, in any event, respondents are incorrect. The availability of sources to replenish the United States' supply of essential nuclear materials is a matter of considerable concern, and the ramifications of responding to that concern by undertaking to renationalize USEC's operations are scarcely inconsequential.

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f. Country-specific issues

(1) Democratic People's Republic of Korea ("DPRK" or "North Korea")

(i) Implementation of October 3, 2007 commitment

On June 26, 2008, President Bush announced the lifting of the application of the Trading with the Enemy Act ("TWEA") with respect to the DPRK (73 Fed. Reg. 36,785 (June 27, 2008)) and notified Congress of his intention to rescind North Korea's designation as a state sponsor of terrorism, as discussed in Chapter 3.B.1.d. (73 Fed. Reg. 37,351 (July 1, 2008)). The action was taken immediately following the DPRK's submission of a declaration of its nuclear programs, which was subject to verification.

The memorandum of justification included in the President's notice of intention to rescind North Korea's designation as a state sponsor of terrorism discussed the DPRK's actions with respect to its nuclear program,

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

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. . . [S]ince August 2003 the DPRK has been engaged in the Six-Party Talks with the United States, Russia, the Republic of Korea, the Peoples Republic of China, and Japan, the goal of which is the verifiable denuclearization of the Korean Peninsula in a peaceful manner.

After several rounds of multilateral negotiations, the Six Parties agreed to the September 19, 2005, Joint Statement of the Fourth Round of the Six-Party Talks, in which the DPRK committed to abandoning all nuclear weapons and existing nuclear programs and returning at an early date, to the Treaty on the Non-Proliferation of Nuclear Weapons and to IAEA safeguards. The Six Parties also agreed to take coordinated steps to implement these commitments in a phased manner in line with the principle of "action for action."

On February 13, 2007, the Six Parties agreed to "Initial Actions for the Implementation of Joint Statement," in which the DPRK would shut down and seal its Yongbyon nuclear complex and invite back IAEA personnel to monitor and verify those actions. In July 2007, the DPRK shut down and sealed the Yongbyon nuclear facility and invited back the IAEA to verify and monitor these activities.

In the October 3, 2007 agreement on "Second-Phase Actions for Implementation of the Joint Statement," the DPRK agreed to disable all existing nuclear facilities, beginning with the Yongbyon nuclear facility and to provide a complete and correct declaration of all its nuclear programs. They also reaffirmed their commitment not to transfer nuclear materials, technology, or know-how.

Since November 2007, U.S. experts have been on the ground in Yongbyon overseeing the disablement of the three core facilities of the DPRK's nuclear weapons program: the 5-MW(e) reactor, the fuel fabrication facility, and the reprocessing facility. Most of the agreed disablement tasks at these three facilities have been

completed, including the removal of several key pieces of equipment at the reprocessing plant necessary for the separation of plutonium from spent fuel rods, and the disablement and removal of major pieces of equipment at the fuel fabrication plant. The discharge of spent fuel is more than half completed at the 5-MW(e) reactor. The North Koreans also intend to "disable" their fresh fuel rods, most likely by selling them to the ROK. With these actions, the DPRK's ability to produce weapons-grade plutonium, the key ingredient in its nuclear weapons program, has been halted. Due to health, safety and verification concerns, the Parties agreed that the fuel discharge (consisting of approximately 8,000 rods in the reactor core) would need to continue even after these other tasks were completed. Other disablement tasks, including the destruction and removal of the interior structure of the cooling tower, have also been completed.

On June 26, 2008, the DPRK formally began to fulfill its declaration commitment, as called for in the October 3, 2007, agreement by submitting what it characterizes as a complete and correct declaration of all its nuclear programs. The DPRK and the other parties to the Six-Party Talks have agreed in principle that the DPRK's declaration will be subjected to a process of verification aimed at resolving any discrepancies and ensuring achievement of a declaration that is in fact complete and correct. . . . Prior to the formal submission of its declaration, the DPRK had provided the United States on May 9, 2008, with an initial tranche of nearly 19,000 pages of operating records from the 5-MW(e) reactor and the reprocessing facility at Yongbyon. The ongoing U.S. review of these documents has yielded data which will serve as a starting point for verifying the DPRK's declaration. Additional activities, however, such as access to sites, materials, personnel, and additional documentation, will be necessary as part of the comprehensive verification process we envision. The DPRK has agreed to cooperate in these verification activities.

As a part of the formal declaration, the DPRK also acknowledged our concerns related to its uranium enrichment activities and nuclear cooperation with Syria. It affirmed that there is no ongoing related activity, and it has provided assurances that it will not engage in such activities in the future. The DPRK has also

agreed to provide additional explanations regarding its uranium and proliferation activities.

Also within the context of the Six-Party Talks, the issue of the abduction of Japanese nationals in the 1970s and 80s by DPRK state entities is being addressed through bilateral discussions between Japan and the DPRK. On June 13, 2008, Japan announced that North Korea has agreed to look again into the abductions issue. North Korea's official KCNA news agency also said Pyongyang would reinvestigate the abduction issue.

* * * *

On June 26, 2008, the Department of State released a fact sheet that described actions taken by the DPRK and the United States, including the lifting of TWEA application, and noted that the lifting of sanctions under TWEA and state sponsor of terrorism designation was largely symbolic. Excerpts from the fact sheet follow; the full text is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/jun/106281.htm*. *See also* Secretary of State determination that North Korea continues to fulfill its commitments under Six-Party instruments, 73 Fed. Reg. 45,795 (Aug. 6, 2008).

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- North Korea's declaration, in conjunction with the steps North Korea has taken to disable, for the purpose of abandonment, its ability to produce plutonium for nuclear weapons, are significant steps toward our goal of the denuclearization of the Korean Peninsula.

* * * *

- In consideration of North Korea's action and having confirmed that North Korea meets relevant statutory criteria, the United States has taken reciprocal action to lift the application of the TWEA with respect to North Korea and is taking the legal steps necessary to rescind North Korea's designation as a State Sponsor of Terrorism.

- The actual rescission of North Korea's designation as a State Sponsor of Terrorism can be carried out 45 days after the President's notification to Congress. The Administration plans to carry out that rescission only after: the Six Parties reach agreement on acceptable verification principles and an acceptable verification protocol; the Six Parties have established an acceptable monitoring mechanism; and verification activities have begun.

Trading with the Enemy Act (TWEA)

- The President's action on June 26 effectively lifts the application of the Trading with the Enemy Act (TWEA).
- This action is largely symbolic, as most of the TWEA-based sanctions were lifted in 2000. Other sanctions—in particular those related to North Korea's detonation of a nuclear device on October 9, 2006, proliferation activities, and human rights violations—will continue on the basis of other laws and regulations.
- The termination of the application of TWEA does remove the current requirement for licenses on all imports from the DPRK, but certain imports continue to be banned under other legal authorities.
- On December 16, 1950, President Truman declared a national emergency with respect to North Korea. The next day, the Treasury Department implemented restrictive regulations under TWEA with respect to North Korea. President Bush's proclamation terminates this exercise of TWEA authority with respect to North Korea.

* * * *

Verification

- North Korea's declaration will be subjected to an iterative process of verification aimed at resolving any discrepancies and achieving a declaration that is in fact complete and correct.

* * * *

- A comprehensive verification regime would include, among other things, short notice access to declared or suspect sites related to the North Korean nuclear program, access to nuclear materials, environmental and bulk sampling of materials and equipment, interviews with personnel in North Korea, as well as access to additional documentation and records for all nuclear-related facilities and operations.
- Any discrepancies in its declaration must be addressed by North Korea until the declaration is deemed to be complete and correct. Issues related to the declaration, including concerns on uranium enrichment and proliferation, can be also addressed via a Monitoring Mechanism to be established under the Denuclearization Working Group. That Monitoring Mechanism is intended to ensure follow-through on all Six Party commitments.

* * * *

- The United States remains committed to the full implementation of the September 19, 2005 Joint Statement of the Fourth Round of the Six-Party Talks, which unanimously reaffirmed that the goal of the Six-Party Talks is the verifiable denuclearization of the Korean Peninsula in a peaceful manner.

The day prior to lifting the application of TWEA, President Bush issued Executive Order 13466, "Continuing Certain Restrictions with Respect to North Korea and North Korean Nationals," pursuant to his authorities under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706. Under E.O. 13466, DPRK-related assets remained blocked if they were blocked under the Trading with the Enemy Act ("TWEA") as of June 16, 2000, and remained blocked immediately prior to the date of the order, and U.S. persons may not "register a vessel in North Korea, obtain authorization for a vessel to fly the North Korean flag, or own, lease, operate, or insure any vessel flagged by North Korea." 73 Fed. Reg.

36,787 (June 27, 2008). President Bush explained the basis for the executive order, stating:

> I, GEORGE W. BUSH, President of the United States of America, find that the current existence and risk of the proliferation of weapons-usable fissile material on the Korean Peninsula constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat. I further find that, as we deal with that threat through multilateral diplomacy, it is necessary to continue certain restrictions with respect to North Korea that would otherwise be lifted pursuant to a forthcoming proclamation that will terminate the exercise of authorities under the Trading With the Enemy Act (50 U.S.C. App. 1 *et seq.*) (TWEA) with respect to North Korea.

A fact sheet entitled "Existing Sanctions and Reporting Provisions Related to North Korea," released on October 11, 2008, sets forth existing sanctions and reporting provisions related to North Korea under U.S. law for (1) proliferation activities; (2) human rights violations; (3) status as a communist state; (4) October 9, 2006 nuclear detonation; (5) under E.O. 13466; and (6) not tied to specific activities. The sanctions fact sheet is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110923.htm*. *See also* October 11 briefing on North Korea by Special Envoy for the Six-Party Talks Ambassador Sung Kim, Assistant Secretary of State for Public Affairs Sean McCormack, Assistant Secretary of State for Verification, Compliance, and Implementation Paula DeSutter, and Acting Assistant Secretary of State for International Security and Nonproliferation Patricia McNerney, available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110926.htm*.

(ii) Verification measures

On October 11, 2008, Assistant Secretary of State for Public Affairs Sean McCormack released a press statement

announcing that the DPRK had "agreed to a series of verification measures that represents significant cooperation concerning the verification of North Korea's denuclearization actions." *See http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110922.htm.* A fact sheet entitled "U.S.–North Korea Understandings on Verification" described the U.S. role in negotiations on verification and listed the agreed measures and next steps in the Six-Party talks on this issue, as excerpted below. The full text of the verification fact sheet is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110924.htm.*

* * * *

- On July 12, China, the Chair of the Six-Party Talks, released a Press Communiqué stating that verification measures would include visits to facilities, review of documents, and interviews with technical personnel as well as other measures unanimously agreed among the Six Parties.
- Upon the invitation of the North Korean government, a U.S. negotiating team on behalf of the Six Parties visited Pyongyang from October 1–3 for intensive talks on verification measures.
- Based upon these discussions, U.S. and North Korean negotiators agreed on a number of important verification measures, including:
  - Agreement that experts from all Six Parties may participate in verification activities, including experts from non-nuclear states;
  - Agreement that the IAEA will have an important consultative and support role in verification[;]
  - Agreement that experts will have access to all declared facilities and, based on mutual consent, to undeclared sites;
  - Agreement on the use of scientific procedures, including sampling and forensic activities; and
  - Agreement that all measures contained in the Verification Protocol will apply to the plutonium-based program and

any uranium enrichment and proliferation activities. In addition, the Monitoring Mechanism already agreed by the Six Parties to monitor compliance with Six-Party documents applies to proliferation and uranium enrichment activities.

- The U.S.–DPRK agreement on these verification measures has been codified in a joint document between the United States and North Korea and certain other understandings, and has been reaffirmed through intensive consultations. The agreement and associated understandings have been conveyed to the other parties.
- These measures will serve as the baseline for a Verification Protocol to be finalized and adopted by the Six Parties in the near future.
- Verification of the North Korea declaration submitted on June 26 has already begun with review of the over 18,000 pages of operating records from Yongbyon that North Korea provided on May 8.

The October 11 press statement described the status of certain other issues in the negotiations as excerpted below.

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* * * *

North Korea has stated it will resume disablement of its nuclear facilities. This demonstrates that the Six-Party principle of "action for action" is working.

We welcome the recent progress made in discussions between Japan and the D.P.R.K. toward addressing Japan's concerns, particularly those arising from the D.P.R.K.'s past abductions of Japanese nationals. We strongly urge the D.P.R.K. to address Japan's concerns without further delay. The United States wholeheartedly supports Japan's position on the abduction issue. We have not forgotten and will never forget the suffering of the abductees and their families.

The D.P.R.K. remains subject to numerous sanctions resulting from its 2006 nuclear test, its proliferation activities, its human rights violations, and its status as a communist state.

The United States will continue to work toward the verifiable end to all North Korean nuclear programs and activities. We will not stop until this work is done.

(2) Iran

(i) Security Council resolutions

During 2008 the UN Security Council adopted two resolutions under Article 41 of Chapter VII of the UN Charter addressing Iran's nuclear program: Resolution 1803 (March 3, 2008) and Resolution 1835 (September 27, 2008).

A fact sheet released by the Department of State on April 4, 2008, identified several important provisions of Resolution 1803, as excerpted below. The full text of the fact sheet, which also summarizes major elements of previous resolutions and related Financial Action Task Force ("FATF") actions is available at *http://2001-2009.state.gov/t/isn/rls/fs/102891.htm.*

* * * *

- **Requires Iran to suspend enrichment-related and reprocessing activities, as well as work on heavy water-related activities.**[*]

* Editor's note: The fact sheet also explained the exception for light water reactors:

> Resolutions 1737 (2006) and 1803 (2008) include exceptions for states to engage with Iran in the limited context of support to Iran's light water reactors, which can provide electricity for civilian use. While all reactors produce plutonium and carry some latent proliferation risk, heavy water reactors (HWRs) are especially problematic because they are more conducive to producing sufficient quantities of weapons-usable nuclear material (plutonium). Iran's Bushehr nuclear power plant is a light water reactor that Russia is building for Iran and for which Russia will both provide new fuel and take back used fuel—all under IAEA safeguards. The heavy water reactor that Iran is developing at Arak, however, is a serious

- **Expands the list of designated individuals and entities** subject to an asset freeze and travel restrictions to include:
  - Thirteen individuals, including the heads of several nuclear projects and front companies.
  - Twelve entities, including several front companies and contractors to the nuclear and missile programs.
- Establishes an entirely new travel ban on 5 individuals designated in a separate annex to the resolution (Annex II).
  - **Strengthens the technology transfer ban** to include all "dual-use" materials and equipment that, because they could be used for both nuclear and non-nuclear purposes, are regulated by the Nuclear Suppliers Group. UNSCR 1803 also prohibits States from transferring certain technologies associated with Unmanned Aerial Vehicles (UAV's) to Iran, which were previously exempt from the broad prohibition on Missile Technology Control Regime-listed commodities established in UNSCR 1737.
  - Calls upon all States to exercise **vigilance in granting export credits, guarantees, or insurance in connection with trade with Iran**, so that such financial support does not directly or indirectly contribute to Iran's proliferation sensitive nuclear activities or development of a nuclear weapon delivery system.
  - Calls for all States to exercise **vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran, as well as their branches and subsidiaries abroad,** especially Bank Melli and Bank Saderat, due to their connections to proliferation sensitive activities and the development of nuclear weapon delivery systems.

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proliferation risk. All technical assistance on this heavy water reactor is prohibited under the UN Security Council resolutions. The terms "light water" and "heavy water" refer to the substances used for key functions of a reactor: light water is ordinary water, while "heavy water" is made up of the heavier hydrogen isotope deuterium.

- For the first time, calls for all countries [consistent with domestic and international law] to **inspect the cargo** of aircraft and vessels of two companies—Iran Air Cargo and Islamic Republic of Iran Shipping Lines—bound to and from Iran, if that cargo is suspected of containing goods prohibited under previous Chapter VII UN Security Council resolutions 1737, 1747 or 1803.
- Endorses the need for Iran to provide f**ull transparency to the IAEA**, especially in implementing the Additional Protocol and all aspects of Iran's Safeguards Agreement, including the provisions in "Code 3.1" that require Iran to make early declarations of all nuclear facilities.
- **Expands the mandate of the UNSCR 1737 Iran Sanctions Committee** to monitor implementation of measures in both this new resolution and Security Council Resolution 1747.

In a statement to the Security Council on March 3, Ambassador Zalmay Khalilzad, U.S. Permanent Representative to the United Nations, welcomed the adoption of Resolution 1803 and described the situation giving rise to it, as excerpted below. The full text of Ambassador Khalilzad's statement is available at *www.archive.usun.state.gov/press_releases/20080303_038.html.*

Mr. President, the United States welcomes the adoption of resolution 1803. Iran's violations of Security Council resolutions not only continue, but are deepening. And instead of suspending its enrichment and reprocessing activities as required by the Council, Iran chose to expand dramatically its number of operating centrifuges and to develop a new generation of centrifuges, testing one of them with nuclear fuel. Iran continues to construct its heavy water research reactor at Arak, a potential source of weapons-useable plutonium. And [Iran] still has not implemented the Additional Protocol. Once again, Iran has not made the choice the world had hoped for; once again, the Security Council has no

choice but to act. At stake is the security of a vital region of the world and the credibility of the Security Council and the International Atomic Energy Agency as they seek to hold Iran to its nuclear nonproliferation commitments.

Mr. President, the latest IAEA report states that Iran has not met its obligation to fully disclose its past nuclear weapons program. On the core issue of whether Iran's nuclear program is strictly peaceful, the report showed no serious progress. . . .

. . . We agree with the IAEA that until Iran declares all of its nuclear activities and ceases its weapons-related work, Iran's nuclear activities cannot be verified as peaceful.

. . . Iran wants us to believe that its nuclear program is peaceful, but it must be transparent with IAEA inspectors. It should implement the Additional Protocol as the Council and the IAEA have repeatedly called for.

* * * *

I want the Iranian people—and others around the world—to know that the United States recognizes Iran's right to develop nuclear energy for peaceful purposes. They should know that the five permanent members of the Security Council and Germany have offered to help Iran develop civil nuclear power, if it complies with the Security Council's demand—a very reasonable demand—to suspend enrichment. They should know that the P5+1 package of incentives includes active international support to build state-of-the art light water power reactors and reliable access to nuclear fuel. The United States also supports Russia's supply of fuel for Iran's nuclear power plant in Bushehr. The delivery of this fuel exposes Iran's false claim that it needs to enrich uranium for civil nuclear power. A total of seventeen countries generating nuclear power today purchase their fuel on the international market rather than enrich uranium themselves. The Russian offer would provide fuel to Iran in a reliable way and would not contribute to proliferation.

* * * *

Mr. President, the international community has good reason to be concerned about Iran's activities to acquire a nuclear weapons

capability. The present Iranian regime armed with nuclear weapons would pose a greater potential danger to the region and to the world. The Iranian government has been a destabilizing force in the broader Middle East and beyond. Contrary to its statements, Iran has been funding and supporting terrorists and militants for operations in Lebanon, the Palestinian territories, Iraq, and Afghanistan. Their assistance has killed countless innocent civilians. The President of Iran has made many reprehensible statements—embracing the objective of destroying a member state of the United Nations. Because of these factors, the international community cannot allow Iran to develop nuclear weapons. If Iran continues down its current path, it would likely fuel proliferation activities in the region, which, in turn, could cause the demise of the NPT regime itself.

Mr. President, the Ministerial Statement agreed to by the Permanent 5 and Germany* shows that we remain committed to a diplomatic solution. . . . It gives us no pleasure, but regret, to have to pass another sanctions resolution. But our vote today demonstrates that the Council will act when countries violate their international obligations. We hope Iran will engage in constructive negotiations over the future of its nuclear program. Such negotiations, if successful, would have profound benefits for Iran and the Iranian people.

. . . [A]s President Bush has said, if Iran respects its international obligations, it will have no better partner than the United States of America.

On September 11, 2008, Ambassador Khalilzad addressed the Security Council, stating that it is "essential that Member States implement the provisions of United Nations Security Council Resolutions 1737, 1747, and 1803" and that the United States "encourage[s] all states to take actions that are complementary to those explicitly required by these resolutions to achieve the international community's ultimate objective: persuading Iran to make a strategic decision to abandon its pursuit of a nuclear weapons capability." Ambassador

* Editor's note: *See* (2)(ii) below.

Khalilzad drew attention in particular to implementation of sanctions related to financial institutions, stating:

> . . . The goals of these provisions are to ensure that Iran's financial sector is not used to fund proscribed nuclear proliferation or missile programs.
>
> . . . We note that these resolutions apply to all types of financial institutions, including both banks and insurance providers.
>
> The United States seeks to aid the 1737 Committee in carrying out its mandate to examine information regarding alleged violations of imposed measures and to seek information from all states regarding actions taken by them to implement the imposed measures. . . .
>
> By sharing best practices, we seek to assist other states in deciding how to carry out this vigilance, particularly because we have encountered a number of attempts by Iran to avoid sanctions through the use of deceptive financial practices. Vigilance is a matter for each member state. We would encourage other countries to share their experiences so that we may help each other implement the provisions of these resolutions more effectively.

The full text is available at *www.archive.usun.state.gov/press_releases/20080911_234.html*.

On September 27, 2008, the Security Council unanimously adopted Resolution 1835, which called upon Iran to meet its obligations under previous Security Council resolutions and meet the requirements of the IAEA Board of Governors, and took note of the March 3, 2008 P5 + 1 statement referred to by Ambassador Khalilzad and referenced in Resolution 1803. U.N. Doc. S/RES/1835. In a brief meeting with reporters, Ambassador Khalilzad stated:

> The resolution states—and it has been the U.S. position that we want to see this issue resolved diplomatically; that's the best way to deal with this issue. And we remain in the phase of diplomacy on this issue.

The full text of Ambassador Khalilzad's exchange is available at *www.archive.usun.state.gov/press_releases/20080927_251.html*.

(ii) P5 + 1 diplomatic effort

During 2008 the P5 + 1 (China, France, Russia, the United Kingdom, the United States, and Germany) continued efforts to reach a diplomatic solution to the problems posed by Iran's nuclear program. As noted in Security Council Resolutions 1803 and 1835, on March 3, 2008, the six countries issued a ministerial statement reaffirming their commitment to a negotiated solution to the Iranian nuclear issue and stating:

> . . . [W]e reaffirm our commitment to a dual-track approach. We reconfirm the proposals we presented to Iran in June 2006 and are prepared to further develop them. Our proposals will offer substantial opportunities for political, security and economic benefits to Iran and to the region. We urge Iran to take this opportunity to engage with us all and to find a negotiated way forward. We reiterate our recognition of Iran's right to develop, research, production, and use of nuclear energy for peaceful purposes in conformity with its NPT obligations. We reconfirm that once the confidence of the international community in the exclusively peaceful nature of Iran's nuclear programme is restored it will be treated in the same manner as that of any Non-Nuclear Weapon State party to the NPT. We remain ready to negotiate future arrangements, modalities and timing in this respect once the conditions for negotiations have been established.

The full text of the statement is available at *www.un.int/russia/new/MainRoot/Statements/ga/ga_docs/Statement030308ru.htm*.

On June 16, 2008, the Department of State Bureau of International Security and Nonproliferation released a fact

sheet concerning an updated package of incentives presented to Iran by the P5 + 1 on June 14–15, 2008. The fact sheet, excerpted below, is available at *http://2001-2009.state.gov/t/isn/rls/fs/106217.htm*. *See also* statement by UK Foreign Secretary David Miliband on behalf of the P5 + 1 after their May 2, 2008 meeting to review the offer to Iran, available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/may/104322.htm*.

* * * *

Through delivery of the package, the members of the P5+1 renew our commitment to a diplomatic solution to the Iranian nuclear issue through the dual-track strategy of both offering negotiations once Iran suspends its proliferation sensitive nuclear activities while increasing the pressure on Iran to comply with its international obligations through a range of targeted sanctions measures. We also demonstrate our continued support for the Iranian people and their legitimate aspirations for technological advancement and economic development.

The updated P5+1 package builds on the structure established in the previous offer, which the P5+1 presented to Iran in June 2006. In doing so, the package promises far-reaching benefits to the Iranian nation and people. In sum, these include:

- Cooperation in support of Iran's peaceful use of nuclear energy through the provision of technological and financial assistance, support for Iran's construction of state-of-the-art light water reactors and guaranteed nuclear fuel supply, and cooperation in spent fuel and radioactive waste management;
- Economic engagement, especially support for Iran's participation in the World Trade Organization, and increased direct investment in and trade with Iran;
- Development of Iran's conventional energy infrastructure;
- Assistance with Iran's agricultural development;

- Cooperation with Iran in transportation, civil aviation, environmental, emergency response, and educational fields; and
- Dialogue on political and regional security issues.

Iran's leaders claim to want civilian nuclear power. The members of the P5+1 will make this goal a reality if Iran accepts the cooperation offered. Moreover, that cooperation will open the way to a more productive economy and greater prosperity for all Iranians. The United States reiterates its long-standing willingness to engage Iran in direct negotiations, as Secretary of State Condoleezza Rice has stated, "on any issue, any time, any place," provided Iran suspends its uranium enrichment-related and reprocessing activities.

Such suspension is required for negotiations to take place in an atmosphere of mutual confidence. We urge Iran to take this step without further delay.

(iii) U.S. controls and sanctions

During 2008 the United States continued to impose and enforce sanctions against Iranian entities and individuals as discussed below. *See also* testimony by Deputy Assistant Secretary for Terrorist Financing and Financial Crimes Daniel Glaser before the House Committee on Foreign Affairs, Subcommittees on the Middle East and South Asia and Terrorism, Nonproliferation and Trade, focusing on "the Treasury Department's strategy and actions to counter [the threat of Iran's nuclear program and its deliberate support of terrorism] and the impact we have achieved on Iranian financial institutions and businesses," available at *www.ustreas.gov/press/releases/hp933.htm*.

(A) Sanctions under Executive Order 13382

The United States imposed additional sanctions on Iran on a number of occasions during 2008 under Executive Order

13382, "Blocking Property of Weapons of Mass Destruction Proliferators and their Supporters," 70 Fed. 38,567 (July 1, 2005) (*see Digest 2005* at 1125–31). E.O. 13382 cuts off financial and other resources that support proliferation networks, effectively denying designated parties access to the U.S. financial and commercial systems. Section 1 of the order blocks, with certain exceptions, all property and interests in property of certain designated persons, "that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons . . . ." Section 1 provides that the following persons are covered by the order:

> (i) the persons listed in the Annex to this order;
>
> (ii) any foreign person determined by the Secretary of State, in consultation with . . . relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons) . . . ;
>
> (iii) any person determined by the Secretary of the Treasury, in consultation with . . . relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in paragraph (a)(ii) of this section, or any person whose property and interests in property are blocked pursuant to this order; and
>
> (iv) any person determined by the Secretary of the Treasury, in consultation with . . . relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

On September 10, 2008, the Department of the Treasury designated the Islamic Republic of Iran Shipping Lines

("IRISL"), and 18 other affiliated entities, for providing logistical services to Iran's Ministry of Defense and Armed Forces Logistics ("MODAFL"). 74 Fed. Reg. 1763 (Jan. 13, 2009). As explained in a Treasury press release of that date,

> Not only does IRISL facilitate the transport of cargo for U.N. designated proliferators, it also falsifies documents and uses deceptive schemes to shroud its involvement in illicit commerce. . . . IRISL's actions are part of a broader pattern of deception and fabrication that Iran uses to advance its nuclear and missile programs. That conduct should give pause to any financial institution or business still choosing to deal with Iran.
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> * * * *
>
> Today's designations reinforce United Nations Security Council Resolution 1803 of March 2008, which among other things, calls upon all States, in a manner consistent with their national legal authorities and international law, to inspect IRISL cargoes to and from Iran, transiting their ports, "provided there is reasonable grounds to believe that the vessel is transporting prohibited goods" pursuant to UNSCRs 1737, 1747 and 1803.

See www.treas.gov/press/releases/hp1130.htm. See also briefing on the designation by Acting Assistant Secretary for International Security and Nonproliferation Patricia McNerney, Principal Deputy Assistant Secretary for Near Eastern Affairs Jeffrey Feltman, and Director of Treasury's Office of Foreign Assets Control Adam Szubin, available at *http://2001-2009.state.gov/t/isn/rls/rm/109472.htm*.

On October 22, 2008, the Department of the Treasury designated the Export Development Bank of Iran ("EDBI") and three additional entities. 73 Fed. Reg. 64,007 (Oct. 28, 2008). A Treasury press release of that date explained that it was designating the four entities for "providing or attempting to provide financial services" to MODAFL and "multiple MODAFL-subordinate entities that permit these entities to advance Iran's WMD programs." *See www.treas.gov/press/releases/hp1231.htm*.

On December 17, 2008, the Department of the Treasury designated ASSA Corp., domiciled in New York, and its parent company ASSA Co. Ltd., located in the Channel Islands. 73 Fed. Reg. 80,513 (Dec. 31, 2008). In a press release of that date, Under Secretary of the Treasury for Terrorism and Financial Intelligence Stuart Levey explained a "scheme to use a front company set up by Bank Melli—a known proliferator—to funnel money from the United States to Iran." *See* press release available at *www.treasury.gov/press/releases/hp1330.htm*.

Other Treasury Department designations under E.O. 13382 during 2008 included Future Bank on March 12, 2008 (73 Fed. Reg. 14,876 (Mar. 19, 2008)); four individuals and four entities on July 8, 2008 (73 Fed. Reg. 40,448 (July 14, 2008)); and five Iranian nuclear and missile entities on August 12, 2008 (73 Fed. Reg. 64,009 (Oct. 28, 2008)).

On July 7, 2008, the Department of State designated two individuals and one entity under Executive Order 13382 determined to "have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery." 73 Fed. Reg. 42,401 (July 21, 2008).

On June 19, 2008, the Department of the Treasury removed the China Great Wall Industry Corporation ("CGWIC") and its U.S. subsidiary, G.W. Aerospace, from the sanctions list. 73 Fed. Reg. 37,533 (July 1, 2008).

(B) Sanctions under Iranian Transactions Regulations and other authority

On September 30, 2008, the Department of State Bureau of International Security and Nonproliferation released a fact sheet, "Recent U.S. actions to Halt Iran's Procurement Practices for Attempted Acquisition of WMD-Related Items." The fact sheet reported actions by the Departments of Commerce, Treasury, and Justice, as excerpted below.

The full text of the fact sheet is available at *http://2001-2009.state.gov/t/isn/rls/fs/110479.htm*. Additional guidance was provided at *www.bis.doc.gov/complianceandenforcement/iranguidance.htm*.

On September 25, 2008, the United States Department of Commerce issued guidance to the U.S. exporting community designed to encourage exporters' vigilance on Iran's efforts to procure items for use in Iran's nuclear and missile programs. This action is part of the United States' broader strategy to ensure that no U.S.-origin items contribute in any way to Iran's nuclear weapons and ballistic missile programs. We believe that Iran's use of companies in third countries to procure goods is a deceptive practice that the entire international community should confront with extreme vigilance.

The Department of Commerce issued this guidance to alert U.S. companies that Iranian entities form front companies in third countries for the sole purpose of procuring dual-use items, including U.S. origin items, which may appear to be for commercial activities elsewhere . . . [This guidance] summarizes the steps that exporters can take in order to prevent unauthorized transfers to Iran.

* * * *

These actions are a continuation of the U.S. Government's coordinated strategy to halt Iran's involvement in the proliferation of weapons of mass destruction and their means of delivery. Recent actions that are part of this strategy include:

- In March 2008, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued guidance to all U.S. financial institutions on the risk arising from deficiencies in Iran's anti-money laundering and counter financing of terrorism (AML/CFT) regime, and noted these deficiencies are exacerbated by the Government of Iran's continued attempts to conduct prohibited proliferation related activity and terrorist financing. For additional information on the Treasury Department's actions, please visit

http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2008-a002.pdf.

- On September 17, 2008, the Department of Justice returned a Superseding Indictment charging eight individuals and eight corporations in connection with their participation in conspiracies to export U.S.-manufactured commodities to prohibited entities and to Iran. These actions underscore that even the most stringent export control and sanctions program can be undermined by Iran's concerted efforts. For more information on the Justice Department's actions, please visit *http://www.bis.doc.gov/news/2008/doj09172008.htm* [and *www.justice.gov/archive/opa/pr/2008/September/08-nsd-828.html*].

A Department of State press release of September 17, 2008, explained that, in addition to the criminal indictment noted above, the Department of Commerce placed more than 100 entities worldwide on the Commerce Entity List. The press release explained:

> Some of the entities and individuals identified today played a vital role in the acquisition or attempted acquisition of electronic components and devices capable of being used in the construction of improvised explosive devices (IEDs). These components and devices have been, and may continue to be, employed in IEDs or other explosive devices used against Coalition Forces in Iraq and Afghanistan. The network relied on a series of front companies around the world to disguise Iran's hand in the procurement activity. The entities designated by the Treasury Department also engaged in procurement on behalf of Iran of conventional weapons parts, military aircraft spare parts, and dual-use goods that can be used in nuclear-related activities.

The full text of the press release is available in full at *http://2001-2009.state.gov/r/pa/prs/ps/2008/sept/109822.htm*.

Effective November 10, 2008, the Department of the Treasury further restricted Iran's access to the U.S. financial system by revoking its "U-turn" license. 73 Fed. Reg. 66,541 (Nov. 10, 2008). As explained by Under Secretary of the Treasury for Terrorism and Financial Intelligence Stuart Levey, "U-turn transactions allowed U.S. banks to indirectly process payments involving Iran if they began and ended with a non-Iranian foreign bank. Given Iran's conduct, it is necessary to close even this indirect access." *See www.ustreas.gov/press/releases/hp1256.htm*; *see also* Treasury fact sheet of the same date, available at *www.ustreas.gov/press/releases/hp1258.htm*.

Excerpts follow from the November 10 Federal Register publication.

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The Iranian Transactions Regulations, 31 CFR part 560 (the "ITR"), implement a series of Executive Orders that began with Executive Order 12613 of October 30, 1987, issued pursuant to authorities including the International Security and Development Cooperation Act of 1985 (22 U.S.C. 2349aa-9). . . . Subsequently, in Executive Order 12957, issued on March 15, 1995, under the authority of, *inter alia*, the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) ("IEEPA"), the President declared a national emergency with respect to the actions and policies of the Government of Iran, including its support for international terrorism, its efforts to undermine the Middle East peace process, and its efforts to acquire weapons of mass destruction and the means to deliver them. . . . On May 6, 1995, to further respond to this threat, the President issued Executive Order 12959, which imposed comprehensive trade and financial sanctions on Iran. Finally, on August 19, 1997, the President issued Executive Order 13059 consolidating and clarifying the previous orders.

* * * *

The reasons OFAC is [amending § 560.516 of the ITR to revoke the U-turn] authorization include the need to further

protect the U.S. financial system from the threat of illicit finance posed by Iran and its banks. This threat was highlighted in March of 2008 when the United Nations Security Council adopted Resolution 1803, which calls upon all states "to exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran . . . in order to avoid such activities contributing to the proliferation [of] sensitive nuclear activities, or to the development of nuclear weapon delivery systems * * *." Moreover, on October 16, 2008, the Financial Action Task Force ("FATF"), the world's premier standard-setting body for anti-money laundering and counter-terrorist financing ("AML/CFT"), warned for the fourth time about the risks posed to the international financial system by continuing deficiencies in Iran's AML/CFT regime, and in particular emphasized Iran's lack of effort in addressing the risk of terrorist financing. The FATF called on all countries to strengthen preventive measures to protect their financial systems from the risk.

* * * *

(3) Syria

On June 5, 2008, the United States addressed the IAEA Board of Governors meeting on the IAEA decision to undertake an investigation of reports concerning a nuclear reactor being clandestinely constructed in Syria. The full text of the U.S. remarks, excerpted below, is available at *http://vienna.usmission.gov/08-06-05syria/*; *see also* statement by U.S. Ambassador Gregory L. Schulte, Permanent U.S. Representative to the IAEA, to the Board of Governors meeting in November 2008, available at *http://vienna.usmission.gov/081128syria.html*. *See also* f.(1) *supra*.

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As the DG reminded us on Monday, Syria failed to declare to the IAEA that it was constructing a nuclear reactor, even though construction of the facility began six years ago. Instead, Syria took measures to conceal its activities, such as altering the exterior of

the reactor building to disguise its similarity to the Yongbyon [North Korea] facility. Syria is legally obligated under its safeguards agreement to notify the IAEA of new nuclear facilities at the time a decision is taken to build them. Therefore by not declaring the site to the IAEA, Syria not only violated its safeguards agreement but also undermined the very purpose of IAEA safeguards—to provide the international community with the necessary assurance that the reactor was part of a peaceful program.

After the reactor was destroyed in September of last year, Syria went to great lengths to clean up the site and destroy evidence of what existed at Al-Kibar. Despite a request by the Director General, Syria did not allow inspectors to visit the site last fall. We now know, and have provided evidence to members of the Board, that on October 10, 2007, Syria conducted a controlled demolition of the reactor debris and promptly began removing equipment and debris from the site. Much of the work took place at night or under the cover of tarpaulins. By December, Syria had constructed a large building where the reactor once stood.

* * * *

The Director General has informed us that the Secretariat has undertaken an investigation to determine the true nature of the facility. The United States strongly supports this investigation and calls on Syria to cooperate with the IAEA's investigation and to provide assurances there are no other undeclared nuclear activities. . . .

The existence of undisclosed nuclear facilities in Syria further underlines the limitations of the Agency in a country with a Comprehensive Safeguards Agreement but without the Additional Protocol. We have seen this before and in response have developed the Additional Protocol in order to give the inspectors the tools they need to provide us, the Member States, with the assurances we require that a country's declaration is not only correct, but is also complete, and its nuclear program is therefore exclusively for peaceful purposes. We call on Syria, and all states that have not yet done so, to sign and implement the Additional Protocol.

* * * *

g. Civilian uses of nuclear energy

(1) Agreements for cooperation on peaceful uses of nuclear energy

During 2008 President Bush transmitted to Congress proposed agreements for cooperation on peaceful uses of nuclear energy with India, Russia, and Turkey, frequently referred to as "123 agreements" because they are entered into pursuant to § 123 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2153. For each of these three agreements, President Bush issued a determination pursuant to § 123 b. that the agreement "will not constitute an unreasonable risk to the common defense and security." *See* for Turkey (determination: 73 Fed. Reg. 6567 (Feb. 4, 2008); transmittal: 44 WEEKLY COMP. PRES. DOC. 97 (Jan. 28, 2008)).*

Russia and India are discussed below.

(i) Russia

On May 5, 2008, President Bush issued Presidential Determination No. 2008-19, as a memorandum for the Secretary of State and the Secretary of Energy. 73 Fed. Reg. 27,719 (May 14, 2008). The President stated:

> I have considered the proposed Agreement Between the Government of the United States of America and the Government of the Russian Federation for Cooperation in the Field of Peaceful Uses of Nuclear Energy, along with the views, recommendations, and statements of interested agencies.
>
> I have determined that the performance of the Agreement will promote, and will not constitute an unreasonable risk to, the common defense and security. Pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2153(b)), I hereby approve

* Editor's note: President Bush also issued a determination for a proposed agreement with the United Arab Emirates. 73 Fed. Reg. 70,583 (Nov. 21, 2008).

> the proposed Agreement and authorize the Secretary of State to arrange for its execution.

President Bush transmitted the agreement to Congress on May 12, 2008, pursuant to §§ 123 b. and 123 d. of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2153(b), (d)). 44 WEEKLY COMP. PRES. DOC. 699 (May 19, 2008).

On September 8, 2008, following Russia's incursions into Georgia and its recognition of the independence of Abkhazia and South Ossetia, discussed in A.1.c.(3) *supra*, the President determined that his determination regarding the agreement with Russia was no longer effective. A memorandum from the President to Congress stated:

> In view of recent actions by the Government of the Russian Federation incompatible with peaceful relations with its sovereign and democratic neighbor Georgia, I have determined that the determination regarding the proposed Agreement in Presidential Determination 2008-19 is no longer effective. Accordingly, a statutory prerequisite for the proposed Agreement to become effective, as required by section 123 b. of the Act, is no longer satisfied. If circumstances should permit future reconsideration of the proposed Agreement, a new determination will be made and the proposed Agreement will be submitted for congressional review pursuant to section 123 of the Act.

The full text of the President's memorandum is available at 44 WEEKLY COMP. PRES. DOC. 1186 (Sept. 15, 2008).

Also on September 8, Secretary of State Condoleezza Rice stated that "[w]e make this decision with regret" and "will reevaluate the situation at a later date as we follow developments closely." *See http://2001-2009.state.gov/secretary/rm/2008/09/109256.htm.*

(ii) India

On October 10, 2008, Secretary of State Rice and Indian External Affairs Minister Pranab Mukherjee signed the

U.S.–India 123 agreement. *See http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110920.htm*; *see also* Department of State fact sheet, "U.S.–India Civil Nuclear Cooperation Initiative," available at *http://2001-2009.state.gov/p/sca/rls/fs/2008/109567.htm*.

President Bush made the same determination as for Russia under § 123 b. of the Atomic Energy Act, *supra*, and in addition, made a number of determinations "pursuant to the authority vested in me by the Constitution and the laws of the United States of America, including the Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006 (Public Law 109-401)." *See Digest 2006* at 1284–87. The full text of the President's determination on the agreement with India, excerpted below, is available at 73 Fed. Reg. 54,287 (Sept. 18, 2008).

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* * * *

1. India has provided the United States and the IAEA with a credible plan to separate civil and military nuclear facilities, materials, and programs, and has filed a declaration regarding its civil facilities and materials with the IAEA;

2. India and the IAEA have concluded all legal steps required prior to signature by the parties of an agreement requiring the application of IAEA safeguards in perpetuity in accordance with IAEA standards, principles, and practices (including IAEA Board of Governors Document GOV/1621 (1973)) to India's civil nuclear facilities, materials, and programs as declared in the plan described in paragraph (1), including materials used in or produced through the use of India's civil nuclear facilities;

3. India and the IAEA are making substantial progress toward concluding an Additional Protocol consistent with IAEA principles, practices, and policies that would apply to India's civil nuclear program;

4. India is working actively with the United States for the early conclusion of a multilateral treaty on the cessation of the production of fissile materials for use in nuclear weapons or other nuclear explosive devices;

5. India is working with and supporting United States and international efforts to prevent the spread of enrichment and reprocessing technology to any state that does not already possess full-scale, functioning enrichment or reprocessing plants;

6. India is taking the necessary steps to secure nuclear and other sensitive materials and technology, including through (A) the enactment and effective enforcement of comprehensive export control legislation and regulations; (B) harmonization of its export control laws, regulations, policies, and practices with the guidelines and practices of the Missile Technology Control Regime (MTCR) and the Nuclear Suppliers Group (NSG); and (C) adherence to the MTCR and the NSG in accordance with the procedures of those regimes for unilateral adherence; and

7. The NSG has decided by consensus to permit supply to India of nuclear items covered by the guidelines of the NSG.*

* * * *

The President transmitted the agreement to Congress on September 10, 2008. 44 WEEKLY COMP. PRES. DOC. 1195 (Sept. 15, 2008). On September 18, 2008, William J. Burns, Under Secretary of State for Political Affairs, and John G. Rood, Acting Under Secretary of State for Arms Control and International Security, testified before the Senate Committee on Foreign Relations in support of the agreement. The full texts of their testimony, and opening statements by Senators Christopher J. Dodd and Richard G. Lugar, are available at *http://foreign.senate.gov/hearings/2008/hrg080918p.html*.

In his testimony, Ambassador Burns explained that the Civil Nuclear Cooperation Initiative "advances U.S. nonproliferation goals by bringing India, a state with expertise in the full nuclear fuel cycle, closer to the global nonproliferation mainstream." For further discussion of the initiative in 2005, including the Joint Statement, *see Digest 2005* at 1077–89.

* Editor's note: An October 15, 2008 Department of State fact sheet explained: "On September 6, 2008, the Nuclear Suppliers group reached a consensus policy decision to grant an exception to its full-scope safeguards requirement to permit civil nuclear supply to India." *See http://2001-2009.state.gov/p/sca/rls/fs/2008/109567.htm.*

Excerpts below from his testimony explain the actions India has taken in this context.

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* * * *

The [Civil Nuclear Cooperation] Initiative has been predicated on the notion that the global nonproliferation regime is strengthened by drawing India closer, rather than leaving it on the outside. The reality for decades has been that India possesses nuclear weapons and has no plans to sign the Nuclear Non-Proliferation Treaty in the foreseeable future. The Initiative takes a pragmatic approach to dealing with this situation. International Atomic Energy Agency (IAEA) Director General Mohamed El-Baradei has endorsed this view and welcomed the Initiative noting, "Out of the box thinking and active participation by all members of the international community are important if we are to advance nuclear arms control, non-proliferation, safety and security, and tackle new threats such as illicit trafficking in sensitive nuclear technology and the risks of nuclear terrorism."

Through the Initiative with the United States, India has committed itself to follow the same practices as responsible nations with advanced nuclear technology. It has agreed to participate in cooperative efforts to deal with the challenges posed by the proliferation of weapons of mass destruction and their delivery systems. In particular, in the July 2005 Joint Statement, India made a number of important nonproliferation commitments . . . .

In addition to these commitments, India has played a constructive role in dealing with some of today's most pressing nonproliferation challenges, including voting twice with the United States to refer Iran to the UN Security Council. . . .

India has proven itself a responsible actor with respect to the export of sensitive nuclear technologies. Based on its sound record on onward proliferation, its enhanced nonproliferation commitments, and its clear and expansive energy needs, India presents a unique case for civil nuclear cooperation. This reality has been recognized by the international nonproliferation community as reflected in the unanimous approval of India's safeguards agreement by the IAEA Board of Governors in July 2008 and the

consensus approval earlier this month by the Nuclear Suppliers Group of an exception to authorize members to engage in civil nuclear trade with India.

* * * *

Mr. Rood discussed India's specific nonproliferation commitments and the actions it has taken consistent with the 2005 Joint Statement and the Hyde Act. Excerpts below explain actions by the Nuclear Suppliers Group in September 2008 and the U.S. view of its right to respond to any testing by India.

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* * * *

Let me also address some aspects of the recently-approved Nuclear Suppliers Group Statement on Civil Nuclear Cooperation with India. This Statement creates the exception that permits international civil nuclear trade with India by NSG members. An initial U.S. draft exception text was first discussed at an NSG meeting on August 21–22. NSG Participating Governments met again from September 4–6, and after intensive discussions, the NSG reached consensus on September 6 to allow for civil nuclear cooperation with India.

Let me be clear that during these negotiations no side deals were made by the United States to achieve consensus at the Nuclear Suppliers Group. We achieved consensus because there was a strong desire among Participating Governments to find a way to enable civil nuclear trade with India while reinforcing the global nonproliferation regime. We were able to do both.

The text of the statement adopted by the NSG is fully consistent with the Hyde Act. The same Indian nonproliferation commitments made in the July 2005 Joint Statement between President Bush and Prime Minister Singh, which were also incorporated in the Hyde Act, are included in the NSG statement. In fact, the NSG explicitly granted the exception based on these commitments and actions by India. The exception provides for ongoing dialogue and cooperation between the NSG and India through outreach by the NSG Chairman and permits the NSG to periodically consider

implementation of the exception and hold consultations to address any circumstances of concern.

India's voluntary, unilateral moratorium on nuclear testing is important. We have been very clear on this subject with the Indian Government. Just as India has maintained its sovereign right to conduct a test, so too have we maintained our right to take action in response. As Secretary Rice said before this committee in April 2006, "We've been very clear with the Indians . . . should India test, as it has agreed not to do, or should India in any way violate the IAEA safeguards agreements to which it would be adhering, the deal, from our point of view, would at that point be off." In the 123 Agreement, for example, either Party has the right to terminate the agreement and seek the return of any transferred materials and technology if it determines that circumstances demand such action. Likewise, the NSG exception permits any Participating Government, including the United States, to request a meeting of the Group to consider actions if "circumstances have arisen which require consultations."

* * * *

The U.S. Congress passed legislation approving the agreement on October 1, 2008, the United States–India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, which President Bush signed into law October 8, 2008. Pub. L. No. 110-369 (2008), 122 Stat. 4028. In a press statement of October 2, Secretary Rice welcomed the congressional action as excerpted below. The statement is available at *http://2001-2009.state.gov/secretary/rm/2008/10/110554.htm*. The agreement entered into force on December 6, 2008.

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* * * *

The U.S.–India 123 Agreement reflects the transformation of our relations and a recognition of India's emergence on the global stage. The Agreement bolsters our partnership with the world's largest democracy and a growing economic power, and will provide economic and job opportunities for our economy.

The Initiative will help India's population of more than one billion to meet its rapidly increasing energy needs in an environmentally responsible way while reducing the growth of carbon emissions.

The approval of the U.S.–India 123 Agreement will also enhance our global nonproliferation efforts. The Agreement reflects a common commitment to share both the benefits of the international system and also the burdens and responsibilities of maintaining, strengthening, and defending it. I am pleased that Congress has endorsed this opportunity to bring the United States and India closer together. I look forward to a new strategic partnership with India that will provide global leadership in the years ahead.

* * * *

On October 20, 2008, President Bush issued Presidential Determination No. 2009-6 pursuant to §§ 102(c) and 204(a) of Public Law 110-369. 73 Fed. Reg. 63,841 (Oct. 28, 2008). The President certified that:

> 1. Entry into force and implementation of the United States–India Agreement for Cooperation on Peaceful Uses of Nuclear Energy pursuant to its terms is consistent with the obligation of the United States under the Treaty on the Non-Proliferation of Nuclear Weapons not in any way to assist, encourage, or induce India to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and
>
> 2. It is the policy of the United States to work with members of the Nuclear Suppliers Group, individually and collectively, to agree to further restrict the transfers of equipment and technology related to the enrichment of uranium and reprocessing of spent nuclear fuel.

(2) Convention on Supplementary Compensation for Nuclear Damage

On May 21, 2008, the United States deposited the U.S. instrument of ratification to the Convention on Supplementary Compensation for Nuclear Damage ("CSC") with the International Atomic Energy Agency. The CSC, which was adopted in Vienna on September 12, 1997, establishes a civil liability

framework for providing compensation for damage arising from certain nuclear accidents. The United States signed the CSC in Vienna on September 29, 1997, the same day it opened for signature, and President Bush transmitted the treaty to the Senate for its advice and consent to ratification on November 15, 2002. S. Treaty Doc. No. 107-21. As described in the transmittal letter:

> . . . U.S. ratification of the Convention is important for two reasons. First, U.S. suppliers of nuclear technology now face potentially unlimited third-party civil liability arising from their activities in foreign markets because the United States is not currently party to any international nuclear civil liability convention. . . . Once widely applied, the Convention will create for suppliers of U.S. nuclear equipment and technology substantially the same legal environment in foreign markets that they now experience domestically under the Price-Anderson Act [42 U.S.C. § 2210]. . . .
>
> Second, under existing nuclear liability conventions many potential victims outside the United States generally have no assurance that they will be adequately or promptly compensated in the event they are harmed by a civil nuclear incident, especially if that incident occurs outside their borders or damages their environment. The Convention, once widely accepted, will provide that assurance.

Excerpts below from the report of the Department of State, which was transmitted with the President's letter, provide additional background on the compensation structure of the treaty and jurisdictional issues, and discuss a declaration the executive branch recommended the United States make in connection with its ratification of the treaty (footnote omitted).

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The CSC is divided into two parts, a main body and an annex. The main body creates mechanisms for compensating nuclear damage caused within the territory of Parties to the CSC (and in certain cases outside their territory) by a nuclear incident in a covered installation for which an operator within a state that is a Party to the CSC is liable under the CSC. Under the regime created by the CSC, the first tier of compensation is provided by funds made available under the laws of the "installation state." The CSC defines an "installation state" in relation to a covered nuclear installation as the Party within whose territory that installation is situated, or if it is not situated within the territory of any state, the Party by which or under the authority of which the nuclear installation is operated. . . . With respect to accidents within the territory of the United States . . . (including its territorial sea), and certain accidents occurring outside U.S. territory, the requirement for the United States to ensure the availability of . . . first tier compensation is already met (with two narrow exceptions) by funds that would be provided under the Price-Anderson Act (42 U.S.C. § 2210). . . .

The second tier of compensation is provided by the international supplementary compensation fund that gives the CSC its name. The obligation to contribute to the fund would be triggered if the "installation state" notifies the Parties that the amount of all eligible claims may exceed the minimum first tier amount that applies to that state. Approximately 90 percent of the international supplementary fund would be made up of contributions assessed on the basis of the nuclear power generating capacity (if any) of each Party to the CSC at the time the incident occurs; the remainder would be made up of contributions assessed on the basis of each Party's United Nations assessment.

* * * *

Article V, paragraph 1, describes the geographical locations within which damage must be suffered in order to qualify a claimant for compensation from the international supplementary fund, provided a Party's courts have jurisdiction under Article XIII. Nuclear damage is covered if suffered: within the territory of a

Party, or in or above the EEZ or the continental shelf of a Party in connection with the exploitation or exploration of the natural resources of that zone or shelf. Also covered is nuclear damage suffered in or above maritime areas beyond the territorial sea of any Party (but outside the territorial sea of any non-Party) where the damage is suffered (a) by a national of a Party; (b) on board or by a ship flying the flag of a Party; (c) on or by an aircraft registered in a Party; or (d) on or by an artificial island, installation or structure under the jurisdiction of a Party. Paragraph 2 permits a state to assimilate persons having their habitual residence in its territory as its nationals for the purposes of paragraph 1(b)(ii) (concerning treatment of a national of a Party damaged while on the high seas). . . .

* * * *

Article XIII determines which Party's courts shall have jurisdiction over claims brought under the CSC and how judgments rendered by the courts of one Party are to be recognized by those of another. Paragraph 1 states the general rule that (vis-à-vis the courts of other Parties) only the courts of the Party within which the incident occurs shall have jurisdiction. Paragraph 2 deals with the exceptional case where the incident occurs within a maritime area coextensive with an EEZ (i.e., an area extending seaward up to 200 nautical miles from the baselines from which a state's territorial sea is measured) that has been or could be established by a Party and that has been notified to the Depositary. (The United States will notify the Depositary of its EEZ upon deposit of its instrument of ratification.) Under this paragraph, the courts of the coastal Parties exercise exclusive jurisdiction vis-à-vis the courts of other Parties. Parties to the Paris or Vienna Convention are permitted to follow the corresponding jurisdictional provisions of those Conventions with respect to non-Parties to the CSC. . . .

* * * *

. . . Article XVI deals with dispute settlement. Paragraph 1 obligates the Parties involved in a dispute over the interpretation or application of the CSC to consult with a view to settling the dispute by negotiation or other peaceful means. Paragraph 2 permits any Party to a dispute to submit it after 6 months of consultations

to binding arbitration or to the International Court of Justice. Paragraph 3 permits a Party to opt out of either of the dispute settlement procedures provided in paragraph 2 by declaring, at the time of ratification, acceptance, approval or accession, that it does not consider itself bound by either or both of the dispute settlement procedures provided for in paragraph 2. I recommend therefore that that the U.S. instrument of ratification be subject to the following declaration:

> As provided for in paragraph 3 of Article XVI, the United States of America declares that it does not consider itself bound by either of the dispute settlement procedures provided for in paragraph 2 of that Article, but reserves the right in a particular case to agree to follow the dispute settlement procedures of the Convention or any other procedures.

* * * *

Article XVIII deals with ratification, acceptance and approval of the CSC. Under paragraph 1, instruments of ratification, acceptance or approval may be accepted by the Depositary only from a state that is party to the Vienna Convention or the Paris Convention, or that declares that its national law complies with the provisions of the Annex, and provides further that such state, if it has a nuclear installation on its territory, must also be party to the 1994 Convention on Nuclear Safety. Paragraph 2 designates the Director General of the IAEA as the CSC's Depositary. . . .

* * * *

> The U.S. Senate provided advice and consent to ratification on August 3, 2006, including the proposed Article XVI declaration in its resolution of ratification. 152 Cong. Rec. S8901 (2006).* The U.S. instrument of ratification deposited with the International Atomic Energy Agency in 2008 in turn

* Editor's note: U.S. legislation to implement the CSC was enacted on December 19, 2007, as § 934 of the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1497, 1741. Section 934(a)(2) states

set forth the Article XVI declaration. Excerpts follow from the U.S. diplomatic note transmitting the U.S. instrument, which provided certain related notifications to the IAEA Director General.

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* * * *

Pursuant to Article VIII, Paragraph 1 of the Convention, the Mission, on behalf of the United States of America, hereby submits as an enclosure to this diplomatic note the listing of nuclear installations in the United States of America referred to in Article IV, paragraph 3 of the Convention.

Pursuant to Article XIII, paragraph 2 of the Convention, the Mission wishes to notify the Director General that the United States of America has established an exclusive economic zone. That exclusive economic zone, as described in the notice from the Department of State appearing at 60 Federal Register 43825 (August 23, 1995) . . . , has been modified by bilateral maritime boundary agreements that entered into force after that notice. The bilateral maritime agreements are available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/USA.htm. The United States is prepared to provide further information on its exclusive economic zone at the appropriate time.

Pursuant to Article XVIII, paragraph 1 of the Convention the Mission wishes to further inform the Director General that the United States of America is a Contracting State to the Convention on Nuclear Safety which was adopted at Vienna on June 17, 1994, and which entered into force for the United States on July 10, 1999. Pursuant to Article XVIII, paragraph 1 of the Convention, the Mission declares on behalf of the United States of America that the national law of the United States of America complies with the provisions of the Annex to the Convention.

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that "[t]he purpose of this section is to allocate the contingent costs associated with participation by the United States in the international nuclear liability compensation system established by the Convention on Supplementary Compensation for Nuclear Damage . . . . "

As of December 31, 2008, the CSC had not yet entered into force. Under Article XX of the CSC, the treaty will enter into force "on the ninetieth day following the date on which at least 5 States with a minimum of 400,000 units of installed nuclear capacity" have deposited an instrument of ratification, acceptance, or approval.

2. Renewal of 1540 Committee Mandate

On April 25, 2008, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1810. U.N. Doc. S/RES/1810. The resolution reaffirmed that "proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security." The resolution also extended for three more years the mandate of the committee created to monitor implementation of Resolution 1540 (2004) (Resolution 1763 (2006) had extended the mandate for two years), and decided that the 1540 Committee "shall continue to intensify its efforts to promote the full implementation by all States of resolution 1540." Resolution 1540 requires States to take and enforce effective measures designed to prevent the proliferation of nuclear, chemical and biological weapons, and related material. The resolution further requires States to adopt appropriate and effective laws prohibiting non-State actors, including terrorists, from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical, or biological weapons and their means of delivery. *See Digest 2004* at 1092–118.

Comments prepared by the United States on the importance of Resolution 1810 and its goal of full implementation of Resolution 1540 are excerpted below. The full text is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

The United States views implementation of UNSCR 1540 as a vital element in our comprehensive and global efforts to prevent the proliferation of Weapons of Mass Destruction (WMD) and to keep these deadly weapons out of the hands of terrorists. UNSCR 1540, if fully implemented, can help ensure that all states have in place appropriate laws and enforcement mechanisms to prevent WMD proliferation and hold those who engage in such behavior accountable.

The security benefits and advantages to implementation of UNSCR 1540 are clear. In addition, the resolution advances the economic interests of nations seeking to be key global economic suppliers of goods and services, including the United States. All states should view universal implementation of UNSCR 1540 as an opportunity to improve our international security and global trade by maintaining high security standards. . . .

Today's resolution adoption takes us in a direction that recognizes the realities and complexities of the work required for states to fully meet the provisions of UNSCR 1540, and outlines the readiness of the UNSC to support this process. . . .

As an example of the importance that we place on implementation of UNSCR 1540, we are seeking broad geographic expansion of the G-8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction to address WMD threats worldwide, which will provide foreign assistance in support of the aims of UNSCR 1540. The United States has supported these implementation efforts in other countries through a variety of mechanisms, including providing funding and expertise for 1540-relatred conferences and outreach, providing extensive technical assistance, and providing strong endorsement for such efforts in the annual G-8 Summit statements. . . .

On August 18, 2008, the United States issued a statement welcoming the completion of the report of the 1540 Committee on states' compliance with Resolution 1540, stating: "As the 1540 Committee's report shows, resolution 1540, if fully implemented, can help ensure that all states have in place appropriate laws and enforcement mechanisms to prevent WMD proliferation and hold those who engage in such

behavior accountable." *See www.archive.usun.state.gov/press_releases/20080818_223.html.*

3. Proliferation Security Initiative

May 28, 2008, marked the fifth anniversary of the Proliferation Security Initiative ("PSI"). In a statement released on that date, President Bush announced:

> Five years ago, the world became aware that an international black market network, headed by A.Q. Khan, had for many years supplied a clandestine nuclear weapons program in Libya. Recently, the discovery of Syria's covert nuclear reactor demonstrated that proliferators are capable of pursuing dangerous objectives even as the world becomes more vigilant. And today, in violation of United Nations Security Council resolutions, Iran continues to enrich uranium and develop missile systems that could eventually deliver WMD. These proliferation activities undermine peace and security and remind us of the continued need for cooperative action.
>
> The PSI has responded to this challenge and achieved a solid record of success. Beginning in 2003 with only 11 states, the PSI has grown to more than 90 nations from every region of the world committed to conduct interdictions and deter those engaged in this dangerous trade. As a result of the collaborative efforts and training it sponsors, PSI is an increasingly effective tool to carry out real-world WMD-related interdictions, from shutting down front companies, to disrupting financial networks, prosecuting proliferators, and stopping shipments of sensitive materials from reaching their intended destination.

See 44 Weekly Comp. Pres. Doc. 762 (June 2, 2008).

In remarks to the fifth anniversary senior level meeting in Washington, D.C., on May 28, National Security Advisor Stephen J. Hadley discussed the new challenges to national

security since the end of the Cold War and the role of the PSI in confronting those proliferation challenges, as excerpted below. The full text of Mr. Hadley's remarks is available at *http://georgewbush-whitehouse.archives.gov/news/releases/2008/05/20080528-3.html*.

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. . . [I]n today's world, the proliferation challenge is very different from what it was in the Cold War:

Then: One technology, nuclear weapons, was our primary proliferation concern. Now: We face increased threats from state and non-state actors seeking nuclear, chemical, biological, and radiological weapons—and many more methods of delivery.

Then: Knowledge to make these weapons was a state secret. Now: Extremists can learn how to make a dirty bomb on the Internet.

Then: Only states had the infrastructure necessary to manufacture weapons. Now: Dual-use or multi-use technologies are commercially available—and proliferation often hides behind legitimate commerce.

Then: Only states had the missiles or bombers need to deploy weapons of mass destruction. Now: A truck is the only delivery system a terrorist needs.

Then: Arms control agreements and the IAEA seemed sufficient to meet the proliferation challenge. Now: Cold War institutions remain necessary, but not sufficient. And we need a new approach.

* * * *

We must attack the problem comprehensively. Together we must: first, secure the sources of dangerous materials; second, dismantle the facilitation networks; third, interdict WMD-related materials in transit; fourth: disrupt the terrorist cells that seek these materials; fifth, strengthen our defenses; and sixth, deter the use of weapons of mass destruction on our people. . . .

* * * *

PSI addresses a specific part of the problem: how to prevent proliferators from transferring weapons of mass destruction, their delivery systems, and related materials using the avenues of global commerce. PSI is not a formal treaty but a new kind of partnership; a voluntary association of nations dedicated to increasing their interdiction capabilities, and then using these capabilities quickly and effectively to disrupt trade in dangerous materials. PSI is not a hierarchical organization, but a decentralized, distributed network of states working together to confront and disrupt the disturbed network of proliferators and facilitators.

PSI does not create a new enforcement mechanism. It uses existing enforcement capabilities effectively, cooperatively, and in a timely manner. Our nations must be able to act with the speed of commerce. If we are lucky, we must match the speed of a ship. If we are unlucky, we must match the speed of a jet plane.

PSI is not a replacement for the NPT, the IAEA, or the multilateral export control regimes—but a way to build upon them and give them a new enforcement mechanism they did not have before. In PSI, cops and criminals do not co-exist in the organization. PSI is a group of nations committed to be cops, a group that defines criminals clearly, and a group committed to hold themselves and each other accountable for results.

* * * *

The United States has entered into nine shipboarding agreements as part of its participation in the PSI. A media note released by the Department of State on August 11, 2008, described the most recent of these agreements, signed with the Bahamas on that date. The agreement

> will facilitate cooperation between the United States and the Bahamas to prevent illicit shipments by sea of weapons of mass destruction, their delivery systems, or related materials. It establishes procedures for obtaining approval for boarding and searching vessels suspected of carrying such prohibited items while in international waters. If a U.S. or Bahamian flagged vessel is suspected of carrying proliferation-related cargo, either Party to this agreement

can request the other to confirm the nationality of the ship in question and, if needed, to authorize the boarding, search, and possible detention of the vessel and its cargo.

The full text of the media note is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/aug/108127.htm*; a fact sheet on the U.S.–Bahamas agreement is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/aug/108128.htm*. The texts of the agreement with the Bahamas and other U.S. PSI agreements are available at *www.state.gov/t/isn/trty*. A State Department fact sheet on the PSI released May 26, 2008, is available at *http://2001-2009.state.gov/t/isn/rls/fs/105217.htm*.

4. Chemical and Biological Weapons

a. Chemical weapons

On April 7, 2008, Eric M. Javits, head of the U.S. delegation, addressed the Second Review Conference of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris, January 13, 1993. The full text of Mr. Javits's statement, excerpted below, is available at *http://2001-2009.state.gov/t/isn/rls/rm/103312.htm*.

* * * *

As we begin this Review Conference, let us re-dedicate ourselves and our governments to the object and purpose of the Chemical Weapons Convention, to its full implementation, and to compliance with all of our obligations. This is an ideal opportunity for us to reaffirm the commitments our nations made in joining the Convention with the aim of completely excluding the possibility of use of chemical weapons by any state, group, or individual. We should also use this opportunity to underscore the continuing importance each of us places on compliance with the Convention,

from both national and global perspectives, and our collective responsibility to follow through on compliance concerns.

During the months of preparation for this Conference, there has been much discussion about the relative importance of various objectives set out in the Convention. I believe that such debates miss the point—which is that the Convention is made up of a series of interlocking, mutually reinforcing objectives and commitments. The Chemical Weapons Convention represents a grand agreement that all nations possessing chemical weapons will destroy them, and that no nation will ever again develop, produce, seek to retain or transfer such weapons, or permit entities or individuals to do so on their territory. It provides for assistance and protection from chemical attack, and includes important provisions to ensure that it does not interfere with trade in chemistry for peaceful purposes or the economic and technological development of its members. The success in achieving each of these objectives depends, in important ways, on successfully achieving the others. The Convention is unique: a verifiable agreement that is at once both a disarmament treaty and a non-proliferation treaty. The matter we must address at this Conference is not the relative importance of these commitments, but how to move the Convention forward—with all its interlocking aims. This is the only way we can reach our ultimate goal.

* * * *

As the world's chemical industry evolves, verification must evolve with it, as provided for in the Convention. There have been significant changes in the industry since entry into force. My government believes that this Review Conference should request the Director-General to study how these changes in the chemical industry may affect the reliability of traditional indicators of chemical weapons production; the efficacy of inspection procedures, equipment, and frequency; and the relevance of sampling and analysis, so that verification remains effective, now and in the future.

* * * *

The world has changed in recent years. We face new threats. It is a new era of asymmetrical challenges by shadowy non-state

groups seeking to tear down the architecture of civilization. The possible use of toxic chemicals by terrorists is just one of the challenges of this new world. Just last year in Iraq, attacks occurred using chlorine, a common industrial chemical. Although the Convention designed declarations and routine inspections to detect quantities of toxic chemicals that were militarily significant, such inspections were not designed to detect or deter small-scale production or improvised use of toxic chemicals by non-state actors. This is an issue we must now address.

. . . The full and effective implementation of and compliance with all Convention provisions by States Parties would be a key contribution to efforts to deny terrorists access to weapons of mass destruction, as was recognized by United Nations Security Council Resolution 1540. The Convention also includes assistance provisions under Article X that may help to mitigate the effects of a terrorist attack using chemical weapons.

* * * *

See also remarks by Ambassador Javits to the Fifty-third session of the Executive Council for the Organization for the Prohibition of Chemical Weapons ("OPCW"), meeting in The Hague on June 24, 2008, available at *http://2001-2009.state.gov/t/isn/rls/rm/107459.htm*.

b. Biological weapons

On December 1, 2008, Christina Rocca, Permanent Representative of the United States of America to the Conference on Disarmament, addressed the Biological Weapons Convention 2008 Meeting of State Parties in Geneva, as excerpted below. The full text of Ambassador Rocca's remarks is available at *http://geneva.usmission.gov/CD/updates/1201RoccaBWC.html*. *See also* statement of Ambassador Rocca to the BWC 2008 Experts Group Meeting, August 18, 2008, available at *http://geneva.usmission.gov/CD/updates/0818BWC.html*.

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. . . [T]he United States welcomed the invitation . . . from the 1540 Committee to brief it on the work of the BWC States Parties. Indeed, in many respects the BWC- and 1540-related activities are mutually reinforcing. Developing and putting into place BWC implementation measures fulfills not only BWC requirements, but also those of UNSC Resolution 1540. These overlapping requirements and shared goals help facilitate compliance, strengthen national capabilities to prevent misuse, and enhance the overall desire of the international community to combat proliferation.

* * * *

On the issues of biosafety and biosecurity, the emerging understanding seems to be that biosafety measures protect people, while biosecurity measures protect biological agents and toxins. In fact, biosafety and biosecurity measures are not wholly separate, but form a continuum. . . . Measures include not only capacity-building, but also such issues as training and oversight. The U.S. believes that success can best be achieved by basing national efforts on guidance and standards that have been recently developed and/or updated internationally, such as those provided by the WHO, OECD and the European Committee for Standardization. We believe all States should seek to strengthen their own practices in order to ensure proper biosafety and biosecurity in the broad context of the International Health Regulations. Those in a position to do so should offer assistance.

* * * *

Lately, more focus has been placed on the need to raise awareness about the risks of misuse of the bio-sciences for biological weapons purposes and to educate researchers on dealing with these risks. The U.S. believes that such education should be a mandatory aspect of graduate education in the life sciences in the broader context of professional responsibility, and that this meeting should urge all States Parties to explore and undertake such efforts. We believe that all those graduating from higher education in fields associated with the life sciences should be familiar with the international prohibition against biological weapons. All those undertaking professional research should have received effective training or instruction related to preventing the misuse of their research.

Governments should commit to initiating a dialogue with their national science academy about how this low level of awareness can swiftly be corrected. This would not replace these educational components at an earlier stage. We also believe in the value of oversight at a number of levels, through a variety of institutional control mechanisms, and among those engaged in the life sciences themselves.

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5. Missile Defense

a. Czech Republic

On July 8, 2008, Secretary of State Condoleezza Rice and Czech Republic Minister of Foreign Affairs Karel Schwarzenberg signed the Agreement between the Czech Republic and the United States of America on Establishing a United States Ballistic Missile Defense Radar Site in the Czech Republic. At the signing, Secretary Rice stated:

> This is an agreement that is supported by our NATO allies, as was noted at Bucharest at the summit, because missile defenses today are aimed only at those who would threaten us. They are not like the missile defenses of the Cold War period, which were caught up in discussions about strategic stability. We've made the point to our Russian colleagues that we all face the threat from states like Iran that continue to pursue missiles of ever-longer range, and we must be in a position to respond. . . .

See http://2001-2009.state.gov/secretary/rm/2008/07/106764.htm. The text of the missile defense agreement is available at *www.aic.cz/cms/Agreement_EN.pdf*. The agreement cannot enter into force until it is approved by the Czech Parliament and signed by President Klaus. Those steps had not yet been completed at the end of 2008.

On September 19, 2008, Secretary of Defense Robert Gates and Czech Republic Defense Minister Vlasta Parkanova

signed a Status of Forces Agreement ("SOFA") to "provide[] for the status of United States forces, its personnel and dependents who are present in the territory of the Czech Republic in connection with the [missile defense] radar site . . . [and of] United States contractors and United States contractor employees present in the territory of the Czech Republic in connection with construction and operation of the radar site." SOFA Article 1.1. Paragraph 2 of the SOFA provided that "[t]he purpose of this Agreement is to regulate matters not covered by the provisions of the NATO SOFA and to supplement certain matters addressed in the NATO SOFA. Provisions of the NATO SOFA shall apply unless otherwise stated in this Agreement." The full text of the SOFA is available at *www.state.gov/s/l/c8183.htm*.

On the same date, Secretary Gates and Defense Minister Parkanova signed the Declaration on Strategic Defense Cooperation "under which a bilateral group will meet regularly to discuss and resolve strategic issues, exchange information and cooperate on research and development in the field of defense industry." *See* press release from the U.S. Embassy in Prague, available at *http://prague.usembassy.gov/united_states_and_czech_republic_sign_sofa_.html*. The text of the declaration is available at *www.state.gov/s/l/c8183.htm*.

b. Poland

On August 20, 2008 in Warsaw, Secretary of State Condoleezza Rice and Poland's Foreign Minister Radoslaw Sikorski signed the Agreement Between the Government of the United States of America and the Government of the Republic of Poland Concerning the Deployment of Ground-Based Ballistic Missile Defense Interceptors in the Territory of the Republic of Poland. On the same date, the United States and Poland also issued a legally nonbinding declaration on strategic cooperation between the United States and Poland. *See* briefing by John Rood, Acting Under Secretary for Arms Control and

International Security, at *http://2001-2009.state.gov/t/isn/rls/rm/108888.htm*.

A media note released by the Department of State on August 20 described the missile defense agreement as excerpted below. The full text of the media note is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/aug/108659.htm*.

. . . This legally-binding agreement calls for the establishment and operation of a U.S. ballistic missile defense (BMD) interceptor facility in Poland. It is an important step in our efforts to protect the United States and Poland, as well as our NATO Allies, from the growing threat posed by the proliferation of ballistic missiles of increasingly greater ranges, lethality, and sophistication, and potentially armed with weapons of mass destruction. This BMD interceptor site would provide a defensive capability to protect Europe and the United States against longer-range ballistic missiles launched from the Middle East, and will be linked to other U.S. missile defense facilities in Europe and the United States.

In addition to deepening the bilateral strategic relationship between our two countries, U.S.–Poland cooperation in this area will make a substantial contribution to NATO's collective security and will be an integral part of any future NATO-wide missile defense architecture.

Upon ratification by the Polish Parliament and entry into force, the ballistic missile defense agreement will allow the United States to construct, maintain, and operate a facility encompassing ten ground-based BMD interceptors. The United States and Poland will negotiate a separate agreement to address the status of U.S. military forces to be deployed to the territory of Poland.

U.S. and Polish military forces will cooperate in providing physical security for the missile defense interceptor facility. The United States will provide the Polish Government with situational awareness into operations and training at the interceptor facility, which includes receiving real-time information of ballistic missiles tracked by the missile defense radar to be located in the Czech Republic, intercept information, and the status of the U.S. missile defense system in Europe.

The United States Government welcomes the strong commitment of the Government of the Republic of Poland, as it joins a growing group of allies and friends that are contributing to efforts to counter existing and future ballistic missile threats in the Twenty-First Century.

The text of the agreement is available at *www.msz.gov.pl/Agreement,regarding,the,placement,in,Poland,of,anti-ballistc,defensive,missile,interceptors.20825.htm*. The text of the nonbinding declaration, which, among other things, affirmed the U.S. commitment "[w]ithin the context of, and consistent with, both the North Atlantic Treaty and the U.S.–Poland strategic partnership, . . . to the security of Poland and of any U.S. facilities located on the territory of Poland," is available at *http://2001-2009.state.gov/r/pa/prs/ps/2008/aug/108661.htm*.

6. Russian Suspension of Convention on Conventional Forces in Europe

On December 12, 2007, Russia ceased observing its obligations under the Treaty on Conventional Armed Forces in Europe ("CFE Treaty"), claiming the right to unilaterally "suspend" its observance. *See Digest 2007* at 1001–02. On December 9, 2008, the United States provided its legal views on the lack of such a right to suspension in a statement and annex to the 62nd plenary meeting of the Joint Consultative Group.*

The annex is set forth below. The full text of the U.S. statement and annex are available at *www.state.gov/s/l/c8183.htm*.

On December 12, 2007, the Russian Federation ceased observing its obligations under the Treaty on Conventional Armed Forces in

* Editor's note: Article XVI(1) established the Joint Consultative Group "[t]o promote the objectives and implementation of the provisions of this Treaty . . . . "

Europe (the "CFE Treaty"), claiming the right to unilaterally suspend its observance of the treaty. On October 14, 2008, the Russian Federation presented a legal argument in an effort to justify its unilateral "suspension" (JCG.DEL/27/08). This statement cites: the withdrawal provision of the CFE Treaty (Article XIX); Articles 31 and 57 of the Vienna Convention of the Law of Treaties (the "Vienna Convention"); the legal concept of *in plus stat minus* ("the greater includes the lesser"); and an "article-by-article" analysis of the CFE Treaty prepared by the United States Government.

The sources cited by the Russian Federation do not support its argument or justify its non-observance of the CFE Treaty. On the contrary, as laid out in the following detailed analysis, neither the ordinary meaning of the CFE Treaty nor customary international law supports a right of unilateral suspension under these circumstances.

Ordinary Meaning of the CFE Withdrawal Clause

— Article 31 of the Vienna Convention requires that the terms of a treaty be given their "ordinary meaning" in their context and in light of the treaty's object and purpose. In this case, the ordinary meaning of CFE Article XIX is that it applies only to withdrawal from the Treaty. The CFE Treaty does not so much as mention "suspension" of a party's observance of the Treaty, and neither the context nor the object and purpose of the treaty suggests that the withdrawal provision should be read to include the right to unilaterally suspend.

— Given the precise nature of arms control treaties in general and the extensive attention that has been focused on the standard "supreme interests" withdrawal clause (which is common to most arms control and nonproliferation agreements), the parties to these agreements surely would have provided explicitly for any additional right of unilateral suspension if they had intended the parties to have such a right within the terms of the Treaty. They did not do so.

— Similarly, nothing in the negotiating history of the CFE Treaty suggests that the parties intended the right of

withdrawal to imply a right of unilateral suspension. The parties to the CFE Treaty simply did not address suspension.

— Accordingly, we must apply the fundamental treaty law principle that the parties to a treaty are bound only to the extent that they clearly consented to be bound. The Parties to the CFE Treaty did not express their consent to an implied right of unilateral suspension within the withdrawal clause.[1]

Customary International Law

— As any support for a right of unilateral suspension in either the plain language or the negotiating history of the CFE Treaty is lacking, we then examine Russia's attempts to invoke principles of customary international law to support the existence of such a right.

— Again, however, Russia's arguments find no support in international law.

— The Vienna Convention on the Law of Treaties (the Vienna Convention) treats termination, withdrawal, and suspension as separate and distinct concepts. (The Vienna Convention is generally considered to reflect customary international law on these issues.)

— Nowhere in the Vienna Convention is it stated or implied that unilateral "suspension" is a lesser included right under a treaty provision concerning unilateral "termination" or "withdrawal."

— On the contrary, when the intention is to permit a party to suspend on the same grounds as termination or withdrawal, the Vienna Convention says so explicitly (see Article 62, paragraph 3, regarding "fundamental change of circumstances").

[1] Note that Russia's own actions are not consistent with its theory that the withdrawal clause is applicable in this situation, as it has not suggested that a conference of states parties be convened, as required by Article XXI(4) of the CFE Treaty.

— Furthermore, the rules and standards applicable to these three concepts (termination, withdrawal, and suspension) are not uniform. If suspension were a lesser included right, as Russia contends, every provision concerning termination or withdrawal would cover suspension as well, which would result in conflicts, overlap, and confusion. The drafters of the Vienna Convention clearly did not intend such a result.
— In short, the language and structure of the Vienna Convention do not support the propositions advanced in the Russian statement.
— Russia also cites the concept of *in plus stat minus* ("the greater includes the lesser"), which it asserts is a general principle of customary international law applicable to treaty law and specifically to the concepts of withdrawal and suspension.
— Russia does not explain why such an important concept is not mentioned in the articles on withdrawal and suspension in the Vienna Convention—which, as previously noted, is generally considered to reflect customary international law on these issues.
— Russia refers generally to cases of the International Court of Justice applying the logic of *in plus stat minus* in the context of its decisions: none of these decisions deal with withdrawal clauses or suspension. Instead, these cases relate to the jurisdiction of the Court and interpret optional clause declarations under Article 36(2) of the ICJ Statute. The Court's jurisprudence thus provides no support for the Russian Federation's argument.
— To link this principle to its asserted right of unilateral suspension, the Russian Federation cites the International Law Commission's preparatory work on the Draft Articles on the Law of Treaties, but it does not indicate how the ILC's work supports its argument. In our view, the ILC's preparatory work directly rebuts Russia's argument:
    — The ILC did not discuss unilateral suspension in the context of a withdrawal provision in a treaty.

— Rather, the principle of *in plus stat minus* was raised by one member of the Commission in the context of a discussion regarding a draft article on termination and suspension by agreement—not unilateral suspension. The discussion was whether to include in the draft article a provision allowing for *inter se* suspension (suspension by agreement of two or more parties to a multilateral treaty as between each other). The discussion was not related to the concept of unilateral suspension, and the consensus at that meeting of the ILC was that *inter se* suspension was distinct from termination.[2] In fact, the ILC eventually decided to separate the concepts of "termination by agreement" and "suspension by agreement" into two separate draft articles.

— The Chairman's comments during this discussion were summarized as follows:

> "One point had been established beyond all doubt: there was no connexion between termination and suspension. Suspension was by its very nature temporary; if it were final, it would constitute termination, and as such, would be subject to separate rules."[3] The Chairman doubted whether suspension should be mentioned in the same context as the case in which a treaty could be terminated.[4]

More enlightening is the Commission's discussion of unilateral suspension in the context of a draft article relating to termination of treaties containing no provision on termination. In response to one Government's suggestion to add a reference to suspension to this article, as had been done with the reference to *inter se* suspension (then Article 40, paragraph 3), the Special Rapporteur made

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[2] Summary Records of the 861st Meeting [1966] 1 Y.B. Int'l L. Comm'n 129, U.N. Doc. A/CN.4/SR.861, available at *http://www.un.org/law/ilc/index.html*.

[3] *Id.* at paragraph 34.

[4] *Id.*

clear his view that unilateral suspension did not automatically follow a right of withdrawal. He observed as follows:

> "The simplicity of this suggestion is, perhaps, a little deceptive. Article 40 does not deal with the intention of the parties regarding the termination or suspension of the operation of a treaty. It deals with the procedural requirements of an agreement to terminate or suspend a treaty's operation and merely provides that the requirements for termination apply also to suspension. In short, not only is the context different in article 40, but there is no question in that article of 'suspension' being made an alternative to termination. In the present article it seems doubtful whether parties who intended to admit a right of denunciation or withdrawal can be assumed automatically to have intended to admit a unilateral right to suspend the operation of the treaty as an alternative to termination; for suspension sets up a more complex relation than termination. The Special Rapporteur, in short, thinks that suspension of the operation of the treaty could not be regarded as admissible—unless it appeared that this particular right had been specifically envisaged by the parties."[5]

— Thus, it is clear that the ILC did *not* view a right to unilaterally withdraw as including a right to unilaterally suspend the operation of a treaty. Rather, there was an acknowledgement that the right to unilaterally suspend would have to be "specifically envisaged by the parties."

Finally, the Russian statement quotes a passage from the U.S. "article-by-article" analysis that had been prepared by the Executive Branch of the U.S. Government and transmitted to

[5] Fifth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, II Y.B. INT'L L. COMM'N 1, 28 (1966), U.N. Doc A/CN.4/183 and Add.1–4.

the Senate prior to ratification of the CFE Treaty. This analysis states the basic proposition that the Article XIX "right of withdrawal is in addition to any other rights a State Party has under customary international law regarding termination or suspension of the Treaty, including its rights in the event of material breach of the Treaty." The United States has never disputed that a party may have rights of termination or suspension under customary international law in addition to the separate and distinct right of withdrawal incorporated into Article XIX. Rather, the United States disputes Russia's claim that an implied right of suspension exists within the Article XIX right of withdrawal. As outlined above, treaty law does not support such an interpretation of Article XIX, which addresses withdrawal and only withdrawal. Therefore, this statement in the article-by-article analysis does not support the Russian claim.

In summary, Article XIX of the CFE Treaty does not contain an implied right of suspension. The analysis presented by the Russian Federation is not supported by the ordinary meaning of the terms of the CFE Treaty, its negotiating history, or customary international law. Accordingly, Russia's decision to cease observance of its CFE Treaty obligations was (and remains) unjustified as a legal matter.

7. START

On November 17, 2008, representatives of the United States, Belarus, Kazakhstan, Russia, and Ukraine met in Geneva, Switzerland, to consider whether to extend the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms ("START"), which entered into force December 5, 1994. *See* S. Treaty Doc. No. 102-20 (1991); *II Cumulative Digest 1991–1999* at 2207–10. A statement by the U.S. representative to the Joint Compliance and Inspection Commission for START explained that the meeting was "[i]n accordance with Paragraph 2 of Article XVII" of START

and fulfilled the requirement to meet on the issue prior to December 5, 2008.* *See* fact sheet issued November 21, 2008, by the Department of State Bureau of Verification, Compliance, and Implementation, available at *http://2001-2009.state.gov/t/vci/rls/prsrl/2008/112284.htm*. The fact sheet concluded:

> The United States of America, The Republic of Belarus, the Republic of Kazakhstan, the Russian Federation, and Ukraine will continue to consider the issue and note that a decision on this issue can be made up until the date of expiration of the Treaty on December 5, 2009.

In remarks to the Center for International Security and Cooperation on February 8, 2008, National Security Advisor Stephen J. Hadley explained that the United States is discussing "the extension of key provisions . . . particularly those related to predictability and transparency" that would otherwise expire. The full text of Mr. Hadley's remarks is available at *http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080211-6.html*.

8. UN Resolution on Arms Trade Treaty

On October 31, 2008, Ambassador Christina Rocca, Permanent Representative of the United States of America to the

* Editor's note: Article XVII, paragraph 2 provides:

2. This Treaty shall remain in force for 15 years unless superseded earlier by a subsequent agreement on the reduction and limitation of strategic offensive arms. No later than one year before the expiration of the 15-year period, the Parties shall meet to consider whether this Treaty will be extended. If the Parties so decide, this Treaty will be extended for a period of five years unless it is superseded before the expiration of that period by a subsequent agreement on the reduction and limitation of strategic offensive arms. This Treaty shall be extended for successive five-year periods, if the Parties so decide, in accordance with the procedures governing the initial extension, and it shall remain in force for each agreed five-year period of extension unless it is superseded by a subsequent agreement on the reduction and limitation of strategic offensive arms.

Conference on Disarmament, addressed the General Assembly's First Committee to explain the U.S. vote against a draft resolution on the Arms Trade Treaty ("ATT"), stating that the United States "support[s] the goal of promoting responsibility in arms transfers and reducing the destabilizing trade in illicit arms, but we do not believe a global Arms Trade Treaty would accomplish that goal." The full text of Ambassador Rocca's comments, excerpted further below, is available at *www.archive.usun.state.gov/press_releases/20081031_298.html.*

* * * *

Any ATT would require the support of the major arms exporters to be effective, and we believe that some major arms exporters would refuse to agree to an ATT that required meaningful, effective conventional arms transfer controls policies. The only way to convince all major arms exporters to sign on to the ATT would be to weaken its provisions. Concluding a weak ATT would legitimize an international standard based on a lowest common denominator that would not address the problem of illicit and irresponsible arms transfers.

Notwithstanding our concerns about an ATT and our vote against Resolution 61/89, my country decided to participate in the [Group of Government Experts ("GGE")] on an ATT that met this year. The U.S. Expert worked hard to ensure that the GGE report accurately conveyed the complex nature of the international arms trade and the need to avoid ineffective or detrimental measures. We were not alone in the Group in insisting that the follow-on work called for by ATT proponents must occur in a step-by-step manner and on the basis of consensus, in order to ensure implementable standards that would constructively address the issue. In the end, all Members of the GGE were able to agree to the carefully balanced recommendation in para 27 of the report that "further consideration of efforts within the United Nations to address the international trade in conventional arms is required on a step-by-step basis in an open and transparent manner to achieve, on the basis of consensus, a balance that will provide benefits to all".

My government stands by those recommendations and the GGE report as a whole. Unfortunately, the ATT draft resolution departs from this carefully constructed recommendation by only selectively drawing on it in Operative Paragraphs 3, 4, and 5 in rushing towards convening an Open-Ended Working Group (OEWG). . . .

More importantly, I do not see anywhere in OP 3, or for that matter in the rest of the resolution, where the protections are that will allow states to participate honestly in a process that directly touches on one of the most sensitive and important parts of the UN Charter—that of the right of individual Members to self-defense. Will states with regional security concerns decide to abrogate their sovereign responsibilities to protect their citizens by deciding to participate in a process that could potentially put at risk their ability to defend themselves? The GGE report reflects the fact that discussion repeatedly returned to this concern.

For example, paragraph 16 of the report states, "It was noted that the feasibility of potential arms trade treaty would be dependent on establishing its collectively agreed objectives, its practical applicability, its resistance to political abuse and its potential for universality". The conclusion in para 27 of the report directly states that follow-on work on an ATT should be done in the UN system "on the basis of consensus". . . .

* * * *

9. Defense Trade Cooperation Treaties

On May 21, 2008, in testimony in support of advice and consent to ratification of U.S. defense trade cooperation agreements with the United Kingdom and Australia before the Senate Committee on Foreign Relations, Acting Under Secretary of State for Arms Control and International Security John G. Rood stated:

> The UK and Australia Defense Trade Cooperation Treaties represent a paradigm shift in the way the United States conducts defense trade with its closest allies. Rather than reviewing and approving individual export licenses, once

ratified and fully implemented, the Treaties will establish an environment where trade in defense articles, technology and services can take place freely and securely between approved communities in the U.S., U.K., and Australia. . . .

The Treaties will permit, without prior written authorization, the export of defense articles, technical information, and services controlled pursuant to the International Traffic in Arms Regulations, or ITAR, between the United States and the United Kingdom and Australia, when in support of:

- combined military and counter-terrorism operations;
- joint research, development, production, and support programs;
- mutually agreed projects where the end-user is Her Majesty's Government or the Government of Australia; or the U.S. Government.

The full text of the testimony is available at *http://foreign.senate.gov/testimony/2008/RoodTestimony080521a.pdf*. The treaties were transmitted to the Senate in 2007, S. Treaty Doc. No. 110-7 (2007); *see Digest 2007* at 996–1000. Action in the Senate remained pending at the end of 2008.

10. Arms Embargoes

a. Security Council arms embargoes

On April 30, 2008, Jeffrey A. DeLaurentis, Minister-Counselor for Political Affairs at the U.S. Mission to the United Nations, addressed the Security Council on the report of the UN Secretary-General on small arms and light weapons. Excerpts below provide U.S. views on arms embargoes; the full text is available at *www.archive.usun.state.gov/press_releases/20080430_096.html*.

* * * *

The Report makes frequent reference to possible areas for UNSC action with respect to arms embargoes. Almost all examples and recommendations are drawn in the report from the most difficult and complex cases which have involved both embargoes and peacekeeping missions in countries or areas where there has been a complete or near-complete breakdown in civil order.

There is a legal maxim that says "hard cases do not make good law." We should not look to those most difficult and complex cases as a source of rules for general application in future arms embargoes and/or peacekeeping operations. Moreover, the paper infers that it is the principal duty of the UN Security Council, or its components, or peacekeeping missions set up under its authority, to enforce arms embargoes. It is not. Enforcement of arms embargoes is primarily a duty of member states of the United Nations.

It is our view that the establishment of comprehensive national laws and regulations is key to the enforcement of arms embargoes and sanctions, and the cornerstone for the reduction of illicit Small Arms and Light Weapons proliferation. We would caution against actions that increase the burden on States, however, through additional studies and mandates, since more assistance, not more reports and meetings, are required for the international community to reach our common goal. We also caution against efforts at standardizing practices without some indication that such standardization will be effective at combating the illicit trade or that duplicate already-existing and effective regional best practices.

Finally, Mr. President, the United States welcomes the inclusion of the UN Peacebuilding Commission (PBC) in the report's consideration of ways to address small arms issues in peacebuilding efforts. We want to see the PBC succeed in its role of marshalling support for sustainable peacebuilding. We welcome greater coordination that helps reduce the illicit proliferation of Small Arms and Light Weapons.

* * * *

b. Somalia

On November 20, 2008, the Security Council adopted Resolution 1844 reaffirming the "general and complete arms

embargo against Somalia" originally imposed by Resolution 733 (1992) and imposing new targeted sanctions on those who violate it, among others. U.N. Doc. S/RES/1844. Paragraph 1 required member states to prevent entry into or transit through their territories of designated individuals, with certain exceptions; paragraph 3 required member states to impose a freeze on assets owned or controlled by designated individuals or entities and ensure that assets are "prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of" designated individuals or entities, with certain exceptions; and paragraph 7 required member states to "prevent the supply, sale or transfer of weapons and military equipment" and related services to designated entities. Paragraph 8 provided criteria for designating individuals and entities for the targeted measures, paragraphs 12 through 22 set forth listing and de-listing procedures, and paragraph 23 expanded the mandate of the Monitoring Group. Security Council Resolution 1811, adopted on April 29, 2008, and Resolution 1853, adopted on December 19, 2008, extended the mandate of the Monitoring Group for six-month and 12-month periods respectively and stressed the obligation of all states to comply fully with the measures imposed by previous resolutions, including the arms embargo. U.N. Doc. S/RES/1811; U.N. Doc. S/RES/1853.

Preambular paragraph 5 of Resolution 1844 stated the Council's "grave concern over the recent increase in acts of piracy and armed robbery at sea against vessels off the coast of Somalia, and not[ed] the role piracy may play in financing embargo violations by armed groups . . . ." For discussion of the authorization of the use of force and other actions against piracy and armed robbery off the coast of Somalia, *see* A.5. *supra*. Peacekeeping forces in Somalia are discussed in Chapter 17.B.6.

11. Small Arms and Light Weapons

On November 17, 2008, Robert Smolik, Senior Advisor to the U.S. Mission to the United Nations, addressed the General

Assembly on agenda item 107, L.27: "Promoting Development through the Reduction and Prevention of Armed Violence." Mr. Smolik reiterated U.S. support for the implementation of the UN Program of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects. He explained, however, that the United States did not support negotiation of a new treaty, stating:

> [T]he United States does not believe that additional legally binding instruments on [small arms and light weapons] or associated issues, as called for by the Geneva Declaration, are required to make an impact on these issues, which are important to us all, nor are such legally binding instruments likely to be successful in accomplishing their desired goals. The United States prefers to focus on concrete action that address the underlying problems, rather than expending limited resources on negotiating additional instruments.

The full text of Mr. Smolik's statement is available at *www.archive.usun.state.gov/press_releases/20081117_318.html*.

12. Other Nonproliferation Sanctions

a. Commerce licensing

On September 29, 2008, the Department of Commerce, Bureau of Industry and Security ("BIS") issued a final rule revising the Commerce Control List ("CCL") and definitions of terms used in the Export Administration Regulations ("EAR") "to implement Wassenaar List revisions that were agreed upon in the December 2007 Wassenaar Arrangement Plenary Meeting and the Wassenaar List provisions regarding solar cells agreed upon in the December 2006 plenary meeting." The rule also "adds or expands unilateral U.S. export controls and national security export controls on certain items to make them consistent with the amendments made

to implement the Wassenaar Arrangement's decisions." 73 Fed. Reg. 60,910 (Oct. 14, 2008), as corrected by 73 Fed Reg. 65,258 (Nov. 3, 2008). The CCL identifies items subject to Department of Commerce export controls. The Background section of the Federal Register publication explained the Wassenaar Arrangement as follows:

> In July 1996, the United States and thirty-three other countries gave final approval to the establishment of a new multilateral export control arrangement called the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies (Wassenaar Arrangement or WA). The Wassenaar Arrangement contributes to regional and international security and stability by promoting transparency and greater responsibility in transfers of conventional arms and dual use goods and technologies, thus preventing destabilizing accumulations of such items. Participating states have committed to exchange information on exports of dual use goods and technologies to non-participating states for the purposes of enhancing transparency and assisting in developing common understandings of the risks associated with the transfers of these items.

b. Iran, North Korea, and Syria Nonproliferation Act

Effective October 23, 2008, the Department of State imposed sanctions under the Iran, North Korea, and Syria Nonproliferation Act, Pub. L. No. 106-178 (2000), as amended. 73 Fed. Reg. 63,226 (Oct. 23, 2008).

The Federal Register notice explained:

> A determination has been made that thirteen foreign persons have engaged in activities that warrant the imposition of measures pursuant to Section 3 of the Iran, North Korea, and Syria Nonproliferation Act, which provides for penalties on entities and individuals for the transfer to or

> acquisition from Iran since January 1, 1999, the transfer to or the acquisition from Syria since January 1, 2005, or the transfer to or acquisition from North Korea since January 1, 2006, of equipment and technology controlled under multilateral control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. The latter category includes (a) Items of the same kind as those on multilateral lists but falling below the control list parameters, when it is determined that such items have the potential of making a material contribution to WMD or cruise or ballistic missile systems, (b) other items with potential of making such a material contribution, when added through case-by-case decisions, and (c) items on U.S. national control lists for WMD/missile reasons that are not on multilateral lists.

The sanctions imposed on the 13 entities for a period of two years were set forth in the notice:

> 1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of any goods, technology, or services from these foreign persons, except to the extent that the Secretary of State otherwise may have determined;
>
> 2. No department or agency of the United States Government may provide any assistance to the foreign persons, and these persons shall not be eligible to participate in any assistance program of the United States Government, except to the extent that the Secretary of State otherwise may have determined;
>
> 3. No United States Government sales to the foreign persons of any item on the United States Munitions List are permitted, and all sales to these persons of any defense articles, defense services, or design and construction

services under the Arms Export Control Act are terminated; and

4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

Cross References

Detainee issues in the context of child soldiers, **Chapter 6.C.1.b. and C.2.**
Exclusive economic zones, **Chapter 12.A.1., 2.a., 4.b., and 7.**
Outer space arms control, **Chapter 12.B.2.**

Table of Cases

**An asterisk denotes cases in fora, including the International Court of Justice, other than U.S. Federal and state courts. Alphabetization is letter-by-letter (e.g., "Lin" precedes "Li Weixum").*

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